

## When the Classroom Is Not in the Schoolhouse: Applying *Tinker* to Student Speech at Online Schools

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### I. INTRODUCTION

The Internet has changed how public school students communicate and learn. Ninety-five percent of American teenagers between ages twelve and seventeen use the Internet—almost twenty percent higher than adults.<sup>1</sup> Of those teens online, eighty percent use social media sites to communicate and interact.<sup>2</sup> Millions of teenagers use the Internet to do their homework and to perform other school related functions.<sup>3</sup> More and more students have Internet access while on campus, either through school computers in the classroom or through smart phones in their pockets. And seventy percent of teen Internet users go online daily, many of them several times per day.<sup>4</sup> More importantly for this Comment, an increasing number<sup>5</sup> of teenagers are enrolled in full- or part-time online schools.<sup>6</sup> Attendance figures at traditional brick and mortar schools are

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1. Amanda Lenhart et al., *Teens, Kindness and Cruelty on Social Network Sites*, PEW RESEARCH CENTER: PEW INTERNET & AMERICAN LIFE PROJECT, 15 (Nov. 9, 2011), [http://pewInternet.org/~media/Files/Reports/2011/PIP\\_Teens\\_Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://pewInternet.org/~media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf). This is up from eighty-seven percent just eight years ago.

2. *Id.*

3. “Students use the Internet dozens of ways to help them in school. They see the Internet as a virtual textbook and reference library, a virtual tutor and study shortcut, a place to conduct virtual study groups, a virtual locker, backpack and notebook, and as a virtual guidance counselor when they are deciding about careers and colleges.” Press Release, Pew Research Center, Pew Internet & American Life Project, *Online Teens Say Their Schools Don’t Use the Internet Well* (Aug. 14, 2002), available at <http://www.pewinternet.org/Press-Releases/2002/Online-teens-say-their-schools-dont-use-the-Internet-well.aspx>.

4. Lenhart et al., *supra* note 1, at 16.

5. Nancy Mitchell, *More Students Choicing Out of District*, EDNEWS COLORADO (Jan. 18, 2011), <http://www.ednewscolorado.org/2011/01/18/12191-more-students-choicing-out-of-district>.

6. ANTHONY G. PICCIANO & JEFF SEAMAN, *K-12 ONLINE LEARNING: A SURVEY OF U.S. SCHOOL DISTRICT ADMINISTRATORS 7* (The Sloan Consortium, 2007).

changing as online learning opportunities grow in popularity and accessibility across the country.<sup>7</sup> One state even requires all of its high school students to take an online class before graduation.<sup>8</sup>

Despite the overwhelming increase in students' Internet use and the growing popularity of online public schools,<sup>9</sup> the United States Supreme Court has never addressed how, or if, schools can discipline students for disruptive online speech without violating the students' First Amendment<sup>10</sup> rights. What the Supreme Court *has* addressed is how school administrators can constitutionally discipline students within traditional schools. In a landmark decision, *Tinker v. Des Moines Independent Community School District*, the Supreme Court announced the now famous principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>11</sup> Still, the Court continued, school administrators can discipline students when their speech "materially disrupts classwork or involves substantial disorder."<sup>12</sup> In a later case, the Court stated that free speech rights for students on campus are "not automatically coextensive with the rights of adults in other settings."<sup>13</sup>

Historically, in order to determine if students have complete free speech rights equal to adults or limited rights, the important distinction was whether the speech occurred on campus or off campus. But "[t]he line between 'on-campus' and 'off-campus' is not as clear as it once was."<sup>14</sup> More and more high school students are electing to enroll in online high schools.<sup>15</sup> In this new school structure, when students misbehave, the boundaries between constitutional protections for free speech and permissible school discipline are unclear. The Court has not ruled on

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7. In 2006, it was estimated that as many as 700,000 students were engaged in online courses, up from an estimated 40,000–50,000 in 2001. *Id.* at 3.

8. *Vote Makes Idaho First State to Require High School Students to Take Two Online Learning Credits*, 15 DISTANCE EDUCATION REPORT 23, 15 (2011).

9. Even though nothing prevents the application of the free speech cases to elementary schools, because of older students' greater access to technology and online schools, this Comment will focus on the issues as applied to middle and high schools.

10. School districts are generally state actors. Thus, most free speech claims are brought under the Fourteenth Amendment. For simplicity, I will refer to free speech rights as existing under the First Amendment.

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

12. *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

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

14. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 951 (3d Cir. 2011) (en banc) (Fisher, J., dissenting).

15. See PICCIANO & SEAMAN, *supra* note 6.

how schools should evaluate conduct relating to online learning.<sup>16</sup> In fact, the Court has not said much about how schools should deal with online comments and speech by students at traditional brick and mortar schools.

As students' access to the Internet both in and out of the classroom grows, the differences between on campus and off campus often seem nonexistent. Students can text or chat online while they are sitting in the same classroom.<sup>17</sup> Or they can communicate while one student is in the classroom and the other is off campus. Two students might be communicating while off campus on Facebook<sup>18</sup> or Twitter,<sup>19</sup> but an on-campus student happens to read the messages and shares them among her classmates in the hallways. Are these examples of student speech on campus or off campus?<sup>20</sup>

Adding more confusion, online school students rarely attend class in a traditional school facility.<sup>21</sup> Online classes typically consist of an online forum, such as Blackboard or other school-sponsored websites, for teachers and students to interact. Also, many online schools have some limited in-person components, such as extracurricular clubs, field trips, athletics, and dances. Still, for many students, in-person interactions are very limited, and their classroom instruction takes place purely online. Online students potentially could sit anywhere with Internet access while they attend their classes.<sup>22</sup> For these online students, off campus and on campus bleed into one another; the dividing line can be nonexistent. In the abstract, there is a compelling argument that students are only on campus for free speech purposes when they are on official school websites, but as this Comment discusses below, drawing the line there is

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16. The terms "online students," "online schools," and "online learning" are used in this Comment to differentiate from students who receive their education in traditional brick and mortar schools.

17. Eighty-eight percent of teens who use social networking websites use them to send instant messages or chat through the site. Lenhart et al., *supra* note 1, at 22.

18. FACEBOOK, <http://www.facebook.com> (last visited Feb. 5, 2013).

19. TWITTER, <http://twitter.com> (last visited Feb. 5, 2013).

20. How all of these different scenarios should be treated are beyond the scope of this Comment as they deal with students at traditional schools, but they do highlight some of the difficulties that arise from students' behavior on the Internet that underlie the discussion.

21. "[C]yber charter schools often serve students on a fulltime basis and, as a result, these students do not have the ability to interact with their teachers and classmates before and after class or in the hallways of the school." Michael Barbour & Cory Plough, *Social Networking in Cyberschooling: Helping to Make Online Learning Less Isolating*, *TECHTRENDS*, 56 (July/Aug. 2009), <http://edlab.tc.columbia.edu/files/Barbour2009.pdf>.

22. Many online classes use online discussion boards to replicate traditional classroom discussions, sometimes requiring students to contribute a set number of "posts" per semester. Nick Kremer, *How I Became a Convert to Online Learning*, *EDUCATIONAL LEADERSHIP*, 63 (Feb. 2011), <http://www.ascd.org/publications/educational-leadership/feb11/vol68/num05/How-I-Became-a-Convert-to-Online-Learning.aspx>.

ineffective and fails to account for ways students and schools use the Internet. Thus, the on-campus and off-campus categories that define much of the current student speech jurisprudence are in danger of becoming unworkable in the world of online learning. In this Comment, I suggest that in order to provide a workable standard that balances online students' free speech rights with online schools' obligations to maintain an appropriate learning environment for all students,<sup>23</sup> the Supreme Court should apply *Tinker*, without its exceptions, to speech made by students at online schools. This solution, however, is not simple: the difficulty is how the standard should apply to achieve that appropriate balance.

Part II discusses the four seminal cases in the area of free speech in public schools and the types of speech on which the Supreme Court has already ruled. In an effort to explain the challenges regarding online speech in general, Part III discusses the current confusion by lower courts in dealing with traditional students' online speech and examines cases where lower courts have successfully evaluated speech under a *Tinker* analysis to determine whether it was substantially disruptive. Part IV suggests that the on-campus versus off-campus distinction is irrelevant for the world of online schools, and that the Supreme Court should apply *Tinker* to online learners because it strikes a balance between speech protections and the need for schools to maintain order and to protect the rights of the other students. Part V offers a brief conclusion.

## II. THE SEMINAL CASES ESTABLISHING LIMITS TO STUDENT SPEECH RIGHTS AT TRADITIONAL SCHOOLS: *TINKER* AND ITS THREE EXCEPTIONS

### A. *Tinker v. Des Moines Independent Community School District*<sup>24</sup>

Students' rights at school are not equivalent to their rights in public settings. Still, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>25</sup> In *Tinker*, three students were suspended for wearing black armbands to school in protest of the Vietnam War.<sup>26</sup> The students' parents filed a complaint and sought an injunction against the school officials and school board members, arguing that the policy against armbands was unconstitutional.<sup>27</sup> The Supreme Court held that the punishment was a violation of the students'

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23. This Comment only addresses public school students because Free Speech and the other First Amendment rights are only applied against state actors, including public school officials, not private school employees or administrators.

24. 393 U.S. 503 (1969).

25. *Id.* at 506.

26. *Id.* at 504.

27. *Id.*

First Amendment right to free speech.<sup>28</sup> Still, the Court did place some limits on student speech, as it said students could not “substantially interfere with the work of the school or impinge on the rights of other students.”<sup>29</sup> In deciding that John Tinker’s constitutional rights were violated, the Court noted that his speech was passive and peaceful.<sup>30</sup> There needed to be more than just the “discomfort and unpleasantness” of an ordinary controversial viewpoint in order for the school to step in and regulate the student’s speech.<sup>31</sup>

Also, the Court made an important distinction by noting that the speech was permissible, in part, because it did not interfere with classroom instruction time.<sup>32</sup> Student speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others”<sup>33</sup> was subject to punishment by the school administration. Schools must show that a student’s speech “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”<sup>34</sup> The Court also mentioned that in this case the school could not prevent a display of speech before it happened because there were not “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”<sup>35</sup> A second prong of the justification, highlighted in later cases, was that schools can discipline students for speech that “colli[des] with the rights of other students to be secure and to be let alone.”<sup>36</sup> Protecting the rights of the other students to receive an education without substantial disruption provides strong justification for applying *Tinker* to students’ speech at online schools.<sup>37</sup>

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28. *Id.* at 514.

29. *Id.* at 512–13.

30. *Id.* at 508.

31. *Id.* at 509.

32. Classroom instruction time refers to exactly that—time that students spend in the classroom learning—as opposed to time after school, during lunch or passing periods, or school events. Still, the Court made clear that students’ speech rights are not limited to time spent in the classroom:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects. . . .

*Id.* at 512–13.

33. *Id.* at 513.

34. *Id.* at 505.

35. *Id.* at 514.

36. *Id.* at 505.

37. See *infra* Part IV.C, discussing the need for schools to be able to protect other students.

*B. Bethel School District No. 403 v. Fraser*<sup>38</sup>

Even though *Tinker* required schools to prove a material or substantial disruption, some student speech, by its very nature, can be regulated in traditional schools in order to maintain discipline and protect the rights of other students to receive an education. Out of this need, the Court created the first of three exceptions to *Tinker*.<sup>39</sup> In *Fraser*, the Court ruled in favor of a school district that had disciplined a student, Matthew Fraser, for giving a vulgar campaign speech that was laden with sexual innuendoes during a school assembly.<sup>40</sup> The speech was given in support of his friend who was running for a student government position at the school.<sup>41</sup> After the speech, the school suspended Fraser for three days and took his name off of a list of potential graduation speakers.<sup>42</sup> After exhausting his administrative appeals within the school district, Fraser sued, claiming a First Amendment violation and sought both an injunction against the school and monetary damages.<sup>43</sup>

In part due to the offensive and graphic language used, the Court held that the school did not violate Fraser's First Amendment rights, and the punishment was upheld, even though the school did not show a material or substantial disruption, as was required under *Tinker*.<sup>44</sup> The Court noted again that public school students' constitutional rights are not equal to that of adults in other settings.<sup>45</sup> Even more specifically, the Court highlighted the fact that public schools play a unique and important role in American society, and their ability to perform that im-

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38. 478 U.S. 675 (1986).

39. In many ways, *Fraser*, *Kuhlmeier*, and *Morse* can be seen as creating exceptions to *Tinker*'s "material and substantial disruption" standard, as under those decisions there is no requirement that the speech create such a disruption. Schools can regulate those types of speech because of the very nature and content of the speech, not because of the disruption it causes. See generally *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Fraser*, 478 U.S. 675.

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

*Fraser*, 478 U.S. at 687 (Brennan, J., concurring) (internal citations and quotations omitted).

41. *Id.*

42. *Id.*

43. *Id.* at 679.

44. *Id.* at 686.

45. *Id.* at 682 (discussing the student constitutional rights based on the search and seizure context as found in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

portant function at times merits a restriction of First Amendment rights.<sup>46</sup> The speech was clearly on campus, as it occurred during the school day, in the school gym, at a school-sponsored assembly.<sup>47</sup> Therefore, the on-campus speech rules applied.<sup>48</sup> In distinguishing *Tinker*, the Court determined that Fraser's speech "undermine[d] the school's basic educational mission,"<sup>49</sup> and that schools have a duty to socialize students in civic decorum with respect to the values of creativity, propriety, and sensibilities of others.<sup>50</sup> Especially because younger students were present and the audience was a captive one sitting in an assembly, the lewd and indecent speech clearly interfered with that mission.<sup>51</sup>

A big lesson from *Fraser* is that schools are training grounds for students to become public citizens, and the vulgar language from the speech would not be tolerated in the real world.<sup>52</sup> The Court stated "[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."<sup>53</sup>

### C. Hazelwood School District v. Kuhlmeier<sup>54</sup>

In *Kuhlmeier*, the Court carved out another exception to *Tinker*, and ruled in favor of a school that disciplined student speech without proving a substantial disruption.<sup>55</sup> When concerns about speech are reasonably related to pedagogical concerns, educators may exercise editorial control over school-sponsored speech without violating the First Amendment.<sup>56</sup> The student speech at issue was written for a high school newspaper class at the school.<sup>57</sup> The newspaper's student-journalists wrote and planned to publish articles about teen pregnancy, teen sexual activity,

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46. *Id.* at 682.

47. *Id.* at 683.

48. *See id.*

49. *Id.* at 685.

50. *Id.* at 681–82 (comparing the school policy to speech restrictions adopted by the United States House of Representatives and Senate).

51. *Id.* at 683–84.

52. This is not to suggest that an adult who gave the same speech in a public venue would face any sort of legal consequences. The focus was on enabling schools to teach and model the "appropriate form of civil discourse and political expression," and "the shared values of a civilized social order." *Id.* at 683.

53. *Id.* at 681.

54. 484 U.S. 260 (1988).

55. *Id.* at 265.

56. *Id.* at 271.

57. *Id.* at 262.

local divorce rates, and birth control use by students.<sup>58</sup> The articles were pulled from the issue by the school principal before publication.<sup>59</sup>

In ruling in favor of the school and principal, the Court held that a school need not tolerate speech that is inconsistent with its educational mission, even though the speech would be permitted outside of the school setting.<sup>60</sup> In distinguishing the case from *Tinker*, the Court said, “The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”<sup>61</sup> In cases where schools are asked to affirmatively promote particular student speech, schools have the ability to exercise editorial control over the speech “so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>62</sup> Indeed, the chance that the public would misinterpret the speech as being promoted by the school provided additional justification for the Court.<sup>63</sup> Thus, a new category of student speech regulation was established: speech that could be seen as school sponsored where discipline relates to the school’s pedagogical mission.<sup>64</sup> And again, like in *Fraser*, the Court did not require a showing of a material and substantial disruption, relying instead on the “substantially interfere with [its] work . . . or impinge upon the rights of other students” justification from *Tinker*.<sup>65</sup>

#### D. Morse v. Frederick<sup>66</sup>

Schools can also regulate speech reasonably viewed as promoting illegal drug use.<sup>67</sup> In *Morse*, a student was suspended for displaying a banner that read, “BONG HiTS 4 JESUS” at an off-campus but school-approved and supervised event.<sup>68</sup> The students gathered off campus to watch the Olympic torch run past.<sup>69</sup> Prior to the event beginning, the school explicitly established that school rules would be applied to students at the event. Still, Joseph Frederick refused to take down the banner, and he was suspended for ten days. In creating its third exception to

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58. *Id.* at 263.

59. *Id.* at 264.

60. *Id.* at 266.

61. *Id.* at 270–71.

62. *Id.* at 273.

63. *Id.* at 271.

64. *Id.* at 273.

65. *Id.* at 271.

66. 551 U.S. 393 (2007).

67. *Id.* at 403.

68. *Id.* at 397.

69. *Id.*

*Tinker*, the Court determined that the punishment was not an infringement on Frederick's First Amendment rights because the banner was "reasonably regarded as promoting illegal drug use," and the school could regulate such speech in order to protect those under its care from speech that encourages drug use.<sup>70</sup>

More important for this Comment than the topic of drug use, the Court in *Morse* chose not to weigh in on how to treat the students' off-campus speech.<sup>71</sup> Because the event was school sponsored, it took place during normal school hours, and the school made it clear that school rules would apply to students at the torch-relay viewing event, the Court used the traditional student speech distinction of on campus and off campus. Instead of dealing with the issue of off-campus speech, the Court simply determined that the speech was on campus and created another exception to *Tinker*.<sup>72</sup>

#### *E. A Brief Summary of the Current Law*

The four Supreme Court student speech cases set some fairly clear boundaries for regulating on-campus student speech at traditional schools. In order for school administrators to regulate student speech, it must either "materially and substantially interfere" or be reasonably foreseeable to materially and substantially interfere with the educational mission of the school;<sup>73</sup> involve lewd and indecent speech;<sup>74</sup> risk being seen as sponsored by the school and be reasonably related to the school's pedagogical concerns;<sup>75</sup> or be reasonably viewed as promoting illegal drug use.<sup>76</sup> The Supreme Court has not yet ruled on an Internet or off-campus speech case, and there is some confusion and inconsistency among lower courts in determining when to apply these tests. Still, when the lower courts do apply a *Tinker* analysis, they do so successfully, as will be seen below.

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70. The Court admitted that the message on the banner was "cryptic," but concluded that the interpretation by the principal that it was promoting drug use was "plainly a reasonable one." *Id.* at 401.

71. *Id.* at 400-01.

72. *Id.* at 401. ("Under these circumstances, we agree with the superintendent that Frederick cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'") (Internal citation omitted).

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

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

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

76. *Morse*, 551 U.S. 393. However, at least one author suggests that trial courts have begun to expand the holding in *Morse* to other areas including violence and homophobic expression, a topic beyond the scope of this Comment. Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 5 (2008).

III. *TINKER* IS A WORKABLE STANDARD FOR COURTSA. *The Current Struggle with Evaluating Online Speech*

At first blush, the simplicity of the on-campus or off-campus approach is appealing—just determine the location of the speech and then apply the speech laws for that location.<sup>77</sup> Historically, this was an easy distinction to make, as the location of speech was physically limited to where the person was speaking. But where is the Internet?<sup>78</sup> And, more importantly here, where is the classroom for online students? Practically speaking, limiting speech regulation to school-sponsored websites would leave administrators unable to protect students' rights to receive an education free from substantial disruption, a foundational principle from *Tinker*. In order to protect the learning environment, online schools need to have the ability to protect students from some comments made on non-school-sponsored websites. The key, of course, is finding the right balance between allowing schools to maintain their educational environment and protecting students' free speech rights. The on or off-campus distinction, a threshold issue for applying *Tinker* and its three exceptions, quickly becomes unworkable and ineffective for determining boundaries for online students' speech.<sup>79</sup>

Even for traditional students, the circuit courts are split as to what to do with speech made online. The Supreme Court's four school speech cases offer little guidance for schools and courts to follow in determining the boundaries of regulating online speech. In the Court's four school speech cases, all of the speech was either at school or at a school-sponsored event.<sup>80</sup> Thus, many courts believe the first step in evaluating the speech is to determine whether or not the speech occurred on campus. Then, the courts apply *Tinker*'s material and substantial disruption test or its three exceptions. Some courts require a "nexus" between the speech and the school or a "reasonable foreseeability" that the speech

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77. The rules from *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* apply to on-campus speech; traditional free speech law (including libel, slander, true threats) applies to off-campus speech. See *supra* Part II.

78. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997) ("[C]yberspace—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.").

79. "[Courts have] failed to establish clear guidance as to how far the First Amendment extends in protecting off campus student speech. . . . Many courts have extended *Tinker* to apply to off campus speech, while others have refused to recognize the school's disciplinary authority simply because of the speech's off campus origin." William Bird, *Constitutional Law—True Threat Doctrine and Public School Speech—An Expansive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising Off-campus: Doe v. Pulaski County Special School District*, 26 U. ARK. LITTLE ROCK L. REV. 111, 128 (2003).

80. See *supra* Part II.

would reach the campus, as will be discussed below.<sup>81</sup> But even for traditional students, some courts have begun to apply *Tinker*'s material and substantial disruption test without first inquiring into the physical location of the speech.<sup>82</sup> This Comment contends that *Tinker* is the appropriate standard for evaluating speech by students at online schools.

One author comments that courts have been more willing to apply *Tinker* to off-campus speech than to apply *Fraser*.<sup>83</sup> As that author notes, this may be because "*Tinker* requires a showing that the expression disrupted or could reasonably be expected to disrupt school activities; *Fraser* does not."<sup>84</sup> *Tinker*'s substantial disruption, or reasonable foreseeability of such a disruption, requirement provides an important safeguard against infringement on students' rights. Even under the wider reaching reasonable foreseeability standard, the disruption must be a substantial one. Similar to the Vietnam War protests in *Tinker*, which would certainly have been likely to cause a disruption, mere discomfort or annoyance is not enough. The school would have to explain why the disruption to the learning environment is likely and how it would be substantial.

The link to the school provides another important justification for applying *Tinker* to online students' speech.<sup>85</sup> Linking speech regulation to the impact of the learning environment protects students who say inappropriate, juvenile, or even idiotic things online that do not affect other students' ability to learn. The nexus also allows schools to perform their duties to regulate speech in those instances when it does interfere with other students' learning.

The circuits are split on whether to apply *Tinker* to off-campus speech.<sup>86</sup> But the courts that do apply a *Tinker* analysis are able to adequately determine whether a substantial disruption has occurred.<sup>87</sup> In two recent Third Circuit en banc opinions, argued and decided on the same day, the circuit did not definitively decide if it would apply *Tinker* to off-campus speech.<sup>88</sup> In one case, the concurrence argued that it should not

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81. *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

82. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1064 (2008) (referring to *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2011)).

83. *Id.* at 1069–70.

84. *Id.* at 1070.

85. *See infra* Part IV.

86. *Compare* *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 620 (5th Cir. 2004) (declining to apply *Tinker* to off-campus speech), *with* *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007) (applying *Tinker* to off-campus speech).

87. *See infra* Part III.B and III.C.

88. "We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because, as we noted earlier, the district court found that Justin's conduct did not disrupt the school, and the District does not appeal that finding." *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc); *see also* *J.S. ex rel. Snyder v. Blue Mountain*

be applied.<sup>89</sup> But in the other case, the concurrence noted that *Tinker* “can be applicable to off-campus speech. . . . [And] no ruling coming out today is to the contrary.”<sup>90</sup>

Because neither school was able to prove a substantial disruption, the court declined to resolve whether *Tinker* applies to off-campus speech.<sup>91</sup> Even if *Tinker* did apply to off-campus speech, the court reasoned, the schools would not be able to discipline the students in those cases.<sup>92</sup> Still, the court was able to successfully use the test and decide that a substantial disruption did not occur.<sup>93</sup>

Even though the Third Circuit does not explicitly apply *Tinker* to off-campus speech, it did successfully analyze the facts using a *Tinker* “substantial disruption” analysis. Because these cases demonstrate the workability of the *Tinker* standard in the courts, the two Third Circuit opinions, as well as an opinion by the Second Circuit, will now be examined in greater detail.

*B. The Third Circuit Cases: Layshock v. Hermitage School District*<sup>94</sup> and *J.S. ex rel. Snyder v. Blue Mountain School District*<sup>95</sup>

In *Layshock*, one of the Third Circuit en banc decisions mentioned above, the student created a fake Internet profile of his school principal while he was at his grandmother’s house during nonschool hours.<sup>96</sup> The profile contained some disrespectful language.<sup>97</sup> The student subsequent-

Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (“[W]e will assume, without deciding, that *Tinker* applies to J.S.’s [off-campus] speech in this case.”).

89. “I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not. . . .” *Blue Mountain*, 650 F.3d at 926 (Smith, J., concurring).

90. *Layshock*, 650 F.3d at 220 (Jordan, J., concurring).

91. See *supra* note 88 and accompanying text.

92. *Blue Mountain*, 650 F.3d 915; *Layshock*, 650 F.3d 205. In some ways, the Third Circuit substitutes the substantial disruption test for the on-campus versus off-campus test as the threshold question. In other words, the initial inquiry is about whether there was a substantial disruption, and not about the location of the speech.

93. *Id.*

94. *Layshock*, 650 F.3d 205.

95. *Blue Mountain*, 650 F.3d 915.

96. *Layshock*, 650 F.3d at 207.

97. The student created a fake profile of his high school principal on MySpace targeting the principal based on his large size, using the word “big” in many of his answers:

For example, [the student] answered “tell me about yourself” questions as follows:

Birthday: too drunk to remember

Are you a health freak: big steroid freak

In the past month have you smoked: big blunt

In the past month have you been on pills: big pills

In the past month have you gone Skinny Dipping: big lake, not big dick

*Id.* at 208.

ly accessed the profile on a school computer during the school day and showed it to other students in his class.<sup>98</sup> “[T]he profile ‘spread like wild-fire’ and soon reached most, if not all, of [the] student body.”<sup>99</sup> Some other students accessed the profile from school computers as well.<sup>100</sup> The student soon went unprompted into the principal’s office and apologized.<sup>101</sup> After learning of the profile, the school suspended the student for ten days.<sup>102</sup> Outside of a few students looking at the profile in a computer lab class, the district court found that the school district did “not establish a sufficient nexus between [the student’s] speech and a substantial disruption of the school environment.”<sup>103</sup>

In *Blue Mountain*, the other en banc decision, a student also created a fake Internet profile from her home computer of the school principal.<sup>104</sup> The profile included vulgar language and profanity and insinuated that the principal was a sex addict and pedophile.<sup>105</sup> The student made the profile “private” and allowed twenty-two other students to view the profile through their MySpace profiles.<sup>106</sup> The only version of the profile that was physically brought to campus was by a different student after the principal asked him to bring it.<sup>107</sup> Again, because there was no substantial disruption, the court held that the school violated the author’s First Amendment rights regulating the speech.<sup>108</sup> The district argued that it had authority to punish the student based on the reasonable foreseeability of the profile creating a substantial disruption in the school.<sup>109</sup> How-

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98. *Id.* at 209.

99. *Id.* at 208.

100. *Id.* at 209.

101. *Id.*

102. *Id.* at 210.

103. *Id.* at 216, 219. The school did not appeal the district court’s holding on the disruption issue.

104. The disciplined student included the following obscene language in the relevant “About Me” section of the principal’s fake profile page: “HELLO CHILDREN[,] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal’s [sic] to be just like me.” J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 921 (3d Cir. 2011) (en banc) (grammar and spelling as it appears in the court opinion).

105. *Id.* at 921. Although the use of sexual and vulgar language has similarities to the type of speech that can be regulated under *Fraser*’s lewdness standard, *Fraser* does not appear to apply to off-campus speech. See *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (discussing *Fraser*, the majority noted that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected”).

106. *Blue Mountain*, 650 F.3d at 921.

107. *Id.*

108. “There was no dispute that J.S.’s speech did not cause a substantial disruption in the school. The School District conceded this point at oral argument . . . .” *Id.* at 928.

109. *Id.* Under *Tinker*, a school can regulate speech based on “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

ever, because other students were already aware of the profile and their reactions were quite limited,<sup>110</sup> the court held that it was not reasonably foreseeable at the time of discipline that the profile would create a substantial disruption at the school.<sup>111</sup> Therefore, the school violated the student's First Amendment rights by suspending her.<sup>112</sup> The case also highlights the high standard schools must meet in order to prove a substantial disruption is reasonably foreseeable.

*C. The Second Circuit Case: Wisniewski v. Board of Education of Weedsport Central School District*<sup>113</sup>

Unlike the Third Circuit, the Second Circuit explicitly applies *Tinker* to off-campus speech. The Second Circuit in *Wisniewski v. Board of Education of Weedsport Central School District* applied *Tinker* and held that it was reasonably foreseeable that a graphic image sent over an instant messenger would materially and substantially disrupt the work of the school.<sup>114</sup> In *Wisniewski*, a student's instant messenger icon displayed a picture of a gun firing a bullet at a man's head.<sup>115</sup> The man was identified in a caption below as his English teacher.<sup>116</sup> When the student sent messages to fifteen of his friends, his instant messenger icon was displayed on the receiving students' computers.<sup>117</sup> It was not sent to any teachers or school officials.<sup>118</sup> The only time the image was physically on campus was after one of the student's classmates brought it in and gave a copy of it to a teacher.<sup>119</sup> After a hearing held before a designated hearing officer, the student was suspended.<sup>120</sup> The court determined that it was reasonably foreseeable that it would create a risk of substantial disruption at school, in part because of the "threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients," and his punishment was upheld.<sup>121</sup>

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110. "[B]eyond some general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred." *Blue Mountain*, 650 F.3d at 929.

111. *Id.* at 930.

112. *Id.* at 931.

113. 494 F.3d 34 (2d Cir. 2007).

114. *Id.* at 38–39.

115. *Id.* at 35–36.

116. *Id.*

117. *Id.*

118. *Id.* at 36.

119. *Id.*

120. The hearing officer found that the act "disrupted school operations by requiring the special attention [of] school officials, replacement of the threatened teacher, and interviewing pupils during class time." *Id.*

121. *Id.* at 39–40.

*D. Concluding Thoughts About the Workability of Tinker*

*Layshock*, *Blue Mountain*, and *Wisniewski* show that the courts are able to distinguish between speech that substantially disrupts, or has a reasonable foreseeability to cause a substantial disruption at school, and speech that does not. Even though those cases shared similar facts (online speech made by students off campus that targeted school officials), the courts only upheld the punishment for the student whose speech was more threatening, and therefore was more likely to cause a substantial disruption to the learning environment. Speech that was merely uncomfortable and inappropriate, but lacked the substantially disruptive quality, was protected. *Tinker*'s workability makes it an attractive starting point for evaluating student speech in the online school context.

IV. *TINKER* SHOULD APPLY TO ONLINE LEARNERS

Based on the school's duty to protect the learning environment for other students and the impracticalities of limiting a school's reach to official school websites only, this Comment proposes applying an old test, *Tinker*, to the new speech issues in online schools. For a number of reasons, applying *Tinker*, without its exceptions, is an appropriate and workable standard for evaluating student speech at online schools. Instead of the on or off-campus approach used in traditional schools, the test for online students' speech should simply be whether or not there was a material or substantial disruption, or the reasonable foreseeability of a substantial disruption, to the learning environment.<sup>122</sup> This solution achieves a proper balance by requiring documentation about the nature of the speech and the substantial effect it has, or is reasonably foreseeable to have, on the learning environment for other students. Due to the limited in-person contacts of online learning, speech in general will be less likely to impact other students, resulting in more free speech protections for online students than traditional students. Comments that may have a major impact at a traditional school might go unnoticed or be ignored at online schools without the in-person discussions that often fuel such disruptions. Lower courts have shown an ability to apply *Tinker* appropriately, and fears of school overreach are unlikely to be realized in practice.

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122. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

*A. Schools Need Tools to Protect the Learning Environment for Other Students*

Critics of both current law and of expanding the reach of school administrators point at the dangers of silencing student speech.<sup>123</sup> But this perspective ignores the importance of schools in our society and their duty to maintain order and discipline for the benefit of the other students.<sup>124</sup> As one scholar notes, “[t]here is little question that students’ constitutional rights at school must be restricted for schools to properly function.”<sup>125</sup>

The *Tinker* Court’s concern with the rights of the other students at the school to receive an education is foundational.<sup>126</sup> In *Tinker*, the concern about the disruption was in order to protect the rights of other students at the school.<sup>127</sup> Indeed, all students’ rights are part of the free speech discussion. *Tinker*’s classmates had every right to go to school and receive their education without others infringing on that right. Because their right was not interfered with, the school could not regulate *Tinker*’s speech. In *Fraser*, the Court mentioned the ages of the younger students present at the assembly several times, signifying its concern with protecting students.<sup>128</sup> The question is not simply whether the student speaker’s rights are being infringed; rather, the legitimate and recognized rights of the other students to receive an education are also in play.<sup>129</sup> Student A’s offensive and vulgar speech is regulated because of its substantial impact on or potential to substantially impact Student B’s right to receive an education.

More specifically than their duty to protect other students’ right to receive an education, schools have a duty to protect students from bullying. Schools need tools to regulate speech because they can be held liable when they fail to address certain types of speech, especially

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123. This is often referred to as the “chilling” of free speech. The chilling effect is problematic because it “gives rise to self-censorship and diminish[es] [] the marketplace of ideas.” Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 148 (2003); see also David L. Hudson, *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 200 M.S.U.-D.C.L. 199, 221 (2000); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 234, 275 (2001).

124. See, e.g., Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257 (2008).

125. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 418 (2011) (referencing the special characteristics of the school environment and the need for some administrative control).

126. See *supra* note 36 and accompanying text.

127. *Tinker*, 393 U.S. at 513.

128. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–84 (1986).

129. See *Tinker*, 393 U.S. at 513 (rights of others prong for supporting discipline at schools).

cyberbullying.<sup>130</sup> After a recent flurry of legislation, forty-six states currently have anti-bullying laws, many of which require schools to take certain steps to protect students.<sup>131</sup> Cyberbullying, like traditional bullying, has consequences that reach beyond the location of the speech and into the school environment.<sup>132</sup> Recent stories about suicides linked to bullying show the seriousness of it<sup>133</sup> and the importance of protecting students.<sup>134</sup> As a result, schools need greater tools to protect students from bullying.<sup>135</sup>

Although cyberbullying likely has its greatest impact when it is combined with in-person bullying at a brick and mortar school,<sup>136</sup> it still remains a real possibility for online schools, especially at those that offer in-person activities or where the students have stronger in-person relationships. By applying the *Tinker* standard, the online school would be able to intervene when the bullying or harassing speech affects the

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130. For example, in the State of Washington, schools may be found liable if the school environment has been altered for a victim of bullying, if staff knew or should have known, and they failed to act or acted with deliberate indifference. School Safety Center, State of Washington, Office of Superintendent of Public Instruction, <http://www.k12.wa.us/safetycenter/default.aspx> (last visited Feb. 5, 2013).

131. *Analysis of State Bullying Laws and Policies*, U.S. DEP'T OF EDUC., OFFICE OF PLANNING, EVALUATION AND POLICY DEV., POLICY AND PROGRAM STUDIES SERV., 3 (2011), <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>; see also Abbott Koloff, *States Push for Cyberbully Controls*, USA TODAY, Feb. 7, 2008, available at [http://www.usatoday.com/news/nation/2008-02-06-cyberbullying\\_N.htm](http://www.usatoday.com/news/nation/2008-02-06-cyberbullying_N.htm).

132. Cyberbullying is one of the many justifications for allowing some school regulation over Internet speech:

When students use off-campus Internet speech to harass the school community, limiting authority to the geographical status of speech becomes harder to justify, as there is a better chance that Internet speech will impact the school community. Furthermore, a bright-line rule that removes all school authority over speech merely because of its off-campus status ignores the relationship between the speaker and the target of the speech.

Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1235 (2003).

133. In some ways cyberbullying creates even more problems, as "bullying online has a disproportionate appeal for girls who can use technology to substitute for physicality." Kathleen Conn, *Cyberbullying and Other Student Technology Misuses in K-12 American Schools: The Legal Landmines*, 16 WIDENER L. REV. 89, 91 n.17 (2010).

134. See U.S. DEP'T OF EDUC., *supra* note 131, at 3.

135. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). In discussing the differences between bullying in adult speech and student speech, one commentator writes:

Contemporary courts and public-interest groups defend this [bullying] speech under the theory that any harm it causes is outweighed by the greater danger of suppressing free expression. While this view of the First Amendment is perhaps an appropriate standard for adults in a democratic society, it is not appropriate for schoolchildren.

Servance, *supra* note 132, at 1214.

136. "This constant harassment made possible by a website compounds the invasion of privacy and the impact of bullying. Inevitably, the resulting emotional wreckage arrives at the schoolhouse gate, leaving school administrators and teachers to deal with the fallout." Servance, *supra* note 132, at 1219.

school environment for the student, but it would not overreach and interfere with incidents that occur without the possibility of substantially impacting the school environment for other students.<sup>137</sup>

*B. The On-Campus Versus Off-Campus Distinction is Unworkable in Practice for Online Schools*

The on-campus versus off-campus distinction is unworkable for students who go to school online—what should be considered as their campus? If the academic aspect of school is conducted on an official school website, but the social aspect of it is done over nonschool websites, where should the line be drawn? Indeed, social networking use is even encouraged in many online schools, through the use of “private”<sup>138</sup> Facebook groups or Gmail discussion threads, as a way to replicate the social interactions at traditional schools.<sup>139</sup>

A hypothetical may be helpful to demonstrate how this would work in practice. It is easy to picture students that go to school online sitting in their bedrooms or living rooms while attending class or completing an assignment, and many online schools provide the students with computers. On a typical day, students would sign in to their school webpage and communicate with other students and their teachers. If a student has multiple windows open on his computer screen—one to the school webpage and one to Facebook, Twitter, or Gmail<sup>140</sup>—he could, in theory, be both on campus and off campus at the same time.

The argument that only comments posted on school-sponsored websites should be subject to review by school administrators fails to account for the practical limitations of such a test and the duties schools have to protect other students’ right to learn. Admittedly, there are legitimate concerns in allowing schools to potentially regulate all student speech made online. Practically speaking, though, schools will not be able to carry out their duties if they are limited to only speech posted on school-sponsored websites. Even the most juvenile of students would figure out how to avoid punishment by simply moving their harassing or bullying comments to Facebook, text message, or other nonschool websites and therefore beyond the reach of the school.

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137. See *supra* note 35 and accompanying text.

138. A “private” Facebook group means a group with limited access. FACEBOOK, [www.facebook.com/help/privacy](http://www.facebook.com/help/privacy) (last visited Feb. 5, 2013).

139. “Essentially, the social network has been the public space that has allowed the students a sphere for their social development, similar to the kind of public space they would have experienced in the traditional school environment (often outside of the formal classroom).” Barbour & Plough, *supra* note 21, at 59.

140. GMAIL, <http://mail.google.com> (last visited Feb. 5, 2013).

Logically, it is easy to draw a line between the school website and the nonschool website, but this line is more of a distinction without a difference. Imagine a situation where some students are harassing a fellow student in a Facebook group about comments he offered in the class discussion on the school website. These comments certainly have the potential to substantially disrupt the learning environment if other students learn about the harassment and begin to withdraw from class participation. Or similarly, what if a student made disparaging, vulgar, or threatening comments over instant messaging with his classmates in one window while “in-class” on the school website in another? If speech on non-school-sponsored websites is completely off limits to school administrators, there would be no remedy for this situation, and the school would be unable to fulfill its duty to protect the impacted students. If those comments were made between students at a traditional school, they would certainly be subject to discipline.<sup>141</sup> Online speech passed between students that is serious enough to substantially disrupt the learning environment is analogous to other students repeating a statement over and over in a traditional classroom. In order for the online student’s speech to rise to the substantially disruptive level, it likely would need to be widely shared among the students. Or, if a student did make comments on school-sponsored websites, it would be much more likely to be noticed by other students and impact the school environment. The only significant distinction from traditional speech is the medium over which the comments were made—a distinction that demonstrates the futility of the current on-campus versus off-campus model.

Technology improvements have also seriously changed the method and intensity of comments directed at teachers and students such that the comparison to previous generations is not particularly applicable.<sup>142</sup> The pervasiveness and speed of technology fundamentally changes the impact of speech.<sup>143</sup> A vulgar remark or joke about a teacher or another student spoken at a private party can quickly be recorded and transmitted beyond the walls that historically would have contained it.<sup>144</sup> Modern student speech has a significantly different character than past generations’ speech, one that is more rapidly disseminated and instantaneously accessed by students, even when not physically together on campus. Giving online schools the ability to regulate speech that substantially dis-

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141. See *supra* Part II.

142. Servance, *supra* note 132, at 1214 (discussing the changes in the content and the manner of student speech since *Tinker*).

143. See *supra* notes 1–4 and accompanying text.

144. The example is based on a hypothetical posed in *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc). There, the private party hypothetical was used to demonstrate why *Fraser* should not apply to off-campus speech.

rupts the school environment recognizes that off-campus comments between classmates, which historically would have been innocuous, can have a much greater impact on the school environment simply because of the technology by which it is transmitted. But only if the speech has a substantial impact on the school environment, or is reasonably foreseeable to have such an impact, would the online school be able to regulate it.<sup>145</sup>

### C. *Tinker* is an Appropriate Standard for Online Schools

The Supreme Court's silence on the on-campus versus off-campus distinction, combined with the emerging popularity of online learning for high school students, leaves school administrators, students, and lower courts uncertain about how to treat student speech now that the high school model is changing to include more online opportunities. Given that schools have a duty to protect students and that limiting schools to speech made on official school websites is ineffective, the question becomes what test should be applied to online students' speech. *Tinker*'s requirement of a connection to the learning environment mitigates some of the concerns that arise from allowing schools to regulate off-campus speech. In many ways, online speech by online students has an even closer nexus to being "on-campus" speech than similar speech by traditional students because the "campus" itself is online.

In addition to the utility of *Tinker*, and courts' ability to effectively apply it, as described in Part III, applying *Tinker* without its exceptions to online students strikes a balance between regulation and protection of student speech rights. The *Fraser*, *Kuhlmeier*, and *Morse* exceptions to *Tinker* do not require a showing of a substantial disruption, or reasonable foreseeability of such a disruption, in order to regulate student speech.<sup>146</sup> In order to avoid censorship and overreaching by schools,<sup>147</sup> only the *Tinker* standard should be applied to online schools. Therefore, even offensive or unpleasant speech with little to no connection to the learning environment would remain protected.

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145. In a similar context—employment harassment—one scholar notes that the location of the speech is largely irrelevant for determining the protection it receives. He writes that in the workplace, Internet speech can "create a 'hostile, abusive, or offensive work environment' . . . based on the person's race, religion, sex, national origin, disability, age, veteran status [or other attributes]" and that "the medium by and large does not and should not affect the protection—or lack of protection—given to the content." Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 301–02 (2000).

146. See *supra* Part II, discussing the seminal cases.

147. See *supra* note 44 and accompanying text.

*Tinker* helps to ensure that only the speech that truly could impact the school environment could be regulated.<sup>148</sup> Requiring online schools to document and provide evidence of the disruption on the school environment, or reasonable foreseeability of such a disruption, would ensure that the speech had a sufficient connection to the school environment before the student was subjected to school discipline for it. This connection is especially important in the online school context because the location of the speech can be ambiguous.

Under *Tinker*'s "substantially disrupts" test, conduct that occurs online would not be regulated unless it has a substantial impact on the learning environment or a reasonable foreseeability of such an impact.<sup>149</sup> Online speech that is uncomfortable, crude, or promotes drug use (the speech categories that traditional schools can regulate under *Fraser*, *Kuhlmeier*, and *Morse*)<sup>150</sup> would be appropriately protected unless it substantially disrupts the learning environment or interferes with the important mission of the school.<sup>151</sup>

Additionally, *Tinker* allows courts to continue the practice of deferring to local control over discipline issues in schools. The Supreme Court has noted, "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>152</sup> Public school officials perform "important, delicate, and highly discretionary functions."<sup>153</sup> Therefore, by applying *Tinker*'s "substantial disruption" test to online schools, the Court provides guidance to local school officials but does not create a heavy-handed or convoluted factor test that would complicate the work of daily school operations. Of course, courts remain in position to adjudicate challenges to the schools' application of *Tinker*. However, the Court is notoriously removed from modern technological advances.<sup>154</sup> Therefore, it is wise for the Court to defer to administrators and teachers who are

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148. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

149. See *id.*

150. See *supra* Part II.

151. See *Tinker*, 393 U.S. at 509.

152. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988); see also, *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982) ("[F]ederal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'" (citation omitted)).

153. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

154. Ashby Jones, *Our Tech-Savvy Supreme Court*, WSJ LAW BLOG (Apr. 19, 2010), <http://blogs.wsj.com/law/2010/04/19/our-tech-savvy-supreme-court/> (examples of confusion by the Justices about technology during oral arguments, including about the difference between email and a pager). Another scholar makes this argument in the Fourth Amendment search and seizure context. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004).

more familiar with the technology they must deal with and the “special characteristics”<sup>155</sup> of the schools.

*D. Due to the Unique Nature of Online Schools, Overreach is Unlikely to Occur in Practice*

Allowing online schools to regulate speech without requiring a connection between the speech and the learning environment would be a tremendous First Amendment violation. Just because students have some limited rights at school does not mean that all of their speech is limited.<sup>156</sup> Yet, students’ free speech rights are “not automatically coextensive with the rights of adults in other settings.”<sup>157</sup> Thus, finding an appropriate balance is critical, and the fear that online students’ free speech rights will be significantly curtailed if schools are allowed to regulate comments made on non-school-sponsored websites is a legitimate one that must be addressed. Still, due to the unique nature of online schools, it is unlikely that these abstract concerns will be realized in the practical application of the rule.

Requiring a connection to the learning environment is a significant barrier against school officials overreaching into all online students’ speech. Applying *Tinker* protects harmless comments and other statements made by online students that result in mere discomfort, annoyance, or unpopularity. These protections are especially important for online students because the lines between the classroom and the home are blurred. Students should be protected when they make online statements in their homes that do not have an effect on their school environment. Students at online schools have much less physical interaction of the kind that often fuels behavior issues in traditional schools. Without the opportunity to be spread between students in the hallways, a comment in an online forum is much less likely to cause any disruption, let alone a substantial one, for students in an online school. A traditional student and an online student might say the same thing, but an online comment’s limited impact on students at the online school might keep the online student from being punished like the traditional student. Therefore, as this example shows, online students do not necessarily have less free speech protections than their traditional counterparts. Even though the net may be wider for administrators at online schools than it is at traditional schools, they will only be able to catch the bigger fish.

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155. *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

156. *See supra* Part II. Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 508.

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

*Tinker* itself contains important free speech protections. The requirement that speech must do more than create discomfort provides a key safeguard to students' rights.<sup>158</sup> Schools must show more than just the possibility of a disruption to the school; the disruption must be substantial.<sup>159</sup> Even if schools desire to regulate speech under the reasonable foreseeability standard, the school would have to explain why it believed a substantial disruption was likely to occur. *Tinker* is not an arbitrary standard. In order to be persuasive, the school's reasoning would include references to similar situations that were documented in the past. Even in *Tinker* there was the threat of disruption based on the controversy surrounding the Vietnam War, but *Tinker's* speech never rose to the level of infringing on the rights of the other students.<sup>160</sup> Thus, the students were able to engage in their protest on school grounds.<sup>161</sup> Although the school was concerned with the speech, the students' rights were protected, and an appropriate boundary was set—a boundary that can just as easily be applied to the online school context.

Another reason often given in support of stronger speech protections and a reduction of school control is that schools should not be able to punish speech that historically took place beyond the earshot of the school and thus beyond the ability to regulate.<sup>162</sup> This argument fails in the context of online schools because *Tinker's* substantial disruption requirement prevents schools from arbitrarily punishing speech simply based on its content.<sup>163</sup> A desire to avoid the unpleasantness that accompanies insults directed at teachers, or speech that the school simply does not like, is not enough.<sup>164</sup> There needs to be more than “undifferentiated

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158. In *Tinker*, the students' speech was protected even though it created some discomfort for others. *Tinker's* armband protest was protected because it did not create a substantial disruption. It was “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.” *Tinker*, 393 U.S. at 508.

159. *Thomas v. Board of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050, n.17 (2d Cir. 1979) (declining to uphold punishment under *Tinker* when “there was simply no threat or forecast of material and substantial disruption within the school”).

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

161. In describing the protection it was providing, the Court noted: “The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.” *Id.* at 513.

162. “Speech that in another time would escape the school's notice now has become the basis for suspensions, expulsions, and other significant punishment.” Papandrea, *supra* note 82, at 1102.

163. *Tinker*, 393 U.S. at 510 (“It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance.”).

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

fears of possible disturbances or embarrassment to school officials.”<sup>165</sup> The school must provide evidence to show a material and substantial interference, or the reasonable foreseeability of such a disruption, with classwork or discipline.<sup>166</sup>

By requiring a connection to the school environment, *Tinker* offers important protections for online students. Limiting regulation to speech that substantially impacts other students’ learning provides schools with the necessary tools to meet their duties to their students but also protects students from excessive regulation that has little to no impact on other students’ rights to learn.

#### V. CONCLUSION

Due to the dramatic increase in teen Internet use and the growing popularity of online schools for public high school students, the current student speech cases need to be updated. Much of this need—as it applies to traditional schools—is beyond the scope of this Comment. But any changes made to students’ Internet speech rights must address the unique circumstances of online schools and the challenges they face.

Applying *Tinker*, without its exceptions, to online schools is an appropriate balance between schools’ needs and students’ rights. Schools will have tools to protect other students and guard against their own financial liabilities, while students will be protected for speech that does not or is not reasonably foreseeable to substantially disrupt the school environment for other students. As online schools change, student speech jurisprudence will need to continue to evolve. This Comment seeks to provide a starting point for that ongoing discussion.

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165. *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

166. “Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” *Tinker*, 393 U.S. at 511.