

THE FIRST AMENDMENT, SOCIAL MEDIA, AND THE PUBLIC SCHOOLS: EMERGENT THEMES AND UNANSWERED QUESTIONS

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INTRODUCTION

The manner in which information is shared has changed dramatically since the late 1960s, when the Supreme Court issued two seminal free speech rulings: *Pickering v. Board of Education* and *Tinker v. Des Moines Independent Community School District*.¹ In *Pickering*, the Court held in favor of a teacher who had written a letter to the local newspaper that was critical of his school board.² The Court held that teachers generally have a right to speak as citizens on matters of public concern.³ The *Pickering* Court, however, stipulated that the speech rights of teachers are not unlimited; they must be balanced against the rights of the state as an employer to efficiently run the schools.⁴ In *Tinker*,

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *Pickering* and *Tinker* represented radical departures from the previously held notions about the extent to which the Constitution protects the interests of teachers or pupils in public schools. Up until *Tinker*, the dominant view was that, because educators acted in place of parents when students are at school, they naturally enjoy the same unfettered right to discipline students that parents do. *See State v. Pendergrass*, 19 N.C. 365, 366 (1837). In *State v. Pendergrass*, the Court stated: “[t]he teacher is the substitute of the parent” and “is invested with his power.” *Id.* As to the educators’ relationship with their state employers, the right/privilege distinction, articulated by Justice Oliver Wendell Holmes in 1892, had long been a significant barrier to advancing the free speech rights of public educators. *See McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892). In *McAuliffe*, a case that dealt with a policeman who had been fired for engaging in political speech, Justice Holmes summed up the right/privilege distinction as follows: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id.*

² *Pickering*, 391 U.S. at 574–75.

³ *Id.* at 572.

⁴ Watt Lesley Black, Jr., *When Teachers Go Viral: Balancing Institutional Efficacy Against the First Amendment Rights of Public Educators in the Age of Facebook*, 82 MO. L. REV. 51, 90 (2017) (see flow chart on page 90, which describes the *Pickering* Balancing test in terms of six considerations: “[1] breach confidentiality[;] [2] undermine the superior/subordinate relationship[;] [3] interfere with the orderly operations of the school[;] [4] interfere with his/her ability to continue to function effectively on the

the Court held in favor of students who had worn black armbands to school in protest of the Vietnam War, holding that students have First Amendment rights in school so long as their speech does not cause material or substantial disruption or an invasion of the rights of other students.⁵

The student speech in *Tinker* had no negative impact on the work of the school, nor did it interfere in any way with the rights of others.⁶ The same is true of Pickering's letter to the editor, which triggered very little public reaction outside of the school board members who felt personally targeted.⁷ In 2019, it is much less likely that such speech will go unnoticed. Unlike in 1969, virtually everyone now has the means to quickly and easily distribute expressive content throughout their communities and far beyond. Electronic speech has the potential to "go viral," reaching an audience far larger than the speaker may have ever intended. The expanded reach of student or educator speech has exponentially increased its potential to cause disruption to the school environment.

This enhanced ability of students and educators to broadcast their expression online has posed unprecedented legal and practical challenges. The public launch of Facebook in 2006 triggered an expansion in the use of social media, which is now widespread among all ages and sectors of society.⁸ According to a 2018 Pew Research study, 95 percent of American "teens have access to a smartphone" and 45 percent of the teens surveyed claim to be online "almost constantly."⁹ Eighty-five percent of the teens surveyed are regular users of YouTube, followed closely in use by Instagram and Snapchat.¹⁰ The improved technology has allowed student speech to be more influential both on matters subject to serious debate¹¹ and on cruel or disparaging speech, such as cyberbullying.¹² The modern school administrator has been forced to struggle with the resultant fallout.

Adults are also prevalent users of social media. Sixty-eight percent of American adults are on Facebook, with even heavier usage among young

job[;] [5] [constitute a] knowingly or recklessly ma[d]e false statement[;] [or] [6] provide evidence of a lack of employee's fitness for duty").

⁵ *Tinker*, 391 U.S. at 504, 508.

⁶ *Id.* at 509.

⁷ *Pickering*, 391 U.S. at 570.

⁸ See *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), <http://www.pewinternet.org/fact-sheet/social-media/> [<https://perma.cc/843N-FTQY>].

⁹ MONICA ANDERSON & JINGJING JIANG, TEENS, SOCIAL MEDIA & TECHNOLOGY 2 (2018).

¹⁰ *Id.*

¹¹ Gary Younge, *What Happened Next? How Teenage Shooting Survivor David Hogg Became a Political Leader*, GUARDIAN (Dec. 12, 2018), <https://www.theguardian.com/news/2018/dec/12/gun-control-activist-david-hogg-parkland-people-dying> [<https://perma.cc/WV8Q-SHT5>].

¹² See Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RES. CTR. (Sept. 27, 2018), <http://www.pewinternet.org/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/> [<https://perma.cc/W36E-NL3X>].

adults in their twenties—the age range of many new teachers.¹³ Social media use by teachers has made their private lives, which have always been subject to heightened scrutiny relative to the general public, more publicly accessible than ever before.¹⁴ Public confidence in the “fitness” of those who work most closely with their children is essential to the effective functioning of a school district and, when an educator expresses himself or herself online in a controversial manner, schools may worry that, absent corrective action against that *employee*, trust may be eroded within their communities. This often presents a conundrum to practicing school administrators who are seeking to balance the efficacy of their school systems against the legitimate rights of their employees.

In matters involving both students and school employees, the Supreme Court has given a rudimentary roadmap for resolving the conflicts, but the Court’s precedents do not easily translate to the digital age. School administrators lack a consistent framework for determining when an employee’s online speech can provide the basis for negative employment action. As to matters involving students, the existing body of case law doesn’t provide school administrators a sufficient level of certainty that their disciplinary decisions will strike the appropriate balance between the maintenance of discipline at school and respect for students’ First Amendment rights.

This article examines the developing law around the First Amendment and electronic speech in public education and identifies the important themes pertaining to both student and educator speech. It also highlights emerging issues and their implications for educational administrators as they wrestle to make legally and ethically defensible decisions related to discipline of both students and school personnel.

Part I will review the relevant Supreme Court precedent regarding the First Amendment rights of both students and teachers in public schools, from the historic *Pickering* and *Tinker* decisions in 1968 and 1969 through the most recent decisions related to student and public employee expression. Part II will focus on public employee expression and how the lower federal courts have applied Supreme Court precedent in cases involving electronic speech. Part III will focus on important developments in lower federal courts as they have attempted to apply Supreme Court precedent to cases involving student speech. Part IV will pull together themes that emerge across both student and educator

¹³ AARON SMITH & MONICA ANDERSON, SOCIAL MEDIA USE IN 2018 2 (2018); Pew Research Ctr., *supra* note 8.

¹⁴ See Marka B. Fleming et al., *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 B.Y.U. EDUC. & L.J. 67, 70 (2009) (arguing that teachers are so influential that parents, legislators, and the general citizenry historically held expectations that they “serve as good examples for their young charges.”); see also Mike Simpson, *Social Networking Nightmares: Cyberspeak No Evil*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/38324.htm> [<https://perma.cc/J3X7-PF8X>] (last visited Nov. 17, 2019) (suggesting that the popularity of social media has “engendered a prurient interest in teachers’ ‘private’ lives”).

speech cases and examine the implications for practice in both the student and employee management realms.

I. THE SUPREME COURT, THE FIRST AMENDMENT, AND PUBLIC SCHOOLS

A. *The Public-School Educator's Speech Rights*

The Supreme Court first waded into the issue of First Amendment rights inside the public schools in 1968.¹⁵ Marvin Pickering was a public high school teacher who was terminated as a result of writing a letter to the editor of a local paper.¹⁶ Pickering's letter was critical of the board's use of funds from a 1961 bond election and also contained accusations that the superintendent had inappropriately coerced employees' support of a local school-related referendum.¹⁷ The Board of Trustees believed that Pickering had cast aspersions on their "motives, honesty, integrity, truthfulness, responsibility and competence."¹⁸ As a result, they terminated Pickering's employment.¹⁹

The Court ruled in *Pickering* that, while educators do have First Amendment rights to speak as citizens on matters of public concern, the state also has the right as a public employer to provide government services with basic efficiency.²⁰ When an educator engages in speech that is sufficiently disruptive to school business, then the balance tilts in favor of the employer.²¹

The Court considered three circumstances under which school administrators might have been able to impose discipline without violating the First Amendment. First, had Pickering's letter breached confidentiality or undermined important workplace relationships, he might legally have been subjected to job-related discipline.²² But Pickering did not report directly to, or regularly interact with, board members or the superintendent; therefore the Court did not find that his letter interfered with any working relationships.²³ Second, had the letter interfered with school operations or damaged Pickering's ability to continue to effectively function in his job, he also could have been subject to discipline.²⁴ With the exception of the board members themselves, however, most in the community had greeted Pickering's letter with "massive apathy and total disbelief."²⁵ Outside of upsetting the superintendent and trustees, the letter had no impact on Pickering's job effectiveness or to the functioning of the school

¹⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

¹⁶ *Id.*

¹⁷ *Id.* at 564, 576.

¹⁸ *Id.* at 567.

¹⁹ *Id.* at 563.

²⁰ *Id.* at 568.

²¹ See Black, *supra* note 4, at 80.

²² *Pickering*, 391 U.S. at 570–73.

²³ *Id.* at 570.

²⁴ *Id.* at 572–73.

²⁵ *Id.* at 570 (internal quotation marks omitted).

system in general.²⁶ Finally, had Pickering knowingly shared false information, he might have been subject to discipline.²⁷ But while the letter contained some inaccurate information, there was no evidence presented that Pickering recklessly made false claims.²⁸ Under the particular circumstances, Pickering's letter survived what has come to be known as the *Pickering* Balancing Test.²⁹

In 1983, the Court issued another ruling that would impact the First Amendment expression rights of public educators. In *Connick v Myers*, the Court held that not all expressive activities of public employees merit First Amendment protection.³⁰ *Connick v. Myers* did not involve an educator; instead it arose out of an employment dispute in an urban district attorney's office.³¹ Sheila Myers worked as an assistant district attorney in New Orleans.³² In response to a pending transfer to another section of the criminal court, Myers prepared and distributed a survey to approximately fifteen other assistant district attorneys, soliciting input on office morale, confidence in supervisors, and whether there should be an official "grievance committee."³³ Upon learning that Myers had distributed the survey, District Attorney Harry Connick terminated her.³⁴ Myers successfully argued in federal district court that the termination violated her First Amendment free speech rights.³⁵ Upon appeal to the Fifth Circuit, the district court's decision was affirmed.³⁶

The Supreme Court, however, viewed this case much differently than the lower courts. In the Court's view, Myers's survey was notably different from Pickering's letter in that it addressed matters almost exclusively of private interest.³⁷ If employee speech does not address a matter of public concern, an employer's decision to impose discipline should not be a judicial concern.³⁸ But, in addition to distinguishing a difference between the public and private nature of the content of Myers's speech, the Court also noted a significant difference related to the capacity of the speakers in these two cases. In contrast to Marvin Pickering, who wrote his letter as a private citizen, Myers was speaking in the capacity of an employee when she distributed a work-related survey

²⁶ *Id.* at 567, 572–73.

²⁷ *Id.* at 569.

²⁸ *Id.* at 572.

²⁹ Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 135 (2008).

³⁰ *Connick v. Myers*, 461 U.S. 138, 154 (1983).

³¹ *Id.* at 140.

³² *Id.*

³³ *Id.* at 140–41.

³⁴ *Id.* at 141.

³⁵ *Id.* at 141–42.

³⁶ *Id.* at 142.

³⁷ *Id.* at 154. It is important to note that, while Myers was speaking in the capacity of an employee, she was not actually doing her job when she was speaking.

³⁸ *Id.* at 146.

throughout her office.³⁹ Writing for the majority in *Connick*, Justice Byron White explained:

[W]hen a public employee speaks not as a *citizen* upon matters of *public concern*, but instead as an *employee* upon matters only of *personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.⁴⁰

The Court gave minimal guidance on the issue of how a public employer should determine whether an employee is speaking as a citizen on a matter of public concern: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement. . . ."⁴¹ The Court concluded that the content of Myers's survey dealt primarily with private workplace concerns.⁴² With respect to form and context, the Court focused heavily on Myers's motivation, which it viewed as primarily self-serving.⁴³ Rather than seeking to blow the whistle on incompetent or corrupt practices within the district attorney's office, Myers was acting out of her dissatisfaction with her impending transfer, hoping to "gather ammunition for another round of controversy with her superiors."⁴⁴

The Court's decision in *Connick* set up two distinct categories of speech: that of an employee on a matter of private interest and that of a citizen on a matter of public concern. And yet the Court was vague in terms of how to distinguish between these two categories. In effect, the Court's decision in *Connick* significantly narrowed the scope of public employee speech rights, creating a "threshold test" through which employee speech must pass before it is evaluated under *Pickering*. As a result, employee speech that fails to meet this test of public concern is no longer under the umbrella of First Amendment protection.⁴⁵

In 1987, the Court clarified what qualifies as a public concern under *Connick*. In *Rankin v. McPherson*,⁴⁶ Deputy Constable Ardith McPherson was fired after she was overheard making a distasteful remark regarding the attempted assassination of President Ronald Reagan.⁴⁷ When she learned that Reagan had been shot, McPherson commented to her boyfriend, who also was

³⁹ *Id.* at 154.

⁴⁰ *Id.* at 147 (emphasis added).

⁴¹ *Id.* at 147–48.

⁴² *Id.* at 154.

⁴³ *Id.* at 148.

⁴⁴ *Id.*

⁴⁵ See *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 449 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985), in which the Sixth Circuit relied upon *Connick* in order to rule against a high school guidance counselor for revealing her bisexuality to co-workers, despite a lack of evidence that her revelation created any type of disruption. The circuit court held that the speech was of a personal interest and, under *Connick*, unprotected. *Id.* The Supreme Court denied certiorari.

⁴⁶ *Rankin v. McPherson*, 483 U.S. 378 (1987).

⁴⁷ *Id.* at 381–82.

employed by the constable: “[I]f they go for him again, I hope they get him.”⁴⁸ A co-worker reported the comment to McPherson’s supervisor, and she was fired.⁴⁹ The Court held that McPherson’s speech dealt with the life and death of the president, a matter of inherent public concern, and therefore protected by the First Amendment.⁵⁰

Perhaps more interestingly, a concurring opinion in *Rankin* raised the possibility that *Connick* should not disqualify purely private employee speech from First Amendment protection. Justice Lewis Powell, in his concurrence, argued that the *Connick* “public concern” test was unnecessary and inappropriate because McPherson’s remark was part of a purely private conversation between her and her boyfriend.⁵¹ McPherson could have had no way of reasonably knowing that her comment would have reached anyone other than the other party involved in the conversation. Further, there was little likelihood that her remark would be disruptive in any way. “The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful,” explained Justice Powell.⁵²

In 1995, the Court dealt with a case involving an *ex ante* restriction on the speech rights of public employees and chose to side-step *Connick* altogether. *United States v. National Treasury Employees’ Union (NTEU)* involved a challenge to a section of the Ethics Reform Act of 1989, which banned federal employees from accepting compensation for writing articles or making speeches.⁵³ The provision was intended to be an ethical safeguard, protecting the integrity of both government workers and the government itself.⁵⁴ The parties challenging the prohibition comprised individual employees and large unions who argued that the measure would have a chilling impact on their private speech, an argument with which the Court agreed.⁵⁵ “With few exceptions,” Justice Stevens explained, “the content of respondents’ messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work.”⁵⁶ Thus, the Act violated the First Amendment rights of federal employees.

In 2004, the Court once again relied on *Connick* in upholding the termination of a police officer in San Diego after he refused an order to stop producing, starring in, and selling adult videos online.⁵⁷ The officer sold his videos on

⁴⁸ *Id.* at 381.

⁴⁹ *Id.* at 381–82.

⁵⁰ *Id.* at 385–87.

⁵¹ *Id.* at 393 (Powell, J., concurring).

⁵² *Id.*

⁵³ *United States v. Nat’l Treasury Emp.’s Union*, 513 U.S. 454, 457 (1995).

⁵⁴ *Id.* at 472.

⁵⁵ *Id.* at 465, 469.

⁵⁶ *Id.* at 465.

⁵⁷ *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004).

the “adults-only” section of Ebay.⁵⁸ He also sold police-related items, one of which was an official San Diego police uniform, something that ultimately caught the attention of department officials.⁵⁹

The department initiated a termination proceeding after the officer refused to fully comply with a directive to cease and desist his online enterprise.⁶⁰ The officer filed suit in federal court alleging a violation of his rights under the First Amendment, but the district court dismissed his case, holding that his speech was not of a public concern, and therefore unprotected.⁶¹ The Ninth Circuit reversed, however, relying upon the *NTEU* decision to argue that this was purely private and non-disruptive speech unrelated to his job duties.⁶² The Court viewed the officer’s online business as essentially different than the speech at issue in *NTEU*, which was unrelated to, and had no impact on, the work or business of the employer.⁶³ In contrast, the officer’s videos were connected to his work as a policeman “in a way injurious to his employer.”⁶⁴ Videos depicting a police officer “performing indecent acts while in the course of official duties” would cause anyone who might view them to develop serious doubts with regard to the professionalism and mission of the San Diego police department.⁶⁵

In the 2006 decision of *Garcetti v. Ceballos*, the Court was forced to grapple with a type of speech that it felt didn’t fit neatly into the dichotomy spelled out in *Pickering* and *Connick*. Like *Connick*, the genesis of *Garcetti* was an employment dispute in an urban district attorney’s office.⁶⁶ Richard Ceballos was a deputy assistant district attorney in Los Angeles County.⁶⁷ As “calendar deputy,” Ceballos would review the work of other attorneys in the office at the request of defense attorneys.⁶⁸ While acting on one such request, Ceballos agreed with the defense attorney that there were significant problems surrounding a state affidavit, problems that could adversely affect the prosecution of the case.⁶⁹ As a result, he forwarded a recommendation that the case be dropped.⁷⁰ Ceballos’s recommendation was not well-received by his superiors, who not only proceeded with the prosecution, but also stripped him of his position as

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 79.

⁶¹ *Id.*

⁶² *Id.* at 80.

⁶³ *Id.* at 81.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006).

⁶⁷ *Id.* at 413.

⁶⁸ *Id.*

⁶⁹ *Id.* at 413–14.

⁷⁰ *Id.* at 414.

calendar deputy, transferred him to another courthouse, and ultimately denied him a promotion.⁷¹

Ceballos filed a suit in federal court, alleging that the actions were in retaliation for his exercise of his First Amendment speech rights.⁷² The Court disagreed, pointing out what it viewed as a critical difference between Ceballos's case and the others it had decided.⁷³ When Ceballos forwarded his recommendation to his superiors, he was not speaking in his capacity as a private citizen on a matter of public concern like *Pickering*. He was speaking as an employee, but not on a matter of personal interest like Myers. Making such recommendations was officially part of his responsibilities as a calendar deputy. Therefore, he was speaking in the course of doing his job.⁷⁴

Justice Kennedy wrote for the majority: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁷⁵ In the view of the Court, Ceballos was not a victim of illegal retaliation over the exercise of constitutionally protected speech. He was simply the recipient of consequences for poor performance—in this case, making recommendations that his supervisors may have perceived as "inflammatory or misguided."⁷⁶

In sum, the trilogy of *Pickering*, *Connick*, and *Garcetti* provide the framework for all cases where public employees suffer *ex post* sanctions for engaging in expressive activity. Under *Connick*, employee speech on matters of private interest is left unprotected by the First Amendment. Under *Garcetti*, speech that is pursuant to job duties is unprotected by the First Amendment. Otherwise, employers must evaluate the disruptive impact or potential of employee speech under *Pickering* prior to imposing discipline.

B. *The Public-School Student's Speech Rights*

A year after its seminal decision in *Pickering*, the Court once again turned to the issue of First Amendment speech rights in public schools, this time in the context of student speech. In *Tinker v. Des Moines Independent Community School District*, the Court extended limited First Amendment speech rights to students.⁷⁷ Fifteen-year-old John Tinker and his thirteen-year-old sister Mary Beth, along with sixteen-year-old Christopher Eckhardt, wore black armbands to school as a symbolic protest to American involvement in Vietnam.⁷⁸ The students had planned to wear the armbands from December 16, 1965 through

⁷¹ *Id.* at 414–15.

⁷² *Id.* at 415.

⁷³ *Id.* at 421.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 423.

⁷⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

⁷⁸ *Id.* at 504.

the holiday season but, when Mary Beth arrived at school on the sixteenth, she was ordered to remove the armband.⁷⁹ Though she complied with the administrator's directive, she was still subsequently suspended.⁸⁰ Eckhardt was also suspended the same day.⁸¹ John Tinker wore his armband the next day and was also suspended.⁸²

The Court determined that the students' First Amendment rights had been violated, stating: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate."⁸³ While endorsing First Amendment protections for public school students, the Court also affirmed that school officials have "comprehensive authority" to regulate student conduct within the schools.⁸⁴ The problem, as the Court explained, was how to reconcile students' First Amendment rights with the legitimate authority of the State to maintain order at school.⁸⁵

In the Court's view, balancing these competing interests requires an evaluation of the impact of particular speech upon the school environment. The students' expression in *Tinker* was a "silent, passive expression of opinion. . . ."⁸⁶ The armbands had not disrupted school business or interfered with the "rights of other students to be secure and to be let alone."⁸⁷ The Court opined that, when school authorities seek to sanction student expression, that decision must be based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁸⁸ Instead, school officials must show that the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ."⁸⁹

Seventeen years after *Tinker*, the Court would weigh in on another student speech issue. In 1986, the Court decided *Bethel v. Fraser*, a case involving Mathew Fraser, a high school senior who was punished for giving a nominating speech at a school assembly that referred to a candidate using "an elaborate, graphic, and explicit sexual metaphor."⁹⁰ Fraser's speech contained no explicit profanity, but was filled with crude sexual references and double entendre.⁹¹ Fraser shared the speech with two different teachers prior to the as-

⁷⁹ *Id.*

⁸⁰ See The City Club of Cleveland, *Mary Beth Tinker 11.9.2018*, YOUTUBE (Nov. 12, 2018), <https://www.youtube.com/watch?v=fU8rZAIcK3w> [<https://perma.cc/S2FS-9TGH>].

⁸¹ *Tinker*, 393 U.S. at 504.

⁸² *Id.*

⁸³ *Id.* at 506.

⁸⁴ *Id.* at 507.

⁸⁵ *Id.*

⁸⁶ *Id.* at 508.

⁸⁷ *Id.*

⁸⁸ *Id.* at 509.

⁸⁹ *Id.* at 513.

⁹⁰ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 678 (1986).

⁹¹ Sample text of Fraser's speech is as follows:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm . . . Jeff Kuhlman is a man who takes his point and pounds it in. If necessary,

sembly, both of whom advised him against delivering it and warned that there could be “severe consequences” if he did.⁹² During the assembly, student reaction to the speech ranged from confusion to embarrassment.⁹³ Some students hooted, yelled, or mimicked the activities referenced in Fraser’s speech.⁹⁴

The following day, school authorities suspended Fraser under a school rule that prohibited “[c]onduct which materially and substantially interferes with the educational process” such as “the use of obscene, profane language or gestures.”⁹⁵ In addition to the suspension, Fraser was removed from a list of student candidates to speak at the graduation ceremony at the end of the school year.⁹⁶

Fraser challenged the school’s action in federal court, alleging that both his First and Fourteenth Amendment rights had been violated.⁹⁷ The district court sided with Fraser, holding that the school rule was unconstitutionally vague and overbroad; Fraser was awarded damages, including an injunction against making him ineligible to speak at the graduation ceremony.⁹⁸ The Ninth Circuit affirmed the district court’s decision, holding that, under *Tinker*, the school had violated Fraser’s First Amendment speech rights by punishing him for non-disruptive speech.⁹⁹

The Supreme Court reversed. The Court found that Fraser’s speech differed significantly from the expression at issue in *Tinker*. An essential function of public education in America, the Court stated, is to “inculcate the habits and manners of civility as values in themselves . . . and as indispensable to the practice of self-government in the community and the nation.”¹⁰⁰ The Court balanced the free speech rights of students against the state’s “countervailing interest in teaching students the boundaries of socially appropriate behavior.”¹⁰¹ Fraser’s speech, while it may not have caused a substantial disruption, constituted an intrusion upon a basic educational mission.¹⁰² Ultimately, the Court concluded that it is not a violation of the First Amendment for a school to discipline students for engaging in speech that is vulgar or offensive, even if

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.

Id. at 687 (Brennan, J., concurring).

⁹² *Id.* at 678.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (internal quotation marks omitted).

⁹⁶ *Id.*

⁹⁷ *Fraser v. Bethel Sch. Dist.*, 755 F.2d 1356, 1357 (9th Cir. 1985).

⁹⁸ *Bethel*, 478 U.S. at 679.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 681.

¹⁰¹ *Id.*

¹⁰² *Id.* at 685.

not legally obscene.¹⁰³ Further, school administrators have broad discretion to define and determine what constitutes vulgar and offensive speech.¹⁰⁴

The decision in *Fraser* did not overturn *Tinker*, it simply created an “exception” to it, a particular type of speech (lewd or vulgar) that is not protected under the First Amendment. Two years after *Fraser*, the Supreme Court created a second exception to the *Tinker* substantial disruption standard when it decided yet another student speech case. *Hazelwood v. Kuhlmeier*, which was decided in 1988, involved a high school principal’s censorship of two articles that were set to appear in the student newspaper at Hazelwood East High School in St. Louis, Missouri.¹⁰⁵ One of the articles was a feature about student experiences with pregnancy, and the other dealt with the impact of divorce on students.¹⁰⁶ The principal worried that, though the article about pregnancy used pseudonyms, the school community would still be able to identify the girls who were profiled.¹⁰⁷ With regard to the article about the impact of divorce, the principal was concerned that one of the students featured had been highly critical of her father, but student journalists had not given the father the chance to share his side of the story.¹⁰⁸

In determining that no First Amendment violation had occurred, the Court made an important distinction between the facts of the case and *Tinker*. In *Tinker*, the Court explained, it had answered the question of whether the First Amendment required schools to “tolerate particular student speech.”¹⁰⁹ In *Hazelwood*, however, the question was whether the First Amendment required schools “affirmatively to promote particular student speech.”¹¹⁰ The difference was significant because the question in *Hazelwood* required the Court to consider the authority of the state as educator to exert control over “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”¹¹¹ Thus, the Court crafted a distinct catego-

¹⁰³ *Id.* at 685–86. Courts have never protected student speech or writing that is legally obscene. However, educators must remember that language is not legally obscene merely because it contains offensive, vulgar, or “dirty” words. To be legally obscene, material must violate three tests developed by the Supreme Court: (1) it must appeal to the prurient or lustful interest; (2) it must describe sexual conduct in a way that is “patently offensive” to community standards; and (3) “taken as a whole, [it] lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁰⁴ For more on *Bethel*, see David Schimmel, *Lewd Language Not Protected: Bethel School District v. Fraser*, 33 EDUC. L. REP. 999, 999–1005 (1986); Elizabeth A. Shaver, *Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students’ First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1545–47 (2017).

¹⁰⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 264 (1988).

¹⁰⁶ *Id.* at 263.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 270.

¹¹⁰ *Id.* at 270–71.

¹¹¹ *Id.* at 271.

ry of student speech that might be subject to discipline, specifically student speech that is school-sponsored. The Court stated: “[E]ducators do not offend the First Amendment by exercising editorial control over . . . student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹¹²

The Court’s last student speech case was decided in 2007. In January of 2002, the Olympic Torch passed through Juneau, Alaska, on its way to Salt Lake City, Utah, where the Winter Olympic Games were held that year.¹¹³ At Douglas High School in Juneau, Principal Debra Morse allowed the students and staff to exit the building in order to watch the Olympic Torch Parade as it passed by the school.¹¹⁴ Joseph Frederick arrived at the school late that day and joined a group of students who were standing across the street from the school to witness the parade.¹¹⁵ As the Olympic Torch passed, Frederick and his friends held up a large banner that read: “BONG HiTS 4 JESUS.”¹¹⁶ Principal Morse approached the group and directed them to take down the banner.¹¹⁷ Everyone, with the exception of Frederick, complied.¹¹⁸ Frederick was suspended for ten school days pursuant to a school policy that forbade student expression that could be construed to advocate “the use of substances that are illegal to minors.”¹¹⁹

Frederick appealed to the superintendent of the district, who agreed that the message on the banner seemed to advocate the use of marijuana and, as a result, disrupted the school’s mission to educate students “about the dangers of illegal drugs.”¹²⁰ Frederick filed suit in federal district court, claiming a violation of his First Amendment rights.¹²¹ The district court granted summary judgment for the district, but the Ninth Circuit reversed, ruling that the banner was not sufficiently disruptive under *Tinker* to justify disciplinary action by the school.¹²²

The Supreme Court reversed. “Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use,” the

¹¹² *Id.* at 273. Concerns over abuses of the broad discretion to censor granted to school administrators by the *Hazelwood* holding have prompted at least fourteen states to pass statutes protecting student journalists from the type of censorship endorsed by the Court in *Hazelwood*. See *Who New Voices Protects*, STUDENT PRESS L. CTR., <http://splc.org/the-legislation/> [<https://perma.cc/E3A7-W7DR>] (last visited Nov. 19, 2019) (providing access to the state statutes).

¹¹³ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 398.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 398–99.

¹²¹ *Id.* at 399 (internal quotation marks omitted).

¹²² *Id.*

Court declared.¹²³ “Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers,” the Court continued, “poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”¹²⁴ Nothing in the First Amendment, the Court reasoned, requires schools to tolerate student speech at a school event that would heighten those dangers.¹²⁵ Thus, another exception to the *Tinker* substantial disruption test was created: schools may sanction student speech that can reasonably be interpreted to promote illegal drug use, whether or not that speech is disruptive.

Of all of the Supreme Court’s student speech cases, *Morse* is the only one that even touched on the scope of school authority over student speech that takes place off campus. The Court rejected an argument from the student that his speech was not “school speech” simply because he physically had not been on school grounds. The Court found that the student, who was “stand[ing] in the midst of his fellow students, during school hours” was under the authority of school officials at the time that the banner was unfurled.¹²⁶ While the Court did acknowledge an “outer boundar[y]” regarding the scope of school authority, it found that this outer boundary had not been reached on the facts of the case.¹²⁷

II. PUBLIC EDUCATOR SPEECH: EMERGING ISSUES AND TOPICS

Even before the explosion of social media and resultant litigation, lower federal courts struggled to apply Supreme Court precedent to cases involving public-employee speech. This has resulted in a significant split between the circuit courts, which are divided on exactly how to discern when an employee is speaking on a matter of private interest or as a citizen on a matter of public concern. Most specifically, the disagreement revolves around which of the *Connick* variables is most important: content, form, or context. This results in a significant disparity in the breadth of public employee speech rights based upon the circuit.

Some circuits, including the Fourth, Fifth, Tenth, and Eleventh, have prioritized the form and context of speech. These “contextual circuits” place greater weight “on both the capacity and the motivation of the speaker.”¹²⁸ Public educators who live in contextual circuits may legally be subjected to adverse employment action even when their speech touches on a matter of inherent public concern and is non-disruptive.¹²⁹ Content-based circuits, which include the First, Second, Third, Sixth, Seventh, and Ninth, largely eschew contextual fac-

¹²³ *Id.* at 408.

¹²⁴ *Id.*

¹²⁵ *Id.* at 410.

¹²⁶ *Id.* at 401.

¹²⁷ *Id.*

¹²⁸ Black, *supra* note 4, at 62.

¹²⁹ *Id.* at 62–63.

tors such as speaker capacity or motivation when the content of the speech touches on an inherent public concern, such as politics or public corruption.¹³⁰ Two cases, one from the Eleventh Circuit and one from the Sixth Circuit, illustrate how these two different approaches can impact outcomes.

In 1996, the Eleventh Circuit ruled against a public educator who criticized his school's registration, scheduling, and teacher assignment processes.¹³¹ Social Studies teacher Lawrence Ferrara spoke out in a faculty meeting and later in a private meeting with his principal.¹³² To his dismay, he was subsequently assigned to teach all freshman and sophomore courses.¹³³ Though the topics about which Ferrara had complained might have been inherently of concern to members of the public, the court viewed his motivation for speaking as purely personal.¹³⁴ The court held that "a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run."¹³⁵ Because the court viewed Ferrara as a disgruntled employee, his speech failed the *Connick* test of public concern and was not protected.¹³⁶

The Sixth Circuit reached a completely different conclusion in the case of Netta Banks, a substitute teacher in Wolfe County, Kentucky who was reassigned after she had filed formal complaints with the state alleging irregularities in the interview and hiring process at her school.¹³⁷ The complaints came after a five-year period during which she repeatedly interviewed for full-time teaching positions but was never offered a job as a certified teacher.¹³⁸ Upon reviewing the record, the Sixth Circuit found evidence in Banks's testimony to suggest personal motivation for her complaints—namely her personal grievance in having been passed over for employment.¹³⁹ While the court acknowledged that Banks's complaints were predominately private, the finding that some of them touched on matters of public concern was enough to prompt the court to remand the case to the district court so that Banks's speech could receive a proper balancing under *Pickering*.¹⁴⁰

Two additional circuit cases from outside the educational arena, both involving complaints about sexual harassment, provide an even more stark illustration of how this split results in a disparity in the breadth of speech rights for educators and other public employees. The first, in 1994, involved an employee in the Department of Development of Allegheny County, Pennsylvania who

¹³⁰ *Id.*

¹³¹ *Ferrara v. Mills*, 781 F.2d 1508, 1515–16 (11th Cir. 1986).

¹³² *Id.* at 1510.

¹³³ *Id.*

¹³⁴ *Id.* at 1516.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 891 (6th Cir. 2003).

¹³⁸ *Id.* at 890.

¹³⁹ *Id.* at 897.

¹⁴⁰ *Id.*

complained that she had been sexually harassed by an executive assistant to the county commissioner.¹⁴¹ Taking a content-based approach, the Third Circuit focused directly upon the nature of the speech, which concerned an “incident of sexual harassment” allegedly perpetrated by someone “exercising authority in the name of a public official. . . .”¹⁴² Such discriminatory behavior on the part of a public official was an issue that inherently rose to the level of public concern, the court ruled.¹⁴³ Though the complaint involved only the employee’s personal grievance related to sexual harassment, the court could find nothing in its analysis of the form and context of her complaints that would diminish the value of these communications “to the process of self-governance.”¹⁴⁴ As such, the speech was protected, irrespective of contextual concerns such as motivation or speaker capacity.

In contrast, two years later the Tenth Circuit held that a female officer’s complaint of sexual harassment against male officers did not touch on a matter of public concern and, therefore, was unprotected speech.¹⁴⁵ Taking a contextual approach, the Tenth Circuit focused on the capacity in which the employee spoke, even referring to it as the “fundamental inquiry” in its analysis.¹⁴⁶ The court evaluated the employee’s motivation to determine whether the speech was “calculated to redress personal grievances [and therefore spoken as an employee] or to address a broader public purpose [and therefore spoken as a citizen].”¹⁴⁷ Because the officer in question alleged that she had been “personally subjected to sexual harassment, retaliation, and unwarranted disciplinary action” the court found that her speech dealt only with the “conditions of her own employment,” indicating that she was speaking in the role of an employee, not as a citizen.¹⁴⁸ Her complaints of sexual harassment, therefore, were left unprotected.

Clearly, public employees who live in contextual circuits are far more at risk of losing First Amendment protection in free speech cases. With the recent explosion of litigation involving the online expression of public employees, this split could become increasingly problematic. This is a major schism in circuit approaches that merits the attention of the Supreme Court. The way in which the Court chooses to resolve this split will substantially alter the analysis in public-employee speech cases over a large swath of the country. Despite the existence of this interpretive split between circuits, analysis of cases involving public employees and online speech does seem to reveal some larger trends, which are discussed below.

¹⁴¹ *Azzaro v. Cty. of Allegheny*, 110 F.3d 968, 970 (3d Cir. 1997).

¹⁴² *Id.* at 978.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 978–79.

¹⁴⁵ *David v. City of Denver*, 101 F.3d 1344, 1356 (10th Cir. 1996).

¹⁴⁶ *Id.* at 1355.

¹⁴⁷ *Id.* (alteration in original).

¹⁴⁸ *Id.* at 1356.

A. *Connick is Rarely Decisive in Cases Involving Public Employees' Online Speech*

After the launch of Facebook in 2004, as social media use became more and more widespread among adults, it didn't take long for problems to present themselves for public educators. The earliest disputes involving educators and social media found their way into federal district courts in 2008, and the educators lost both cases.¹⁴⁹ The United States District Court of Connecticut upheld the dismissal of a high school English teacher who communicated with students via MySpace during non-school hours.¹⁵⁰ Jeffery Spanierman used his page to discuss both school-related and personal matters with his students.¹⁵¹ The court used the *Connick* public concern test to strip Spanierman of his First Amendment protection, noting that not much of the content on his page seemed to rise to the level of a matter of public interest.¹⁵²

Later that same year, the United States District Court for the Eastern District of Pennsylvania ruled against a student teacher at Conestoga Valley High School who posted critical comments about her supervising teacher, as well as a photo of herself hoisting a plastic cup and wearing a pirate hat.¹⁵³ The photo was accompanied by the caption "drunken pirate."¹⁵⁴ Stacy Snyder was in the process of completing requirements for a bachelor's degree and teaching credentials at Millersville University, but the picture, along with her criticism of her supervising teacher, got her removed from her student teaching position.¹⁵⁵ As a result, she was unable to complete her education degree or receive teaching credentials.¹⁵⁶ Even though Snyder was a student and not an official employee of the district, a district judge applied the *Connick* test of public concern, and held that Snyder's speech was that of an employee on a matter of private interest, and was therefore not protected by the First Amendment.¹⁵⁷

These two early cases fueled speculation that the *Connick* test of public concern might, for all intents and purposes, strip First Amendment protection from public educators who engage on social media. In 2010, Patricia Nidiffer from the University of Dayton warned that any social media expression by a public educator that does not touch on a matter of public concern is likely to be

¹⁴⁹ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297 (D. Conn. 2008); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *2 (E.D. Pa. Dec. 3, 2008).

¹⁵⁰ *Spanierman*, 576 F. Supp. 2d at 298.

¹⁵¹ *Id.* Some of the interaction between Spanierman and his students was characterized by school officials as inappropriately "peer-to-peer" like in nature. *Id.*

¹⁵² *Id.* at 310.

¹⁵³ *Snyder*, 2008 WL 5093140 at *5-*6.

¹⁵⁴ *Id.* at *6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *8.

¹⁵⁷ *Id.* at *15-*16.

job-threatening if it finds the wrong audience.¹⁵⁸ In 2012, Mary Rose Papandrea of the Boston College Law School also expressed concerns that judicial reliance on *Connick* in social media cases would severely undermine the constitutional rights of public educators.¹⁵⁹ These concerns seemed well-founded in 2012, but as more and more cases have been decided, it appears that the *Connick* public concern test is not as substantial a risk to educators' online speech rights as these scholars once thought.¹⁶⁰

Of thirty-three federal cases reviewed since 2008, only nine (27 percent) have relied on the *Connick* test of public concern to disqualify the online speech of a public employee from First Amendment protection.¹⁶¹ The trend toward bypassing *Connick* in favor of balancing under *Pickering* holds at both the district and circuit court levels. *Connick* has proven decisive in only five of eighteen (27 percent) district-level cases, with a nineteenth case featuring three employees who passed *Connick* and one who did not. Employees failed to pass the *Connick* test of public concern in four of fourteen (28 percent) of the circuit level cases reviewed.¹⁶²

This trend exists even in cases where employees engage in speech that arguably touches more on private than public concerns. The Ninth Circuit, in the 2009 case of *Richerson v. Beckon*, “assume[d], without deciding” that a teacher’s “highly personal and vituperative” blog posts about her employers and co-workers touched on matters of public concern.¹⁶³ In 2013, the Seventh Circuit held that a high school guidance counselor who had self-published a relationship book for women which was filled with misogynistic and racially offensive language was speaking as a citizen on the dynamics of adult relationships, a subject matter that it considered a public concern.¹⁶⁴ In 2015, the Third Circuit “reluctantly assume[d]” that a teacher was blogging on matters of public concern when she wrote about commentary she’d like to add to student’s report cards, such as “[f]rightfully dim,” “[l]azy asshole,” and “[u]tterly loathsome in all imaginable ways.”¹⁶⁵ The court believed that she was, in her own way, addressing the work ethic of today’s youth and the value of hard work in general, a matter of public concern.¹⁶⁶

In 2016, the Fourth Circuit decided *Liverman v. City of Petersburg*, which involved two police officers discussing police promotion policies on Face-

¹⁵⁸ Patricia M. Nidiffer, Note, *Tinkering with Restrictions on Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?*, 36 DAYTON L. REV. 115, 135 (2010).

¹⁵⁹ Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1629 (2012).

¹⁶⁰ See Black, *supra* note 4, at 67.

¹⁶¹ See *infra* Appendix I and Appendix II.

¹⁶² See *infra* tables of reviewed cases in Appendix I and II.

¹⁶³ *Richerson v. Beckon*, 337 F. App’x 637, 638 (9th Cir. 2009).

¹⁶⁴ *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1113 (7th Cir. 2013).

¹⁶⁵ *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 459–60, 470 (3d Cir. 2015).

¹⁶⁶ *Id.* at 470.

book.¹⁶⁷ One officer argued that promoting officers into leadership when they had insufficient background or experience negatively impacted officer safety, and the officer cited statistics to support his points.¹⁶⁸ The second officer agreed with the first officer's points, but then made a thinly veiled reference to an individual within the department whom he believed had been wrongly promoted.¹⁶⁹ The district court analyzed the two officers' speech separately and found that the first officer's speech passed the *Connick* test of public concern, while the second officer's didn't.¹⁷⁰ The Fourth Circuit, however, considered the two officers' speech as a "single expression of speech to be considered in its entirety," and held that both employees passed the test of public concern.¹⁷¹ While one officer had used a "more colloquial tone," both were generally voicing concerns about the department's ability to effectively carry out its mission.¹⁷²

In 2017, the Fourth Circuit decided *Grutzmacher v. Howard County*, a case with a similar set of facts. Members of a fire department were discussing gun control online and making derogatory comments towards political liberals.¹⁷³ Some of their online commentary was racially offensive.¹⁷⁴ The court opined that much, but not all, of the content discussed by the firemen touched on matters of public concern.¹⁷⁵ Again, the Fourth Circuit held that the multiple interactions and comments on Facebook should be treated as one single expression, one that focused on a matter of public concern.¹⁷⁶

Decreased judicial reliance on *Connick* in favor of *Pickering* in First Amendment cases involving public employees and social media or other electronic speech is not entirely surprising, considering that many social media users routinely use their accounts to discuss politics or other current events. As such, it makes sense that the content of public-employee expression will also frequently touch on matters of inherent public concern. In a significant number of the cases reviewed, this was exactly the case. For example, in the 2013 Fourth Circuit decision *Bland v. Roberts*, the court held that deputy sheriffs who had been fired after "liking" and making supportive comments on the Facebook page of the man running for sheriff were speaking as citizens on a matter of public concern—local politics.¹⁷⁷ In *Duke v. Hamil*, a deputy police chief in Georgia was demoted after posting a Confederate flag and a call for a sec-

¹⁶⁷ *Liverman v. City of Petersburg*, 844 F.3d 400, 404–05 (4th Cir. 2016).

¹⁶⁸ *Id.* at 405.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 406.

¹⁷¹ *Id.* at 410.

¹⁷² *Id.*

¹⁷³ *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 338–39 (4th Cir. 2017).

¹⁷⁴ *Id.* at 338.

¹⁷⁵ *Id.* at 343–44.

¹⁷⁶ *Id.* at 344.

¹⁷⁷ *Bland v. Roberts*, 730 F.3d 368, 387 (4th Cir. 2013).

ond revolution in response to President Obama’s reelection.¹⁷⁸ The political nature of his postings ensured that his speech easily passed the *Connick* test of public concern.¹⁷⁹ Cases such as these serve to remind us that the content of public employees’ social media expression is just like that of the public in general—often meant to be seen by a reasonably limited audience, but frequently touching on matters of inherent public concern.

Even in cases in which employee speech does not seem on its face to be inherently of public concern, judges have bypassed *Connick*. This was the case in both *Richerson* and *Munroe*, where teachers blogged highly demeaning personal thoughts about co-workers and students.¹⁸⁰ The *Connick* framework is simply problematic in analyzing the type of speech presented in many of these cases. Online speech often doesn’t fit neatly into the dichotomous categories of either citizen speech on a matter of public concern or employee speech on a matter of private interest. In many cases, an employee’s online speech represents a hybrid of the two types of speech identified in *Connick*—the speech of a *private citizen* on a matter of *personal interest*.

A notable exception, however, is the Fifth Circuit—which has ruled against public employees who were speaking as citizens on matters of private interest three times between 2015 and 2018. The case *Graziosi v. the City of Greenville, Mississippi* dealt with Sergeant Susan Graziosi of the Greenville, Mississippi police department, who lost her job after posting comments on Facebook that were critical of the Greenville police chief.¹⁸¹ Graziosi was upset that the chief had not sent a departmental representative to the nearby community of Pearl, Mississippi for the funeral of an officer from that department who had been killed in the line of duty.¹⁸² Her initial post was on her personal Facebook page and included a plea to the city’s mayor to “please get a leader” who understood the importance of sending representatives to neighboring communities when police officers are lost.¹⁸³ Later, she reposted her comments on the mayor’s public Facebook page, adding the rejoinder “[i]f you don’t want to lead, can you just get the hell out of the way.”¹⁸⁴ The district court had ruled that she was speaking in the capacity of an employee, because she’d cited her membership in the department and used the first person plural “we” to show membership in that group.¹⁸⁵ The Fifth Circuit disagreed, holding that she was speaking not as an employee, but as a citizen.¹⁸⁶ But while the Fifth Circuit conceded that Graziosi’s speech held inherent public concern, it found

¹⁷⁸ *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1293 (N.D. Ga. 2014).

¹⁷⁹ *Id.* at 1300.

¹⁸⁰ *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 459–60 (3d Cir. 2015); *Richerson v. Beckon*, 337 F. App’x 637, 638 (9th Cir. 2009).

¹⁸¹ *Graziosi v. City of Greenville*, 775 F.3d 731, 733 (5th Cir. 2015).

¹⁸² *Id.* at 734.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 737.

¹⁸⁶ *Id.*

that her posts “quickly devolved into a rant” against the chief’s leadership, fueled by previous conflict between her and the chief.¹⁸⁷ Thus, the Fifth Circuit combined the *Connick* speech variables in a novel way to create a form of unprotected speech not previously contemplated by the Court in *Connick*: that of a citizen on a matter of private concern.¹⁸⁸

In the 2017 case *Lumpkin v. Aransas County*, the Fifth Circuit ruled against two paralegals who were fired because of a series of private text messages in which they were critical of the Aransas County Attorney Richard Bianchi.¹⁸⁹ According to the court, the messages touched on the impact of Bianchi’s campaign on the office, office and personal affairs, and opinions about Bianchi’s intelligence and competence.¹⁹⁰ The texts were between the two paralegals and former Assistant Aransas County Attorney Deborah Bauer, who had previously been fired by Bianchi.¹⁹¹ The messages only came to the attention of the county because Bauer produced them as part of her legal challenge to her termination, which she also alleged was in retaliation for criticizing Bianchi.¹⁹² The Fifth Circuit held that the paralegals’ text messages were clearly the expression of private citizens, but the expression still didn’t meet the test of “public concern.”¹⁹³ The court, therefore, disqualified the texts from First Amendment protection, once again holding that when public employees speak as private citizens on a matter of private interest, their speech is not protected.¹⁹⁴

In the 2018 case *Malin v. Orleans Parish Communication District*, the Fifth Circuit held for a third time that a public employee’s speech as a private citizen on a matter of private concern is not protected.¹⁹⁵ This case involved Frith Malin, a deputy director of the Orleans Parish Communication District (OPCD) who responded to an email from her supervisor, the executive director, announcing to the organization that one of OPCD’s board members had been named CEO of another organization and would be leaving the board.¹⁹⁶ Malin emailed back, suggesting that this particular board member would do a good job of “bleeding all these funds dry, just as he has done with the City.”¹⁹⁷ Unfortunately, she hit the “reply all” button, sending her email to the entire organization. As a result, she was suspended and ultimately terminated.¹⁹⁸ The

¹⁸⁷ *Id.* at 738. The court noted that Graziosi had just returned from a week-long suspension from duty over an unrelated disciplinary matter. *Id.* at 739.

¹⁸⁸ *Id.*

¹⁸⁹ *Lumpkin v. Aransas Cty.*, 712 F. App’x. 350, 352 (5th Cir. 2017).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 358.

¹⁹⁴ *Id.* at 355.

¹⁹⁵ *Malin v. Orleans Par. Comm’ns Dist.*, 718 F. App’x 264, 265, 271–72 (5th Cir. 2018).

¹⁹⁶ *Id.* at 265.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 265–66.

Fifth Circuit ruled that the employee was speaking, at least in part, as a citizen, but that the content of her email did not constitute a public concern.¹⁹⁹

These recent decisions from the Fifth Circuit seem to increase the chances of Supreme Court intervention at some point. And if other circuits follow the Fifth Circuit's lead and use *Connick* to strip First Amendment protection from employees who are speaking as *citizens* on matters of private interest, *Connick* could become a greater threat to educators' online expression than it appears to be currently. Until the Supreme Court clarifies where this type of speech fits into the *Connick* equation, however, school administrators would be wise to avoid taking negative employment action against educators because of online speech, unless they have evidence to support some sort of disruptive impact on institutional efficacy.²⁰⁰ Relying on a broad reading of the *Connick* test of public concern places employers at increased risk legally.

B. *Online Employee Expression is Rarely Pursuant to Job Duties*

In cases involving the online speech of public employees, the “pursuant to job duties” test emanating from *Garcetti v. Ceballos* has rarely been determinative. There are only three cyber-speech cases in which a court has relied on *Garcetti* in order to disqualify an employee from First Amendment protection.²⁰¹ The most instructive of these was decided in October of 2014 by the United States District Court for the Northern District of West Virginia. The court ruled that Courtney Austin, the director of the Preston County Animal Shelter, was speaking pursuant to her job duties when she created and administered a shelter Facebook page.²⁰² “An employee may still be acting ‘pursuant to official duties,’” the court stated, “even if she engages in speech that is not part of her official job duties so long as it is in furtherance of such job duties.”²⁰³ Although Austin was not directed to establish and maintain the shelter Facebook page, she did not use the page for personal communication, only for shelter business.²⁰⁴ Austin's posts showed as “Preston County Animal Shelter” rather than her own name.²⁰⁵ The shelter's Facebook page was listed in shelter information as its official website.²⁰⁶ All this, in the view of the court, led to the conclusion that she was speaking in the capacity of an employee “pursuant to her job duties,” and as such, had no claim under the First Amendment.²⁰⁷

¹⁹⁹ *Id.* at 270–72.

²⁰⁰ Black, *supra* note 4, at 80. As will be explored *infra*, in the cyber-speech cases where employees have prevailed, the common thread is that employers did not provide evidence of a disruption to institutional efficacy.

²⁰¹ *Id.* at 88–89.

²⁰² *Austin v. Preston Cty. Comm'n*, No. 1:13CV135, 2014 WL 5148581, at *7 (N.D. W. Va. Oct. 14, 2014).

²⁰³ *Id.* at *6.

²⁰⁴ *Id.* at *7.

²⁰⁵ *Id.* at *6 (internal quotation marks omitted).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *7.

The Preston County case would seem to suggest that educators who use social media to communicate with students might be speaking “pursuant to job duties.” But this stands in contrast to *Spanierman v. Hughes*, discussed *supra*, which involved a high school English teacher who used the social networking site MySpace to communicate with students.²⁰⁸ The district court considered whether the online communications with students had occurred in his role “as a public employee pursuant to his official duties.”²⁰⁹ Despite the fact that much of the content on the page was school-related, the court did not view the online communication as “pursuant” to his job duties, largely because there was no evidence that he was directed by his employer to communicate with his students on MySpace.²¹⁰

Spanierman notwithstanding, the Preston County case is cautionary for any public educator who administers social media pages on behalf of a school organization. A fine arts director, for example, who maintains a Twitter, Instagram, or Facebook page for a school program such as band, orchestra, or choir should be aware that such communication could be considered pursuant to job duties even if he or she was not specifically directed to maintain such a page. Administrators who expect their employees to maintain an official web presence should ensure their employees know that their online expression is in furtherance of their job duties and is not protected speech.

Although the Preston County Animal Shelter case stands as the only federal case reviewed in which the social media expression of a public employee was held to be pursuant to job duties, it should be mentioned that there are other forms of digital communication embraced in the modern workplace that may be more susceptible to disqualification under *Garcetti*. Emails and texts are much less likely to reach an unintended audience than social media postings but can frequently go public as a result of litigation or open records requests. When this happens, these forms of communication seem more likely than social media postings to be considered pursuant to job duties. Recently, the Tenth Circuit ruled that a city planner was speaking pursuant to his job duties when he sent an email to the city attorney raising concerns about suspected corruption directly related to a city project with which he was involved.²¹¹ Additionally, a federal district court in New York ruled that a teacher who sent a series of internal emails expressing concerns about student discipline, conduct of district employees, district policies, lack of support, and alleged violations of law/policy was speaking pursuant to her job duties.²¹² Cases such as these suggest that public educators should be exceedingly cautious about emails and other text messages that pertain to work. Even when educators use private emails or cell phones to communicate, if they are communicating with col-

²⁰⁸ *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 298 (D. Conn. 2008).

²⁰⁹ *Id.* at 309.

²¹⁰ *Id.*

²¹¹ *Knopf v. Williams*, 884 F.3d 939, 949 (10th Cir. 2018).

²¹² *Agyeman v. Roosevelt Union Free Sch. Dist.*, 254 F. Supp. 3d 524, 536–37 (E.D.N.Y. 2017).

leagues or superiors about work-related issues, these communications may be considered pursuant to job duties and therefore unprotected by the First Amendment.

A trend that could make *Garcetti* more relevant in the future is the increasing embrace of social media by school systems interested in facilitating communication with stakeholders. Consider that when Frederick County Public Schools in Maryland hired Katie Nash as their “Social Media Coordinator” in November of 2016, they were looking to her to build more community engagement.²¹³ “We had received feedback from some students in a focus group that our tweeting was a bit flat,” Nash explained.²¹⁴ In January of 2017, with winter weather approaching, a student tweeted a request to the district: “[C]lose school tamarow [sic] PLEASE.”²¹⁵ From the district’s Twitter page, Nash responded, “but then how would you learn to spell ‘tomorrow’?”²¹⁶ Nash was fired a week later.²¹⁷

The district was widely criticized for its actions. Nash became a celebrity on Twitter, but she didn’t challenge her firing.²¹⁸ Even if she had, however, it’s hard to see how her speech would not have qualified as “pursuant to job duties” under *Garcetti*, thus making it unprotected by the First Amendment. She was, after all, the social media director for the district. Managing the district’s social media presence was her job. As more school districts are considering hiring social media managers in an effort increase their digital engagement, it is possible that the *Garcetti* standard may come into play in more cases in the future.

C. *The Pickering Balancing Test is Frequently Decisive in Cases Involving Public Employee Speech*

Because *Connick* and *Garcetti* both seem to be of limited utility in cases involving public employees and social media or other internet-based speech, *Pickering* has emerged as the most relevant tool for analyzing online employee speech. The concept of disruption articulated by *Pickering* is expansive enough

²¹³ Tara Bahrapour, *Maryland School District Worker Fired After Correcting Student’s Spelling in Tweet*, WASH. POST (Jan. 16, 2017), https://www.washingtonpost.com/local/social-issues/school-district-employee-fired-after-correcting-students-spelling-in-a-tweet/2017/01/16/fd548bf2-dc29-11e6-acdf-14da832ae861_story.html [https://perma.cc/ZY75-4R86].

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* This was despite Nash’s response receiving 1,400 likes and 1,100 retweets as well as the student who posted the original misspelled tweet taking no offense. *Id.*

²¹⁸ Emma Prestwich, *Katie Nash, Maryland School District Employee Fired After Correcting Student’s Spelling*, HUFFINGTON POST (Jan. 16, 2017), https://www.huffingtonpost.ca/2017/01/16/katie-nash-fired-twitter-spelling_n_14207920.html; *Get Katie Her Job Back!*, CARE2 <https://www.thepetitionsite.com/382/246/305/get-katie-nash-her-job-back/> (last visited Dec. 19, 2019).

to allow employers broad leeway to discipline employees who engage in controversial speech online, as long as they can document some level of disruption to the efficacy of the institution or individual employee. *Pickering* has proved determinative in two-thirds (20/30) of the reviewed cases.²¹⁹ In total, the *Pickering* test has tilted toward the employers in eleven of the cases in which it was decisive, and toward the employees in nine.²²⁰ Until recently, it appeared that the *Pickering* test was tilted significantly in favor of the employer. Through 2015, employees survived balancing under *Pickering* only twice.²²¹ Only when employers failed to present sufficient evidence of workplace disruptions did employees prevail.²²² In cases decided 2016 or later, however, there are seven more examples of the test tilting towards employees.²²³

The *Pickering* Test in online speech cases often comes down to whether the speech interferes with an employee's ability to continue to function effectively in the workplace. For example, when Natalie Munroe blogged commentary that she wished to add to students' report cards, the Third Circuit Court of Appeals held that, by directing such "invective" at the very people she was supposed to serve, she had rendered herself unable to effectively continue in the job.²²⁴ In *Craig v. Rich Township High School District*, the Seventh Circuit upheld the firing of a high school guidance counselor and girls' basketball coach after he self-published a relationship book for women that was full of misogynistic and racist stereotypes.²²⁵ Due to the nature of the book's content, members of the community rightfully lost confidence in the teacher's fitness to counsel or coach their children.

III. STUDENT OFF-CAMPUS SPEECH: CONFUSION AND DIVISION

Before the explosive growth of digital communications, several federal circuit courts had affirmed that school officials have no authority over student speech that takes place outside of school and does not disrupt the school environment.²²⁶ With the tremendous rise of digital communications—and the varying forms that such communications can take (text, tweet, Instagram photo,

²¹⁹ See *infra* Appendix I and II.

²²⁰ *Infra* Appendix I and II.

²²¹ *Infra* Appendix I and II.

²²² *Infra* Appendix I and II.

²²³ *Infra* Appendix I and II.

²²⁴ *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 458, 474, 476 (3d Cir. 2015).

²²⁵ See *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1113–14, 1119 (7th Cir. 2013); see also *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1293, 1303 (N.D. Ga. 2014) (a deputy police chief was demoted after posting an image of a Confederate flag with the caption "time for the second revolution" the morning after President Obama's reelection).

²²⁶ *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (a drawing created and kept at home could not form basis for school discipline); *Thomas v. Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1045, 1051 (2d Cir. 1979) (off-campus creation of an underground newspaper was beyond the scope of school authority); *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986) (student's vulgar gesture to teacher off campus was not subject to school authority).

“liking” material on social media platforms)—the courts have struggled to find the proper balance between students’ First Amendment rights when not at school and the authority of school officials to discipline students for off-campus speech that affects the school environment. As a result, student-speech cases decided by the lower federal courts in the last fifteen years or so have brought about a confusing patchwork of varying standards and rulings on the important question of whether school officials have authority to discipline students for speech that is created and distributed outside of school.

One of the early cases regarding student off-campus speech was a 2004 decision of the Fifth Circuit Court of Appeals in *Porter v. Ascension Parish School Board*.²²⁷ In *Porter*, the Fifth Circuit held that a student’s violent drawing of a school shooting, which came to the attention of school officials two years after its creation because the student’s younger brother had discovered the picture at home and taken it to school, was not school speech that was subject to school authority.²²⁸

In determining that school officials had violated the student’s First Amendment rights for disciplining him for a picture he had created and stored outside of school, the Fifth Circuit noted that the student had not “publicized [the drawing] in a way certain to result in its appearance at” school, thus removing it from the protection of the First Amendment.²²⁹ Indeed, the Fifth Circuit stated that “[p]rivate writings made and kept in one’s home enjoy the protection of the First Amendment”²³⁰ The court, while recognizing that the distinction between “on-campus” and “off-campus” speech may sometimes be unclear, posited that a student’s speech is subject to school authority only where it has been composed on campus or “purposefully brought” to school.²³¹ And when the Supreme Court decided *Morse* just a few years later, it cited the Fifth Circuit’s decision in *Porter* for the proposition that an “outer boundar[y]” exists, beyond which school officials may not regulate student speech.²³²

Very soon after the decisions in *Porter* and *Morse*, the issue regarding students’ First Amendment rights shifted dramatically from homemade banners and hand-sketched drawings to electronically created speech. In the electronic speech era, the federal courts have been unable to establish clear or consistent standards to address the scope of school authority over students’ off-campus speech. Rather, the federal courts have either declined to address the issue²³³ or crafted various tests²³⁴ in an attempt to balance students’ speech rights with the

²²⁷ *Porter*, 393 F.3d at 615.

²²⁸ *Id.*

²²⁹ *Id.* at 620.

²³⁰ *Id.* at 617.

²³¹ *Id.* at 618–19.

²³² *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

²³³ *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011).

²³⁴ *See, e.g., C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016); *Bell v. Itawamba Cty Sch. Bd.*, 799 F.3d 379, 397 (5th Cir. 2015) (en banc); *Kow-*

need for school officials to maintain a safe and orderly school environment. While the courts have developed different analytical frameworks, the courts largely do require that school officials satisfy some “threshold test” in order to be able to assume authority over students’ off-campus electronic speech.²³⁵ And yet, with each successive decision of a federal appellate court, the scope and requirements of these threshold tests have shifted greatly. Thus, the lower federal courts—and school administrators—have little guidance when reviewing cases involving student off-campus, electronic speech.

A. *Shifting Sands: The Federal Appellate Courts Create, Modify, and Redefine the Scope of School Authority Over Students’ Off-Campus Speech*

The Second Circuit Court of Appeals was the first federal appellate court to weigh in on the issue of school authority over a student’s off-campus electronic speech.²³⁶ In two decisions that were issued within a year after the decision in *Morse*, the Second Circuit determined that school officials have the authority to discipline students for off-campus electronic speech if it is “reasonably foreseeable that the [speech] would come to the attention of school authorities”²³⁷ or otherwise “reach campus.”²³⁸

In both cases, the Second Circuit found the student’s manner of distributing the speech to be important in determining whether school officials could assert authority over the off-campus speech. For example, in a case where a student had created an instant message (IM) icon that depicted the shooting of a teacher, the Second Circuit noted the “extensive distribution” of the icon, including both the number of individuals to whom the icon had been sent and the amount of time that it remained available to be viewed.²³⁹ In the second case, the Second Circuit noted that the student’s blog posting had been publicly accessible and that the student had “purposely designed” the blog posting to be seen by the school community.²⁴⁰ Those actions by each of the two students had made it “reasonably foreseeable” that the students’ speech would reach school.²⁴¹

alski v. Berkeley Cty Sch., 652 F.3d 565, 567 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 51–52 (2d Cir. 2008); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007).

²³⁵ See *Layshock*, 650 F.3d at 219.

²³⁶ *Doninger*, 527 F.3d at 48; *Wisniewski*, 494 F.3d at 40.

²³⁷ *Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 39–40.

²³⁸ *Doninger*, 527 F.3d at 48; *Wisniewski*, 494 F.3d at 40.

²³⁹ *Wisniewski*, 494 F.3d at 39–40 (icon sent to 15 recipients and available for a three-week period).

²⁴⁰ *Doninger*, 527 F.3d at 50.

²⁴¹ *Id.*; *Wisniewski*, 494 F.3d at 39.

The Second Circuit's reasonable foreseeability test was quickly adopted and applied by both the Fourth and Eighth Circuit Courts of Appeal.²⁴² In a case involving a student's off-campus speech that had threatened a school shooting, the Eighth Circuit relied on Second Circuit precedent in holding that school officials had properly disciplined the student because it had been reasonably foreseeable that the student's speech would "come to the attention of the school authorities."²⁴³ A year later, the Eighth Circuit again applied the Second Circuit's reasonable foreseeability test when it held that school officials could discipline students for off-campus racist speech because the speech had been "reasonably [] expected to reach the school or impact the environment."²⁴⁴

As the Second Circuit had done, the Eighth Circuit also noted the form of distribution of the off-campus speech as relevant on the scope of authority issue. In one case, the student had communicated his thoughts about a school shooting to several students via an instant messaging service.²⁴⁵ In the second case, the students' racist blog postings had appeared on a publicly accessible website that was not password protected and, within only a few days after the blog postings began, the majority of the student body had become aware of the postings.²⁴⁶

The Fourth Circuit also has applied the Second Circuit's "reasonable foreseeability" test, although the decision also contained language that has been interpreted to have created a "nexus" test. In 2011, the Fourth Circuit decided *Kowalski v. Berkeley County Schools*, a case filed by a high school student who had created a discussion group webpage that bullied a classmate by alleging that the classmate had contracted herpes.²⁴⁷ In determining that school officials had properly disciplined the student for her off-campus speech, the Fourth Circuit applied the Second Circuit's reasonable foreseeability test.²⁴⁸ Specifically, the Fourth Circuit determined that discipline is appropriate when "it [is] . . . foreseeable that the off-campus expression might . . . reach campus."²⁴⁹ On the facts of the case, the court determined that "it was foreseeable in this case that [the student's] conduct would reach the school"²⁵⁰ And, similar to the Second Circuit cases discussed above, the Fourth Circuit noted that the student

²⁴² *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777–78 (8th Cir. 2012); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 765 (8th Cir. 2011).

²⁴³ *D.J.M.*, 647 F.3d at 765–66.

²⁴⁴ *S.J.W.*, 696 F.3d at 773, 777–78 (quoting *Kowalski*, 652 F.3d at 573).

²⁴⁵ *D.J.M.*, 647 F.3d at 758.

²⁴⁶ *S.J.W.*, 696 F.3d at 773–74.

²⁴⁷ *Kowalski*, 652 F.3d at 567.

²⁴⁸ *Id.* at 574.

²⁴⁹ *Id.* (quoting *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008)).

²⁵⁰ *Id.*

had encouraged widespread distribution of her speech, inviting approximately 100 people to join the discussion group webpage.²⁵¹

The *Kowalski* decision also contained language that has been interpreted as having created a “nexus” test to resolve the scope of authority issue.²⁵² Specifically, the Fourth Circuit stated:

There is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of [the student’s] speech to [the] [h]igh [s]chool’s pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body’s well-being.²⁵³

The reference to a “nexus” in this passage caused some courts and commentators to opine that the Fourth Circuit had created a nexus test, although the decision did not provide any details about the parameters of such a nexus test.²⁵⁴ Although, it seems unlikely that the Fourth Circuit chose to create a second test even as it applied the Second Circuit’s reasonable foreseeability test,²⁵⁵ the decision continues to be cited as having created a nexus test.²⁵⁶ Indeed, as discussed in further detail below, later federal decisions have begun to combine and conflate the reasonable foreseeability and nexus tests into one.²⁵⁷

In 2015, the Fifth Circuit Court of Appeals, rather than adopting either the reasonable foreseeability or the nexus tests, created its own threshold test regarding the scope-of-school-authority issue.²⁵⁸ The case involved a rap song recorded outside of school and posted on the Internet that contained vulgar language and accused two school employees of sexually harassing female students.²⁵⁹ In August 2015, an *en banc* panel of the Fifth Circuit affirmed the dis-

²⁵¹ *Id.* at 567.

²⁵² *See, e.g.,* McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068 (9th Cir. 2013).

²⁵³ *Kowalski*, 652 F.3d at 573.

²⁵⁴ *Wynar*, 728 F.3d at 1068; Margaret A. Hazel, *Student Cyber-Speech After Kowalski v. Berkeley County Schools*, 63 S.C. L. REV. 1081, 1087 (2012) (describing *Kowalski* as adopting a “sufficient nexus approach”) (citation omitted); Mary Noe, *Sticks and Stones Will Break My Bones but Whether Words Harm Will Be Decided by a Judge*, 88 N.Y. ST. BAR J., 39, 40 (2016); Daniel Marcus-Toll, Note, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3395 (2014); Nicholas McGrath, Note, *The Omnipotent School Administrator: Seeking to Curb Restriction of Off-Campus Speech in the Wake of C.R. v. Eugene School District 4J*, 97 NEB. L. REV. 258, 268 (2018). *But see* Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 ST. LOUIS U. L.J. 531, 551 (2015) (stating “[t]he Second, Fourth, and Eighth Circuits all considered the question of the reasonable foreseeability that a student’s off-campus speech would reach the school before extending *Tinker* to off-campus speech.”).

²⁵⁵ *Kowalski*, 652 F.3d at 574.

²⁵⁶ For a full discussion of the reasons why the *Kowalski* decision should not be interpreted as creating a “nexus” threshold test, see Shaver, *supra* note 104, at 1567–68.

²⁵⁷ *See supra* Section III.A.

²⁵⁸ *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391 (5th Cir. 2015) (*en banc*).

²⁵⁹ *Id.* at 383.

trict court's grant of summary judgment in favor of the school board.²⁶⁰ While declining "to adopt any rigid standard"²⁶¹ with regard to the scope of authority issue, the Fifth Circuit created a test that essentially only applied to the highly specific facts before it. The majority held that school officials may discipline a student for off-campus speech if (a) "a student intentionally directs [speech] at the school community," and (b) the speech is "reasonably understood by school officials to threaten, harass, and intimidate a teacher."²⁶²

The Third Circuit has avoided the scope of authority issue altogether, having decided two student off-campus electronic speech cases on other grounds.²⁶³ The two cases both involved students who had been disciplined for creating fake—and unflattering—social media profiles of school administrators. In the first case, the Third Circuit avoided the scope of authority issue because the school district alleged only that discipline was appropriate under *Fraser* on the ground that the student's speech had been lewd and obscene.²⁶⁴ School officials argued that, by using the district's website to copy a photograph of the school administrator, the student had "entered" school, thus giving school officials the authority to impose discipline.²⁶⁵ The Third Circuit rejected that argument and held that *Fraser* applies only to lewd or obscene speech uttered at school, not to speech that appears on the Internet.²⁶⁶ In the second case, the Third Circuit found in favor of the student on the ground that, even assuming that authority existed over the student's off-campus speech, the school district had failed to satisfy *Tinker*'s substantial disruption test.²⁶⁷

The most recent decisions regarding the scope of school authority over student off-campus speech have been issued by the Ninth Circuit Court of Appeals.²⁶⁸ In 2013, the Ninth Circuit decided *Wynar v. Douglas County School District*, a case in which a student had been disciplined for off-campus speech that threatened a school shooting.²⁶⁹ The Ninth Circuit held that school officials had authority to discipline a student who, from his home, had sent "a string of increasingly violent and threatening instant messages . . . bragging about his weapons, threatening to shoot specific classmates, intimating that he

²⁶⁰ *Id.*

²⁶¹ *Id.* at 396.

²⁶² *Id.* In a decision issued in 2016, the Fifth Circuit, quoting *Bell*, stated that the decision whether to apply *Tinker* in any particular case is "heavily influenced by the facts in each matter." *Brinson v. McAllen Indep. Sch. Dist.*, 832 F.3d 519, 533 n.7 (5th Cir. 2016).

²⁶³ *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011).

²⁶⁴ *Layshock*, 650 F.3d at 216–17.

²⁶⁵ *Id.* at 214.

²⁶⁶ *Id.* at 217 n.17.

²⁶⁷ *J.S.*, 650 F.3d at 928.

²⁶⁸ Before 2013, the Ninth Circuit had not definitively weighed in on the issue of the scope of school officials' authority over student off-campus speech, although it had issued a decision affirming discipline of a student whose off-campus speech had threatened a school shooting. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988–90 (9th Cir. 2001).

²⁶⁹ *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1065 (9th Cir. 2013).

would ‘take out’ other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre.”²⁷⁰

In addressing the scope of authority issue, the Ninth Circuit reviewed all of the then-issued decisions of its “sister circuits,”²⁷¹ primarily the decisions of the Second, Fourth, and Eighth Circuits.²⁷² The Ninth Circuit noted that these circuit courts had devised “additional threshold test[s]”²⁷³ as prerequisites to the application of *Tinker*’s substantial disruption standard. The Ninth Circuit identified both a nexus test, citing the Fourth Circuit,²⁷⁴ and a reasonable foreseeability test, citing the Second and Eighth Circuits.²⁷⁵

Yet the Ninth Circuit declined to adopt any of these tests. The court noted the difficulty of articulating “a global standard for a myriad of circumstances involving off-campus speech.”²⁷⁶ It also expressed “reluctan[ce] to . . . craft a one-size fits all approach.”²⁷⁷ Rather, the court relied on the content of the student’s speech, stating that “when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech” that would cause a substantial disruption.²⁷⁸

In 2016, the Ninth Circuit returned to the scope of authority issue. In *C.R. v. Eugene School District 4J*, the Ninth Circuit held that school officials had the authority to discipline middle school students who had directed sexually suggestive speech to other students on property that was adjacent to school grounds.²⁷⁹ The speech in question had taken place while the students were walking home from school and, thus, was not electronic off-campus speech.²⁸⁰

As it had in *Wynar*, the Ninth Circuit found that there were two primary tests to address the scope of authority issue: the nexus and reasonable foreseeability tests.²⁸¹ The Ninth Circuit then confusingly endorsed not one of the tests described above, but both of them, stating that it would “apply[] both the nexus and reasonable foreseeability tests to [the student’s] speech.”²⁸² In so doing, the Ninth Circuit defined the nexus test as one that determines whether the student’s speech is “closely tied to the school.”²⁸³ The Ninth Circuit found that the nexus test was satisfied because (a) all of the individuals involved had been

²⁷⁰ *Id.* at 1064–65.

²⁷¹ *Id.* at 1067.

²⁷² The Ninth Circuit did also briefly discuss the Fifth Circuit’s decision in *Porter*, noting that the Fifth Circuit had not adopted any particular threshold test for the scope of school authority. *Id.* at 1068–69.

²⁷³ *Id.* at 1068.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1069.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1146 (9th Cir. 2016).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 1149.

²⁸² *Id.* at 1150.

²⁸³ *Id.*

students; (b) the speech had taken place just beyond school property; and (c) the speech had taken place just after the school day ended such that the school had an interest in student well-being as they were beginning their trips home.²⁸⁴

The Ninth Circuit also determined that the reasonable foreseeability test had been satisfied because “administrators could reasonably expect the harassment’s effects to spill over into the school environment” and “be disruptive for affected students.”²⁸⁵ In that regard, the Ninth Circuit seems to have misapplied the Second Circuit’s “reasonable foreseeability” test. As a threshold test to determine the scope of school authority over off-campus speech, the reasonable foreseeability test is designed to determine whether off-campus speech would be discoverable by school officials, not whether the speech would be disruptive to the school environment. The Ninth Circuit skipped that inquiry altogether and proceeded directly to find that the off-campus speech was foreseeable to cause a disruption.

In its most recent decision, *McNeil v. Sherwood School District*, the Ninth Circuit has muddied the waters even more.²⁸⁶ In *McNeil*, the court determined that school officials had appropriately disciplined a student who had written a “[H]it [L]ist” identifying students and school staff that the student determined “*Must Die*.”²⁸⁷ The student had written the Hit List in a journal that he had kept in his bedroom at home.²⁸⁸ About four months after the student wrote the Hit List, his mother found the list in the student’s room and shared it with a therapist, who then determined that she was obligated as a mandatory reporter to report the matter to the police.²⁸⁹ After the student was expelled from school, he filed suit alleging a violation of his First Amendment rights.²⁹⁰

At the trial court level, the federal district court had determined that school officials had authority to discipline the student for his off-campus speech under both the nexus and reasonable foreseeability tests.²⁹¹ In particular, the court found that the nexus test applied to any student off-campus speech where the content of the speech was related to school, even if the manner of communication—a private journal that was kept in the student’s room—might otherwise indicate a lack of school authority.²⁹² In that regard, the decision in *McNeil*

²⁸⁴ *Id.* at 1150–51.

²⁸⁵ *Id.* at 1151.

²⁸⁶ C.L.M. *ex rel.* *McNeil v. Sherwood Sch. Dist.* 88J, 918 F.3d 700 (9th Cir. 2019).

²⁸⁷ *Id.* at 704.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 705.

²⁹¹ C.L.M. *ex rel.* *McNeil v. Sherwood Sch. Dist.* 88J, No. 3:15-cv-01098-SB, 2016 WL 8944450, at *7–*9 (D. Or. Dec. 30, 2016). In a later decision, the federal district court adopted the report and recommendation of a magistrate judge and granted the defendants’ motions for summary judgment, giving rise to an appeal to the Ninth Circuit. C.L.M. *ex rel.* *McNeil v. Sherwood Sch. Dist.* 88J, No. 3:1-cv-1098-SB, 2017 WL 2129301, at *1–2 (D. Or. May 16, 2017).

²⁹² C.L.M., 2016 WL 8944450 at *7.

seems directly at odds with the Fifth Circuit's decision in *Porter*, where the court determined that school officials lacked the authority to discipline a student for a sketch that depicted violence at school. In issuing its decision, however, the trial court did not distinguish *Porter* on its facts, and only noted that *Porter* was a Fifth Circuit case and that its reasoning had not been adopted by the Ninth Circuit.²⁹³

Also of note in the *McNeil* trial court decision was the district court's formulation of the nexus test. While the Ninth Circuit in *C.R.* had defined the nexus test as an inquiry of whether the student's speech was "tied closely enough to the school to permit its regulation,"²⁹⁴ the federal district court in *McNeil* used substantially more diluted language, stating that the nexus test would not permit discipline for off-campus speech "not relating to the school."²⁹⁵

On appeal, the Ninth Circuit affirmed the lower court's decision that discipline had not violated the student's First Amendment rights.²⁹⁶ In its decision, however, the Ninth Circuit created a new type of nexus test. The court stated: "[C]ourts considering whether a school district may constitutionally regulate off-campus speech must determine, based on the totality of the circumstances, whether the speech bears a sufficient nexus to the school."²⁹⁷ This new nexus test, which is supposed to be "flexible and fact-specific,"²⁹⁸ should consider the following factors: "(1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school."²⁹⁹

The Ninth Circuit's ruling in *McNeil* thus adds another layer of complexity and confusion. In the Ninth Circuit, the reasonable foreseeability threshold test has become but one consideration of a multi-factored nexus test for determining school authority over students' off-campus speech.³⁰⁰ And the Ninth Circuit also chose to use vague language about the central inquiry of nexus, i.e., connection, between the speech and school. Rather than repeating the "closely tied" language that it had used in *C.R.*, the Ninth Circuit noted that nexus exists merely if "the content of the speech involved the school."³⁰¹

Also of note is the court's rejection of the student's argument "that he had no intent to communicate [his private writings] to anyone" and, indeed, had not done so.³⁰² In that regard, the Ninth Circuit's decision in *McNeil* radically de-

²⁹³ *Id.* at *3 n.3.

²⁹⁴ *C.R. ex rel. Rainville v. Eugene Sch. Dist.*, 835 F.3d 1142, 1149 (9th Cir. 2016).

²⁹⁵ *C.L.M.*, 2016 WL 894450 at *7.

²⁹⁶ *C.L.M. ex rel. McNeil v. Sherwood Sch. Dist.*, 918 F.3d 700, 712 (9th Cir. 2019).

²⁹⁷ *Id.* at 707.

²⁹⁸ *Id.*

²⁹⁹ *Id.* (citations omitted).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 710.

³⁰² *Id.* at 708.

viates from the prior precedent of *all* prior federal circuit court decisions, where the student's manner of distributing off-campus speech was highly relevant to the court's ruling.³⁰³

It is quite clear that the Ninth Circuit was particularly concerned about the fact that the student's speech was a "credible, identifiable threat of school violence,"³⁰⁴ and with good reason. Indeed, the court properly recognized that, when faced with such threats, school administrators are obligated to act in order to protect the school community.³⁰⁵ However, the Ninth Circuit's broad definition of "nexus" as any speech that involves school, together with a rejection of the argument that private speech is beyond school authority, raises the thorny question of how this newly described nexus test is to be appropriately applied in cases of non-violent student speech.³⁰⁶

For the lower federal courts, the lack of a consistent framework to address the scope of school authority over students' off-campus electronic speech has been frustrating. One Pennsylvania federal district court noted the existence of "discord" and "divi[sion]" within the courts regarding the question of how to apply *Tinker's* substantial disruption test to a student's off-campus speech.³⁰⁷ In that case, one involving a student's social media posting about a bomb at school, the court stated, due to the unsettled state of the law, it would undertake to decide the case only "with considerable apprehension and anxiety."³⁰⁸

This apprehension and anxiety is notable in judicial rulings involving different forms of students' electronic expression, ranging from social media posts on Facebook and Instagram to electronic expression that is stored on a student's cell phone. As discussed below, the courts have varied widely in their approaches even in cases with very similar facts.

B. Discipline of Student Off-Campus Speech That Threatens Violence Invariably is Deemed to be Constitutional

Although the federal circuit courts have adopted widely varying frameworks to address school administrators' ability to review student online expression and impose discipline, there is one issue on which the courts nearly

³⁰³ S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 779 (8th Cir. 2012); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 571 (4th Cir. 2011); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 765 (8th Cir. 2011); Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008); Wisniewski v. Bd. of Ed., 494 F.3d 34, 38 (2d Cir. 2007).

³⁰⁴ *C.L.M.*, 918 F.3d at 708.

³⁰⁵ *Id.* at 710.

³⁰⁶ Indeed, given that the Supreme Court has created specific, content-based exceptions to students' First Amendment rights, such as the prohibition on the use of lewd or obscene speech at school, the courts simply should adopt a clear-cut rule that any credible threat of school violence is subject to potential discipline whenever it comes to the attention of school officials. *See* Shaver, *supra* note 104, at 1581–82.

³⁰⁷ R.L. v. Cent. York Sch. Dist., 183 F. Supp. 3d 625, 635 (M.D. Pa. 2016).

³⁰⁸ *Id.* at 630, 635.

uniformly agree. Student speech—electronic or otherwise—that threatens violence to the school community will be subject to school authority and discipline.³⁰⁹ As discussed above, the Ninth Circuit’s decision in *McNeil* is perhaps most emblematic of courts’ firm convictions that school officials always are authorized to take action whenever they are made aware of a credible threat of violence.

In any event, when the student’s speech involves a threat against the school community, students almost uniformly fail to establish that a constitutional violation occurred.³¹⁰ It does not matter if the speech is a picture on Instagram³¹¹ or other social media posting.³¹² It does not matter whether the court applied the reasonable foreseeability test,³¹³ nexus test,³¹⁴ or just a “circumstance-specific inquiry.”³¹⁵ The courts consistently will find that any student speech that could reasonably be perceived as a threat to the school community is subject to discipline of school officials.³¹⁶

³⁰⁹ See, e.g., *C.L.M.*, 918 F.3d at 710.

³¹⁰ *McKinney v. Huntsville Sch. Dist.*, 350 F. Supp. 3d 757, 763, 766 (W.D. Ark. 2018) (student who posted a picture on Instagram of himself wearing a trench coat and holding an AR-15 rifle was constitutionally subject to school discipline); *A.N. ex rel. Niziolek v. Upper Perkiomen Sch. Dist.*, 228 F. Supp. 3d 391, 394 (E.D. Pa. 2017) (student subject to school discipline for an Instagram video posting of a school shooting, with a caption that read “[s]ee you next year, if you’re still alive”); *C.L.M. ex rel. McNeil v. Sherwood Sch. Dist.* 88J, No. 3:15-cv-01098-SB, 2016 WL 8944450, at *9 (D. Or. Dec. 30, 2016); *R.L.*, 183 F. Supp. 3d at 639 (school authority existed over a student’s Facebook post that made reference to a bomb having been placed at school); *N.Z. v. Madison Bd. of Educ.*, 94 N.E.3d 1198, 1201–02, 1212 (Ohio Ct. App. 2017) (students who had participated in social media postings on a messaging app called “Kik” were subject to school discipline for having discussed the possibility of a school shooting (a “Klebold Surprise,” named after one of the Columbine shooters, Dylan Klebold)).

³¹¹ *McKinney*, 350 F. Supp. 3d at 763.

³¹² *R.L.*, 183 F. Supp. 3d at 639; *N.Z.*, 94 N.E.3d at 1202.

³¹³ *McKinney*, 350 F. Supp. 3d at 766–67; *R.L.*, 183 F. Supp. 3d at 635, 639.

³¹⁴ *C.L.M.*, 2016 WL 8944450 at *7.

³¹⁵ *N.Z.*, 94 N.E.3d at 1212.

³¹⁶ See *J.R. ex rel. Redden v. Penns Manor Area Sch. Dist.*, 373 F. Supp. 3d 550, 559 (W.D. Pa. 2019) (“[F]ederal courts have uniformly agreed that language reasonably perceived as threatening school violence is not constitutionally protected—whether such language is written or oral, and whether it occurs at school or elsewhere.”). The student speech should constitute a credible threat to the school community. For example, in *Burge v. Colton School District*, 100 F. Supp. 3d 1057, 1060 (D. Or. 2015), a middle school student established that his First Amendment rights had been violated after he was disciplined for off-campus statements he had posted on social media. The student complained that he wanted to “start a petition to get [his teacher] fired,” *id.*, that the teacher was “the worst teacher ever,” *id.*, and that she was “just a bitch.” *Id.* After a friend responded “XD HAHAAAAHA!!,” *id.* (“XD” is a laughing emoticon. See *What Does XD Mean?*, SLANGIT.COM, <http://slangit.com/meaning/xd> [https://perma.cc/GAQ8-U95T] (last visited Oct. 5, 2019)), the student wrote, “[y]a haha she needs to be shot.” *Burge*, 100 F. Supp. 3d at 1060. School officials argued that the student’s speech constituted a “true threat.” *Id.* at 1068. The court rejected that argument, noting that many facts indicated the lack of any belief that the speech was threatening, particularly the fact that the student’s suspension was served at school and no law enforcement had been called. *Id.* at 1064.

C. *The Courts Are Inconsistent in Their Approaches to Different Forms of “Speech,” Particularly Photographs and Activity on Social Media Platforms*

Although the courts have taken a consistent approach in student-speech cases involving potential threats to the school community, the courts struggle to apply existing precedent to other types of student speech. In some cases, the courts struggle with the scope of authority over a student’s off-campus speech. In other cases, the courts struggle to apply speech precedents to new and different forms of speech.

For example, in *Shen v. Albany Unified School District*,³¹⁷ a California federal district court decided a case involving an Instagram account that contained racially divisive material. A high school student had created the Instagram account that featured posts “target[ing] fellow [] students and school personnel with racist and derogatory comments, often with a picture identifying the target.”³¹⁸ The pictures that were posted had been taken at school and, in some cases, altered with the addition of curse words or other images, including items like a noose.³¹⁹ The student invited several friends to join the Instagram account.³²⁰ These other students responded by either commenting on or liking the posts made by the account’s creator.³²¹ At least one student who had access to the account neither commented on nor liked any of the posts during the time that the account was active.³²²

Several months after the Instagram account was created, it came to the attention of African American students whose images appeared in the pictures.³²³ As news of the contents of the Instagram account spread throughout the high school, students became increasingly agitated, and it was this agitation at school that brought the existence of the Instagram account to the attention of school officials.³²⁴ School officials ultimately decided to expel the student who had created the account, while the other students were suspended for different periods of time depending on their level of involvement.³²⁵ The students then filed suit alleging a violation of their First Amendment rights.

The court first considered whether the students’ activity on the Instagram account qualified as “speech” under the First Amendment. Citing *Bland v. Roberts*, the court held that the acts of posting, commenting on, or even just “liking” the material that had been posted on Instagram did constitute expres-

³¹⁷ *Shen v. Albany Unified Sch. Dist.*, No. 3:17-cv-02478-JD, 2017 WL 5890089 (N.D. Cal. Nov. 29, 2017).

³¹⁸ *Id.* at *1–*2.

³¹⁹ *Id.* at *6.

³²⁰ *Id.* at *1.

³²¹ *Id.* at *2.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at *3.

³²⁵ *Id.*

sive activity.³²⁶ The court stated: “This action broadcasts the user’s expression of agreement, approval, or enjoyment of the post, which is clearly speech protected by the First Amendment.”³²⁷

The court then concluded that school officials had authority to institute discipline under either the reasonable foreseeability or nexus test.³²⁸ The nexus test was satisfied because the pictures posted to Instagram had been taken at school and were picture of specific African American students.³²⁹ The court also found that the nature of the postings and the number of students with access to the account made it reasonably foreseeable that the students’ speech would come to the attention of school authorities.³³⁰ Indeed, as to online speech generally, the court stated: “[I]t is common knowledge that little, if anything, posted online ever stays a secret for very long, even with the use of privacy protections.”³³¹

The court next addressed the question of whether discipline had been properly imposed on the students under *Tinker*. As to the student who had created the account, taken the pictures at school, and authored the posts on the account, the court found that his speech had created a substantial disruption under *Tinker*.³³² Thus, his First Amendment rights had not been violated by the imposition of discipline.³³³

The court then divided the remaining student-plaintiffs into two groups: one group consisted of those students who had commented on or liked posts that targeted specific African American students, and the other group consisted of students who commented on or liked posts that were racially divisive without identifying or targeting specific students.³³⁴ As to the first group of students, the court found that *Tinker* was satisfied because these students had “meaningfully contributed to the disruptions at [school] by embracing [the] posts”³³⁵ In addition, the court determined that the discipline of these students was constitutional under *Tinker* because the students’ speech had inter-

³²⁶ *Id.* at *5; *see also* M.L. *ex rel.* Longoria v. San Benito Consold. Indep. Sch. Dist., No. 1:17-cv-00160, 2018 WL 5629941 (S.D. Tex., Oct. 31, 2018) (adopting report and recommendation of magistrate judge, who found that high school cheerleader’s act of liking posts on social media was a form of protected speech); M.L. *ex rel.* Longoria v. San Benito Consold. Indep. Sch. Dist., No. 1:17-cv-160, 2018 WL 6288142, at *1, *6–*7 (S.D. Tex. Jul. 31, 2018) (report and recommendation of magistrate judge).

³²⁷ *Shen*, 2017 WL 5890089 at *5. As to the one student who had neither commented nor liked any of the posts, the court concluded that the student’s act of merely reading the material on the account constituted protected First Amendment activity. *Id.*

³²⁸ *Id.* at *6.

³²⁹ *Id.*

³³⁰ *Id.* at *7.

³³¹ *Id.*

³³² *Id.* at *8.

³³³ *Id.*

³³⁴ *Id.* at *9.

³³⁵ *Id.* at *9.

ferred with the rights of other students “to be secure and to be let alone.”³³⁶ By commenting on or liking the Instagram posts that had identified and targeted specific students, the court found that this first group of students had “impermissibly interfered” with the rights of other students to have a safe learning environment.³³⁷

However, the court determined that the second group of students could not be disciplined due to their acts of commenting on or liking the Instagram posts that had not targeted specific students. The court distinguished the conduct of these students on the ground that this third group of students had made comments or liked only a particular type of post, ones that did not, in the court’s words, “target[] specific individuals at [the school],”³³⁸ stating:

Endorsement or encouragement of speech that is offensive or noxious at a general level differs from endorsement or encouragement of speech that specifically targets individual students. The former is much more akin to the “merely” offensive speech that is beyond the scope of *Tinker*. Although some of these plaintiffs’ conduct may have been experienced as hurtful and unsettling by classmates, the Court cannot say that their involvement affirmatively infringed the rights of other students to be secure and to be let alone.³³⁹

Finally, the court briefly concluded that these same students, by commenting on or liking racially divisive posts that did not specifically target other students, had not “contributed to” the disruptions that were present at school based on the conduct of the other students who had posted, commented on, or liked material on the Instagram account.³⁴⁰ Thus, they could not be disciplined under *Tinker*.

The court’s ruling in *Shen* can be contrasted with an earlier decision of a Tennessee federal district court, in which the court found that school officials had no authority to discipline a student for a series of tweets posted on Twitter that targeted a specific student.³⁴¹ In *Nixon v. Hardin County Board of Education*, a middle school student was disciplined by school officials for having posted on Twitter numerous comments about another student.³⁴² The plaintiff’s comments initially were in response to a posting from a friend, who was threatening violence against a third student as part of a fight about a boyfriend.³⁴³ In one tweet, the plaintiff had stated, “[g]ood [l]uck. Shoot her in the face.”³⁴⁴ In another tweet, the plaintiff had stated, “I hate her. That was my whole point . . . I’m funny. I’ll kill her.”³⁴⁵

³³⁶ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

³³⁷ *Id.* at *10.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Nixon v. Hardin Cty. Bd. of Educ.*, 988 F. Supp. 2d 826, 830, 839 (W.D. Tenn. 2013).

³⁴² *Id.* at 830–31.

³⁴³ *Id.* at 830.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

School officials disciplined the plaintiff by sending her to an alternative school for a forty-five-day period, which later was reduced to ten days.³⁴⁶ She then filed suit alleging a violation of her First Amendment rights. After reviewing the decisions of the Second, Third, Fourth, Eighth, and Ninth Circuits, the court determined that the student's First Amendment rights had been violated because school officials had no authority over the off-campus speech.³⁴⁷ Specifically, the court rejected an argument that discipline was appropriate because the plaintiff had "used a social media platform to make negative and offensive comments about a classmate."³⁴⁸ The court also stated that the student's speech lacked a sufficient "connection," i.e., nexus, to school as would allow school officials to assert authority over her off-campus speech.³⁴⁹ Indeed, the only connection to school was "the fact that both the speaker and the target of the speech studied there."³⁵⁰ The fact that the off-campus speech involved a dispute between two students attending the same school alone was not sufficient to vest school officials with authority to discipline the student for her off-campus speech.

Some recent cases involving student speech involve social media posts, but not ones that identify or are directed at other students. This set of cases involves students' use of vulgar or sexually charged material on social media. Again, the courts struggle to find a consistent approach. In *A.F. v. Kings Park Central School District*,³⁵¹ several students were given a one-day suspension for having received a text message from another student that contained a video of two minor students engaged in sexual activity. School administrators concluded that, among other violations of the school's disciplinary code, all of the students who had received the text message had violated the disciplinary code by improperly possessing obscene material and engaging in "inappropriate use of an electronic device."³⁵² Two students were suspended even though they had immediately deleted the video after determining its contents; these two students filed suit alleging, among other claims, a First Amendment retaliation claim.³⁵³

³⁴⁶ *Id.* at 831.

³⁴⁷ *Id.* at 839.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*; see also *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1109–10, 1122 (C.D. Ca. 2010) (holding that school had authority to consider imposing discipline on a student who posted a YouTube video that contained derogatory material about a classmate under a reasonable foreseeability test; however, discipline was unconstitutional in the absence of sufficient facts that the video either had caused an actual disruption at school or that school officials could reasonably predict a future disruption).

³⁵¹ *A.F. ex rel. Fenton v. Kings Park Cent. Sch. Dist.*, 341 F. Supp. 3d 188, 193 (E.D.N.Y. 2018).

³⁵² *Id.*

³⁵³ *Id.* at 193, 199–200.

The court acknowledged that all of the activity related to the text message had taken place outside of school,³⁵⁴ yet found that the students had no First Amendment claim because the video could be classified as child pornography that was not subject to First Amendment protection.³⁵⁵ Absent from the discussion, however, was the question whether school administrators had any authority to discipline students for being the recipients of a form of speech rather than the speaker, or whether authority of school officials even extends to inappropriate social media use by students that occurs completely outside of school.

That latter issue has been tested in a recent series of three cases that all involved cheerleaders.³⁵⁶ In each case, a high school cheerleader was dismissed from the cheerleading squad for social media posts that primarily contained obscene words. One cheerleader had posted an eight-second video on Snapchat in which several cheerleaders were singing the lyrics of Big Sean's song "I.D.F.W.U."³⁵⁷ Another cheerleader who was angry about not having been selected for the varsity squad posted, also on Snapchat, a picture of herself (out of school on a Saturday in street clothes) with a middle finger raised and text that read: "fuck school fuck softball fuck cheer fuck everything."³⁵⁸ In the last case, the cheerleader had made ten posts on Twitter that had some expletives and sexual innuendo.³⁵⁹

In each of the three cases, school officials suspended the students from the cheerleading squad for having violated policies about use of social media.³⁶⁰ Two of the federal district courts properly concluded that school officials had no authority to discipline students for off-campus vulgar speech posted on a social media account.³⁶¹ In each case, the court rejected an argument that *Fraser* should be extended to permit discipline by school officials for lewd or obscene speech that occurs outside of school.³⁶² Responding to the school's argument that the speech had come onto campus by way of screenshots shown to school officials by other students, the court stated: "[E]ven if the screenshots of Plaintiff's ten social media posts made their way to the *school setting*, online,

³⁵⁴ *Id.* at 193.

³⁵⁵ *Id.* at 200.

³⁵⁶ *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019); *M.L. ex rel. Longoria v. San Benito Consol. Indep. Sch. Dist.*, No. 1:17-cv-00160, 2018 WL 5629941, at *1 (S.D. Tex. Oct. 31, 2018); *S.J. ex rel. Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1308 (D. Utah 2018).

³⁵⁷ *S.J.*, 323 F. Supp. 3d at 1309. "I.D.F.W.U." stands for "I don't fuck with you." *Id.*

³⁵⁸ *B.L.*, 376 F. Supp. 3d at 433.

³⁵⁹ *Longoria*, 2018 WL 5629941, at *1–2.

³⁶⁰ *B.L.*, 376 F. Supp. 3d at 433; *Longoria*, 2018 WL 6288142, at *1; *Johnson*, 323 F. Supp. 3d at 1310.

³⁶¹ *B.L.*, 376 F. Supp. 3d at 432; *Longoria*, 2018 WL 5629941 at *4.

³⁶² *B.L.*, 376 F. Supp. 3d at 441–42 (holding that school has no educational mission to prohibit off-campus vulgarity); *Longoria*, 2018 WL 5629941 at *4.

off-campus lewd speech ‘does not mutate into on-campus speech’ and remains protected under the First Amendment.”³⁶³

The third case involved the eight-second video posted on Snapchat in which cheerleaders were singing Big Sean’s song. In that case, on a motion for a preliminary injunction to have the student reinstated to the cheerleading squad, the federal district court found that the student had not demonstrated a likelihood of success on the merits of her First Amendment claim.³⁶⁴ While noting that the student’s discipline had been based on facts other than just the mere language used in the video (namely “insubordination” under the disciplinary code and failing to take responsibility for her actions), the court stated the following:

This case raises very interesting First Amendment issues for our social media age. . . . Are there students across the country using profanity on social media? Yes. Are some of those students cheerleaders? Yes. Do those cheerleaders have the absolute right to remain on the cheer squad without consequences for such posts when they are sent to other students at the school? This court cannot answer that question clearly and unequivocally yes, especially in the factual scenario in which S.J. made her post.³⁶⁵

Thus, unlike the other two decisions, the federal district court was unwilling to find that the student’s posts to social media, which took place off-campus and outside of school, were beyond the purview of school officials.³⁶⁶

Finally, the federal courts have struggled to apply school speech precedents in cases involving either photographs posted by students or even simply stored on their cellphones. In a case out of the Northern District of Indiana, a federal judge sided with two girls who were suspended from their extracurricular activities as a result of sexually suggestive photographs that they had taken at a slumber party and posted on their social media accounts.³⁶⁷ The action against the girls was taken after another student’s parent had discovered the photographs online and complained to the superintendent that the social media postings were causing a rift on the volleyball team.³⁶⁸ At issue for the judge was not only whether the conduct depicted in the photographs constituted expression for First Amendment purposes, but also whether the decisions to take the pictures and then post them online were expressive acts protected by the First Amendment. Each of these three decision points, the judge ruled, were expressive acts that fell under the scope of First Amendment protection:

I conclude that whether the punishment of T.V. and M.K. was based on the acts depicted in the photographs, the taking or existence of the images themselves,

³⁶³ *Longoria*, 2018 WL 5629941 at *4 (quoting *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring)).

³⁶⁴ *Johnson*, 323 F. Supp. 3d at 1322.

³⁶⁵ *Id.* at 1321.

³⁶⁶ *Id.* at 1322.

³⁶⁷ *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 772, 784 (N.D. Ind. 2011).

³⁶⁸ *Id.* at 772.

or the posting of the photographs to the internet, each of those possibilities qualifies as “speech” within the meaning of the First Amendment.³⁶⁹

The court also concluded that the discipline of the plaintiffs for their off-campus social media postings violated the First Amendment.³⁷⁰

In another case, a Pennsylvania federal court considered whether school officials violated the student’s First Amendment rights by reviewing her text messages and photographs after her phone was confiscated pursuant to the school’s cellphone use policy.³⁷¹ In *N.N. v. Tunkhannock Area School District*, the student filed suit alleging that her First and Fourth Amendment rights had been violated by school officials who disciplined her based on semi-nude and nude photographs that she had taken of herself and sent to a boyfriend.³⁷² The photographs had been discovered by the school principal who, upon receiving the confiscated phone from a teacher, proceeded to review the stored photographs on the phone.³⁷³ The court noted the following relevant facts: “The photographs were taken off school property, were saved to the cell phone, were never emailed or uploaded to the internet, and were not shared with other students. To access the photographs, which are not immediately visible, school officials must have ‘clicked’ on at least three ‘menu’ selections.”³⁷⁴ The student’s phone was turned over to law enforcement officials, who threatened to, but ultimately never did, charge the student with a felony.³⁷⁵ Rather, the school and law enforcement officials required the student to complete a sexual violence and victimization course.³⁷⁶ Thereafter, the student filed suit against the school district and others alleging a violation of her First and Fourth Amendment rights.³⁷⁷

The school district settled with the student shortly after it was filed, but the case proceeded against individual and municipal defendants, who filed motions

³⁶⁹ *Id.* at 777.

³⁷⁰ *Id.* at 785.

³⁷¹ *N.N. v. Tunkhannock Area Sch. Dist.*, 801 F. Supp. 2d 312, 313 (M.D. Pa. 2011). The conduct of school officials spawned numerous related lawsuits. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010); *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009).

³⁷² *N.N.*, 801 F. Supp. 2d at 314–15. The case was filed by the American Civil Liberties Union (ACLU) on the student’s behalf. *See ACLU Settles Student-Cell-Phone-Search Lawsuit with Northeast Pennsylvania School District*, AM. CIV. LIB. UNION (Sept. 15, 2010), <https://www.aclu.org/news/aclu-settles-student-cell-phone-search-lawsuit-northeast-pennsylvania-school-district> [<https://perma.cc/D9RX-QUZP>]. The ACLU has been active in litigating the issue of searches of students’ cellphones, litigation that has resulted in the adoption by some school districts of policies that limit the scope of any such searches. *See Amy Vorenberg, Indecent Exposure: Do Warrantless Searches of a Student’s Cell Phone Violate the Fourth Amendment?*, 17 BERKLEY J. CRIM. L. 62, 86 (2012).

³⁷³ *N.N.*, 801 F. Supp. 2d at 314.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 315.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

to dismiss all claims.³⁷⁸ The court denied motions for judgment on the pleadings, finding that the plaintiff had sufficiently alleged a violation of her First and Fourth Amendment rights.³⁷⁹ Thereafter, the remaining defendants also settled with the plaintiff, a settlement that included a monetary payment to the plaintiff.³⁸⁰ Because of the settlement, the court did not render a final decision on the merits of the student's First Amendment claim.

A Mississippi federal district court reached the opposite conclusion in a case that also was filed by a student who had been disciplined at school after school officials reviewed photographs stored on his cellphone.³⁸¹ In *J.W. v. DeSoto County School District*, the cellphone of a seventh-grader was confiscated because he brought it to school and used it in violation of school policy.³⁸² The teacher who confiscated the cellphone searched the photographs stored on the phone and discovered photographs—taken by the student at home in his bathroom—that school officials deemed to be evidence of use of “gang” symbols.³⁸³ The student contended that the photographs were nothing more than childish dancing and posing in the bathroom mirror.³⁸⁴

The student filed suit alleging a violation of his Fourth Amendment rights only; he did not assert any violation of his First Amendment rights.³⁸⁵ The court granted motions to dismiss filed by individual defendants and one municipal defendant, although the school district itself remained a defendant in the case.³⁸⁶ In considering the extent of the student's privacy rights under the Fourth Amendment, the court in *J.W.* stated, without citation to any authority, that “[the] student's decision to violate school rules by bringing contraband on campus [i.e., the cellphone] . . . appropriately results in a diminished privacy

³⁷⁸ *Id.* (noting that the case was filed on May 10, 2010); see also AM. CIV. LIB. UNION, *supra* note 375 (announcing settlement in September 2010).

³⁷⁹ *N.N.*, 801 F. Supp. 2d at 315.

³⁸⁰ Stipulated Order of Dismissal at 5, *N.N. v. Tunkhannock Area Sch. Dist.*, 801 F. Supp. 2d 312 (M.D. Pa. 2012) (No. 3:10-CV-01080) (indicating a \$10,000 payment directly to plaintiff and an additional \$10,000 payment to the ACLU).

³⁸¹ *J.W. v. Desoto Cty. Sch. Dist.*, No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059, at *1 (N.D. Miss. Nov. 1, 2010).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ See *id.*

³⁸⁵ *Id.* at *3. The Fourth Amendment inquiry regarding searches of a student's person or belongings by school officials is examined under a two-part test established by the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). First, the search must be justified at its inception, which essentially requires that school officials have reasonable grounds to believe that the student violated the rules of the school. *Id.* at 341–42. Second, the scope of the search must be reasonably related to the grounds for instituting the search in the first place. *Id.* at 341. Searches may not be excessive in terms of the nature of the infraction. *Id.* at 342.

³⁸⁶ *J.W.*, 2010 WL 4394059, at *9. As to the municipal defendant, the court found that the plaintiff had not alleged that city employees had undertaken any search of the phone; rather, it was the school district employees who had searched the phone. *Id.* at *3. Thus, no Fourth Amendment claim could be asserted against the municipal defendant.

expectation in that contraband.”³⁸⁷ The court also minimized the extent of school officials’ review of the cellphone’s contents, characterizing their decision “to *merely look at* the photos on [the student’s] cell phone” as a limited intrusion into the student’s privacy.³⁸⁸

Nonetheless, the court’s opinion was not wholly in favor of the school district’s actions. In dicta, the court noted that it had “serious concerns regarding the school district’s actions in this case.”³⁸⁹ In particular, the court expressed concern that the district had taken disciplinary action against the student not based on the minor offense of bringing his cellphone to school, but based on school officials’ interpretation of the meaning of photographs taken by the student in the privacy of his home and stored on the phone.³⁹⁰ In that regard, the court stated:

Public actors step upon a very slippery slope when students are expelled on this basis, particularly if the school district’s opinions in this regard are based largely upon subjective impressions of a student’s private activities off school grounds. The slope is even slipperier [sic] when, as here, the school district only obtained the evidence of these activities by conducting a search which, while not unconstitutional, does tread into a constitutionally sensitive area.³⁹¹

Indeed, the court concluded by suggesting that the school district settle the case, stating that the district should “recognize that there are limits . . . upon the power of school officials to police the private lives of their students.”³⁹² And, in fact, the district did settle the case.³⁹³

Given the court’s apparent concern that discipline was imposed due to a student’s private, unpublished, and off-campus activities, it is possible that the court would have reached a different conclusion had the plaintiff asserted a violation of his First Amendment right to engage in off-campus speech that is beyond the reach of school officials’ authority. In any event, the case highlights the difficulty of applying school speech precedents to cases involving photographs taken by students while not at school that, due to being stored on a mobile device that is carried to school, come to the attention of school authorities.

³⁸⁷ *Id.* at *5.

³⁸⁸ *Id.* (emphasis added). The court granted motions to dismiss filed by school district employees on qualified immunity grounds. *Id.* at *7.

³⁸⁹ *Id.* at *9.

³⁹⁰ *Id.* at *6 (expressing “serious concerns regarding the wisdom and legality of the school district’s decision to expel [the student] based on its subjective impressions of photographs depicting him in his personal life.”).

³⁹¹ *Id.* at *9.

³⁹² *Id.* at *9 n.5.

³⁹³ See Order Dismissing Action by Reason of Settlement, *J.W. v. Desoto Cty. Sch. Dist.*, No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059 (N.D. Miss. Nov 1, 2010) (No. 2:09CV155-M).

IV. THEMES AND IMPLICATIONS

Parts II and III of this article have highlighted the developing law around the electronic speech of both educators and students. While the analysis of employee speech is significantly different than the analysis of student speech, some larger themes do emerge in both educator and student speech cases. This Part explores some of those themes and their applications to student and educator speech, respectively.

A. *Scope of Authority*

The ubiquitous nature of social media has brought into focus the question of the school's scope of authority to regulate speech that students and teachers create and distribute outside of school. In this area, there is a significant difference between students and employees. There is no question that *Pickering* allows the state, as an employer, the authority to discipline public educators for expressive conduct, regardless of where the speech occurs. Marvin Pickering composed his letter outside of school and, had it disrupted the school, he may have legally faced job-related discipline. Even prior to the Internet and social media, the location of the employee speaker has never been the focus of the courts. Instead, the primary considerations are the nature of the content and the capacity within which the employee was speaking.

By contrast, most of the student-speech cases in the digital age focus heavily on the in-school versus out-of-school nature of the student's speech and whether school officials have authority to discipline students for speech created and distributed outside of school.³⁹⁴ Focus on this issue has led to the proliferation of "threshold" tests to address the scope of authority issue and, in recent cases, a "kitchen sink" approach where a court will adopt all varieties of threshold tests and apply them to the facts.³⁹⁵ The current approach lacks a firm analytical foundation and inevitably leads to confusion on the part of public school administrators about their ability to discipline students for off-campus speech. Thus, public-school administrators considering disciplinary action against students for online, off-campus speech should be aware of the law within their own federal circuit. Other than speech involving a credible threat of violence to the school community, there is little guidance for school administrators regarding the scope of their authority to act.

³⁹⁴ See, e.g., *C.R. ex rel. Rainville v. Eugene Sch. Dist.*, 4J, 835 F.3d 1142, 1149 (9th Cir. 2016) (framing the legal issue as one involving scope of authority over students' off-campus speech); *R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 636 (M.D. Pa. 2016) ("The main quandary of federal courts is whether *Tinker* applies to student speech that occurs off-campus at all . . .").

³⁹⁵ See *C.R.*, 835 F.3d at 1150 (holding that both a nexus and a reasonable foreseeability test can be applied); *N.Z. v. Madison Bd. of Educ.*, 94 N.E.3d 1198, 1212 (Ohio Ct. App. 2017) (applying fact-specific inquiry, nexus test, and reasonable foreseeability test).

B. The Concept of Disruption Differs between Educators and Students

Whether student or educator speech is at issue, the concept of disruption is a critical consideration. For educator speech, the Court has explicitly and expansively defined disruption. In *Pickering*, there is granular guidance as to when employee speech might be disruptive enough to merit discipline. Under *Pickering*, public employers may legally take action against an employee when evidence exists that the employee’s expression interfered with school operations, impeded the employee’s ability to perform his job duties, or constituted a willful or reckless false statement.³⁹⁶ Further, under *Pickering*, speech that breaches confidentiality or undermines superior/subordinate relationships can subject an employee to workplace discipline.³⁹⁷ The Court even allowed that, in some cases, a public educator might engage in expression “so without foundation as to call into question his fitness to perform his duties in the classroom.”³⁹⁸

These guidelines for evaluating the disruptive impact of employee speech do not change based upon whether the speech occurs on or off campus. Rather, the concept of disruption in the realm of educator speech appears to have no in-school/out-of-school boundary. More important is the underlying notion that a public educator should demonstrate a basic level of mental and moral fitness to serve as a teacher, caretaker, role model, or disciplinarian. Thus, the Third Circuit concluded that Natalie Munroe’s blog postings about commentary that she wished to add to students’ report cards was disruptive under *Pickering* because, by directing such invective towards her students, she had become unable to effectively do her job.³⁹⁹ The Seventh Circuit similarly found that a high school guidance counselor/girls’ basketball coach who self-published a relationship book for women that was full of misogynistic and racist stereotypes was legally fired under *Pickering* because the community justifiably lost confidence in his fitness to effectively coach or counsel their children.⁴⁰⁰

In addition, public employees lose constitutional protection when they speak as an employee on a matter of private concern or pursuant to their job duties, and in such a situation, they may be legally disciplined irrespective of whether the speech was disruptive. Nonetheless, it is always the most prudent course for school administrators to evaluate the disruptive impact of the speech on a case-by-case basis before making any negative employment decision. In cases involving online speech, the *Connick* and *Garcetti* threshold tests have not been frequently used by courts to disqualify employee speech—and in the

³⁹⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968).

³⁹⁷ *Id.* at 570 n.3.

³⁹⁸ *Id.* at 573 n.5.

³⁹⁹ *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 473–74 (3d Cir. 2015).

⁴⁰⁰ *See Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1113–14, 1120–21 (7th Cir. 2013); *see also Duke v. Hamil*, 997 F. Supp. 2d 1291, 1293–34 (N.D. Ga. 2014) (a deputy police chief was demoted after posting an image of a confederate flag with the caption “time for the second revolution” the morning after President Obama’s reelection).

cases where employees have prevailed on free speech claims, it has generally been the result of the employer failing to document disruption.⁴⁰¹

The concept of disruption in the student-speech realm, by contrast, has developed quite differently. In *Tinker*, the Court held that student speech that creates a material or substantial disruption or invasion of the rights of others may be disciplined by the school, but it did not give a great deal of guidance about exactly what would constitute such a disruption.⁴⁰² Over time, the courts have determined that a substantial disruption occurs in a variety of contexts, including when teachers may be “incapable of teaching or controlling their classes” because of the student’s speech,⁴⁰³ when the “educational responsibilities” of school administrators are interrupted to respond to a student’s speech,⁴⁰⁴ or even when a student’s speech leads to a breakdown of a “civil and respectful atmosphere” that is part of an orderly school day.⁴⁰⁵

However, in the context of off-campus speech, the courts have struggled with the contours of actual or forecasted disruptions within the school environment.⁴⁰⁶ The result is a compilation of rulings that, in many cases, are highly inconsistent with one another. One such example is the Fifth Circuit’s decision in *Bell*, where the court found that school officials could have forecasted that the student’s rap song would lead to a future disruption.⁴⁰⁷ Engaging in rather hyperbolic language, the Fifth Circuit found that a future substantial disruption exists whenever a student’s off-campus speech disparages a teacher (or coach) because the speech would interfere with the educational process and, without education, there would be “little, if any, civilization.”⁴⁰⁸

The *Bell* decision stands in contrast to the Third Circuit’s decisions in two cases that involved discipline of two students who created disparaging fake social media profiles of school principals.⁴⁰⁹ Under both sets of facts, the ability of a school official to be effective at school arguably had been impacted, but the courts differed greatly in their treatment of the off-campus speech. While

⁴⁰¹ See *Wudtke v. Bieber*, No. 16-C-260, 2017 WL 2274475 (E.D. Wis. May 24, 2017); see also *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).

⁴⁰² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁴⁰³ *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

⁴⁰⁴ *Doninger v. Niehoff*, 527 F.3d 41, 51–52 (2d Cir. 2008).

⁴⁰⁵ *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1280 (W.D. Wash. 2007).

⁴⁰⁶ See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 399 (5th Cir. 2015); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011); *Nixon v. Hardin Cty. Bd. of Educ.*, 988 F. Supp. 2d 826, 836 (W.D. Tenn. 2013).

⁴⁰⁷ *Bell*, 799 F.3d at 400.

⁴⁰⁸ *Id.* at 399–400. This position was roundly criticized in the dissenting opinion of Judge Dennis, who characterized the majority’s position as converting the *Tinker* disruption inquiry into a “toothless” standard. *Id.*

⁴⁰⁹ *J.S.*, 650 F.3d at 930–31; *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

the Fifth Circuit predicted that student off-campus speech that disparages⁴¹⁰ a teacher or coach might lead to the end of civilization, the Third Circuit simply found that, in the absence of a disruption at school, students' off-campus speech, even speech that mocks or disparages a school official, is not subject to discipline.⁴¹¹

Another example is the Ninth Circuit's decision in *C.R.*, where the court conflated the issue of whether off-campus speech was reasonably foreseeable to come to the attention of school officials with the issue of a reasonable forecast of future disruption. The court held that the reasonable foreseeability test was satisfied because school officials could have seen that the off-campus speech would "spill over" into the school environment.⁴¹² Indeed, the Ninth Circuit posited that merely seeing one of the "harassers" in the school hallway could be "disruptive" to a student.⁴¹³

Other courts have taken a "hands-off" approach, as in the *Nixon* case, where the court found that text messages by one student that arguably threatened another student were not subject to school discipline because they had been exchanged outside of school and did not cause any disruption.⁴¹⁴ A California federal court similarly determined that school officials had not been able to demonstrate the existence of disruption resulting from a YouTube video in which several high school students made derogatory and disparaging remarks about another student.⁴¹⁵ In finding that school officials had failed to demonstrate either an actual or forecasted disruption, the court noted that school discipline cannot be imposed because one student is embarrassed, has hurt feelings, or otherwise may not want to attend class.⁴¹⁶ The court also declined to

⁴¹⁰ It is true that the Fifth Circuit characterized the student's rap song as threatening, harassing, or intimidating speech, not merely disparaging speech. However, in a dissenting opinion, Judge Dennis criticized the use of such "content-based" and "vague" terms that were wholly opinion based. *Bell*, 799 F.3d at 412–13. On the facts of the case, it is highly questionable whether the coaches referenced in the student's rap song felt that they had been threatened, harassed, or intimidated. See Shaver, *supra* note 104, at 1588 (discussing particular facts that demonstrated the lack of any reasonable belief that the student had threatened, harassed, or intimidated the coaches).

⁴¹¹ *J.S.*, 650 F.3d at 931.

⁴¹² *C.R. ex rel. Rainville v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1151 (9th Cir. 2016).

⁴¹³ *Id.* The Ninth Circuit did find that the students' speech was subject to discipline under *Tinker's* "rights of others" prong, although the court's analysis under that prong is questionable as well. The court found that the rights of the students who had been subject to the sexually charged speech were impinged upon because school officials had questioned those students about the speech, causing them to feel uncomfortable. *Id.* at 1152. The court also found that "[t]he school could . . . reasonably expect that those [uncomfortable] feelings would cause [the student] to feel less secure in school." *Id.* In other words, it was the questioning of school officials that created the uncomfortable feelings that might have—in the future—caused the student to feel less secure.

⁴¹⁴ *Nixon v. Hardin Cty. Bd. of Educ.*, 988 F. Supp. 2d 826, 839 (W.D. Tenn. 2013).

⁴¹⁵ See *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010).

⁴¹⁶ *Id.* at 1117, 1121.

defer to school officials, who claimed the need to impose discipline in order to protect the “emotional well-being of its young students.”⁴¹⁷

Thus, while both *Pickering* and *Tinker* relied heavily on the concept of disruption to or interference with the work of school, the application of those concepts to off-campus electronic speech differs greatly between educators and students. While public educators are never able to shed the mantle of “teacher” and enjoy truly unencumbered free speech rights, in the case of student speech, the issue is much less clear. In the context of student speech, school administrators will have to carefully consider the facts of any particular case and proceed with the understanding that they have no good guidelines to follow.

C. *Employee and Student First Amendment Rights May Differ Based on the Content of the Speech*

Generally, the rights of children are more limited in scope than those of adults.⁴¹⁸ This, however, doesn’t hold true for online, off-campus speech—where the scope of authority of the state to regulate off-campus employee speech is more clearly established than the scope of authority of the state to regulate off-campus student speech. Further, the notion of mental or moral “fitness” is one that only applies in the employment context. As a result, students may have stronger First Amendment rights with regard to certain topics, namely lewd or sexually suggestive speech and racially divisive speech.

Fraser established that students may be disciplined for speech that is lewd or vulgar when that speech occurs at school or a school function, but not when that speech occurs online and off-campus.⁴¹⁹ Thus, students ought to be able to engage in lewd and sexually suggestive speech in online, off-campus forums, so long as the speech does not target a specific student.⁴²⁰ Although certain recent decisions might undercut the clear distinction between on-campus and off-campus lewd speech,⁴²¹ generally, students maintain the right to use foul language or sexual innuendo in their off-campus communications.

Employees, on the other hand, may well be subject to job-related discipline when they post material that is lewd; such speech is very likely to undermine the employee’s fitness or effectiveness, thus becoming disruptive to institutional efficacy under *Pickering*. For example, the “hypersexualized” na-

⁴¹⁷ *Id.* at 1121–22.

⁴¹⁸ See James G. Dwyer, *Equality Between Adults and Children: Its Meaning, Implication, and Opposition*, 2013 MICH. ST. L. REV. 1007, 1011 (2013).

⁴¹⁹ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); see also *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986) (student’s vulgar gesture to teacher off campus was not subject to school authority).

⁴²⁰ See, e.g., *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 776, 783–84 (N.D. Ind. 2011) (holding that school had no authority to discipline high school girls who posted photographs online that showed students using toy props in the form of sexual organs).

⁴²¹ *S.J. ex rel. Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1320–21 (D. Utah 2018).

ture of Bryan Craig’s book in the *Rich Township School District* case “loomed large” in the Seventh Circuit’s finding that his speech was disruptive to his ability to effectively function as a school guidance counselor.⁴²² While lewd, vulgar, or sexually explicit speech is dangerous for public educators, it may be less so for other public employees. Although a federal district court in Indiana upheld the dismissal of a Volunteers in Service to America (VISTA) volunteer in 2018 after she self-published a book detailing her experiences as a phone-sex worker and linked it to her Facebook page, the Seventh Circuit subsequently reversed the lower court’s decision, finding no evidence that the book had resulted in any workplace disruption.⁴²³

With racially insensitive speech, the legal calculus also may be different depending upon whether the speaker is a student or employee. Courts are almost certain to uphold negative employment consequences for public employees who engage in such expression, regardless of whether the speech is directed toward individuals in the school community, or if it is simply a general expression of a racist world view. For example, in *Snipes v. Volusia County*, the Eleventh Circuit upheld disciplinary action taken by the county against one of its beach patrol officers, who had posted racially insensitive comments and sent racially insensitive texts in the aftermath of the Trayvon Martin killing in 2012.⁴²⁴ In *Geer v. Altieri*, a federal district court in Ohio upheld disciplinary action against a deputy sheriff in Trumbull County after the sheriff disparaged Freddie Gray, an African American who died in the custody of Baltimore Police, allegedly as a result of excessive force.⁴²⁵ And in *Duke v. Hamil*, a deputy chief’s posting of the Confederate flag in response to President Obama’s reelection was enough to justify his demotion.⁴²⁶

But when students are away from school, their First Amendment rights seem to clearly encompass an ability to express themselves in a racially insensitive manner. Unlike public employees, there is no concept of “fitness” that would allow school administrators to take action against students for simply expressing racist opinions outside of school. As noted in *Shen*, school authorities can only discipline students for this type of speech when it qualifies as materially disruptive under *Tinker*.⁴²⁷ While racist student speech may be upsetting to many within the school environment, it isn’t likely to trigger the level of disruption required under *Tinker* unless the speakers threaten or otherwise target individuals or groups of students. The Instagram account created by the

⁴²² *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1119 (7th Cir. 2013).

⁴²³ *Harnishfeger v. United States*, No. 1:16-cv-03035-TWP-DLP, 2018 WL 1532691, at *1–*2 (S.D. Ind. Mar. 29, 2018), *aff’d in part rev’d in part* No. 18-1865, 2019 WL 6486869 (7th Cir. Dec. 3, 2019).

⁴²⁴ *Snipes v. Volusia Cty.*, 704 F. App’x. 848, 850, 853–55 (11th Cir. 2017).

⁴²⁵ *Geer v. Altieri*, No. 4:16CV2213, 2018 WL 1535232, at *5–*6 (N.D. Ohio Mar. 29, 2018).

⁴²⁶ *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1293, 1303 (N.D. Ga. 2014).

⁴²⁷ *Shen v. Albany Unified Sch. Dist.*, No. 3:17-cv-02478-JD, 2017 WL 5890089, at *11 (N.D. Cal. Nov. 29, 2017).

students in *Shen* featuring altered photographs of minority students with profane language and violent images is an example of the type of student speech that targets and disrupts the school community in a way that would make it actionable by the school. Merely expressing a noxious racist point of view is not enough.⁴²⁸

D. The Courts Take an Expansive View of Speech for First Amendment Purposes

The nature of social media has forced the courts to explore not only the words that are written, but other means of online expression, such as “liking” certain posts or pages, sharing other persons’ posts, or posting pictures online. The question some courts have considered is whether the person who “likes” something is more akin to an audience member who claps when another is speaking—think of Mr. Fraser’s speech—or an actual speaker.⁴²⁹ Whether the case involves student speech or educator speech, the courts have developed a fairly expansive view of what constitutes “speech” for First Amendment jurisprudence.

In *Bland v. Roberts*, the Fourth Circuit dealt squarely with whether “liking” content on social media constituted an expressive act for First Amendment purposes.⁴³⁰ The court explained that, once a person understands what it means to “like” content on social media, “it becomes apparent that his conduct qualifies as speech.”⁴³¹ “In the context of a political campaign’s Facebook page,” the court opined, “the meaning that the user approves of the candidacy whose page is being liked is unmistakable.”⁴³² In *Shen*, the court cited *Bland* in the context of student speech, specifically addressing the question whether students who liked content on Instagram could be subject to discipline.⁴³³ While the Fourth Circuit has determined that “liking” content on Facebook is an expressive act, no court has yet weighed in on the act of “retweeting” content on Twitter. Whether or not a Twitter user who “retweets” content created by another Twitter user is necessarily endorsing that expression is a point of disagreement among Twitter users, but it might be prudent for school administra-

⁴²⁸ *Id.* at *2, *10.

⁴²⁹ See, e.g., Alicia D. Sklan, @socialmedia: Speech with a Click of a Button? #SocialSharingButtons, 32 CARDOZO ARTS & ENTER. L.J. 377, 389 (2013) (arguing that “[l]iking a Facebook page [] is core speech”).

⁴³⁰ *Bland v. Roberts*, 730 F.3d 368, 384–85 (4th Cir. 2013). In *Bland*, when the case was appealed to the Fourth Circuit, Facebook filed an amicus curiae brief arguing that Facebook’s “like” feature was a form of communication that merited First Amendment protection. Brief for Facebook, Inc. as Amicus Curiae Supporting Respondents at 2, *Bland v. Roberts*, 730 F.3d 368 (2013) (No. 12-1671); see also Ira P. Robbins, *What is the Meaning of “Like”?: The First Amendment Implications of Social Media Expression*, 7 FED. CTS. L. REV. 127, 144 (2013); Jorge R. Roig, *Emerging Technologies and Dwindling Speech*, 16 U. PENN. J. CONST. LAW 1235, 1235–36, 1236 n.7 (2013).

⁴³¹ *Bland*, 730 F.3d at 386.

⁴³² *Id.*

⁴³³ *Shen*, 2017 WL 5890089, at *5–*6.

tors to assume that the voluntary nature of the act would render it speech under the First Amendment.⁴³⁴

It is common for one individual to create content on social media, to which other individuals will react, either by commenting, liking, or posting memes or pictures. The difficult issue is not whether such activity is a form of expressive activity. The difficult issue is the degree of responsibility of each individual. In terms of weighing the legality of disciplinary action against students or employees who participate in these types of social media interactions, the courts have struggled to be able to distinguish levels of culpability among the speakers. Indeed, the courts have applied different methods of analysis for students as opposed to employees. In *Liverman*, the Fourth Circuit treated the social media postings and comments of various public employees as a single expression of speech, whereas in *Shen*, the court treated the various comments and likes posted by students as separate expressions.⁴³⁵

Treating the speech as separate expressions allows the court to support differentiated consequences for different speakers, based upon their specific expressive conduct, as was the case in *Shen*. However, in the case of student speech, it might require a court to engage in a somewhat tortured analysis of the level of disruption caused by a student's single act of liking the post of another person. In the case of employee speech, treating an online discussion as one single expression for the purposes of the *Connick* analysis will mean that each individual who posted, commented, or liked will be treated the same. In *Liverman*, this approach turned out to be speech protective, where the elevated nature of one of the officer's comments had the effect of pulling the second officer's comments under the umbrella of protected citizen speech.⁴³⁶ Clearly, however, that may not always be the outcome. Thus, in the realm of speech that involves an individual's act of merely "liking" someone else's speech, the analysis could be thorny.

That same difficulty also is present with expressive activity that consists of sharing pictures and videos online. Such activity is common practice for both students and adults, and often these images may memorialize conduct or otherwise convey messages that are troubling to school administrators. A practical implication for school administrators is that they must take a broad view of what constitutes "expressive" conduct. If an image conveys a message that offends or upsets school administrators, that, in and of itself, is a pretty strong indication that the conduct is "inherently expressive."⁴³⁷ Before taking action

⁴³⁴ See Frank E. Langan, *Likes and Retweets Can't Save Your Job: Public Employee Privacy, Free Speech, and Social Media*, 15 U. ST. THOMAS L.J. 228, 244 (2018) (arguing that public employees can better protect their job interests by assuming that retweeting will be considered an expressive act).

⁴³⁵ *Liverman v. City of Petersburg*, 844 F.3d 400, 410 (4th Cir. 2016); *Shen*, 2017 WL 5890089, at *10.

⁴³⁶ *Liverman*, 844 F.3d at 410.

⁴³⁷ *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 776 (N.D. Ind. 2011).

against conduct that is memorized in online photographs, administrators would be wise to consider whether the behavior is expressive in nature and, if so, whether there is a disruptive impact.

E. Can Educators and Students Claim Their Speech is Political Hyperbole?

When a public educator posts content online that might cast serious doubt upon his/her judgment, or provides evidence of prejudice against particular groups of students, employers and judges are forced to make evaluative judgments as to whether the speech is so egregious that it serves as evidence of an educator's lack of fitness to continue his or her duties. Just what sort of expression would disqualify one to continue as an educator is a calculus that is highly influenced by contemporary community values. In cases up until now, when public employees have engaged in expression online that disparages individuals or groups of students, it has generally been fatal to their free speech claims. But in 2019, the public seems to be increasingly divided regarding the question of how to distinguish between a lack of fitness and harmless hyperbole, particularly when it comes to social media.⁴³⁸

There has been a coarsening of our public and political discourse, particularly online. One of the nation's highest profile users of social media, President Donald Trump, has pushed the boundaries of what the public does or does not view as appropriate online expression from a public figure. In April of 2018, Trump used his Twitter account to respond to Stephanie Clifford (a.k.a. Stormy Daniels), who had released a sketch of a man she claimed had threatened her in order to keep her from publicly discussing her alleged affair with Trump.⁴³⁹ "A sketch years later about a nonexistent man," tweeted the president, "[a] total con job, playing the Fake News Media for Fools (but they know it)!"⁴⁴⁰ Believing that the President had publicly called her a liar, Daniels filed a civil case for defamation, which was dismissed in October of 2018. The judge agreed with the President's argument that the tweet, even though it was "derogatory and disparaging," was protected speech: "[T]he tweet in question constitutes 'rhetorical hyperbole' normally associated with politics and public discourse in the United States. The First Amendment protects this type of rhetorical statement."⁴⁴¹

Even before the President relied upon this strategy to successfully get the Clifford defamation case dismissed, his Twitter feed had inspired another attorney to consider a "political hyperbole" defense for his high-profile client.

⁴³⁸ The Supreme Court in *Watts v. United States*, 394 U.S. 705, 708 (1969) used the phrase "political hyperbole" in holding that an individual could not be criminally prosecuted for having stated, in a discussion of police brutality and the Vietnam War draft: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Court found that those words constituted political hyperbole and not a true threat against President Lyndon Johnson. *Id.* at 706, 708.

⁴³⁹ Clifford v. Trump, 339 F. Supp. 3d 915, 919 (C.D. Cal. 2018).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 925.

Disgraced pharmaceutical executive Martin Shkreli was free on a five-million-dollar bail while awaiting sentencing after his conviction on three counts of fraud in August of 2017.⁴⁴² In September of 2017, he posted an offer on Facebook of a \$5,000 payment in exchange to anyone who could “grab a hair” off of Hillary Clinton’s head as she embarked on a book tour.⁴⁴³ A federal district judge in Brooklyn stated the post “could be perceived as a true threat” and revoked Shkreli’s bail, sending him directly to jail.⁴⁴⁴ Shkreli’s attorney’s Benjamin Brafman publicly argued that Shkreli’s tweet was simply a form of the same type of “political hyperbole” that President Trump engaged in throughout the 2016 campaign, citing specifically a Trump tweet attacking Hillary Clinton in which he referenced “Second Amendment people” as the only way to stop her if she were to be elected.⁴⁴⁵

In March of 2018, Florida middle school teacher Dayana Volitich was removed from her social studies classroom after her employers discovered that she had been hosting a “white nationalist podcast.”⁴⁴⁶ Through her lawyer, Volitich publicly stated that, in her podcast, which she did under a pseudonym, she was merely attempting to employ “political satire and exaggeration, mainly to the end of attracting listeners and followers, and generating conversation about the content discussed”⁴⁴⁷ Volitich never got to test this defense in court, however, because when an investigation showed that she had been deceiving school administrators about what she’d been teaching in her classroom, she submitted her resignation.⁴⁴⁸ Although it hasn’t happened yet, it is reasonable to speculate that an increasing number of public educators (and other public employees) may attempt to defend their speech by claiming that it is political or social hyperbole and therefore protected speech.

As discussed *supra*, student-speech cases do not turn on a question of mental or moral fitness as cases involving employees often do. Therefore, students may be less likely to raise a “political hyperbole” defense. Students

⁴⁴² Stephanie Clifford, *Martin Shkreli is Jailed for Seeking a Hair from Hillary Clinton*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/business/dealbook/martin-shkreli-jail.html> [https://perma.cc/7X47-8A2H].

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ Renae Merle, *Martin Shkreli Jailed After Facebook Post About Hillary Clinton*, WASH. POST (Sept. 14, 2017), https://www.washingtonpost.com/news/business/wp/2017/09/13/martin-shkreli-apologizes-for-facebook-post-about-hillary-clinton/?utm_term=.8691a3f20fa6 [https://perma.cc/NE2N-T925].

⁴⁴⁶ Phil McCausland & Erik Ortiz, *Florida School Removes Teacher Who Hosted White Nationalist Podcast*, N.B.C. NEWS (Mar. 5, 2018), <https://www.nbcnews.com/news/us-news/florida-school-removes-teacher-who-hosted-white-nationalist-podcast-n853096> [https://perma.cc/TZ2R-J5RF].

⁴⁴⁷ *Id.*

⁴⁴⁸ Carly Zervis, *Volitich Investigation Found Cause for Discipline: Teacher Disputes Findings, but Resignation Renders Null Any Punishment*, CITRUS COUNTY CHRON. (May 2, 2018), https://www.chronicleonline.com/news/education/volitich-investigation-found-cause-for-discipline/article_c57e3f14-4e49-11e8-98bc-c7bff01a02cd.html.

sometimes seek to characterize their speech as attempts to be funny or sarcastic but, in the context of threatening speech, the courts have invariably rejected such attempts.⁴⁴⁹ Students also have not succeeded in claiming that off-campus speech that meets a definition of bullying was really nothing more than a joke.⁴⁵⁰

The success of a “hyperbole” defense for student speech that is neither threatening nor bullying is less clear. The Third Circuit’s decision in *J.S.* demonstrates that such a defense sometimes can succeed. In *J.S.*, the court ruled in favor of a student who created a hyperbolic and profane parody profile of his principal on MySpace, explaining that the speech was so outrageous that no reasonable reader would take it seriously.⁴⁵¹ And it is clear that students’ right to engage in comedic expression, even if it is deemed “juvenile and silly,” is protected under the First Amendment.⁴⁵²

CONCLUSION

In the years since *Pickering* and *Tinker* were decided, our communicative technology has outpaced our First Amendment jurisprudence. The advent of the Internet and social media have created significant free speech challenges inside the public schools. As internet-based speech controversies have wound their way up the court system, some clarity has been gained about how the Supreme Court precedent is applied to online speech controversies in the public-school setting. But educational practitioners continue to struggle to make decisions related to personnel or student discipline that are consistently defensible in both the legal and ethical sense. As the title of this article suggests, significant unanswered questions remain.

As far as employee speech, the most significant unanswered questions concern the application of *Connick* to online speech. First and foremost is whether and how the Supreme Court will settle the split between the circuits regarding content versus context. Second, and more generally, will courts continue to bypass the public concern test in *Connick* in favor of balancing online speech of employees under *Pickering*? Will the Garcetti “pursuant to duty” threshold test gain more relevance in future cases? And will our coarsening political discourse eventually allow employees to successfully defend their controversial online speech as “political hyperbole”?

In terms of student speech, of course the most pressing unanswered question involves the scope of school district authority to sanction students for their

⁴⁴⁹ See, e.g., *J.R. ex rel. Redden v. Penns Manor Area Sch. Dist.*, 373 F. Supp. 3d 550, 564 (W.D. Pa. 2019) (collecting cases); *R.L. ex rel. Lordan v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 639, 647 (M.D. Pa. 2016) (rejecting the student’s contention that he was joking); *Yates v. Cobb Cty. Sch. Dist.*, No. 1:15-cv-3211-SCJ, 2016 WL 9444376, at *3, *13 (N.D. Ga. Aug. 4, 2016).

⁴⁵⁰ See, e.g., *Dunkley v. Bd. of Educ.*, 216 F. Supp. 3d 485, 492 (D.N.J. 2016).

⁴⁵¹ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920, 929 (3d Cir. 2011).

⁴⁵² *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 775 (N.D. Ind. 2011).

off-campus expressions. Although almost all circuits that have heard such cases have decided that the *Tinker* disruption standard can be applied to off-campus student speech, there are significant discrepancies from circuit to circuit regarding when and how. This uncertainty may continue unless and until the Supreme Court weighs in.

Amid this uncertainty, an overarching best practice recommendation for school administrators dealing with online speech controversies involving either students or employees is to always engage in a thorough and thoughtful evaluation of the disruptive impact of that speech, remembering that one's own subjective reaction to the speech is not relevant. For employees, the definition of "disruptive" is spelled out by the *Pickering* Balancing Questions, which are easily applied to off-campus, online speech. For students, the analysis is less clear. Whether it's students using social media to threaten or harass teachers or classmates, or educators sharing racist diatribes that prompt members of the community to question their fitness to teach, the problems generated for the public administrator are substantial.

Ethical administrators aspire to protect the rights of both students and employees but must respond to student or employee speech in a way that protects safety, order, discipline, and achievement within the school. The principles outlined in this article will hopefully help both legal and educational practitioners meet this challenge.

APPENDIX I: COURT OF APPEALS CASES INVOLVING PUBLIC EMPLOYEES AND
CYBER SPEECH

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCE TEST
Bland v. Roberts, 730 F. 3d. 368 (4th Cir. 2013).	Deputy sheriffs “liked” and made supportive comments on Facebook page of boss’s political opponent.	No	Yes	Passed: no showing of disruption within sher- iff’s office.
Craig v. Rich Twp. High Sch. Dist., 736 F.3d 1110 (7th Cir. 2013).	High school guidance coun- selor and girls’ coach self- publishes sexually explicit self-help book for women.	No	Yes	Failed: speech that objectified females would justifiably erode confidence and trust in employee as counselor.
Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015).	Veteran police officer criti- cizes chief’s decision to not send representative to of- ficer funeral in neighboring city.	No	No	N/A, but would have failed if speech had been deemed on public concern, due to disrup- tion of working rela- tionships.

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCE TEST
Grutzmacher v. Howard Cty., 851 F.3d 332 (4th Cir. 2017).	Paramedic comments on Facebook disparaging gun control and liberals. After being directed to remove comment, he complained about the social media poli- cy.	No	Yes	Failed: comment could cause dissent, discord, appearance of racial bias, erode public trust, encourage disrespect, and insubordination. Department had al- ready repealed portions of social media policy that were overbroad or vague, so that was moot.
Harnishfeger v. United States, No. 18-1865, 2019 WL 6486869 (7th Cir. Dec. 3, 2019).	VISTA volunteer writes book about previous expe- rience as phone-sex worker and posted announcement and Amazon link on her Facebook page.	No	Yes	Passed

Knopf v. Williams, 884 F.3d 939 (10th Cir. 2018).	Experienced city planner non-renewed by mayor after expressing legal/ethical concerns regarding a project with which he had some involvement in an email to city attorney.	Yes	N/A	N/A
LeFande v. District of Columbia, 841 F.3d 485 (D.C. Cir. 2016).	Police officer fired for making harsh and accusatory statements in emails to superiors.	No – Court need not address question, because it will fail <i>Pickering</i>	Yes – Court doesn't specifically address, but moves to <i>Pickering</i>	Failed
Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016).	Two police officers engage in Facebook exchange expressing disapproval of promotion procedures.	No	Yes	Passed: and social media policy was considered overly broad.*

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCE TEST
Lumpkin v. Aransas Cty., 712 F. App'x 350 (5th Cir. 2017).	Paralegals were fired after private text messages with assistant county attorney were critical of bosses' failure to resign while running for higher offices. Texts were captured in lawsuit between assistant county attorney and county attorney.	No	No – even though it was clearly citizen speech	N/A
Malin v. Orleans Par. Commc'ns Dist., 718 F. App'x 264 (5th Cir. 2018).	Deputy Director of Orleans Parish Communication District accidentally hits “reply all” and sends email criticizing one of the board of directors.	No	No	N/A
Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015).	Teacher blogged disparaging comments about students	No	Yes	Failed: invective directed at students undermined teacher effectiveness.
Odermatt v. N.Y.C. Dep't of Educ., 694 F. App'x 842 (2d Cir. 2017).	NYCTF (New York City Teaching Fellow) writes critical comments in NYCTF Facebook groups about “Relay,” the master's program NYCTF had placed her with. After warnings, fellow writes email to NYCTF pushing back and was subsequently removed from the program.	No	No	N/A

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCING TEST?
Richerson v. Beckon, 337 F. App'x 637 (9th Cir. 2009).	Curriculum specialist blogs insulting remarks about supervisors and colleagues.	No	Assumed yes, but not decided.	Failed: undermined workplace relationships and personal effectiveness.
Snipes v. Volusia Cty., 704 F. App'x 848 (11th Cir. 2017).	Beach patrol supervisor fired for racially insensitive Facebook posts and text messages (texts while on duty) in aftermath of Trayvon Martin killing.	No	Yes – assumed by district court, not discussed on appeal.	Failed
Utter v. Colclazier, 714 F. App'x 872 (10th Cir. 2017).	Substitute teacher suffers retaliation for Facebook support of bond election.	No	Yes	Passed

*Denotes employer's social media policy ruled overbroad and vague.

APPENDIX II: FEDERAL DISTRICT COURT CASES DEALING WITH PUBLIC
EMPLOYEE CYBERSPEECH

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCING TEST?
Agyeman v. Roosevelt Union Free Sch. Dist., 254 F. Supp. 3d 524 (E.D.N.Y. 2017).	Teacher sent series of internal emails expressing concerns about student discipline, conduct of district employees, district policies, lack of resources/support, and alleged violations of law/policy.	Yes	N/A	N/A
Austin v. Preston Cty. Comm'n, No. 1:13CV135, 2014 WL 5148581 (N.D. W. Va. Oct. 14, 2014).	County animal shelter director puts objectionable posts on animal shelter Facebook page, refuses to give password to bosses.	Yes	N/A	N/A
Bailey v. Barrett, No. 17-0937-CV-W-BP, 2018 WL 2051513 (W.D. Mo. May 2, 2018).	Public defender posts derogatory comments about supervisor on Facebook.	No	Yes	Passed
Bryant v. Vill. of Bald Head Island, No. 7:14-CV-223-H, 2017 WL 1194347 (E.D.N.C. Mar. 30, 2018).	Police officer fired for series of texts with co-workers in which he discussed newspaper article written by supervisor.	No	Yes	Passed
Cannon v. Vill. of Bald Head Island, No. 7:15-CV-187-H, 2017 WL 2712958 (E.D.N.C. June 22, 2017).	Four police plaintiffs fired for series of private group text messages in which they were discussing newspaper article written by supervisor as well as making jokes about co-workers.	No	Yes for three employees, no for Cannon. All were speaking as citizens, but Cannon was speaking on a matter of private interest.	Passed: for 3 plaintiffs who passed public concern test. N/A for Cannon

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCING TEST?
Cochran v. City of Atlanta, 289 F. Supp. 3d 1276 (N.D. Ga. 2017).	Employee publishes book criticizing homosexuality	No	Yes	Failed
Czaplinski v. Bd. of Educ., No. 15-2045 (JEL/JS), 2015 WL 1399021 (D.N.J. Mar. 26, 2015).	School security guard posts about "black thugs" involved in shooting of Philadelphia police officer.	No	Yes	Failed: comment impeded ability to do daily duties/cast doubt upon her judgment and fairness.
Duke v. Hamil, 997 F. Supp. 2d 1291 (N.D. Ga. 2014).	Deputy Police Chief posts rebel flag and calls for second revolution the morning after Obama's re-election.	No	Yes	Failed: speech communicated racist ideology, which undermines public trust and confidence in law enforcement.
Geer v. Altieri, No. 4:16CV2213, 2018 WL 1535232 (N.D. Ohio Mar. 29, 2018).	Police officer in Baltimore posts negative post regarding Freddie Grey in the aftermath of his death at the hands of Baltimore PD.	No	Yes	Failed
Mattingly v. Milligan, No. 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).	Public employee makes sympathetic remark on Facebook regarding fired co-workers.	No	Yes	Passed: employer showed no evidence of disruption.
Moreau v. St. Landry Par. Fire Dist. No. 3, No. 6:18-00532, 2019 WL 4282696 (W.D. La. Sept. 10, 2019).	Fire Department Chief criticizes school board and fire department board on Facebook post.	No	No	N/A

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCING TEST?
Ryan v. Santa Clara Valley Transp. Auth., No. 16-CV-04032-LHK, 2017 WL 3142130 (N.D. Cal July 25, 2017).	Public transportation lawyer fired for posting "any[body] but [X] for city council" on Facebook. X was an agency employee who was also on the city council and known to be a marginal employee.	No	Yes	N/A
Sampson v. City of Fort Smith, 255 F. Supp. 3d 873 (W.D. Ark. 2017).	Officer posted on Facebook regarding discriminatory practices within department.	No	No	N/A
Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140 (E.D. Pa. 2008).	Student teacher posts "drunken pirate" picture on MySpace page.	No	No	N/A
Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn 2008).	Teacher interacts inappropriately with students on MySpace page.	No	No - except for an anti-war poem that played no role in decision to dismiss.	N/A - but would have failed, disruption would have outweighed First Amendment value of speech.
Thiede v. Burcroff, No. 16-13650, 2018 WL 465968 (E.D. Mich. Jan. 18, 2018).	Employee internal texts.	No	No	N/A

CASE	SPEECH	PURSUANT TO JOB DUTIES?	PUBLIC CONCERN?	PICKERING BALANCING TEST?
<p>Vincent v. Story Co., No. 4:12-cv-00157- RAW, 2014 WL 10007079 (S.D. Iowa Jan. 14, 2014).</p>	<p>Employee in county at- torney’s office “likes” Facebook post that is highly critical of findings clearing local police of- ficers in the shooting of a family member.</p>	<p>No</p>	<p>Yes</p>	<p>Failed - speech adversely impacted working rela- tionships between county attorney, local police and attorney general offices.</p>
<p>Wudtke v. Bieber, No. 16-C-260, 2017 WL 2274475 (E.D. Wis. May 24, 2017).</p>	<p>Police officer confronts sheriff candidate at cam- paign picnic and asks questions, later responds to candidate’s Facebook post regarding the en- counter. When candidate wins, officer ultimately must resign.</p>	<p>No</p>	<p>Yes</p>	<p>Passed - no evidence presented that under- mined Wudtke’s effec- tiveness.</p>

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