COMMENT

A *TINKER*'S DAMN: REFLECTIONS ON STUDENT SPEECH

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> *If we see the reality in things, of what moment is the superficial and apparent? Take the earth and all the interests it has known,—what are they beside one deep surmise that pierces and scatters them? The independent beggar disposes of all with one hearty, significant curse by the roadside. 'Tis true they are not worth a "tinker's damn."*[1]
>
> – Henry David Thoreau

INTRODUCTION

On April 25, 1839, when Henry David Thoreau penned this short entry in his journal, he had no way of knowing that the term "tinker" would later evoke—not just an itinerant craftsman with a penchant for swearing[2]—but also one of the seminal United

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1. 1 HENRY DAVID THOREAU, *The Kingdoms of the Earth*, *in* THE JOURNAL OF HENRY D. THOREAU 78, 78 (Dover Publications, Inc. 1962) (1906).

2. The Oxford English Dictionary defines a "tinker" as "a craftsman (usually itinerant) who mends pots, kettles, and other metal household utensils." In the quote above, Thoreau uses the idiom "not worth a 'tinker's damn,'" to denote something of little value. This phrase originated because of the tinker's itinerant nature, low class, and

States Supreme Court cases on student speech.[3] Yet Thoreau's musing is oddly prescient, eliciting themes that have come to embody the kind of paradox typical of First Amendment school law.

In the journal entry quoted above, Thoreau struggles to distinguish reality from superficiality, asking which moment is real and which is merely "apparent." Ultimately, he accepts that he will always be uncertain, noting that there is little value in attempting to distinguish between the two and equating reality (i.e., the "earth and its interests") with "one big surmise" (i.e., presumption). For Thoreau, the best solution is to defer to the tinker, who would presumably dismiss the entire matter as he would any other, with little more than a curse, otherwise known as the "tinker's damn."

Though the legal issue is considerably less existential in scope, it stems from a similar problem, which arises when attempting to distinguish between what is real and what is mere "surmise." According to the Supreme Court, the public school, unlike most other environments,[4] is a sort of "special" sphere in which First Amendment rights are available to students,[5] but not necessarily coextensive with those of adults.[6] As a result, courts have been asked to balance students' free speech rights against the school's own "basic educational mission."[7] In doing this, courts generally ask whether a student's speech is sufficiently severe to reasonably create—or whether that speech has already created—a substantial disruption in the school environment, pursuant to the Supreme Court's guidance in *Tinker v. Des Moines Independent Community School District*.[8]

penchant for swearing. *tinker, n.*, 18 OXFORD ENGLISH DICTIONARY 125 (2d ed. 1989) (further defining "*not to care, be worth, (etc.), a tinker's curse, cuss, or damn*" as "an intensification of the earlier 'not to care, or be worth, a curse or damn' . . . with reference to the reputed addiction of tinkers to profane swearing").

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

4. Some commentators have categorized the school environment as similar to that of a prison or the military. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1146 (3d ed. 2006) (collecting cases); *see also* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1362 (3d ed. 1974).

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

6. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

7. *Id.* at 685.

8. *Tinker*, 393 U.S. at 514.

This raises difficult questions. When is a student's speech protected under the First Amendment? Is there a time when a student's speech is unequivocally protected or unprotected? Should there be a bright line rule? The issues are murky and courts have ruled both ways, protecting and prohibiting speech on seemingly similar facts, blurring the line between what constitutes acceptable or unacceptable student speech.

Thoreau would, presumably, accept this "blurriness" as a necessary part of the nature of reality. Should courts do the same, ruling each time on a case-by-case basis, or is there a clear standard that could be used to distinguish between acceptable and unacceptable student speech in the schools?

Perhaps the answer is a little of both. This Comment will discuss current Supreme Court precedent, some representative lower court decisions, and the limitations of the current standard (i.e., its "blurriness"). It will also advocate for both deference to the school board and an acknowledgment of student rights, based on the particularized facts of each case and the best interests of the students, and informed by an understanding of the special environment in which student speech exists.

I. FREE SPEECH JURISPRUDENCE IN PUBLIC SCHOOLS

A. The First Amendment and Its Limits

The First Amendment of the United States Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[9]

This is, of course, the preeminent law in all cases concerning free speech, student or otherwise. Though the language is broad, the Supreme Court has authored a number of opinions meant to both explain and narrow the application of the First Amendment in a public forum.[10] While an in-depth

9. U.S. CONST. amend. I (emphasis added).

10. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("[O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that

explication of First Amendment law is beyond the scope of this paper, it is helpful to note that, generally, the Court has either disallowed or proclaimed unprotected: (1) obscene speech,[11] (2) speech that is likely to provoke the average person to retaliation and cause a breach of the peace (i.e., "fighting words"),[12] (3) defamatory speech (i.e., false statements made about someone else),[13] (4) true threats,[14] or (5) speech advocating imminent lawless action.[15]

While there are many nuances surrounding each of these exceptions to the First Amendment's guarantee of free speech, for the purposes of this Comment it is sufficient to merely keep these prohibited forms of speech in mind and note that they are applicable to each and every citizen of the United States, including public school students.[16] Thus, given the proper

any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

11. *See* Miller v. California., 413 U.S. 15, 24 (1973) (ruling that speech may be regulated when, taken as a whole and applying contemporary community standards, it "appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which . . . do[es] not have serious literary, artistic, political, or scientific value").

12. *See Chaplinsky*, 315 U.S. at 572–73 ("'[F]ighting' words—those which by their very utterance inflict injury or tend to incite an *immediate breach of the peace* . . . . epithets or personal abuse [are] not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .") (emphasis added) (internal quotations omitted).

13. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (finding that a public official may recover damages for a "defamatory falsehood relating to his official conduct" if he can show "'actual malice'—that is, with knowledge that [the speech] was false or with reckless disregard of whether it was false or not"); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343, 347 (1974) (finding that private figures need not meet the actual malice standard to recover damages for defamation and that the states may set their own standards, as long as they do not impose liability without fault). It should be noted that some states have still adopted an actual malice standard in establishing a private cause of action for defamation, while others have looked to "negligence or public interest criterion." RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 39 (2003).

14. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (prohibiting "true threat[s]" and defining them as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals") (citing Watts v. United States, 394 U.S. 705, 708 (1969) (finding that mere political hyperbole is not sufficient to constitute a prohibited true threat)).

15. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (finding that a state may only proscribe "advocacy of the use of force" when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

16. *See* Janine M. Murphy & Ann L. Majestic, *Students' First Amendment Rights*, *in* EDUCATION LAW IN NORTH CAROLINA ch. B.8 (Janine M. Murphy ed., 2009) (discussing more fully the limits on student speech) (on file with author).

circumstances, a student could violate any of these exceptions or any of those discussed below (addressing the special nature of the school environment) and could be lawfully regulated by school authorities.

B. Tinker v. Des Moines Independent Community School District

The first applicable Supreme Court case concerning student speech is *Tinker v. Des Moines Independent Community School District*.[17] There the Supreme Court ruled that public school students have a right to free speech unless that speech substantially disrupts or is reasonably likely to materially interfere with school activities and invade the rights of others.[18]

In *Tinker*, two middle school students wore black armbands to class in protest of the Vietnam War.[19] Having been alerted to the students' intentions beforehand, the school board adopted a policy that students would be asked to remove any armbands worn at school.[20] If they refused, the students would be suspended.[21] The Tinker children ignored this policy and attended school with their armbands firmly in place;[22] they were suspended that same day.[23] The Tinker family brought suit, but the trial judge felt that the school authorities' actions were reasonable in order to "prevent disturbance of school discipline," dismissing the Tinkers' suit.[24] The Eighth Circuit affirmed, and the case went to the Supreme Court on certiorari.[25]

The Supreme Court reversed and found that the students' decision to wear the armbands at school was within their free speech rights.[26] The Court likened the armbands to "pure speech" and stated that the students were entitled to "comprehensive protection under the First Amendment."[27] Further, the Court held

17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
18. *Id.* at 513–14.
19. *Id.* at 504.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 504–05.
25. *Id.* at 505.
26. *Id.* at 514.
27. *Id.* at 505–06.

that public school students are generally entitled to a certain level of First Amendment protection, applied in light of the special characteristics of the school environment.[28] Specifically, the Court balanced what it deemed to be students' fundamental First Amendment rights against the "comprehensive authority of the States and school officials . . . to prescribe and control conduct in the schools."[29]

The Court ultimately came down on the side of the students, highlighting the fact that the armbands had not caused a substantial disruption and that the record did not demonstrate any reason for the school authorities to have "forecast" such a disruption.[30] Further, the Court specifically noted that "school officials cannot suppress 'expressions of feelings with which they do not wish to contend,'"[31] implying that the students' behavior must be objectively disruptive, not just offensive to the administrator in question.

The dissenting justices, Hugo L. Black and John Marshall Harlan II, wrote their opinions separately.[32] Justice Black, in a ten-page dissent, decried what he believed to be an unnecessary usurpation of power on the part of the Supreme Court away from school officials.[33] Justice Black stressed that the Court should have given significant deference to the school authorities who were elected and appointed for the specific purpose of governing the school environment.[34] While he admitted that the armbands had not resulted in shouting, violence, or profanity, he noted that the Tinker children had been teased and warned not to wear the

28. *Id.* at 506.

29. *Id.* at 507.

30. *Id.* at 513–14 ("But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.") (citing with approval Blackwell v. Issaquena Cnty. Bd. Ed., 363 F.2d 749, 754 (5th Cir. 1966) (holding that students may be barred from distributing "freedom buttons" when their distribution results in "an unusual degree of common, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum")).

31. *Id.* at 511 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

32. *Id.* at 515–25.

33. *Id.* at 515 ("The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court.").

34. *Id.* at 516.

armbands by other students, the effect of which practically "wrecked" a mathematics lesson at the school.[35]

However, while Justice Black conceded that the armbands may not have resulted in a substantial disruption, he argued that it was unacceptable for the Tinker children's behavior to divert the other students away from their class work and toward "the highly emotional subject of the Vietnam War."[36] He further noted that it was good policy to send children to school for the purpose of being taught, and not for the purpose of teaching others,[37] arguing that school discipline was necessary for training "our children to be good citizens."[38]

Justice Harlan, in a less vehement dissent, argued in favor of a standard which asked not whether there had been or reasonably could be a substantial disruption, but whether the students could show that "a particular school measure was motivated by *other than legitimate school concerns* . . . ."[39] For Harlan, the record simply did not show that the school had acted outside of a legitimate pedagogical rationale, and for that reason he would have upheld the appellate court's restrictive holding.

Despite these dissents, *Tinker* remains controlling precedent today, and courts continue to ask whether a student's speech substantially interfered or would reasonably likely have so interfered with the proper functioning of the school environment.[40] The Supreme Court has not maintained *Tinker*'s original broad scope, however, opting to narrow its application in a number of instances.[41]

35. *Id.* at 517.

36. *Id.* at 518.

37. *Id.* at 522 ("The original idea of schools, which I do not believe is yet abandoned as worthless or not of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders.").

38. *Id.* at 524–25 ("This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.").

39. *Id.* at 526 (noting that, "for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion" would be prohibited as an illegitimate school concern) (emphasis added).

40. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

41. *See Hazelwood*, 484 U.S. at 273 (holding that the Court may censor student speech when it is published in the context of a school-sponsored activity and related to a legitimate pedagogical concern); *Fraser*, 478 U.S. at 683 (holding that the determination of what speech is inappropriate rests with the school board).

C. Bethel School District v. Fraser

The first case to limit the *Tinker* decision was *Bethel School District v. Fraser* in 1986.[42] There a student was disciplined for using an "elaborate, graphic, and explicit sexual metaphor" during a formal speech given at a school-sponsored, mandatory student assembly.[43] Though the majority opinion does not provide the text of the student's unprotected speech, Justice Brennan's concurring opinion cites it in full, quoting Mr. Fraser as having said:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.[44]

In response, the Court held for the school, supporting its decision to punish the student on the grounds that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[45] The Court ruled that schools may prohibit speech which is "lewd, indecent, or offensive" because of the school's important function of teaching our "shared values of a civilized social order."[46] To support this decision, the Court noted, as it had in *Tinker*, that students' free speech rights—especially the right to advocate unpopular or controversial views in the school—must be

42. *Fraser*, 478 U.S. at 675.
43. *Id.* at 677–78.
44. *Id.* at 687 (Brennan, J., concurring).
45. *Id.* at 683 (majority opinion).
46. *Id.*

balanced against "society's countervailing interest in teaching students the boundaries of *socially appropriate behavior*."[47]

While the separate opinions of Justices Brennan, Marshall, and Stevens all agreed with the majority's method of balancing students' free speech rights against the school's necessary role of establishing a proper educational environment, they disagreed on *how* that balance ought to be weighed.[48] This is evidenced, in part, by the mere fact each of them wrote separate opinions.[49]

Justice Brennan, concurring with the majority in *Fraser*, differed in his interpretation of the lewdness of Fraser's speech, but was willing to vote with the majority because he believed the issue was a close one and, given the context of the mandatory high school assembly, he was willing to defer to the school administrators.[50] Justice Marshall, however, disagreed with the Court's holding on the ground that the school district had failed to bring evidence that the educational environment had been "disrupted by [Fraser's] speech."[51] Finally, Justice Stevens dissented on all points, arguing that Fraser's speech should have been protected because he had not received fair notice that his speech would result in a suspension, and that, at the time, Fraser

47. *Id.* at 681–82 (emphasis added) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings . . . . '[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.'"). "Cohen's jacket" refers to a case in which an individual wore a jacket with the words "Fuck the Draft" written on the outside in easily visible lettering, while walking through a courthouse. While similar to "Tinker's armband" in that both the jacket and the armband were meant to express a lack of support for the Vietnam War (i.e., political speech), the Court's quote suggests that in schools—unlike in the courthouse—Cohen's jacket would not be protected speech and, thus, that certain kinds of speech generally receive less protection in the schoolroom context. *See* Cohen v. California, 403 U.S. 15, 16 (1971). *See generally* Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979) (permitting the curtailment of speech if it threatens to interfere with school operations).

48. *Fraser*, 478 U.S. at 687–96.

49. *See id.*

50. *Id.* at 687–88 (Brennan, J., concurring). In his opinion, Justice Brennan stated that the regulation was "not unconstitutional," which suggests that while the school did not go too far in regulating Fraser's speech, its actions were not patently acceptable, either.

51. *Id.* at 690 (Marshall, J., dissenting). This reasoning suggests the belief that there ought to be an actual disruption in order for speech to be limited under *Tinker*, a perspective which would invalidate those lower court decisions that rely on the reasonable likelihood that a student's speech will cause a disruption (even when it has not already done so) in order to regulate it.

had no reason to believe that his speech would disrupt the school's educational function at all.[52]

Fraser represents the Court's first step away from the broad standard set forth in *Tinker*. Though the Court clearly relied on *Tinker* in its opinion, it also carved out a narrow exception for speech that it believed was "lewd, indecent, or offensive,"[53] language which necessarily grows from the Court's own particular understanding of what "lewd" means. In that case, the Court felt that Matthew Fraser's poorly veiled sexual metaphor was sufficiently improper, given the school environment, to constitute unacceptably "lewd, indecent, or offensive" speech.[54]

This speaks to the heart of the issue surrounding the jurisprudence of student speech, and that with which Thoreau himself struggled, whether something is truly "lewd" or merely the "surmise" of the sitting justices at that time (or whether this distinction even matters).[55] If so, how can such a standard be applied consistently? In Justice Brennan's concurring opinion, for example, he expressed serious doubts concerning the "lewdness" of Fraser's speech, despite his ultimate decision to side with the majority.[56]

Unfortunately, courts must often rely on a sort of "gut" instinct when determining whether a student's speech has gone "too far" and is unacceptably lewd, offensive or indecent. The lower courts must make determinations based on their own beliefs and feelings—a subjective standard.[57] This subjects a student's speech to continually shifting "community standards"[58] and the ambiguous meaning of those terms on which the Court relied.[59]

52. *Id.* at 691–92 (Stevens, J., dissenting).

53. *Id.* at 683.

54. *Id.* at 677–78, 683.

55. *See* THOREAU, *supra* note 1, at 38.

56. *Fraser*, 478 U.S. at 687 (Brennan, J., concurring) ("Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes.").

57. *See, e.g.*, *id.* at 687, 690. *Fraser* illustrates the subjectivity of these determinations. The two lower courts were not convinced that the speech in question disrupted education, and Justice Brennan and the majority held differing opinions concerning the lewdness of respondent's remarks.

58. *See* Miller v. California, 413 U.S. 15 (1973). It is interesting that the Court chose not to apply *Miller* in this case. Presumably the Court felt that while Fraser's speech was "lewd, indecent, or offensive," it was *not* "obscene" under *Miller* (a case which had specifically noted that contemporary community standards must be applied when evaluating "obscene" material). Comparing *Miller* to *Fraser*, however, begs the question of

D. Hazelwood School District v. Kuhlmeier

Further exacerbating the growing complexity of First Amendment school law, and just two years after its decision in *Fraser*, the Court continued its assault on the *Tinker* standard with *Hazelwood School District v. Kuhlmeier*.[60] This time the Court held that school officials may censor student speech when it is published in the context of a school-sponsored activity and related to a legitimate pedagogical concern.[61]

In *Hazelwood*, two articles published in the school newspaper were censored because their content was considered inappropriate.[62] The articles centered on certain individuals' experiences with pregnancy and divorce, stirring worries by one school administrator that the student-subjects would be singled out, and that the material was too mature for the high school's younger students.[63]

The Court agreed, noting that schools have a right to regulate speech which "the public might reasonably perceive to bear the imprimatur of the school," given the special nature of the school environment and the school's important educational function of teaching proper values.[64] The Court noted, among other things, the school's fundamental role as "a principal

Fraser's true utility. While *Fraser* seems to be intended as a narrower standard than *Miller*, it is odd that the Court felt an entirely new lexicon ("lewd, vulgar, offensive") needed to be developed to suit the particular nature of the school environment. In fact, the Court failed to discuss *Miller* at all, despite similarities between the two fact sets in those rulings.

59. *See, e.g.*, Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 330–31 (2d Cir. 2010) (holding that the FCC's policy prohibiting certain words and admitting others without reason was void for vagueness, and commenting on the evolving nature of the English language and the frequent addition of "new offensive and indecent words" to the list of potentially "obscene" material).

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

61. *Id.* at 273 ("[W]e hold that educators do not offend the First Amendment by exercising editorial 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.").

62. *Id.* at 262–63.

63. *Id.* at 263.

64. *Id.* at 267, 271 ("Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.").

instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[65]

In his dissenting opinion, Justice Brennan disagreed with this new limitation on student speech, writing for Justices Marshall and Blackmun, by applying *Tinker*.[66] Justice Brennan noted that the administrator had not believed, upon pulling the articles in question from the school newspaper, that they would cause a substantial disruption; thus, Justice Brennan argued, the administrator's actions were unacceptable.[67] Though Justice Brennan, like the majority, relied on the idea that proper behavior should be taught in public schools,[68] he also concluded that, in order to *teach* such behavior, educators should support a student's expression unless it prohibits the school's legitimate "pedagogical functions" under *Tinker*.[69] Justice Brennan argued that it was better for students to learn to express themselves freely than for the school to shield them from material it deemed unsuitable.[70]

This is representative, again, of the continuing problem of applying a constitutional standard in the school environment, as

65. *Id.* at 272 (quoting Brown v. Bd. Ed., 374 U.S. 483, 493 (1954)).

66. *Id.* at 277–78 (Brennan, J., dissenting).

67. *Id.* at 278. Justice Brennan's reliance on the fact that the school administrator decided to remove the articles from the newspaper not because he believed they would cause a substantial disruption, but because he considered them inappropriate, suggests that, given the exact same facts, excepting the administrator's view as to their appropriateness, Justice Brennan would have joined the majority's holding restricting those articles under *Tinker*. That is to say, had the school administrator merely believed that the articles *could* have resulted in a disruption, Justice Brennan would have likely deferred to that belief as a reasonable one—regardless of the fact that disruption had never occurred. This shows Justice Brennan's deference to school administrators when making these sorts of determinations and is indicative of the judiciary's broad deference to the school, when determining what is best for students in the school environment. This, of course, also speaks to the broader issue of *Tinker's* reliability as a viable, consistently applied constitutional standard.

68. *Id.* at 279.

69. *Id.* at 280 (expressing the fear that allowing school officials to censor students when the two merely express incompatible messages would convert "our public schools into 'enclaves of totalitarianism' . . . that 'strangle the free mind at its source'") (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that students may not be required to salute the flag)).

70. *Id.* at 285–86 ("[T]he state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position.").

exemplified in Thoreau's journal entry.[71] It is unclear what behavior should or should not be promoted. Here Justice Brennan argued that schools ought to teach students the value of free expression, yet the majority argued in favor of censorship using substantially similar language.[72] Further, Justice Brennan himself had joined the restrictive majority just a few years earlier in the *Fraser* case. Justice Brennan addressed this issue in his dissent, stating that:

> The public educator's task is weighty and delicate indeed. It demands *particularized* and *supremely subjective* choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved the "daily operation of school systems" to the States and their local boards.[73]

This suggests that courts must look to a moral—not a legal—standard. As a result, judges are forced to either rely on their own understanding of what is acceptable behavior within the school or to defer to the school administrators' determination of that very same issue. This is the fundamental problem of adjudicating student speech cases: there is no objective standard that can be consistently applied.[74]

E. Morse v. Frederick

Perhaps satisfied after its four-year sprint in *Fraser* and *Hazelwood*, the Court then took a nineteen-year hiatus from First

71. *See* THOREAU, *supra* note 1.

72. *See supra* note 60.

73. *Hazelwood*, 484 U.S. at 278–79 (emphasis added) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (finding that state statutes forbidding schools from teaching evolution were contrary to freedom of religion)).

74. This standard is similar to the family law principle of advocating for "the child's best interests"—an inherently subjective standard that relies on the particular facts of a certain case. Though some courts have delineated certain factors to consider when evaluating what is in a child's best interests, it is ultimately based on the court's subjective determination of what is "best" for the child. *See, e.g.*, M.F. v. N.H., 599 A.2d 1297 (N.J. Super. Ct. App. Div. 1991) (listing factors to be considered when evaluating whether or not a father's motion to disestablish paternity is in the child's best interests).

Amendment school law, failing to return to that "special" environment until June of 2007, in the case of *Morse v. Frederick*.[75] There, a student had refused his principal's request to take down a banner proclaiming the words "BONG HiTS 4 JESUS," while he was standing across the street from his school during a school-sanctioned viewing of the Olympic Torch Relay parade.[76] As a result, the principal ran across the street and tore down the banner, eventually suspending the student.[77]

In upholding the school board's decision to suspend the student, Chief Justice Roberts first noted that because the student had unfurled his banner during school hours, at a school-sanctioned event, and among his fellow students, he was "at school" for the purposes of the First Amendment and, thus, subject to the principal's authority.[78] Chief Justice Roberts stated that schools may regulate student speech when that speech is reasonably viewed by the school as "promoting illegal drug use."[79] The Court relied on the importance of "deterring drug use by school children" and deferred to the school administrators' authority to shield students from certain unappealing topics.[80]

In response, four justices filed separate opinions.[81] The first was Justice Thomas in a lengthy twelve-page concurrence.[82] Justice Thomas stated that, while he agreed with the holding in *Morse*, he felt that *Tinker* should be completely overruled, hearkening back to Justice Black's dissent and his own originalist philosophy, and argued that, in the earliest public schools, "teachers taught, and students listened," and that was how order was maintained.[83]

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

76. *Id.* at 397–98.

77. *Id.*

78. *Id.* at 401.

79. *Id.* at 403.

80. *Id.* at 407–08 (relying on the "special characteristics of the school environment" and noting that "part of a school's job is educating students about the dangers of illegal drug use").

81. *Id.* at 410, 422, 425, 433 (Thomas, J., concurring; Alito, J. & Kennedy, J., concurring; Breyer, J., concurring in part and dissenting in part; and Stevens, J., Souter, J. & Ginsburg, J., dissenting).

82. *Id.* at 410–22 (Thomas, J., concurring).

83. *Id.* at 412. To make this point absolutely clear, Justice Thomas argued that public schools are best served if students are stripped of all First Amendment rights and completely subjected to their teachers' determinations as to what sort of speech is acceptable. While a ruling to this effect could be consistently applied by the lower courts—contrary to the current standard—it would be a radical departure from the

Thomas further noted that the *Tinker* standard was particularly problematic because of the inherent "judgment calls about what constitutes interference and what constitutes appropriate discipline."[84] As a result, Thomas explicitly sided with Justice Black's dissenting opinion from *Tinker*, stating that "*Tinker* has undermined the traditional authority of teachers to maintain order in public schools," expressing his belief that the *Tinker* opinion should be overruled and student speech should be left entirely to the discretion of school authorities.[85] While Justice Thomas is in the minority, if nothing else, he levies a number of valid criticisms against *Tinker*. Further, if his view had been shared by the majority, courts would be able to easily and consistently dispatch nearly every student speech case by simply deferring to the school.[86]

Justice Thomas was merely the first justice to concur with the opinion in *Morse*, however. Justice Alito also filed a concurring opinion, joined by Justice Kennedy.[87] Justice Alito began by noting that he did not believe that students were without constitutional rights, stating that he only supported the majority opinion insofar as it prohibited the specific activity of advocating illegal drug use in schools. He did not agree, however, with prohibiting political speech, including speech on the topic of drug legalization more broadly.[88] He further noted that school officials should not be allowed to engage in viewpoint discrimination based on the idea that students *choose* to attend a particular institution (thereby giving their consent) because many students do not have a true choice between schools.[89] Instead, Justice Alito concluded that

current understanding of students' First Amendment privileges.

84. *Id.* at 421 ("Local school boards, not the courts, should determine what pedagogical interests are 'legitimate' and what rules 'reasonably relat[e]' to those interests.") (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

85. *Id.* at 421–22 ("'Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools' . . . . [t]o elevate such impertinence to the status of constitutional protection would be farcical . . . .") (quoting Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996) (arguing that the then-current Supreme Court jurisprudence on school law had resulted in a "decline in school order and educational quality")).

86. *Id.* at 441.

87. *Id.* at 422 (Alito, J. & Kennedy, J., concurring).

88. *Id.*

89. *Id.* at 424 (noting that parents often do not truly delegate school officials with

because "speech advocating illegal drug use poses a threat to *student safety*," it is akin to a threat of imminent violence[90] and, thus, may be proscribed under the First Amendment.[91]

Next came Justice Breyer's opinion, concurring only with the Court's holding in favor of the school by noting that the student in *Morse* was already barred from collecting damages under a theory of "qualified immunity"[92] and dissenting from the Court's application of First Amendment jurisprudence.[93] With respect to the First Amendment, Justice Breyer felt that the issue was too complex to be dealt with in the *Morse* case, intentionally expressing the contrary beliefs that (1) students should be allowed to unfurl banners designed to attract the attention of television cameras on "basic First Amendment principles [of viewpoint discrimination]," and (2) that it is also important to allow schools to restrict speech that advocates an illegal activity.[94] He further noted that the principles established in Justice Stevens's dissenting opinion, which would have protected the student's speech, could significantly interfere "with reasonable school efforts to maintain discipline."[95] Thus, Justice Breyer's frustration seems to stem from his own conflicted interests in both allowing student "expression" and letting school administrators maintain order within the school.

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the authority to act *in loco parentis* because they often have no choice *but* to send their children to public school). Interestingly, this suggests that Justices Alito and Kennedy would be comfortable giving a public school broad authority to regulate student speech as long as its students had the *choice* to attend. Such an environment (i.e., where schools have broader authority to regulate student speech) might be found, for example, at a publicly funded, state, residential honors school like the North Carolina School of Science and Mathematics or, perhaps, a chartered school.

90. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

91. *Morse*, 551 U.S. at 425 (Alito, J. & Kennedy, J., concurring) (emphasis added).

92. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "qualified immunity" as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights").

93. *Morse*, 551 U.S. at 425 (Breyer, J., concurring in part and dissenting in part).

94. *Id.* at 426 ("This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.").

95. *Id.* at 427 ("What is a principal to do when a student unfurls a 14-foot banner . . . during a school-related event in an effort to capture the attention of the television cameras? . . . [K]nowing that adolescents often test the outer boundaries of acceptable behavior, [a school official] may believe it is important . . . to establish when a student has gone too far.").

Lastly, in the fourth opinion filed, Justice Stevens expressed his dissent, writing for Justices Souter and Ginsberg.[96] Justice Stevens noted that the banner was not meant to reach the school but the television cameras.[97] He agreed that the principal was immune from liability, but he argued that the school's interest in restricting an "oblique reference to drugs" was slight and not sufficient to meet the standard in *Tinker*.[98] Justice Stevens noted that *Tinker* had created "[t]wo cardinal First Amendment principles": (1) that censorship based on the content of speech is a form of viewpoint discrimination, which is "subject to the most rigorous burden of justification,"[99] and (2) that an individual may only be punished for advocating illegal conduct when that advocacy is likely to provoke harm.[100]

With this in mind, Justice Stevens argued that the majority opinion in *Morse* struck "at the heart" of First Amendment school law because it did not meet the criteria in *Tinker*, but punished a student-speaker based on the "listener's disagreement with her understanding . . . of the speaker's viewpoint."[101] He argued that the banner (what he called "Frederick's ridiculous sign") simply did not come close enough to advocating that imminent lawless action, which could be proscribed.[102] Stevens argued that, while it is important to protect children from drugs *in the school environment*, the banner proclaiming "BONG HiTS 4 JESUS" could not reasonably be interpreted as "advocating drug use."[103] He noted that there was nothing to suggest that the banner "willfully

96. *Id.* at 433 (Stevens, J., Souter, J. & Ginsburg, J., dissenting).

97. *Id.* at 433–34; *cf.* Wisniewski v. Bd. of Ed. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (Walker, J., dissenting) (arguing that a middle school student who had sent instant messages displaying the image of a bullet going through his teacher's head should only have been disciplined if it was reasonably likely that he anticipated that his speech would reach the school).

98. *Morse*, 551 U.S. at 434.

99. *Id.* at 436.

100. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)). With this comparison Justice Stevens suggests that the *Tinker* standard, which protects student speech unless it is likely to cause a substantial disruption at the school, is a sort of modification of the *Brandenburg* test, which prohibits speech that is likely to incite imminent lawless action.

101. *Id.* at 437–38 ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

102. *Id.* at 438–39.

103. *Id.* at 438.

infringed on anyone's rights or interfered with any of the school's educational programs," and therefore *should have been protected.*[104]

In applying the opinions discussed above, courts generally attempt to dispose of a student speech case on grounds other than *Tinker* whenever possible.[105] Indeed, *Tinker* is the most difficult of these standards to apply consistently. As a result, courts will often first ask if the student's speech violated any traditionally unprotected forms of speech (obscenity, true threats, etc.). If not, they will go through the four school law cases discussed above and ask: (1) does the speech advocate illegal drug use; (2) is the speech school-sponsored or does it otherwise "bear the imprimatur of the school"; and (3) is the speech lewd, indecent, or patently offensive?[106] If the court can answer "yes" to any of the above questions, it will likely dispose of the case on those grounds.[107] If not, however, the court will direct its attention to *Tinker*.

104. *Id.* at 445 (citing *Tinker's* proclamation that students "may not be confined to the expression of those sentiments that are officially approved"). Interestingly, Justice Stevens also noted that the students' behavior in *Tinker* was considered far more treasonous than it would be today because of the "dominant opinion" at that time strongly in favor of the war in Vietnam and against those who opposed it. Yet, despite the taboo nature of the *Tinker* students' speech, no substantial disruption occurred in that case, and the speech was considered protected. Today, according to Justice Stevens, the dominant cultural opinion against drug use is less potent—surely not treasonous—and there are "literally millions of otherwise law-abiding users of marijuana." Using this logic, the *Morse* ruling is inconsistent with *Tinker*, unnecessarily burdening students' First Amendment rights. *Id.* at 447–48.

105. *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (finding that a student's violent and derogatory internet website could be proscribed under *Tinker* after determining that it was not a true threat, distinguishing it from the speech in *Fraser* on the grounds that the speech in question did not occur "at any official school event or even during a class," and distinguishing *Hazelwood* because "there [was] no suggestion that the School District sponsored the speech").

106. There is also some question as to whether speech that is regulated as "lewd, indecent, or offensive" must also be presented in front of a "captive audience" in order to be regulated under *Fraser*. This is based on the Court's reliance, in that case, on the fact that the school assembly was mandatory. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 684 (1986) (noting that school authorities have a clear mandate "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech"); s*ee also* Morse v. Frederick, 551 U.S. 393, 394 (2007) (noting that Fraser's speech certainly would have been protected in a public forum).

107. *See* David L. Hudson, Jr., *Student Online Expression: What Do the Internet and MySpace Mean for Students' First Amendment Rights?* FIRST AMEND. CENTER 11 (Dec. 19, 2006), http://www.firstamendmentjournal.com/PDF/student.internet.speech.pdf (collecting cases and noting the trend of avoiding a *Tinker* analysis when possible).

II. THE PROBLEMS WITH *TINKER* AND THE THIRD CIRCUIT SPLIT

Unfortunately, as Justice Thomas noted in *Morse*, the *Tinker* standard is difficult to apply consistently.[108] It is "malleable" and "judgment calls about what constitutes *interference* and what constitutes *appropriate discipline*" are inherent in its application.[109] Whatever critics may say about Justice Thomas's originalist jurisprudence,[110] his evaluation of *Tinker* has proven quite prescient.

In applying the *Tinker* standard, courts often differ on what constitutes a "substantial disruption" or, in cases where no disruption has actually occurred, on what facts are sufficient for the school administrators to find that a disruption was reasonably likely to have occurred.[111] This "reasonably likely" interpretation[112] is problematic because it adds a new level of subjectivity to an

108. *Morse*, 551 U.S. at 421 (Thomas, J., concurring).

109. *Id.* (emphasis added).

110. *See generally* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 303–05 (2009) (criticizing Justice Thomas's "inconsistent" originalist jurisprudence on the grounds that it "allows him to draw indiscriminately on sources that are of differing value to different versions of originalism . . . which of course broadens his ability to find evidence to support what may really be a subconsciously predetermined meaning that yields his preferred outcome"). *But see* Hannah L. Weiner, *The Next "Great Dissenter"? How Clarence Thomas Is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 DUKE L.J. 139, 139–43 (2008) (arguing that Justice Thomas's "solitary" dissenting opinions—like those of Justice Harlan—may one day be proven especially prophetic, earning him the title "Great Dissenter").

111. *Morse*, 551 U.S. at 421 (Thomas, J., concurring).

112. It is a bit unclear if the Court in *Tinker* actually intended that the lower courts ask whether or not a substantial disruption is "reasonably foreseeable" in proscribing student speech. The only language from Judge Fortas's opinion that would suggest this merely noted that the Tinker children should not have been prohibited from wearing black armbands—in part—because the school authorities could not even demonstrate facts "which might reasonably have led [them] to *forecast* substantial disruption." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (emphasis added). This language has been interpreted to mean that school officials may either show a disruption *or* show facts sufficient to reasonably forecast a disruption. However, given the fact that the language is only used once, on the last page of the opinion, in an attempt to bolster the Court's argument, one could argue that Justice Fortas merely meant it to serve as more evidence to support the fact that the Tinkers' armbands did not constitute unprotected speech. Justice Fortas may have simply been intimating that if the school cannot even *forecast* a disruption, then there is no chance that this speech may be prescribed. Taking this interpretation, then, *Tinker* may have never affirmatively stated that the "reasonable forecast" language was a separate standard under which speech may be prescribed—as it has been so applied by the lower courts. While this is somewhat speculative, the *Tinker* standard could be much more reliably applied if the "reasonably forecast" test were removed. *See infra* Part III.

already shaky proposition. If a court does not believe it has sufficient facts to show that a substantial disruption has occurred, a student's speech might still be proscribed based only on the school administrator's asserted belief at the time of the censorship that such a disruption was reasonably likely to occur.[113] This is, of course, an extraordinarily "malleable" standard, as Justice Thomas put it, and very susceptible to conflicting opinions and, accordingly, conflicting rulings.[114]

Whether or not a school administrator should have the broad authority to proscribe a student's conduct, the application of a reasonably foreseeable standard—especially within the unique environment of the schoolhouse, where courts routinely defer to school administrators—is treacherous for both students and school boards. Further, while there are instances in which *Tinker* is clearly applicable—a true "substantial disruption"[115]—such cases are the exception, not the rule.

The trouble with *Tinker* is perhaps best exemplified by two recent Third Circuit decisions from 2010, *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District.*[116] In a unique

113. *See, e.g.*, Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (finding that a student's blog, which referred to the school administrators as "those douchebags in central office" and encouraged the student's fellow classmates to "piss [one administrator] off more," was reasonably likely to cause a substantial disruption on campus). Interestingly, one of the jurists on the two-judge panel that decided *Doninger* was current Supreme Court Justice Sonya Sotomayor. This suggests that, at least in the context of *Doninger*, Justice Sotomayor is amenable to the *Tinker* standard and the use of "reasonable foreseeability" in its application. *But see* Beussink *ex rel.* v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (finding that a high school student's website, which used vulgar language to criticize the school, was protected under *Tinker* because the authorities' mere dislike of the site's content "is not an acceptable justification for limiting student speech," and further noting the important public policy of providing for a "wide dissemination of ideas" in schools). In comparing these two cases, it seems that the judges' decisions were based on whether or not they believed—intuitively—that the speech was *actually* reasonably likely to reach the school and cause a disruption. Whatever judicial value such a "feeling" might have, it is of such a subjective nature that it is nearly impossible to replicate consistently across the board, a problem that is beginning to manifest itself in the current body of student speech case law.

114. *Morse*, 551 U.S. at 421 (Thomas, J., concurring).

115. *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (finding that a student's violent and insulting website—listing the phrase "Fuck You Mrs. Fulmer. You Are A Bitch. You Are A Stupid Bitch." over 136 times—while not a true threat, could be regulated as an impermissible substantial disruption under *Tinker* when the teacher became so frightened and anxious that she could not continue teaching and student morale dropped to levels "comparable to the death of a student or staff member").

116. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); J.S.

twist of fate, both Third Circuit panels filed their opinions on the same day—February 4, 2010—on cases sharing substantially similar facts.[117] Yet, despite sharing the same jurisdiction, filing date, and fact sets, the two panels applied *Tinker* in completely disparate ways.[118]

Factually, *Layshock* and *Blue Mountain* are extraordinarily similar. In both cases, students were suspended for creating a false, derogatory profile of the school's principal on the website MySpace.com.[119] In *Layshock*, the website described the principal as a drunk, drug-user, "steroid freak[,] . . . big whore [and] big fag."[120] In *Blue Mountain*, the principal was characterized as a "sex addict . . . fagass . . . [and] dick head," among other things.[121] The school board in *Layshock* argued that the website disrupted the school process because it forced the school to temporarily block access to its computer system,[122] and the principal in *Blue Mountain* argued that the website had "created quite a buzz," noting that a number of students had decorated their lockers in support of the suspended students.[123]

In response, the *Layshock* panel held in favor of the student, finding that the website was protected speech.[124] The court distinguished *Fraser* on the grounds that it only applied to speech occurring in school[125] and ruled that *Tinker* was not applicable because it felt that there was not a sufficient "nexus" between the student's speech and any substantial disruption of the

ex rel. Snyder v. Blue Mtn. Sch. Dist., 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, 2010 U.S. App. LEXIS 7342 (3d. Cir. Apr. 9, 2010).

117. *Layshock*, 593 F.3d 249; *Blue Mountain*, 593 F.3d 286.

118. *Layshock*, 593 F.3d at 263 (ruling that a student's off-campus speech was protected because it did not cause a disruption at school and failing to apply the reasonable foreseeability standard); *Blue Mountain*, 593 F.3d at 300 (finding that a substantial disruption resulting from the student's speech was reasonably foreseeable).

119. *Layshock*, 593 F.3d at 252; *Blue Mountain*, 593 F.3d at 291.

120. *Layshock*, 593 F.3d at 252–53.

121. *Blue Mountain*, 593 F.3d at 291.

122. *Layshock*, 593 F.3d at 253.

123. *Blue Mountain*, 593 F.3d at 294.

124. *Layshock*, 593 F.3d at 263. It should be noted that the court in *Layshock* consciously refrained from addressing the defamation argument, noting that "the issue before us is limited to whether the District had the authority to punish Justin for expressive conduct outside of the school that the District considered lewd and offensive." *Id.* at 263 n.20.

125. *Id.* at 260 ("[T]here is no evidence that [the student] engaged in any lewd or profane speech while in school.") (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007)).

school environment.[126] As a result, the court held that it simply did not have the authority to "support punishment for creating such a profile" when the school board was unable to show a "foreseeable and substantial disruption," noting that the school board had relied on little more than the fact that the derogatory website *existed* in its argument for suspension.[127]

In *Blue Mountain*, on nearly the same facts as those put forward in *Layshock*, the *other* Third Circuit panel found that the website in question constituted unprotected speech and held in favor of the school board, again applying *Tinker*.[128] This panel reasoned that the website presented a "reasonable possibility of a future disruption," relying on its "blatant [sexual] allusions" and the principal's own observations that the school environment had undergone "severe deterioration" since the website had become active.[129] The court also noted the importance of employing a "hesitant application" when allowing student speech, in light of the "special characteristics of the school environment."[130]

The Third Circuit split arising from the decisions in *Layshock* and *Blue Mountain* exemplifies two problems with the *Tinker* standard. First, it highlights what Justice Thomas called the ambiguity of the substantial interference standard.[131] Second, it functions as an excellent case study on the judiciary's somewhat arbitrary employment of the "reasonably foreseeable" substantial interference standard and its inconsistent application when employed.[132]

126. *Id.* at 260–61.

127. *Id.* at 263.

128. *Blue Mountain*, 593 F.3d at 301 ("[W]e hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school . . . [may be] regulated pursuant to *Tinker*.").

129. *Id.* at 300.

130. *Id.* at 306.

131. Morse v. Frederick, 551 U.S. 393, 421 (2007) (Thomas, J., concurring); *see also* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (defining "substantial disruption" as more than a mild distraction or curiosity but less than "complete chaos").

132. It should be noted that the Third Circuit Court of Appeals chose to review both *Layshock* and *Blue Mountain* en banc because of the tension between these strikingly similar cases. *See generally Layshock*, 593 F.3d at 249; *Blue Mountain*, 593 F.3d at 286. The entire Court of Appeals for the Third Circuit heard oral arguments for both cases on June 3, 2010, and then considered those arguments for a full year before filing its opinion on June 13, 2011. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011)(en banc) [hereinafter *Layshock II*]; J.S. *ex rel.* Synder v. Blue Mtn. Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc) [hereinafter *Blue Mountain II*]. While both cases were decided in favor of the students, the lack of consistency that this legal standard provides, as evidenced by the

Even beyond *Layshock* and *Blue Mountain*, however, *Tinker* faces other problems. The substantial disruption standard may be susceptible to a variant of that idea for which Professor Harry Klaven, Jr. has been attributed—the "Heckler's veto."[133] After the passing of the 1964 Civil Rights Acts, Klaven recognized the possibility that a speaker might be restricted for her speech not because the speech violated any exceptions to the First Amendment in and of itself, but because the audience might intentionally act so raucously that it would impermissibly breach the peace, thereby restricting the speaker's ability to speak.[134]

This fear is pertinent to the school environment because any student speech (even pure, political speech) may be prohibited in this context if it results in or is reasonably likely to result in a substantial disruption. Thus, the exact same form of speech could be regulated in one school context and not the other based on nothing more than the audience's reaction. If a third party had a hostile motive against the speaker, he could attempt to react so negatively that his behavior would result in a sort of "false substantial disruption" at the school,[135] effectively censoring the speaker without the court ever having to look at the content of the speech.

This effect can be demonstrated by looking at the facts in *Layshock*. There the school board attempted to argue that a substantial disruption had occurred by citing the fact that the school had been "forced" by the student's website to block access

very fact that the panel chose to decide both of these cases en banc, remains largely unresolved. *See Layshock II*, 650 F.3d at 220–21 (Jordan, J., concurring) (stating that despite the unanimous decision, there is still debate as to how to apply *Tinker* to off-campus speech); *see also Blue Mountain II*, 650 F.3d, at 928 (holding that "[t]he facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable"). In addition, it should be noted that the Supreme Court recently denied certiorari for these cases, suggesting that it may be many years before a definitive ruling comes down. *See, e.g.*, Blue Mtn. Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012).

133. HARRY KLAVEN, JR., THE NEGRO & THE 1ST AMENDMENT 140 (1965) ("If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve."); *see also* Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 61 (1973) (concluding, in the context of a public forum and regarding the problem of the Heckler's veto, that "[i]f the speaker intends to create disorder, the speech should be prohibited . . . [but] [i]f the speaker desires to communicate his ideas, and the audience intends to create disorder, the speech should not be prohibited").

134. *See* KLAVEN, *supra* note 133, at 140.

135. *See* McGaffey, *supra* note 133, at 61.

temporarily to its computer system and supervise students' time in the computer labs.[136] Although this claim may have been true, it is exceedingly difficult to tell if it was a necessary or legitimate response. It may very well have been an unnecessary, excessive, or even fraudulent reaction. Courts simply do not know. Courts *cannot* know; they can only infer or, as Thoreau put it, "surmise."

III. PREDICTABILITY, PERCEPTION, AND THE PUBLIC SCHOOL ENVIRONMENT

The great difficulty surrounding *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, then, is determining the extent to which they are subject to the special characteristics of the school environment. In making this determination, courts are in the unenviable position of balancing a student's interest in free speech against the school's interest in providing that same student with a proper, healthy, safe, and morally acceptable environment. Beyond this necessity, courts are also subject to external legal pressures, which require consistency, predictability, and strict adherence to precedent.

Unfortunately, the available precedent is shaky. Although *Morse* and *Hazelwood* may be applied by simply allowing schools to employ a blanket prohibition against speech that advocates illegal drug use and giving schools strict control over "school-sponsored" speech,[137] *Fraser* and *Tinker* are more difficult to apply. It is unclear what sort of speech is sufficiently "lewd" to be unprotected. Further, it is even less clear what sort of student behavior constitutes a "substantial disruption" under *Tinker*.

What is left? In his book *Concerning Dissent and Civil Disobedience*, Justice Fortas[138] briefly addressed the problem of reconciling free speech rights and the state's interest in peace and security—albeit in the context of a public forum.[139] Justice Fortas acknowledged the "infinite variety" of situations in which courts are confronted with this problem, and he argued that, ultimately,

136. *Layshock*, 650 F.3d at 208–09.

137. Morse v. Frederick, 551 U.S. 393, 403 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

138. Justice Fortas is also the author of *Tinker v. Des Moines Independent Community School District*, the subject of this Comment.

139. ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 17 (1968).

First Amendment protection turns on "[t]he *precise facts* in each situation."[140]

This is a somewhat unsatisfying solution. It provides no clear marker when applying the already ambiguous standards with which we must work. Accordingly, Justice Fortas has been criticized. Professor Ruth McGaffey of the University of Wisconsin claimed that his statement "says little at all helpful to the solution of a problem which may be becoming our most important First Amendment issue."[141]

Yet, despite her frustration with Judge Fortas's answer, Professor McGaffey's argument that a speaker be given carte blanche unless there is "no other conceivable way" to maintain order—although perhaps more palatable to the traditionally American, "damn the torpedoes,"[142] mentality—disregards the importance of protecting the audience's interests, as well as the speaker's. Although the audience's interest is relatively low in the traditional public forum, it is heightened in the schoolhouse.[143]

How should the law progress in light of the problems discussed above? Given the inconsistent application of the *Tinker* standard—especially when no disruption has actually occurred, but is merely "reasonably likely to occur"—it would be advantageous to distance our First Amendment school law jurisprudence from reliance on the "reasonably foreseeable" standard. It is simply too difficult for courts to determine *consistently* that a student's speech might or might not cause a substantial disruption at some point in the future.

To make even an educated guess, a court would need to understand and process a panoply of intricate and personal information about each particular school and its inhabitants at the time the student's speech was received. Further, even if a court were to attain such an intricate understanding of the inner workings of a particular school, there is no guarantee that the court's prediction would have come to pass had the matter not been litigated. In fact, the speech would have necessarily ended

140. *Id.* (emphasis added).

141. McGaffey, *supra* note 133, at 62 (referring to the problem of the heckler's veto).

142. *Id.* at 64. The phrase "[d]amn the torpedoes" is attributed to Fleet Admiral Farragut of Union Army, United States Civil War. Joan K. Davidson, *Put Miss Liberty in the Met, Too?*, N.Y. TIMES, Mar. 15, 1986, § 1, at 27.

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

long ago. Thus, the judge would already know whether or not any substantial disruption had actually occurred. If it had not, the only question would be whether the speech, despite having never caused a disruption, was *reasonably likely* to have caused such a disruption in the absence of court proceedings. Such speculation leaves the realm of acceptable uncertainty and merely adds to the number of conflicting cases. It is too far a leap of faith to argue that a student's speech, which never actually created a disruption, is reasonably likely to have done so, and it is inappropriate to make such a claim.

CONCLUSION

It is perhaps unwise to follow Justice Thomas's concurring opinion in the *Morse* case[144] and grant school administrators near-absolute authority over their student charges. Instead, we should follow Justice Fortas's guidance and look to the precise, particularized facts of each case when determining whether a substantial disruption has occurred.[145] This determination is made by balancing (1) the importance of allowing students to exercise their free speech rights, against (2) the interests of the school.[146]

In doing so we must recognize that elementary, middle, and high school students are not the same as adults, and the environment in which they learn is not a public forum. Schools should not allow students the sort of freedom to speak that is given to adults, especially when the form of speech used is not the sort of pure, political speech found in *Tinker*.[147] Students often say hurtful things and they often bully. If they are left alone, this sort of speech can result in, even if not a visible disruption on campus, a significant social harm to other students and the learning environment as a whole.[148] Bullying speech should be closely

144. Morse v. Frederick, 551 U.S. 393, 412–13 (2007) (Thomas, J., concurring).

145. FORTAS, *supra* note 139, at 17; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (stating that there were no facts in the record that might have indicated a risk of substantial disruption or material interference with school activities).

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

147. *See id.* at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

148. *See* Justin W. Patchin & Sameer Hinjuda, *Traditional and Nontraditional Bullying*

monitored by school administrators and, if found to be a particularly egregious or disruptive infringement on student rights, it should be restricted.

In sorting out these matters, courts should defer to those individuals who best understand the school environment—the teachers and administrators.[149] When an administrator deems that it is in the best interests of the student or the student body to restrict a student's speech, a court should give that determination heavy consideration and not reject it easily.

Recall Henry David Thoreau's journal entry.[150] In that brief moment, Thoreau expressed his frustrations with the limits of reality and concluded that the best solution was to accept those limits, and defer to the "tinker's damn."[151] In kind, courts should embrace the limits on speech that are necessary given the complexities of the schoolroom context. Courts should defer to school authorities where reasonable and, when asked to make a determination, look at the particularized facts of each case, balancing the interests of the student against those of the school.

This determination is not easily made. It requires, at times, a "gut" feeling rooted in one particular individual's judgment about what is acceptable and what is not, hearkening back to *Miller*'s "community standards."[152] Yet, given the nature of the schoolhouse environment, the conflicting interests involved, and the ambiguous standards that the Court has adopted, it is a necessary restriction to the application of school law. As Supreme Court Justice Stewart stated in *Jacobellis v. Ohio*, just five years before *Tinker* was decided:

> I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I

Among Youth: A Test of General Strain Theory, *in* YOUTH & SOCIETY (forthcoming) (published online with Sage Publications as of May 7, 2010) (finding that individuals who experience "strain"—anger and frustration—are more likely to bully other students, which in turn can lead to further bullying or maladaptive "coping").

149. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The inculcation of these values is truly the 'work of the schools.' The determination of what manner of speech in the classroom or school assembly is inappropriate properly rests with the school board.") (quoting *Tinker*, 393 U.S. at 508).

150. *See supra* INTRODUCTION.

151. THOREAU, *supra* note 1, at 38.

152. Miller v. California, 413 U.S. 15, 30 (1973).

> could never succeed in intelligibly doing so. But *I know it when I see it . . . .*[153]

153. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (emphasis added).