Tinker Operationalized: The Judiciary's Practical Answer to Student Cybersearch

Darin M. Williams

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol62/iss1/4

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
TINKER OPERATIONALIZED: THE JUDICIARY'S PRACTICAL ANSWER TO STUDENT CYBERSPEECH

Introduction

As the current generation of American students embraces the Internet more completely than any before it, online student speech (student cyberspeech) continues to generate controversy in schools and myriad First Amendment issues in the lower courts. In addressing school regulation of student speech, the Supreme Court has repeatedly emphasized the special characteristics of the school environment and required a balance to be struck between students' free speech rights and the operation of schools. The Supreme Court has not, however, provided any specific guidance on how to approach the growing issue of student cyberspeech. Thus, while it is left to district and circuit courts to strike a functional balance between online student expression and schools’ disciplinary authority in particular cases, delineating the details of that balance is fraught with difficulty.

To start, the broad formulation of the First Amendment offers no clarification for courts attempting to devise a standard applicable to

1. In a survey conducted in December 2000, the Pew Research Center found that 73% of teens used the Internet occasionally and 42% of teens used the Internet daily, while a similar survey in September 2009 put the numbers at all time highs of 93% and 63%, respectively. See PEW RESEARCH CTR., PEW RESEARCH CENTERS INTERNET & AMERICAN LIFE PROJECT: TEEN INTERNET USAGE OVER TIME (2009), available at http://pewinternet.org/Trend-Data-(Teens)/Usage-Over-Time.aspx.

2. One of the first cases to address the problem of student cyberspeech was Beussink v. Woodland R-IV School District. Beussink v. Woodland R–IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (addressing a website created by a student at home, which featured crude and vulgar language that was highly critical of the high school administration). Since then, the fact patterns in student-cyberspeech cases have run the gamut from simply puerile to considerably disturbing. Compare Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–08 (3d Cir. 2011) (addressing a student-created MySpace profile parody of a school principal, which claimed that the principle smoked "big blunts[’s]" and was a "big fag"), with O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist., 2008 U.S. Dist. LEXIS 110409, at *2–3 (C.D. Cal. Sept. 9, 2008) (addressing an online video posted by a student that depicted a graphic dramatization of a teacher's murder).


4. The Supreme Court addressed the issue of student free speech as recently as 2007 in Morse v. Frederick, but this case did not involve cyberspeech and the Court narrowly held that schools may "restrict student expression that they reasonably regard as promoting illegal drug use." See Morse, 551 U.S. at 408.
the particularized issue of student cyberspeech. In its turn, the Supreme Court recognized a general right to free speech for students in schools less than fifty years ago, but has given limited consideration to the issue since then. Finally, the Supreme Court specifically declined to address cyberspeech in its latest student-speech decision, *Morse v. Frederick.* Consequently, because the decisions of the Supreme Court are, in effect, the only guidance that lower courts have for regulating student speech, including student cyberspeech, these courts must rule in student-speech cases solely by reference to a small body of case law.

Additionally, the guidance of the Supreme Court is constrained with respect to student cyberspeech because most cyberspeech originates off campus and thus does not technically occur *in school.* Therefore, the precedent is unclear about when, or if, school officials may discipline students for cyberspeech created off campus.

This uncertainty has prompted concern among commentators that schools and courts are unconstitutionally limiting the First Amendment rights of students in cyberspeech cases. At the center of much of the recent cyber-age controversy is *Doninger v. Niehoff,* decided by the Second Circuit subsequent to *Morse.* In *Doninger,* the court held that a principal did not violate a student’s First Amendment rights when she punished the student for posting a blog from an off-campus location. The bases for concern are varied. One commentator expressed concern that such Second Circuit cases are irreconcilable with a recent Third Circuit decision, *J.S. v. Blue Mountain School*

---

5. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ").
6. See infra notes 37–49 and accompanying text.
7. See generally infra notes 50–77 and accompanying text.
8. See infra notes 68–77 and accompanying text.
9. In the majority of student-cyberspeech cases, the cyberspeech at issue was created on a personal computer at the student’s house. See, e.g., *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (en banc) (addressing an online profile created at home); *Doninger v. Niehoff,* 527 F.3d 41, 48 (2d Cir. 2008) (addressing an online blog written at home).
12. *Doninger,* 527 F.3d at 41.
13. Id. at 53.
District,\textsuperscript{14} in which the court concluded that a school impermissibly infringed upon the First Amendment rights of a student under similar circumstances.\textsuperscript{15} Other commentators have expressed concern that decisions such as Doninger give too much deference to school officials.\textsuperscript{16} Yet another has stressed the importance of “the foundational query of when school officials may properly assert in-school disciplinary authority over high-tech, off-campus-created expression,”\textsuperscript{17} and urged the Supreme Court to render a decision on the boundaries of school jurisdiction over student cyberspeech.\textsuperscript{18}

In this social and judicial landscape, then, the importance of articulating an approach to student cyberspeech cannot be overstated.\textsuperscript{19} In the absence of direct guidance from the Supreme Court, the practical question is what, if any, meaningful standard has been utilized by the judiciary to address the growing phenomenon of student cyberspeech. This Comment proposes an empirical answer to that question. More specifically, it argues that a discerning analysis of the growing body of student-cyberspeech jurisprudence in the lower courts reveals a prevailing approach, which this Comment calls the “operationalized Tinker standard.”\textsuperscript{20} At first blush, it might be tempting to claim that no coherence exists in the regulation of student cyberspeech, and that the Supreme Court should decide such a case to provide clarity on the issue.\textsuperscript{21} Yet the operationalized Tinker standard proposed by this Comment preserves student rights in accord with the Supreme Court’s prevailing student-speech decisions, thus obviating the need for Supreme Court intervention.

\textsuperscript{14} Cf. Joseph A. Tomain, Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection, 59 Drake L. Rev. 97, 100 (2010) (“Recent cases in the Second and Third Circuits demonstrate uncertainty as to whether Fraser applies to online, off-campus speech.”).

\textsuperscript{15} See J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (en banc). In this case, a school punished a student for the off-campus creation of a fake online profile of her principal. Id. at 920.

\textsuperscript{16} Fronk, supra note 11, at 1441-42.

\textsuperscript{17} Calvert, supra note 10, at 213 (“Without such threshold jurisdictional authority over the off-campus-created expression, one never reaches the second issue about which substantive rules from Supreme Court cases . . . should be applied to a given case.”).

\textsuperscript{18} Id. at 251.

\textsuperscript{19} See, e.g., id. at 214, 216 (“[T]he [cyberspeech] quandary . . . has picked up substantial steam at the federal court level since the High Court handed down Morse . . . .”).

\textsuperscript{20} See infra Part III. This Comment articulates the operationalized Tinker standard as a practicable standard for the regulation of student cyberspeech, namely that a student may express her opinion so long as doing so does not materially and substantially intrude upon the work of the school.

\textsuperscript{21} See Calvert, supra note 10, at 250-51.
Part II of this Comment explores the background of Supreme Court student-free-speech jurisprudence. Part III first addresses the limits of Supreme Court precedent with regard to student cyberspeech and then analyzes how lower courts have proceeded in student-cyberspeech cases in light of these limits. Part III proceeds to argue that most lower courts have employed the limited Supreme Court precedent logically and consistently by operationalizing the *Tinker* decision; that is, courts have routinely applied the analysis espoused in *Tinker* to all manner of student-speech cases to create a practicable student-cyberspeech standard. Operationalizing the *Tinker* standard reconciles apparently disparate decisions such as *Doninger* and *Blue Mountain School District*; in fact, these decisions provide clear examples of this standard in practice. Part IV outlines the impact of the operationalized *Tinker* standard and analyzes its utility for both students and school administrators. In Part V, this Comment concludes that the overarching consistency of student-cyberspeech jurisprudence in the lower courts has rendered Supreme Court intervention unnecessary.

II. BACKGROUND

A. The First Amendment and Student Speech

The First Amendment of the United States Constitution, from which all rights to free expression are derived, provides that "Congress shall make no law . . . abridging the freedom of speech." The right to free speech is understood to be a fundamental right in the United States and receives strong constitutional protection; in general, content-based restriction of speech is subject to strict scrutiny review, while content-neutral restriction is subject to intermediate scrutiny review. However, the language of the First Amendment is extremely

22. See infra notes 28-78 and accompanying text.
23. See infra notes 79–109 and accompanying text.
24. See infra notes 110–93 and accompanying text.
25. See infra notes 194–240 and accompanying text.
26. See infra notes 241–53 and accompanying text.
27. See infra notes 254–64 and accompanying text.
29. See *Daniel A. Farber, The First Amendment* 20–37 (3d ed. 2010). A restriction of speech is content-based if it is enforced based on the substance of what is being said, and content-neutral if it broadly bans speech without regard for the specifics of what is being said. For example, if a speaker is restricted in the delivery of a particular message, but would not have been restricted in the delivery of a different message under exactly the same circumstances, the restriction is likely content-based. See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You" [as opposed to "Thank God for Dead Soldiers"],
broad; if interpreted literally, it would grant absolute and unrestricted freedom of speech. Aware of this fact, the Supreme Court has justified the restriction of certain categories of speech by recognizing that the inherent harm in these categories outweighs their social value.\textsuperscript{30} Such unprotected speech includes "true threats,"\textsuperscript{31} "fighting words,"\textsuperscript{32} obscene speech,\textsuperscript{33} and defamatory speech.\textsuperscript{34} As such, the right to free speech is not absolute and state actors, including schools, can prevent and punish some limited categories of speech.

Moreover, with regard to schools specifically, the Supreme Court has taken note of the "special characteristics of the school environment"\textsuperscript{35} and allowed schools to punish and limit student speech more extensively in light of that environment.\textsuperscript{36} The following quartet of cases delineates the Supreme Court's current understanding of schools' "special characteristics" and governs the issue of student free speech.

\textbf{B. Tinker: The Foundation of Student Free Speech Jurisprudence}

The Supreme Court laid the foundation for student free speech in 1969 when it famously stated in \textit{Tinker v. Des Moines Independent Community School District}, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\textsuperscript{37} In \textit{Tinker}, students wore black armbands to school in silent protest of American involvement in...
the Vietnam War. Concerned that the gesture would cause controversy, school administrators suspended the students until they removed the armbands.

The majority in Tinker recognized that the special characteristics of the school’s educational environment required delicate balancing. On the one hand, such an environment was “reason for scrupulous protection of constitutional freedoms of the [student], if we are not to strangle the free mind at its source.” The Court weighed this interest against “the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.” The Supreme Court held that the students’ suspension was a violation of their First Amendment rights, and reasoned that a student may express his opinions in school so long as doing so does not “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school” or collide with the rights of others.

However, the Court also unequivocally stated that a school may be able to justify the restriction of student speech if it can “show that its [disciplinary] action was caused by something more than a mere desire to avoid the discomfort . . . that always accompany[es] an unpopular viewpoint.” Thus, the Court left open the possibility that student speech could be regulated on facts that might reasonably lead school authorities to forecast substantial disruption, but specified that the forecast of disruption must be based on more than “undifferentiated fear or apprehension of disturbance.” Although the language of the opinion applied the “substantial disruption” test to in-school student speech, the Court implied that its decision could extend beyond the school campus.

38. Id. at 504.
39. Id. at 510.
40. See id. at 504.
41. See id. at 507.
42. Id.
43. Tinker, 393 U.S. at 507.
44. Id. at 514.
45. Id. at 513.
46. Id. at 509.
47. See id. at 514.
48. Id. at 508.
49. See Tinker, 393 U.S. at 513 (“[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”).
The other three Supreme Court cases that addressed student free speech can usefully be interpreted as limitations on, or exceptions to, the broad "substantial disruption" test set out in Tinker. The first of these, Bethel School District No. 403 v. Fraser, was decided in 1986. In Fraser, a high school student made a nomination speech that contained a sexually suggestive metaphor in front of an auditorium of 600 classmates. The next morning, the assistant principal notified the student that he had been removed from the list of possible commencement speakers and suspended for three days.

Again, the Court recognized the need to strike a balance, yet "re-affirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." The Court did not use the Tinker "substantial disruption" standard, but instead reasoned that public schools have a duty to "teach[ ] students the boundaries of socially appropriate behavior." The Court held that the school's punishment did not violate the student's First Amendment rights because schools have the authority to prevent the undermining of the school's basic educational mission by prohibiting lewd and vulgar speech. Notably, as in Tinker, the Court emphasized the in-school nature of the speech.

50. See Tova Wolking, School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights, 23 BERKELEY TECH. L.J. 1507, 1510-11 (2008) ("In Fraser . . . [the Court marked a new exception to Tinker . . . .]"); James M. Patrick, Comment, The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests, 79 U. Cin. L. Rev. 855, 860 (2010) ("In its decision in Bethel, the Supreme Court created an exception to the applicability of Tinker . . . .").


52. Id. at 677-78. The following are excerpts from the student’s speech: "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 . . . doesn't attack things in spurts—he drives hard, pushing and pushing . . . ."; "Jeff is a man who will go to the very end—even the climax, for each and every one of you." Id. at 687 (Brennan, J., concurring).

53. Id. at 678 (majority opinion).

54. See id. at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").

55. Id. at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).

56. See id. at 681.

57. Fraser, 478 U.S. at 685.

58. See id. ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself . . . .").
D. Kuhlmeier: An Exception for Speech Bearing the Imprimatur of the School

The Supreme Court next addressed the issue of student free speech just two years later in *Hazelwood School District v. Kuhlmeier*. In *Kuhlmeier*, a school withheld two student-written articles from publication in the school newspaper because the principal disapproved of their content. The Supreme Court first addressed the question of whether the school newspaper constituted a public forum. After concluding that the school newspaper was not a public forum, the Court held that school officials were entitled to regulate the contents of the school newspaper.

The Court distinguished *Tinker* and held that when the speech "might [be] reasonably perceive[d] to bear the imprimatur of the school," educators may exercise control over that speech "so long as their actions are reasonably related to legitimate pedagogical concerns." Like the majority in *Fraser*, the *Kuhlmeier* Court sought to protect the school’s ability to dissociate itself from certain manners and styles of student speech. The holding of *Kuhlmeier* is even narrower still than the holding of *Fraser—Kuhlmeier* explicitly applies


60. *Id.* at 263–64. One of the stories described three Hazelwood East students’ experiences with pregnancy, and the school worried that the anonymity of the subject students was not adequately protected. *Id.* at 263. The other story at issue discussed the impact of divorce on students at school and contained negative statements given by a student about her parents; the school worried that the parents did not have an opportunity to respond to the remarks. *Id.*

61. *Id.* at 267–70. Some of the most common examples of public forums include streets, parks, and sidewalks. *Id.* at 267; see also *Farber*, supra note 29, at 168. These locations are called "public forums" because the government "cannot close these facilities to speech activities, cannot discriminate between speakers based on content, and can exercise little discretion in determining whether to allow a particular expressive activity." *Farber*, supra note 29, at 168. School facilities, however, are only considered public forums in limited circumstances. See *Kuhlmeier*, 484 U.S. at 267 ("[S]chool facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’ or by some segment of the public, such as student organizations.” (citations omitted)).

62. Kuhlmeier, 484 U.S. at 270 (reasoning that the school showed no intent to open the pages of the school newspaper to "indiscriminate use," but "instead reserved the forum for its intended purpose, as a supervised learning experience for journalism students").

63. *Id.*

64. See *id.* at 270–71 (noting that while *Tinker* addressed the question of "whether the First Amendment requires a school to tolerate particular student speech," *Kuhlmeier* addressed the question of "whether the First Amendment requires a school affirmatively to promote particular student speech").

65. *Id.* at 271, 273.

66. *Id.* at 272 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use [or] irresponsible sex . . .").
only to school-sponsored speech while Fraser concerned in-school speech.67

E. Morse: An Exception for Speech Reasonably Thought to Promote Illegal Drug Use

The most recent chapter of Supreme Court jurisprudence on the issue of student free speech is Morse v. Frederick.68 The student in Morse unfurled a fourteen-foot banner at a school-sponsored outing across the street from his school that read, “BONG HiTS 4 JESUS.”69 The principal “immediately . . . demanded that the banner be taken down.”70 The student refused to comply with her request and subsequently received a ten-day suspension.71

The principal later explained that she thought the banner would be interpreted as promoting illegal drug use, and the Court agreed that the principal’s concern was legitimate.72 The Court reasoned that “[s]tudent speech celebrating illegal drug use at a school event . . . poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”73 Thus, the Court held that “[t]he ‘special characteristics of the school environment,’ and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”74

67. See id. at 273.
68. Morse v. Frederick, 551 U.S. 393 (2007). As stated previously, the Supreme Court chose not to issue any meaningful dicta with regard to student cyberspeech, only cursorily stating that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.” Id. at 401. It is also interesting to note the divisiveness of the Morse opinion: in addition to the majority, four members of the Court wrote opinions. Id. at 410 (Thomas, J., concurring); id. at 422 (Alito, J., concurring); id. at 425 (Breyer, J., concurring in part and dissenting in part); id. at 433 (Stevens, J., dissenting).
69. Id. at 397 (majority opinion). In effect, the student was “in school”—the event was a brief reprieve from class, during school hours, to watch the Olympic Torch Relay pass. See id. (“[P]rincipal [Morse] decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street.” (citation omitted)).
70. Id. at 398.
71. Id.
72. Id. at 401. The principal explained that “when she saw the sign, she thought that the reference to a ‘bong hit’ would be widely understood by high school students and others as referring to smoking marijuana.” Id. (internal quotation marks omitted). In its interpretation, the Court reasoned that the words of the banner could be taken as an imperative, i.e. “[Take] bong hits” or, alternatively, as a celebration of drug use; either interpretation, however, supported the principal’s reaction to the banner. Id. at 402.
73. Id. at 408. “The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.” Id. at 410.
While this holding continued the Supreme Court's trend of "adding to the patchwork of exceptions to the Tinker standard," the Court also sought to clarify Fraser. The Court noted that "[t]he mode of analysis employed in Fraser [was] not entirely clear," but distilled two principles from that case: (1) "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings" and (2) "the mode of analysis set forth in Tinker is not absolute."

Based on a comprehensive reading of these cases, the most efficient and reasonable approach to student speech is to first examine whether the speech in question falls into any of the exceptions outlined by Fraser, Kuhlmeier, and Morse; if it does, then it can clearly be regulated. However, when, as is the case with the majority of student speech, an expression does not neatly fit into one of these categories, courts must turn to the more general doctrine espoused in Tinker. The purpose of the analysis, then, is to demonstrate the consistency with which courts have applied Tinker to student cyberspeech.

III. Analy  

This Part examines the limits and implications of Supreme Court jurisprudence, as well as the lower courts' off-campus student-speech jurisprudence in light of these implications, to determine the relevance of the foregoing decisions to student cyberspeech. It then proposes that the reaction of the lower courts to the Supreme Court precedent has created a practicable standard for the regulation of student cyberspeech, referred to throughout this Comment as the "operationalized Tinker standard," namely that a student may express his opinion so long as doing so does not materially and substantially intrude upon the work of the school. The analysis concludes with a detailed distinction between Doninger and Blue Mountain to illustrate and solidify the principles of this standard.

A. The Limits and Implications of the Supreme Court Student-Speech Jurisprudence for Student Cyberspeech

Upon careful evaluation of the Supreme Court student-speech precedent, two limits for student cyberspeech become immediately clear: (1) the Court has not ruled on student speech that originates off cam-

75. Id. at 422 (Thomas, J., concurring).
76. See id. at 404–05 (majority opinion).
77. Id.
78. See supra notes 50–74 and accompanying text.
pus and (2) Tinker is the Court's only student-speech decision that can be reasonably applied to most student-cyberspeech cases.

First, while the Supreme Court’s approach to the regulation of student speech that occurs in school is clear, the Court has never directly addressed the regulation of off-campus student speech.79 This appears to be a major hurdle in considering cyberspeech cases because the cyberspeech being punished by schools is primarily created off campus.80 Still, though limited, the Supreme Court’s precedent provides the principal guidance for lower courts in student-speech cases. As a result, while this precedent does not directly address off-campus student speech, lower courts are essentially bound to extrapolate it as sensibly and consistently as possible.

The second important limitation on the Supreme Court’s student-speech precedent results from the particular methodology of the Court: it created a general rule in Tinker and subsequently carved out exceptions from this rule.81 The general rule is that only student speech that is likely to cause a substantial disruption may be regulated.82 The exceptions to the general rule are the following: lewd or obscene speech,83 speech bearing the imprimatur of the school,84 and speech promoting illegal drug use.85 Most student cyberspeech is unlikely to fall under any of these narrow exceptions. First, in Fraser, the Court’s determination that the students in the auditorium were a “captive audience” was critical to its reasoning in upholding the student’s punishment for lewd speech.86 Yet, an Internet audience is unlikely to be “captive” in the sense described by the Court.87 Further, while a student could create cyberspeech that bore the imprimatur of the school and theoretically fall under the Kuhlmeier exception, the likelihood that such cyberspeech would reasonably be thought to be school sponsored is low given the outrageous nature of most student

---

79. See generally supra notes 37–74 and accompanying text.
80. See generally infra Part III.C.1.
81. See supra note 50 and accompanying text; see also Morse, 551 U.S. at 417 (Thomas, J., concurring) (“[T]he Court has . . . set the [Tinker] standard aside on an ad hoc basis”).
82. See supra notes 45–49 and accompanying text.
83. See supra notes 50–58 and accompanying text.
84. See supra notes 59–67 and accompanying text.
85. See supra notes 68–74 and accompanying text.
87. See id. at 684–85. “[The Court’s First Amendment jurisprudence] recognize[s] the obvious concern . . . to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.” Id. at 684. “A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” Id. at 685 (emphasis added).
Student cyberspeech reasonably thought to promote illegal drug use might be punishable under *Morse*, but this decision, like *Fraser* and *Kuhlmeier*, is narrowly applicable. Thus, *Tinker* is seemingly the only precedent that can be logically applied to the majority of student cyberspeech, even if it does not expressly apply to off-campus speech.

Making note of these limits, it is possible to outline the implications of the Supreme Court jurisprudence for student cyberspeech. There is an underlying concern present in all four of the Court’s decisions that structures the analysis of the relationship between schools and their students, namely, the need to strike a balance between student free speech and school authority. That students have a right to free speech is not in question, but as *Morse* recently affirmed, “the nature of [that right] is what is appropriate for children in school.”

Therefore, the Supreme Court’s student-speech decisions are necessarily framed by the “special characteristics of the school environment.” In *Tinker*, the special characteristic was identified as the need of schools “to prescribe and control conduct.” In *Fraser*, it was the need of schools to “teach by example the shared values of a civilized social order.” In *Kuhlmeier*, it was the need of a school to regulate its curriculum, even outside of the traditional classroom setting. Finally, the Court reasoned in *Morse* that schools have a “particular concern to prevent student drug abuse.”

In each case, the special characteristic identified by the Court was instrumental to its holding. As such, finding a common thread among these “special characteristics” should help bring the implications of these decisions into sharper focus. The key is that each of these special characteristics can properly be described as part of the fundamental work of schools; it could hardly be disputed that main-

---

88. See, e.g., supra note 2 (citing cases in which students used cyberspeech to insult and threaten school teachers and administrators).
90. The Supreme Court decisions following *Tinker* have all expressly affirmed that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Fraser*, 478 U.S. at 680; *Morse v. Frederick*, 551 U.S. 393, 403 (2007).
93. *Id.* at 507.
94. *Fraser*, 478 U.S. at 683.
95. See *Kuhlmeier*, 484 U.S. at 270–71.
96. *Morse*, 551 U.S. at 408.
97. See supra Part II.
taining discipline,98 imparting certain habits of civility,99 properly instructing students,100 and looking after the safety of students101 fall within the purview of schools. Moreover, the Supreme Court has declared that the substantial disruption rule of Tinker is "not the only basis for restricting student speech."102 Reading this assertion in conjunction with the analysis of the various special characteristics of the school environment, the more operative inquiry under a Tinker analysis is whether the student speech intrudes upon the work of the school.103 Accordingly, this Comment distills the Supreme Court precedent into a general standard by making a slight adjustment to the Tinker substantial disruption rule—a student may express his opinions so long as doing so does not materially and substantially intrude upon the work of the school.104 With this newly developed standard—the "operationalized Tinker standard"—in mind, it is easier to understand how the Court's student-speech precedent can be applied to student cyberspeech.105

In sum, three important concepts are drawn from this analysis of the Supreme Court precedent: (1) in the absence of more direct guidance from the Supreme Court, lower courts are forced to make inferences as to the meaning of the existing student-speech cases regarding off-campus student speech;106 (2) the exceptions carved out from

98. See Tinker, 393 U.S. at 513.
99. See Fraser, 478 U.S. at 681; see also Plyler v. Doe, 457 U.S. 205, 221 (1982) ("We have recognized the public schools as... the primary vehicle for transmitting the values on which our society rests." (citations omitted) (internal quotation marks omitted)).
100. See Kuhlmeier, 484 U.S. at 273.
101. See Morse, 551 U.S. at 408.
102. Id. at 406.
103. Cf. Tinker, 393 U.S. at 508 ("There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work .... Accordingly, this case does not concern speech or action that intrudes upon the work of the schools ....").
104. Note the difference between this standard and the rule originally asserted by the Court in Tinker, which found that a student may express even controversial opinions on school campus as long as "he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school.'" Id. at 512–13 (alteration in original) (emphasis added).
105. At this point, a few remarks about the coining of the phrase "operationalized Tinker standard" are in order. By its use of the term "operationalized," this Comment means to suggest that the reasoning of the original Tinker decision has been (and should be) put to use more extensively than what may have been contemplated by the Court in 1969. To understand and further effect this broader operation, this new standard modifies Tinker's original language in an attempt to bring all four of the Supreme Court student-speech decisions within its scope. In this way, it is less particularized than the Court's individual student-speech holdings, see supra notes 34–103 and accompanying text, and, also, more readily removed from considerations of the in-school/out-of-school origin of the speech, see infra notes 140–154 and accompanying text.
106. See supra notes 79–80 and accompanying text.
Tinker are, for the most part, unsuitable for student cyberspeech; and (3) the fundamental concern of the Court in reaching a balance between student rights and school rights is whether student speech interferes with the work of the school. This empirical analysis of the Supreme Court precedent, then, points to the operationalized Tinker standard as the most appropriate standard for the emerging genre of student cyberspeech.

B. Lower Courts’ Treatment of Off-Campus, Non-Cyber Student Speech

Lower courts have been required to address off-campus student speech since before the advent of the Internet. As such, an understanding of the principles applied by circuit courts to off-campus student speech in non-Internet cases affords perspective for courts’ later treatment of student cyberspeech.

1. Thomas v. Board of Education

In Thomas, a group of students created a satirical newspaper emulating National Lampoon, but took great effort to sever the connection between the newspaper and the school. When the newspaper’s existence was revealed to the school administrators, they imposed five-day suspensions on the students.

The Second Circuit explained that this case arose “in a factual context distinct from that envisioned in Tinker and its progeny” because “all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate.” Moreover, the court found that the school officials had ventured “into the general community where the freedom accorded expression is at its zenith.” Accordingly, the Second Circuit held that the punishments imposed in this case could not withstand a First Amendment

107. See supra notes 81–88 and accompanying text.
108. See supra notes 89–105 and accompanying text.
109. See supra notes 79–105 and accompanying text.
110. Cf. supra notes 37–77 and accompanying text.
112. Id. at 1045. The students included on the cover of the newspaper a disclaimer of responsibility for copies found on school property, produced the copies by means of a local business, and only sold the newspaper at a local store. Id. Looking at the facts in this light, the court found that the students “diligently labored to ensure . . . that no copies [of the newspaper] were sold on school grounds.” Id. at 1050.
113. Id. at 1046.
114. Id. at 1050.
115. Id.
chall enge. Nonetheless, the court significantly conceded that it could "envision a case in which a group of students incites substantial disruption within the school from some remote locale." 117

2. Boucher v. School Board of the School District of Greenfield 118

Boucher is another case in which an underground student newspaper sparked controversy. 119 The student in Boucher published an article in an unofficial student publication that purported to contain instructions for hacking the school’s computers, and then distributed it on campus. 120 When school district officials determined who had written the article, they initially suspended and eventually expelled the student for one year. 121 The student filed a complaint alleging infringement of his First Amendment rights “accompanied by a motion for preliminary injunction against the [school’s] enforcement of the expulsion order”; the district court granted the injunction. 122 The Seventh Circuit later vacated the injunction, finding that the district court improperly failed to credit the harm the injunction imposed on the school board. 123

Nevertheless, the Seventh Circuit addressed the First Amendment claims by way of dicta. In so doing, the court left open the possibility of applying the Tinker standard to the First Amendment claims even though the newspaper originated off campus. 124 The court further suggested that the school board would likely prevail on the merits of the First Amendment claim because evidence of past disruption 125 supported an inference of future disruption. 126

116. Id. “We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property.” Id. at 1051.
117. Thomas, 607 F.2d at 1052 n.17.
119. Id. at 822.
120. Id. The article described, among other things, how to enter the computer’s setup utility, how to view all students’ and teachers’ login names, the procedure for accessing .com or .exe files, and tips for circumventing password protection. Id.
121. Id. at 823.
122. Id.
123. Id. at 826–27, 829 (“While the district court’s statement that a year’s expulsion is extreme is understandable, we cannot accept the conclusion that the harm the injunction imposes on the Board is insignificant. . . . The utter defeat of the Board’s disciplinary efforts when confronted by a self-proclaimed ‘hacker’ is clearly a substantial harm.”).
124. See Boucher, 134 F.3d at 827 (“The Court has indicated that in the case of student expression, the relevant test is whether school authorities ‘have reason to believe’ that the expression will be disruptive.”).
125. See id. (noting that the school had to change all of its passwords and call in computer experts to conduct four hours of diagnostic checks on the computer system).
126. Id.
3. LaVine v. Blaine School District\textsuperscript{127}

Like the Second and Seventh Circuits, the Ninth Circuit also ruled
on an early case that addressed the issue of non-cyber student speech
originating off campus in \textit{LaVine}.\textsuperscript{128} The student in \textit{LaVine}, while off
campus, wrote a poem unrelated to schoolwork that contained graphic
and violent sentiments about killing his classmates and himself.\textsuperscript{129} He
later brought the poem to school and gave it to one of his teachers to
review.\textsuperscript{130} Disturbed by the poem’s contents, the teacher showed it to
the counselor and the principal; after an investigation, the student was
expelled.\textsuperscript{131}

The Ninth Circuit applied \textit{Tinker} without any regard for the fact
that the poem was drafted outside of school and independent of
school activities.\textsuperscript{132} Because the facts revealed a likelihood of instability on the part of the student,\textsuperscript{133} several school shootings that had recently
occurred on other campuses,\textsuperscript{134} and the disturbing content of
the poem itself,\textsuperscript{135} the circuit court found that it was reasonable for
school officials to predict substantial disruption and possible
violence.\textsuperscript{136}

Reviewing these three decisions, it would appear that the possibility
of using \textit{Tinker} to regulate off-campus student speech was recognized
by the lower courts as early as 1979.\textsuperscript{137} Furthermore, \textit{Tinker} was ap-

\begin{itemize}
\item \textsuperscript{127} LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001).
\item \textsuperscript{128} See \textit{id.} at 983–84.
\item \textsuperscript{129} The following is an excerpt from the student’s poem:
\begin{quote}
[N]ow I know, what I must do.
I pulled my gun, from its case, and began to load it.
I remember, thinking at least I won’t, go alone . . .
As I walked, through the, now empty halls, I could feel my hart [sic] pounding.
As I approached, the classroom door, I drew my gun and, threw open the door, BANG,
BANG, BANG-BANG.
When it was all over, 28 were, dead . . . .
\end{quote}
\textit{Id.} at 984, 986.
\item \textsuperscript{130} \textit{id.} at 984, 989.
\item \textsuperscript{131} \textit{Id.} at 984–86.
\item \textsuperscript{132} See \textit{id.} at 989. The court, following its decision in another case, “discerned three distinct
areas of student speech, each of which is governed by a different Supreme Court precedent: (1)
vulgar, lewd, obscene and plainly offensive speech is governed by \textit{Fraser}; (2) school-sponsored
speech is governed by \textit{Hazelwood}; and (3) speech that falls into neither of these categories is
governed by \textit{Tinker}.” \textit{Id.} at 988–89.
\item \textsuperscript{133} The student had discussed suicidal tendencies with the school psychologist, had been
involved in a domestic dispute at home that caused him to leave his house, had been accused of
stalking his ex-girlfriend, and had at least one act of violence on his school record. \textit{LaVine}, 257
F.3d at 984, 989–90.
\item \textsuperscript{134} \textit{Id.} at 987.
\item \textsuperscript{135} \textit{id.} at 984–84, 990.
\item \textsuperscript{136} \textit{Id.} at 990.
\item \textsuperscript{137} See Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979).
\end{itemize}
plied by way of dicta to an off-campus-created student newspaper in 1998, 138 and explicitly to an off-campus-created poem in 2001. 139 Thus, these three circuit court cases demonstrate a shift toward the operationalized Tinker standard and provide an instructive transition into the lower courts’ student-cyberspeech jurisprudence.

C. Lower Courts’ Treatment of Off-Campus Student Cyberspeech

1. Operationalizing Tinker

One of the primary concerns among commentators with the regulation of student cyberspeech is the fact that most cyberspeech is created off campus, where freedom of expression is least restrained. 140 The main argument is that, in addressing student-cyberspeech issues, courts must determine whether the school has jurisdiction over the speech in the first place because the Supreme Court has never explicitly granted schools jurisdiction over off-campus speech. 141 The lower courts, however, do not seem to share this concern. To start, the circuit court decisions in Thomas, Boucher, and LaVine illustrate the willingness of courts to apply the substantive Tinker standard in cases in which traditional, non-electronic student speech originated off campus. 142 Whether the student speech was brought to or distributed on campus is an important consideration: when the speech reached school grounds, the courts were more likely to find that punishment of the student was proper. 143 Moreover, because the Tinker standard has been applied to traditional forms of off-campus speech such as student newspapers, a format necessarily limited by its medium, it does not seem an unwarranted stretch to apply Tinker to student cyberspeech, for such speech is instantaneous and nearly limitless in scope. 144 Stu-

---

139. LaVine, 257 F.3d at 988–89.
140. See Calvert, supra note 10, at 212–13; see also Tomain, supra note 14, at 100; supra Part III.A.
141. See Calvert, supra note 10, at 210–12 ("Morse . . . did nothing to resolve a much more pervasive and pernicious First Amendment problem cropping up at schools across the country that the High Court has never considered. That issue is whether, consistent with the constitutional guarantee of free expression, public school officials may permissibly punish students for speech that defames, disparages or threatens teachers, administrators and students when that speech is created [off campus], during non-school hours and posted on the [I]nternet.").
142. See supra notes 111–39 and accompanying text.
143. Compare Thomas, 607 F.2d at 1050 (student not punished for newspaper distributed off campus), with Boucher, 134 F.3d at 822–23 (student punished for newspaper distributed on campus).
144. Compare Thomas, 607 F.2d at 1050 ("[A]ppellants diligently labored to ensure that [their newspaper] was printed outside the school, and that no copies were sold on school grounds.").
dent cyberspeech, by its nature, blurs the line between what occurs at home and what occurs at school, and lower courts have recognized this by applying *Tinker* from the earliest student-cyberspeech case through the most recent.\textsuperscript{145} Indeed, many courts have explicitly recognized that the weight of authority gives little consideration to the geographic origin of student speech.\textsuperscript{146}

Nevertheless, some circuits have formally adhered to a geographic jurisdictional inquiry. In other words, these circuits base the propriety of a school's jurisdiction over student speech, at least in part, on whether or not the speech was created on the school's campus. The Second Circuit has maintained in student-cyberspeech cases that the speech can only be regulated when it is "foreseeable that the off-campus expression might also reach campus."\textsuperscript{147} The Fourth Circuit recently alluded to a threshold geographic inquiry as well, noting that "[t]here is surely a limit to the scope of a high school's interest . . . when the speech at issue originates outside the schoolhouse gate."\textsuperscript{148}

Still, both of these courts found that the school in question had properly asserted jurisdiction over the online, off-campus student speech\textsuperscript{149} and proceeded to apply the *Tinker* standard.\textsuperscript{150} The apparent willingness of these courts to apply *Tinker* to student cyberspeech demonstrates that their geographical inquiries are, at best, tenuous. The Second Circuit has formulated such an expansive test that it is "easy . . . for schools to gain jurisdictional authority over off-campus-

---

\textsuperscript{145} See Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) ("Disliking or being upset by the content of a student's [website] is not an acceptable justification for limiting student speech under *Tinker*."); T.V. v. Smith–Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 782 (N.D. Ind. 2011) ("[T]he First Amendment standard to be applied [is] whether . . . [the principal] reasonably found that the pictures posted on the [I]nternet had disrupted, or would materially and substantially disrupt, the work and discipline of the school.").

\textsuperscript{146} E.g., Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) ("The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."); J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010) ("In sum, the substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis.").

\textsuperscript{147} Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) ("We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct would foreseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus." (emphasis added) (internal quotation marks omitted)); see also Wisniewski v. Bd. of Educ., 494 F.3d at 34, 39–40 (2d Cir. 2007).

\textsuperscript{148} *Kowalski*, 652 F.3d at 573.

\textsuperscript{149} See id. at 574; *Doninger*, 527 F.3d at 50.

\textsuperscript{150} See *Kowalski*, 652 F.3d at 572–73; *Doninger*, 527 F.3d at 51–52.
created Internet expression."151 The Fourth Circuit’s test is similarly ineffectual (at least as it currently stands) as a limit on school jurisdiction because it left the scope of the limitation entirely undefined.152 Therefore, even in circuits that purport to give weight to the geographic origin of student speech, this inquiry is hardly a bar to schools’ jurisdiction over off-campus speech.

Consequently, some lower courts have regularly blended the threshold geographic question regarding when schools can assert jurisdiction into the substantive rule of Tinker for determining the appropriate bounds of the censorship itself. Other courts seem to simply ignore the geographic question altogether: one district court has stated in regard to student cyberspeech that “[w]here the foreseeable risk of a substantial disruption is established, discipline for such speech is permissible.”153 This treatment of the geographic inquiry thus makes the application of Tinker dispositive—the main focus of the courts is the effect of the speech rather than the origin of the speech.

Operationalizing Tinker in this way offers two major advantages to courts facing student-cyberspeech issues. First, the approach simplifies the courts’ inquiry. Particularly, by focusing on the effect of the speech on the school, this approach conserves judicial time by eliminating the necessity for a separate geographical inquiry, an inquiry that is generally so expansive as to be inadequate as a constraint on schools’ censorship.154 Second, the operationalized Tinker standard offers courts the flexibility to parse the facts unimpeded by competing considerations. Such flexibility is beneficial because the issue of student cyberspeech is extremely fact intensive.155 Though such a high degree of flexibility leaves open the possibility of disparate rulings or excessive deference to school decisions, the lower courts as a whole have applied the operationalized Tinker standard reasonably and consistently, even without necessarily realizing this to be the case.156 In

151. Calvert, supra note 10, at 235. Calvert noted “three reasons why it is reasonably foreseeable that nearly any and all controversial or provocative speech that is created and posted [online] off-campus by a student will come to the attention of school authorities:” (1) tattletale students; (2) curious teachers/administrators; and (3) in-school buzz/discussion. Id. at 235–36.

152. See Kowalski, 652 F.3d at 573 (“There is surely a limit to the scope of a high school’s interest . . . 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 school’s] pedagogical interests was sufficiently strong to justify the action taken by school officials . . . .”).


154. See generally supra notes 147–52 and accompanying text.

155. See infra Part III.C.2.

156. See infra Part III.C.2.
so doing, the courts have outlined many of the limits and boundaries of student cyberspeech.\textsuperscript{157}

2. A Standard Based on the Operationalized Tinker Test

As argued above, the Supreme Court's primary concern in student-speech cases is the effect of such speech on the work of schools.\textsuperscript{158} Recognizing this concern, the majority of courts have operationalized \textit{Tinker} by blending the questions of jurisdiction and censorship under the "substantial disruption" test;\textsuperscript{159} even those courts that have tried to keep the questions separate have implicitly operationalized \textit{Tinker}.\textsuperscript{160} In light of this analysis, the next logical step is the investigation of the operationalized \textit{Tinker} test's boundaries. In other words, the analysis must determine how this test has been applied among the lower courts and consider the coherence of the standard it creates.

While the foregoing study of student-speech jurisprudence illustrates that the inquiry is extremely fact intensive, certain general facts emerge as particularly important. This Subpart of the analysis identifies these facts in the context of the decisions in which they arose and measures them against the overarching student-speech standard of the Supreme Court described above, that is, a student may express his opinions so long as doing so does not materially and substantially intrude upon the work of the school.\textsuperscript{161} In this way, this Subpart seeks to synthesize all of the foregoing discussion and reach a conclusion as to the efficacy of the student-cyberspeech standard that is developing in the lower courts.\textsuperscript{162}

a. Foreseeable Disruption or Undifferentiated Fear?

Fundamentally, the \textit{Tinker} standard is based on substantial disruption, so in evaluating student speech under this standard, courts must be certain that the action of school authorities is based on something more than undifferentiated fear or apprehension of disturbance.\textsuperscript{163} If the action has an insufficient basis, then it violates students' First

\begin{flushleft}
158. \textit{See supra} notes 97–104 and accompanying text.
159. \textit{See supra} notes 140–46 and accompanying text.
160. \textit{See supra} notes 147–52 and accompanying text.
161. \textit{See supra} notes 97–105 and accompanying text.
162. It should be noted here that this Comment does not address the growing concern of cyberbullying. For a thorough analysis of this important issue, see Chris Burrichter, Comment, \textit{Cyberbullying 2.0: A "Schoolhouse Problem" Grows Up}, 60 \textit{DEPAUL L. REV.} 141 (2010).
163. \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); \textit{see also supra} notes 46–49 and accompanying text.
\end{flushleft}
Amendment rights. In *Beussink v. Woodland R-IV School District*, for example, a student created a website from home criticizing the school administration. When a classmate found out about the website, she showed a teacher who in turn showed the principal. The principal testified that he was upset when he made the decision to discipline the student “immediately upon viewing the homepage,” and that his decision was made “before he knew whether any other students had seen or even had knowledge of the homepage.” As such, the principal’s imposition of a ten-day suspension violated the student’s First Amendment right because the punishment was based on an emotional reaction to the speech, rather than any foreseeable risk of disruption.

Similarly, in *Evans v. Bayer*, a student created a social networking group and posted the following: “Ms. Sarah Phelps is the worst teacher I’ve ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred.” The posting was only up for two days and came to the attention of the principal only after its removal. Even so, the principal suspended the student for three days, based on “serious consequences for the potentially defamatory content.” Like in *Beussink*, the court found in favor of the student, ruling that the complaint did not contain a well-founded expectation of disruption.

On the one hand, these cases simply reiterate the substantial disruption standard: without the reasonable forecast of substantial disruption, no intrusion on the work of schools can occur. Yet, on the other hand, they show that the motives behind the punishment handed out by school officials can play a role in the substantial disruption test. Decisions to regulate student speech made by administrators in the

---

164. *Tinker*, 393 U.S. at 509 (“[T]o justify prohibition of a particular expression of opinion, [school officials] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”).


166. *Id.* at 1177–78.

167. *Id.* at 1178.

168. *See id.* at 1180 (“Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.”).


170. *Id.*

171. *Id.*

172. *See id.* at 1373.

173. *Id.* (“[I]f school administrators were able to restrict speech based upon a concern for the potential of defamation, as Bayer claims, students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom.”).
heat of the moment, as in Beussink, or based on an undifferentiated fear, as in Bayer, are unconstitutional.

b. Students' In-School Discussion of the Speech at Issue is Insufficient to Create a Substantial Disruption

Beginning with Tinker, the Supreme Court emphasized that students merely engaging in controversial speech is insufficient to create a substantial disruption. The evidence in Tinker showed that several non-protesting students made hostile comments and issued warnings to the protesting students. Still, the court found that there was no substantial disruption when students “caused discussion outside of the classrooms, but no interference with work and no disorder.” The courts have reaffirmed this principle in the Internet era in cases such as Layshock v. Hermitage School District. In that case, a student created an online profile of his principal containing vulgar and offensive language. Even though “word of the profile ‘spread like wildfire’ and . . . reached most, if not all, of [the high school’s] student body,” the court found that it did not cause a substantial disruption.

Again, these decisions are clearly consistent with the Supreme Court precedent because it is highly unlikely that, by itself, discussion among students would ever intrude upon the work of schools. Indeed, the Tinker Court stated that communication between students is one of the principal activities to which schools are dedicated.

c. Speech that Causes School Administrators to Be Diverted from Their Tasks Can Be Sufficient Evidence of Disruption of School Activities

When teachers or school administrators are forced to leave their ordinary tasks to mitigate the effects of student speech, the speech has likely caused a substantial disruption of school activities. One example of this kind of speech was discussed in Boucher, illustrated above, in which a student distributed an underground newspaper containing

175. Id. at 517 (Black, J., dissenting).
176. Id. at 514 (majority opinion).
178. Id. at 207-08.
179. Id. at 208.
180. Id. at 219.
181. Tinker, 393 U.S. at 512.
instructions for hacking into the school's computers.\textsuperscript{182} As a result of the newspaper's distribution, the school was required to call technology experts to perform hours of diagnostic checks on school computers.\textsuperscript{183} Moreover, the school had to change all of the passwords mentioned in the article.\textsuperscript{184} The court reasoned that the effort expended by the school to mitigate the harmful effects of the article weighed in favor of finding a risk of substantial disruption.\textsuperscript{185}

Similarly, in \textit{Doninger}, a student's blog posting, which urged students to contact the school about a cancelled school event, resulted in an inundation of calls and emails related to the event.\textsuperscript{186} As such, some school officials were late to or absent from school-related activities.\textsuperscript{187} This led the court to conclude that the student's blog posting posed a risk of substantial disruption in school operations.\textsuperscript{188}

Clearly, one of the most significant aspects of a school's operation is the education of students. Finding that an activity that diverts school administrators from their ordinary tasks constitutes a substantial disruption represents an express recognition by the courts that the efficient administration of education is accomplished in large part through the cooperation and scheduling of school officials and teachers. Thus, this guideline for addressing student cyberspeech is clearly in line with the Supreme Court precedent outlined above.\textsuperscript{189} Further, it is sound policy for courts to disallow student speech that distracts administrators "from their core educational responsibilities by the need to dissipate misguided anger"\textsuperscript{190} or mitigate the technological harm caused by a student article.\textsuperscript{191} Moreover, the lower courts appear to have focused on the speech's effect on the work of the schools rather than its effect on the discipline of the schools,\textsuperscript{192} in line with the operationalized \textit{Tinker} standard described above.\textsuperscript{193}

\begin{itemize}
  \item \textsuperscript{182} See \textit{Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield}, 134 F.3d 821, 822-23 (7th Cir. 1998).
  \item \textsuperscript{183} \textit{Id.} at 827.
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} \textit{Id.} ("This is, at a minimum, \textit{some} evidence of past disruption, which would support an inference of potential future disruption—especially in light of the article's promise to 'teach you more.'").
  \item \textsuperscript{186} See \textit{Doninger v. Niehoff}, 527 F.3d 41, 51 (2d Cir. 2008).
  \item \textsuperscript{187} \textit{Id.}
  \item \textsuperscript{188} \textit{See id.}
  \item \textsuperscript{189} \textit{See generally supra} Part III.B.-D.
  \item \textsuperscript{190} \textit{Doninger}, 527 F.3d at 51.
  \item \textsuperscript{191} See \textit{Boucher v. Sch. Bd. of Sch. Dist. of Greenfield}, 134 F.3d 821, 827 (7th Cir. 1998).
  \item \textsuperscript{192} \textit{See supra} notes 158-88 and accompanying text.
  \item \textsuperscript{193} \textit{See supra} notes 104-05 and accompanying text.
\end{itemize}
The foregoing analysis considered case law from the top down, beginning with Supreme Court jurisprudence and ending with the specific decisions of the district courts, in an attempt to articulate the current judicial landscape of student cyberspeech. It suggested that to effectively address student cyberspeech, lower courts have had to operationalize the Tinker test, which has allowed them broad authority over off-campus student speech, particularly cyberspeech. However, the majority of courts have employed this authority moderately, and thus have created a practicable standard that is true to the spirit, if not the letter, of the Supreme Court student-speech jurisprudence.

This final Subpart of the analysis revisits the circuit court decisions of Doninger v. Niehoff and J.S. v. Blue Mountain School District with the operationalized Tinker standard in mind. As discussed above, the apparently disparate approaches taken by the Second and Third Circuits in these cases has caused some unease among commentators. The concern around Doninger, in particular, is even more marked as many believe that the holding of that case allowed an unconstitutional infringement upon a student’s First Amendment rights. As such, the purpose of this Subpart is twofold: (1) to reconcile Doninger and Blue Mountain in light of the operationalized Tinker standard and (2) to provide a conclusion of the analysis by detailing the practical application of the operationalized Tinker standard.

1. The Details of Doninger

Avery Doninger, a student who was an active member of the student government at her school, was in charge of organizing an annual battle of the bands. After the event was postponed twice, she and other students wrote a mass email to the local community urging its constituents to contact the school and protest the cancellation of the
The direct (and desired) result of this email was a deluge of phone calls and emails to the school, which caused the principal to be called back from a scheduled in-service day. The principal then had a conversation with Doninger and asked her to send out a corrective email, which she agreed to.

That night, however, instead of sending a corrective email, Doninger wrote a blog from home that reproduced her initial email, addressed the administration as “douchebags,” and further urged fellow students to contact the school to “piss [them] off more.” The day after the blog posting, calls continued to pour into the school, administrators were called from their duties, and a group of upset students gathered outside of the principal’s office. When the principal found out about the blog, she barred Doninger from running for senior class secretary.

The Second Circuit affirmed the district court’s denial of Doninger’s request for a preliminary injunction, holding that she had failed to demonstrate a sufficient likelihood of success on her First Amendment claim. After employing the threshold geographical inquiry—described and argued against above—to gain jurisdiction, the court cited three reasons that justified the principal’s punishment of Doninger. First, the blog “was not only plainly offensive but also potentially disruptive of efforts to solve the ongoing controversy.” Second, the blog contained “‘at best misleading, and at worst false’ information,” which made it “foreseeable . . . that school operations might well be disrupted further by the need to correct misinformation.” Finally, the discipline at issue “related to Avery’s extracurricular role as a student government leader.”

201. See id. Whether the event had in fact been cancelled was a disputed fact, but the district court credited the principal’s testimony denying that she ever told Avery the event would not be held. Id. at 44–45.
202. Id. at 44.
203. Id. at 45.
204. Id.
205. Id. at 45–46.
206. Doninger, 527 F.3d at 46.
207. Id. at 53.
208. See supra notes 147–52 and accompanying text.
209. Doninger, 527 F.3d at 50–51.
210. Id. at 51 (alteration in original).
211. Id. at 52.
2. The Details of Blue Mountain

J.S. was an honor roll student who created a fake profile of her principal on MySpace.\textsuperscript{212} The profile contained the principal’s picture from the school district’s website, but “did not identify [him] by name, school, or location.”\textsuperscript{213} “The profile further contained crude content and vulgar language,” and leveled personal attacks at the principal.\textsuperscript{214} Upon seeing the website, the principal suspended J.S. for ten days.\textsuperscript{215}

The Third Circuit found that the school violated J.S.’s First Amendment rights when it punished her for creating the profile.\textsuperscript{216} The court reasoned that \textit{Tinker} set the general rule for regulating school speech, and that a forecast of substantial disruption was unreasonable in this case.\textsuperscript{217} The court further reasoned that \textit{Fraser}’s lewdness standard did not apply because the speech originated off campus, and the \textit{Fraser} standard is explicitly limited to on-campus speech.\textsuperscript{218}

3. Using the Operationalized \textit{Tinker} Test to Distinguish Doninger from Blue Mountain

Again, the operationalized \textit{Tinker} test holds that a student may express his opinions so long as doing so does not materially and substantially intrude upon the work of the school.\textsuperscript{219} This includes both actual intrusion and the reasonable forecast of such an intrusion,\textsuperscript{220} and courts have distilled certain particularly relevant facts that are instructive in the application of this test.\textsuperscript{221}

Examining the facts and reasoning of \textit{Doninger} and \textit{Blue Mountain} in conjunction with this analysis, the two cases are plainly distinguishable and properly decided under the operationalized \textit{Tinker} standard. It must first be noted that neither of these cases falls under any of the established exceptions to \textit{Tinker}.\textsuperscript{222} This leads to application of the operationalized \textit{Tinker} standard, under which a court must determine
at the outset whether the student's punishment was based merely on undifferentiated fear or apprehension of disturbance, or whether there was something more. Then, if the punishment resulted from something more than apprehension, the inquiry is narrowed to two questions: (1) whether students discussed the contentious speech in school and (2) whether school administrators were diverted from their school-related responsibilities. This Comment previously concluded that mere discussion among students of the speech at issue at the school does not normally rise to the level of substantial disruption. Therefore, the dispositive question regarding substantial disruption in these cases is whether school administrators were pulled from their tasks, which leads to the same conclusions drawn by the courts.

To fully illustrate, in Blue Mountain, there is some evidence that the emotions of the principal, about whom the profile was created, were running high. However, unlike in Beussink, the principal in Blue Mountain attempted to make a legitimate claim that the student's action constituted a substantial disruption. The punishment enforced by the principal in Doninger was clearly based on more than undifferentiated fear or apprehension of disturbance, as the evidence in that case showed that the school administrators were inundated with emails and phone calls about the student blog and purportedly cancelled event. Furthermore, neither of these cases presented facts showing speech that is threatening or violent toward members of the schools, which could also lead to a fear of disruption.

Accordingly, the other operative facts of the student-cyberspeech inquiry must provide guidance for analyzing these cases. In Blue Mountain, the court did not find that the principal was diverted from his tasks; in fact, the court found that "any suggestion that, absent [the principal's] actions, a substantial disruption would have occurred, is

223. See Tinker, 393 U.S. at 508; see also supra notes 163–64 and accompanying text.
224. See supra notes 174–81 and accompanying text.
225. See Blue Mountain, 650 F.3d at 922. "[The principal] told J.S. . . . that he was upset and angry," threatened her and her family with legal action, and contacted the local police to ask about the possibility of pressing criminal charges. Id.
226. See supra notes 167–68 and accompanying text.
227. See Blue Mountain, 650 F.3d at 929.
228. Doninger v. Niehoff, 527 F.3d 41, 44 (2d Cir. 2008).
229. Cf. LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001). The wide variety in lower courts' reactions to violent or threatening speech suggests that such speech may present the most difficulty for courts attempting to distinguish between "undifferentiated" and well-founded fear of disruption; O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist., 2008 U.S. Dist. LEXIS 110409 (C.D. Cal. Sept. 9, 2008).
directly undermined by the record." Consequently, there were only "general rumblings" and a few discussions in class about the student cyberspeech—schoolwork was not substantially disrupted. Thus, the court correctly decided that the school infringed upon the student's First Amendment rights.

This brings us to Doninger. In Doninger, a student sent a mass email to her community that caused enough commotion to interrupt her principal's participation in an in-service day. Although the principal believed that the email was disingenuous, she did not punish the student; instead, the principal requested that the student send a clarifying email. Yet the student simply reproduced her earlier, disruptive (and arguably false) email in a blog posting and offered further incitement. Based on the past disruptive actions of the student and the reaction to the blog, this case presented "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." Thus, the court correctly decided that the school was justified in punishing the student for her blog posting.

It is also noteworthy that the nature of the punishment handed down by the schools seemed to influence the courts in these cases. The student in Doninger was prevented from running for senior class secretary, and the court noted that "participation in . . . extracurricular activities is a 'privilege' that can be rescinded when students fail to comply with the obligations inherent in the activities themselves." On the other hand, the student in Blue Mountain was punished with a ten-day suspension, and "[the principal] testified that the other times he imposed a ten-day suspension were when students brought to school a knife, razor, alcohol, or marijuana." Therefore, courts

230. See Blue Mountain, 650 F.3d at 931. "If anything, [the principal's] response to the profile exacerbated rather than contained the disruption in the school." Id.

231. Id. at 929.

232. Doninger, 527 F.3d at 44.

233. Id. at 45.

234. See id. at 45. Doninger's blog referred to the "douchebags in central office" and urged more callers in order to "piss [the principal] off more." Id.


236. Id. at 52; accord Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007). In Lowry, high school football players were removed from the team after signing a petition expressing their hatred of the coach and their desire not to play for him. Id. at 585–86. This was not a violation of the students' First Amendment rights. See id. at 600. Students were "free to continue their campaign to have [the coach] fired" but were not free to "continue to play football for him while actively working to undermine his authority." Id.

likely consider the proportionality of schools' reaction to student speech with relation to the harm caused by the speech.

Under the operationalized Tinker standard, the decisions in Doninger and Blue Mountain are consistent with one another. While in Doninger there was, at the very least, a reasonably foreseeable risk that the student cyberspeech at issue would substantially interfere with the work of the school, the only substantial disruption to the school's work in Blue Mountain was a result of the principal's reaction to the student cyberspeech rather than the expression itself. Doninger's First Amendment rights were not violated, but instead were adjudicated in accordance with the special characteristics of the school environment.

IV. IMPACT

A. The Operationalized Tinker Standard Is Consistent with the Policy Behind Supreme Court Jurisprudence

Under the operationalized Tinker standard expounded above, schools clearly have broad authority. This is so because the operative factor under this standard is "the work of schools" and, with only minimal guidance from public and educational policy, schools essentially have deference to define this phrase. A school could thus, presumably, grant itself the authority to discipline student speech, even if it does occur off campus, by broadening its definition of "the work of schools." This leads to concern that schools have used, and will continue to use, this wide deference to unconstitutionally infringe upon the First Amendment rights of students.

However, the overwhelming evidence gleaned from the decisions of lower courts employing the operationalized Tinker standard tends to show that student speech is permitted under this standard far more often than it is enjoined. Given the strong constitutional protection that freedom of speech receives, this standard is generally in line with the Supreme Court's First Amendment jurisprudence. More specifically, the operationalized Tinker standard aligns with the policy behind the original Tinker decision by continuing to permit students

238. See supra notes 222–37 and accompanying text.
239. See supra notes 230–31 and accompanying text.
240. See supra notes 41–43 and accompanying text.
242. See, e.g., Fronk, supra note 11, at 1441–42.
243. See Wolking, supra note 50, at 1527.
244. See supra notes 28–36 and accompanying text.
their "constitutional rights to freedom of speech [and] expression" within "the schoolhouse gate."245

In addition to being supported by the jurisprudence of the lower courts, it is also important to remember that the Supreme Court has limited the Tinker "substantial disruption" standard in the past. Prior to being decided by the Supreme Court, the lower courts in Fraser, Kuhlmeier, and Morse each employed the "substantial disruption" standard as outlined in Tinker.246 Yet, in each of these cases the Supreme Court intervened and overturned the lower courts' decisions by creating exceptions to Tinker's substantial disruption test.247 The Court's most recent student-speech decision, Morse, was decided well after student-cyberspeech cases began making their way into courtrooms; still, the Court scarcely addressed student cyberspeech in that opinion.248 The Court's silence regarding student cyberspeech is significant because the Supreme Court has clearly demonstrated a willingness to go beyond the reasoning of Tinker in student-speech cases.249 Therefore, the Supreme Court's silence on the issue is just as telling as a direct decision would be—the Court has not intervened in the cyberspeech decisions of the lower courts because those decisions are in line with the original policy behind Tinker.250

B. The Utility of the Proposed Standard for School Administrators and Students

The operationalized Tinker standard discussed in this Comment will prove useful to school administrators, students, and parents who are concerned with student freedom of speech on the Internet by providing a practicable standard by which to judge such student cyberspeech.

246. See Frederick v. Morse, 439 F.3d 1114, 1117–23 (9th Cir. 2006); Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1371–76 (8th Cir. 1986); Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1359–61 (9th Cir. 1985).
248. The only language from the case that seems, even arguably, to recognize the difficulties surrounding student cyberspeech is dicta, as Justice Roberts's stated, "There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts." Morse, 551 U.S. at 401.
249. See supra note 247 and accompanying text.
250. See supra notes 41–49 and accompanying text. Interestingly, the Supreme Court cited to Justice Black's dissent from Tinker in both Kuhlmeier and Fraser. Kuhlmeier, 484 U.S. at 271 n.4; Fraser, 478 U.S. at 686. Justice Black's dissenting opinion stated: "I wish, therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." Tinker, 393 U.S. at 526 (Black, J., dissenting).
The first aspect of this standard that administrators and students should note is that the geographic origin of the speech does not necessarily curtail schools' authority to limit speech. As traditionally understood, the Supreme Court's student-speech jurisprudence applies only to students in school.\textsuperscript{251} However, the advent of the digital age has required the extension of the Supreme Court doctrine, and an increasing number of lower court decisions have embodied this change.\textsuperscript{252}

Still, a school can punish student cyberspeech if and only if the expression in question materially or substantially disrupts the work of the school. While the implications of such a standard appear broad at the outset, the growing body of case law dealing with student cyberspeech has outlined and defined the phrase "materially or substantially disrupts the work of the school."\textsuperscript{253} Threats of violence, real or pretend, have been and continue to be a sensitive subject, especially in the school context. As such, parents and students should not be surprised if violent speech directed toward the school or any member of the school—student, teacher, or administrator—is subject to school disciplinary action. However, schools should probably not punish cyberspeech that is simply vulgar or insulting to school administrators or officials, even though such speech is perhaps inappropriate, unless it obstructs the administrators and teachers from carrying on their jobs.

By way of a final illustration of the operationalized \textit{Tinker} standard, consider the following hypothetical. Assume that the facts are similar to those in \textit{Doninger} with one slight change: instead of the student misrepresenting that the school cancelled an event when, in fact, it had rescheduled the event, the school actually had cancelled the event. Assume that the student in this hypothetical took the same steps to encourage community participation, and achieved the same results as Doninger. This hypothetical could probably be distinguished from \textit{Doninger} based on the emphasis of the operationalized \textit{Tinker} standard on "the work of schools." The school in \textit{Doninger} was forced to field calls and complaints in order to explain a student's misrepresentation, and it is highly unlikely that correcting a student's lie could or should be considered part of the work of schools. The school in this hypothetical, on the other hand, is forced to field calls to explain its reasoning for canceling an event that it had previously sanctioned. At the very least, it is arguable that part of a school's

\textsuperscript{251} See generally supra notes 37–74 and accompanying text.

\textsuperscript{252} See supra Part III.C.1.

\textsuperscript{253} See supra Part III.C.2.
work is remaining accountable to its constituents. Although these facts would present a difficult case, it is likely that, under the operationalized Tinker standard, the student’s cyberspeech would be protected and school punishment would be unwarranted. The student in this hypothetical simply exercised her First Amendment right to free speech by petitioning her community with a legitimate concern.

The operationalized Tinker standard is reasonable such that, with the application of some common sense, students and school officials should be able to appropriately predict and address the issue of student cyberspeech. It has never been the job of the Supreme Court to babysit unruly schoolchildren, and the standard outlined in this Comment should, as it develops, guard against such a misuse of the Court’s time and resources.

V. CONCLUSION

As the lower courts have addressed cyberspeech controversies between students and school administrators, these courts continue to remain in line with both Supreme Court precedent and one another.254 For the most part, this consistency has been accomplished by using the Supreme Court standard established in the seminal student-speech case, Tinker v. Des Moines Independent Community School District,255 to extend school jurisdiction to student cyberspeech regardless of the geographic origin.256 Thus, the lower courts have, on the whole, operationalized Tinker by fusing the threshold question of when schools can assert jurisdiction with Tinker’s “substantial disruption” test257 to determine whether a school can censor student speech.258 Without further guidance from the Supreme Court, lower courts have been forced to either apply the existing precedent as accurately as possible, or establish precedent of their own in contravention of the existing jurisprudence. Courts have rightfully followed the former route in student-cyberspeech cases, and as the sample size of such cases contin-

254. See generally supra Parts II, III.
257. See Tinker, 393 U.S. at 509 ("[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." (internal quotation marks omitted)).
258. See Calvert, supra note 10, at 243.
ues to grow, a practicable standard with its foundation in the "substantial disruption" test has taken form.  

Examined in this context, many of the difficulties surrounding student cyberspeech are allayed. First, operationalizing the Tinker decision has resulted in a simple and flexible approach to the problem that, though it may vary slightly from the letter of the law, is very much true to the spirit of the decision in Tinker. This simple approach does not automatically simplify the problem, but it does allow courts to efficiently address the fact-intensive inquiry in student-cyberspeech cases without being hampered by the threshold geographic question. Also, under this light, the apparent inconsistencies between lower court decisions disappear. Finally, and perhaps most importantly, school restriction of student speech appears to be the exception rather than the rule, as "lower courts . . . more often than not, rely on Tinker to uphold student rights."  

Perhaps part of the support to involve the Supreme Court in student cyberspeech is derived from the "fear" of adults that students are more technologically advanced. As demonstrated by its current silence, the Supreme Court does not share these concerns. Rarely, if ever, does a clear solution to a legal problem exist, and this is especially so with an issue that is as fact-intensive as student speech; it is unlikely that a single Supreme Court decision will be able to untangle these facts in all or even most cases. Before hastening to the conclusion that direct intervention by the Supreme Court is the sole solution to the difficulties raised by student cyberspeech, those concerned should take a thorough look at the jurisprudence of lower courts and grant these decisions the respect they deserve.

Darin M. Williams*  

259. See supra Part III.C.2.  
260. See supra Part IV.  
261. See supra Part IV.  
262. See supra Part III.D.  
263. Wolking, supra note 50, at 1527.  
264. See Calvert, supra note 10, at 252.  

* J.D. Candidate 2013, DePaul University College of Law; B.A. 2008, Rice University. Thanks to the editorial board of Volume 62 for all the long weeks. Any errors in this Comment are mine and mine alone.