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College Student Speech - What You Can't Say Can't Say Off-Campus on Your Computer and Why

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Introductory Argument and Thesis

With the 21st Century giving birth to social media outlets such as Facebook, MySpace, Twitter, and blogs, students now have the capacity to communicate with thousands of people with a click of a mouse. In a digital age, college students tend to express their viewpoints, communicate with friends and update their statuses on a daily basis. But how is the First Amendment affected by this advancement in technology? Should students’ online speech be constitutionally protected? Or, should students be confined to responsible speech that does not substantially disrupt a classroom, a school or a college campus?

Based on the increasing frequency of social media usage by Americans of all ages and the steady stream of students being punished in school for their online speech, this is an issue the Supreme Court will likely address in the near future. As the constant usage of social media by students will continue to pit student speech against the operation of secondary and post-secondary education institutions, the Supreme Court could provide clarity to America’s educational administrators and students by coming to a legal conclusion on this issue. Federal Appellate Courts and State Supreme Courts have begun to hear cases in which students were suspended or punished because of their off-campus social media postings. In some cases, courts applied the existing and standard school speech Tinker test to determine that the off-campus social media posting warranted a punishment of some kind because it “created a material and substantial disruption of the classroom setting.” In other cases, courts found a student’s speech to be protected by the First Amendment, but only after applying the Tinker test framework and concluding that the student’s off-campus social media expression was not reasonably forecasted to cause a substantial disruption of the school’s operation. Still other courts have determined that the Tinker test should not be applied given that the speech itself did not occur on school grounds

and that such social media speech should be protected, regardless of an occurrence of a material disruption in the school. A main issue the Supreme Court of the United States will need to address in the near future is: how should courts analyze and determine the constitutionality of educational institutional punishments for students’ off-campus social media postings that affect the school?

This article argues that the Tinker test should be applied in its entirety to high school and college students’ social media postings that materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. Such language is taken directly from the test applied in Tinker, the Supreme Court case that has nationally governed school speech cases since 1969. This article also argues that the specific content of the social media speech should not be a determinative factor in deciding the constitutionality of the punishment of that student. Whether the social media posting involves a school figure (such as a fellow student, professor, teacher, staff member, dean or the institution itself) should not materially matter, because Tinker is concerned with the material disruption of the speech, not the content of the speech itself. Regardless of what the posting says, if that speech materially and substantially interferes with the requirements of appropriate discipline in the operation of the school, the speech should be analyzed under the Tinker test and should not receive constitutional protection by the 1st Amendment. This focuses the analysis on the effect and causation of a student’s speech (the ends), not the content, form or situs of the expression itself (the means).

Some may argue that off-campus online student speech that does not involve a school figure should not be considered “school speech” because it does not involve the school in any way and should receive First Amendment protection, granted that the speech does not fall within
any other unprotected sub-categories of First Amendment precedent (incitement, false statements of fact, obscenity, offensive speech, speech integral to criminal conduct, etc.). However, if such speech causes a material interference or disruption in the operation of the school, then by definition that speech has involved the school because of the reaction it has received within the school’s walls. Focusing on whether the content of the speech involves a school figure or not is too simplistic of a test to determine whether off-campus speech should be analyzed under the Tinker school speech framework. The primary concern of Tinker and subsequent case law is the possible negative effects and substantial disruption a student’s speech may cause other students and the school’s classrooms, not what the content of the speech actually communicates or who it involves.

Context must be considered when a school punishes a student for his or her speech. While a Facebook post or a tweet may not directly involve the school in any way, if that speech is sufficiently polarizing, controversial or disruptive enough to cause a material interference in the operation of the school, the tangible product of that speech violates Tinker and therefore the speech itself should be considered unprotected by the First Amendment. Such a rule protects innocent students who were not implicated in the online speech and are attending school to gain useful knowledge and receive an education. Student’s school speech is limited under the First Amendment because society and the Court has determined that we do not want one student to be able to take away from other students’ educational experience with his or her disruptive speech without being punished for doing so.\textsuperscript{2} This test is focused on the end product of the online speech and can be boiled down to one question: did the online social media speech cause a material disruption in the operation of the school? If “yes,” then the speech is unprotected and punishment levied by the school is warranted. If “no,” then the speech is protected and

\textsuperscript{2} Id.
punishment is constitutionally impermissible.  *Tinker* is a workable and ideal framework for high school and college students’ social media posts as it protects the healthy learning environment within the intellectual training grounds of our nation’s future leaders.

Students pay tuition to take classes and learn material in focused courses so that the information consumed can be applied to a career following high school or college graduation. No student has the right to infringe upon the rights of other students with offensive, threatening or obscene social media posts. Such posts may constitute a material and substantial interference with the operation of a healthy learning environment on a school campus and could collide with the rights of the other college students. “Indeed, the ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’”

In applying *Tinker* to students’ off-campus social media postings, the Supreme Court would have the opportunity to protect the learning environment that each student should value and cherish. As our nation seeks to improve its schools in comparison to other modern first-world sovereign nations, The U.S. Supreme Court should consider that off-campus social media posting have the capability of disrupting our nation’s schools to the same effect or even greater than in-school oral expression. Such disruptions are unnecessary and unacceptable hindrances upon the educations of our nation’s youth. Schools should be equipped to constitutionally punish such substantial interferences that were created via social media, and applying *Tinker* to student off-campus social media speech is just the recipe to protect our schools as valued places of learning for our current students. To answer the question presented by this article’s title,

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“Student Speech: What You Can’t Say Off-Campus and Why”: the inquiry is not about what a student’s social media posting says, it is about the effect that speech has on the school and whether it causes a substantial interference of the school’s operation (unprotected and punishable if “yes”, protected and not punishable if “no”).

**Overview of the First Amendment – School Speech**

The First Amendment to our nation’s constitution reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” While the First Amendment on its face reads as a proscription against laws that abridge the freedom of speech, the Supreme Court has repeatedly created categories of speech that are not protected. The freedom of speech does not entitle Americans to say anything in any context. Free speech is not absolute. Speech that falls under the categories of incitement (*Brandenburg*⁵), false statements of fact (*Gertz*⁶), obscenity (*Miller*⁷), speech integral to criminal conduct (*Ferber*⁸), offensive speech (*Chaplinski*⁹), and others are not protected by the First Amendment. States and institutions may punish speech that falls into one of the above categories. A student’s speech that disrupts the operation of a school is no different; The U.S. Supreme Court has carved out rules regarding school speech via case law precedent.

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⁴ U.S. Const. amend. I.
The answer to the question of “should students’ online social media speech be considered ‘school speech’?” starts with the watershed case of Tinker, which was the Supreme Court’s first major precedent regarding school speech. The phrase “school speech” encompasses a setting in which the government is acting as an educator. Tinker involved a case in which John Tinker, Christopher Eckhardt and Mary Beth Tinker, ages fifteen, sixteen and thirteen respectively, wore black armbands to their Des Moines high school to protest the Vietnam War. The school, following its own policy, asked the students to remove the armbands. After the students refused, they were all suspended for two weeks, and a lawsuit was brought forth challenging the school district’s policy and decision to suspend the students for their speech.

Tinker is a vital precedent for school speech not because of the holding of the case (which found that the suspensions were unconstitutional and a denial of the students’ right of expression of opinion), but because of the framework-oriented test that was promulgated by the Justices. As written, the Tinker test states, “A student may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.” So, in breaking down the Tinker test, there are two prongs: (1) A material and substantial interference, or (2) An invasion of others’ rights. If either of these prongs is met by a student’s speech - that speech is unprotected under the First Amendment and such speech can be constitutionally punished by the school.

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10 Tinker at 504.
11 Id.
12 Id.
13 Tinker at 513.
14 Id.
In John T. Ceglia’s 2012 Pepperdine Law Review article, “The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age,” Ceglia explains how courts should analyze a school speech issue under Tinker.\(^{15}\)

In deciding whether a school regulation of student expression collides with the First Amendment, the Tinker Court developed a two-pronged rule. According to this rule, student expression can only be suppressed or regulated by school authorities if the expression would (1) substantially interfere with the work of the school, or (2) obstruct the rights of other students. In so doing, the Court demonstrated that students maintain strong First Amendment rights to free expression and speech, even within the schoolhouse gate.\(^{16}\)

In the case of Tinker itself, the Supreme Court found that there was an absence of facts which might have reasonably led the school to forecast a substantial disruption or material interference with school activities, and therefore the students’ black armband non-verbal speech was protected under the First Amendment.\(^{17}\) Under the Tinker test, mere fear of interference is not enough; there must be a specific reason to anticipate a material and substantial interference.\(^{18}\) An actual interference need not be shown by the school district when it defends the punishment of a student’s online speech; instead a reasonably forecasted substantial disruption of the

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\(^{16}\) Id. at 948.

\(^{17}\) Tinker at 514.

\(^{18}\) “The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom-this kind of openness-that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

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. Certainly where 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.” Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). Tinker at 509.
school’s operation is sufficient to violate Tinker’s first prong. Having said that, another student’s right would actually have to be violated for Tinker’s second prong to be met, and anticipation the punished student’s speech “colliding with the rights of other students” is insufficient under First Amendment school speech analysis. Neither prong of the Tinker test was met in Tinker and the Court held that the school could not constitutionally punish the students for wearing black armbands to protest the Vietnam War.19

The Court reasoned that students have to give up some rights when they come to school, but not all of them.20 Since schools are a training ground for some citizens, each student’s right of expression of opinions is retained as long as (1) it does not substantially interfere with the school’s activities and (2) does not invade other students’ rights.21 The two pronged Tinker test continues to be “good law” (it has not been overruled) and a precedent that covers students’ in-class school speech around the country.

Seventeen years after Tinker was decided, the Court added a layer to its school speech framework analysis with its opinion in Fraser.22 In Fraser, Matthew Fraser, a student at Bethel High School delivered a nomination speech for another student at a school assembly in which the entire high school was in attendance.23 Before his speech, Fraser was warned by multiple teachers that the speech was inappropriate and may draw severe consequences.24 During his speech, Fraser made elaborate, graphic and explicit sexual metaphors and innuendos in an attempt to be comedic and clever while nominating a student for a student government

19 Tinker at 514.
20 “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.” Tinker at 506 (emphasis added).
21 Tinker at 513.
23 Fraser at 677.
24 Fraser at 678.
position. The effect was described by the Court as “offensive”, “vulgar” and “insulting,” especially to high school females, some of whom were 14 years old at the time. Following the speech, Fraser was suspended for three days and prohibited from speaking at graduation. Fraser brought a lawsuit challenging this suspension under the theory that his speech was protected under the First Amendment and did not meet either of the prongs of the Tinker test.

In its opinion, the majority of the court noted and affirmed the Tinker test, but the Court went on to announce a new part of the school speech framework. Fraser’s effect on school speech is that student speech that is vulgar and offensive because of its particular wording and not because of its viewpoint is unprotected under the First Amendment. This “vulgar and offensive” test is to be considered in conjunction with the Tinker test in that it provides another avenue for a school to punish the student’s expression. The Fraser test should be looked at as another means for a school to constitutionally punish a student for his or her school speech. Fraser seems to generally support the school’s power to restrict vulgar speech by its students.

The Court noted, “Public education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” This stresses the Court’s belief that the classroom is a place of undistracted, uninterrupted and focused learning which should be free of obscenity, vulgarity and offensiveness in order to harbor and foster the education of America’s youth. Tinker does not protect speech that interferes with school activities, substantially disrupts the classroom setting or violates other students’ rights.

25 Id.
26 Id.
27 Id. at 679.
28 Id.
29 Id. at 680.
30 Fraser at 685.
31 Id. at 681.
Fraser does not protect speech that is vulgar and offensive. After Fraser was decided, schools had three different avenues to constitutionally punish student speech: either prong of the Tinker test or the “vulgar and offensive” prong announced in Fraser itself.

Additionally, the majority famously penned, “The First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”32 This is in reference to the case of Cohen33 (decided two years after Tinker) in which Cohen walked through a courthouse corridor wearing a jacket bearing the words “Fuck The Draft” in a place where women and children were present.34 In that case, the Court held that Cohen could wear the jacket and that it was not unconstitutionally offensive speech because, “there was no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.”35 The Court also reasoned that the words “Fuck The Draft” on Cohen’s jacket were clearly not directed at a specific individual and no one could have reasonably regarded those words as a direct and personal insult.36

However, in Fraser, the Court stated that students do not have the right to wear such a jacket in school, and that students do lose some but not all of their rights when they walk through the school house gate.37 This is because a school is different than a public setting – a school is a place of learning for our nation’s present youth and future leaders. In comparison, the corridor of a courthouse is truly an open public place where the First Amendment’s freedom of speech clause was intended to have its full force of protection for oral or written expression. Society has an interest in children learning in a safe, undistracted and uninterrupted educational setting. The

32 Thomas v. Board of Education, Granville Central School Dist., 607 F.2d 1043, 1057 (2d Cir. 1979)
33 Cohen v. California, 403 U.S. 15 (1971)
34 Cohen at 16.
35 Id. at 26 (emphasis added).
36 Id. at 20.
37 Fraser at 688, quoting Tinker at 506.
Court has an interest in providing a hospitable learning environment for children and young adults when the government is acting in the role of an educator. By not protecting speech that disrupts these interests, our nation ensures a beneficial learning environment in America’s schools.

The Supreme Court’s most recent addition to the First Amendment school speech analysis occurred in 2007 in the case of Morse. In Morse, the Olympic torch relay passed by Juneau-Douglas high School in Alaska. The high school principal saw Morse, along with a few other students, unfurl a large banner that read “BONG HiTS 4 JESUS.” The large banner was easily readable to all students at the event and was displayed when camera crews and the torch passed by on the street near the high school. Morse admitted that “the words were just nonsense meant to attract television cameras.” The principal approached the students, told them to take down the banner, and everyone complied except Morse, who refused to take it down. The principal then confiscated the banner and suspended Morse for 10 days for encouraging illegal drug use, which was in violation of high school policy. Morse brought a lawsuit which challenged the suspension under the theory that his speech was constitutionally protected under the First Amendment. Additionally Morse did not believe his speech met either of the Tinker prongs or the Fraser prong.

The Court announced another corollary to the Tinker and Fraser prongs of school speech, announcing that speech that advocates illegal drug use and does not qualify as social or political

38 Morse v. Frederick, 551 U.S. 393 (2007).
39 Morse at 397.
40 Id.
41 Id.
42 Id. at 401.
43 Id. at 398.
44 Id.
45 Id. at 399.
commentary is unprotected speech under the First Amendment.\textsuperscript{46} The \textit{Morse} prong, like the Fraser prong, is to be considered in conjunction with the \textit{Tinker} test and comes with its own analysis. Like Fraser, Morse creates another pathway for a school to constitutionally punish a student for his or her speech. Under this prong of school speech, a school need not show that a student substantially or materially interrupted a school setting (the first prong of \textit{Tinker}). Instead, in order to constitutionally suspend a student for his or her speech, a school need only show that the speech advocated or promoted illegal drugs.\textsuperscript{47}

The Court reasoned that this new student speech prong, which does not protect speech promoting illegal drug usage, is added to the First Amendment student speech analysis because, “deterring drug use by school children is an important – indeed, perhaps compelling interest.”\textsuperscript{48} Speech which advocates for the usage of illegal drugs has no value in a school setting, as a school is a place for learning and intellectual stimulation, not the proper location for promoting the usage of illegal substances. In \textit{Morse}, the Court also reaffirms that “while children assuredly do not shed their constitutional rights at the schoolhouse gate, the nature of those rights is what is appropriate for children in school.”\textsuperscript{49} In sum, student speech which promotes and advocates illegal drug use is not appropriate in school, and is therefore not protected by the First Amendment.

Students retain the freedom of speech in school, but it is constrained and limited to speech that: does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school\textsuperscript{50}, does not invade the rights of others\textsuperscript{51}, is not vulgar and

\textsuperscript{46} Id. at 403.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 407 quoting \textit{Veronia School Dist. 47J v. Acton}, 515 U.S. 646, 661 (1995)
\textsuperscript{49} \textit{Veronia} at 655-656.
\textsuperscript{50} \textit{Tinker} at 513.
\textsuperscript{51} Id.
offensive because of its particular wording and not because of its viewpoint, and would not be interpreted by a reasonable observer as advocating illegal drug use and cannot be plausibly interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalization of marijuana for medicinal use. After the Court’s opinions in Tinker, Fraser and Morse, the primary rule for school speech is that, generally speaking: First Amendment protection of a student’s expression only exists when the speech does not disrupt the operation of a school.

At the outset of Morse, the Court also determined that although the banner was unfurled outside of the physical school itself, on one side of the street adjacent to the school, this was a school speech case to be decided under the framework of Tinker, Fraser and the Morse prong announced in this case. This is part of the reasoning argued for later in this paper, that school speech does not necessarily need to take place on the school’s property to be considered as such. Morse shows that school speech can and sometimes does take place outside of the classroom, outside the school building and in fact across the street from the school itself. When discussing the idea that students lose some of their rights but not all of them when they pass through the “school house gate,” the Court is drawing a figurative line and not a literal one. The “school house gate” is a reference used for readers of the opinion to understand the Court’s annunciation of the Tinker test and its corollaries Morse and Frederick; the “school house gate” line is not a part of the actual test itself.

52 Fraser at 685.
53 Morse at 422 (Alito J. and Kennedy J., concurring)
54 “At the outset, we reject Frederick’s argument that this is not a school speech case – as has every authority to address the question. The event occurred during normal school hours. It was sanctioned by Principal Morse ‘as an approved social event or class trip,’ and the school district’s rules expressly provide that pupils in ‘approved social events and class trips are subject to district rules for student conduct.’” Morse at 400-01.
55 Id. at 401.
56 Tinker at 506.
Considering school speech may occur outside of school property by students, this idea reinforced in Morse is an important pillar in this article’s argument that the constitutionality of school punishment for students’ off-campus social media speech should be decided by the Tinker, Fraser and Morse framework. The Court has shown it is comfortable with categorizing certain kinds of speech which occur outside of the school’s classrooms and hallways as “student speech,” and students’ off-campus social media postings that materially and substantially interfere or disrupt a school or invades the rights of other students (Tinker) should be considered “school speech” as well.

This article also argues that a student’s social media posting which is vulgar or offensive (Fraser) or advocates illegal drug usage (Morse) should be considered school speech if it materially interferes with the operation of the classroom. If a student’s online expression that utilizes vulgar or offensive speech, or speech that advocates for illegal drug usage causes a material interference with the school’s operation, then it should be found to violate Tinker and would render such speech unprotected. As mentioned above, the content of the speech (whether it involves a school figure, is vulgar or offensive, or advocates for illegal drug usage) should not be the primary concern or focus of a court hearing an off-campus online student speech litigation. The primary focus of such a case should be whether that speech, whatever its content, caused a material interference or substantial disruption of the school’s operation (or was reasonably forecasted to do so). For in-school and off-campus speech alike, the first prong of Tinker is largely the entire ball game – if the speech causes a substantial disruption of the school’s operation, it is constitutionally unprotected and subject to punishment by the school district.
First Amendment School Speech Analysis in the Digital Age

But how does the school speech framework announced in Tinker and its progeny apply to a student’s Facebook, Twitter, MySpace or blog postings written from home? Why would a student’s speech made in the privacy of his home not be protected by the most important amendment to our Constitution? The answer is the detrimental effect of that speech upon a school or university. As mentioned above, student online expression that violates either prong (substantial disruption or a violation of other students’ rights) of the Tinker test should receive the school speech framework articulated in Tinker and be punishable regardless of the origin site of the speech.

The Court in Tinker reasoned that a school is a place of learning in which each student has the right to receive an education.57 Speech that materially disrupts the school’s function or violates other students’ rights is punishable and constitutionally unprotected.58 Fraser deemed another type of school speech category punishable by announcing that all vulgar and offensive speech within a school is not protected by the First Amendment.59 Morse created another category of speech that does not receive protection, speech that advocates illegal drug usage.60

These examples of carved out categories of speech make the possibility that the Supreme Court would create another category of speech conceivable. In the near future the Court will likely determine whether a student’s off-campus speech should be considered school speech and

57 “The principle of these cases is not confined to the supervised and ordained discussion which takes place 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 like the conflict in Vietnam, if he does so without ‘materially and substantially interfering with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.” Tinker at 512-13, citing Burnside v. Byars, 363 F.2d 744,749 (5th Cir. 1966).
58 Tinker at 513.
59 Fraser at 685.
60 Morse at 403.
fall within the Tinker test or if it should be considered constitutionally protected speech. Based on the Court’s and the nation’s interest in promoting efficient and effective middle schools, high schools and universities, this end can be achieved through the means of not offering constitutional First Amendment protection for speech that materially interferes and disrupts a school’s operation or violates other students’ speech. In order for our nation to have safe and well-conducted places of learning, students’ speech – even on social media from their homes – should not be detrimental to the education of our nation’s future leaders. Through constitutionally authorized punishment of such detrimental speech, our nation’s educational institutions can deter students from interrupting classrooms with substantially disruptive online speech.

The classroom is the origin of our nation’s future. In Meyer⁶¹, Justice McReynolds expressed America’s repudiation of the principle that a State might so conduct its schools as to ‘foster a homogeneous people.’⁶² The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.⁶³ The classroom is peculiarly the “marketplace of ideas,” and while an unfettered exchange of ideas and theories benefits all of the participants who are seeking truth, there must be an honorable limit to such a discussion. That limit should be the material interference / substantial disruption line that was articulated in Tinker and such a line protects respectful and politically correct speech and leaves hateful, threatening, anger-provoking and potentially action-inducing speech unprotected. The nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative

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⁶² Tinker at 511-12.
selection. Our nation invests much into the education and growing process of our children as they are our future leaders. The classroom should be considered a protected environment which is conducive to learning. Such protection is afforded by the Tinker test as it punishes speech that materially interferes with the intellectual training ground of students. Efficient schools foster maximum knowledge for our children, and the Tinker test seeks to enforce the protection of such a setting by drawing the line between speech that can be reasonably forecasted to cause a substantial disruption of a school’s operation and speech that cannot be forecasted as such.

Student speech that disrupts the classroom curtails an environment conducive to learning. It does not matter the source, location or origin of that speech – the speech still has a detrimental effect upon other students’ education and the operation of the school itself. The origin of the speech is not vital and should not be the focus of the First Amendment student speech analysis. If the speech is created by a student, and that student’s speech detrimentally affects a school, that speech should be considered school speech by courts across the country. The main difference between a student overtaking the PA system and saying “Me and my friends are going to bring paintball guns to school tomorrow and we are going to shoot every teacher that we don’t like, and everyone else should too” and that student posting the same sentence on Facebook or Twitter will be the time it takes for that speech to materially interfere with a school’s operation. Because of the content, both oral speech on school grounds and posted online speech will eventually have the same result – students and teachers alike will fear for their safety and there will be a substantial disruption in the school’s operation. The disruption will likely occur immediately if the student surprisingly says it on the PA system and the disruption may take hours or days to occur if it is posted online. This difference should not change the First Amendment analysis to

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64 Tinker at 512.
both sets of speech. Both examples should not receive protection under the Tinker test promulgated by the Supreme Court to be the framework for school speech.

Also consider that in the 21st Century, technology has advanced our world to the point that it is rather easy for students to access off-campus online expression on campus. With the advent of mobile smart phones that have internet access, students can view social media postings from home or in school. This provides for two scenarios in which a substantial disruption might take place in a school: 1) Students see the social media posting off campus and then act in school in a substantially disruptive way subsequent to seeing the expression, or 2) Students actually view the speech authored off-campus within the school building via smart mobile phones or school computers and then proceed to take part in a material interference of a school’s operation. In 2012, students have the ability to bring off-campus speech on campus without the school’s knowledge and beyond the school’s ability to regulate the content brought onto school grounds.65

In an instantaneous communication world in which information can change hands in fractions of a second, the ease by which students’ off-campus communications can effect on-campus security and discipline has increased from pre-internet generations. Protecting off-campus speech that materially interferes the on-campus educational environment would defeat the purpose of a school punishing disruptive on-campus speech in the first place. On-campus and off-campus speech should both be reviewed under Tinker because a student’s expression that interferes with a school’s operation and ability to discipline students should be constitutionally punishable, no matter the situs of the speech.

The focus on school speech should not be the location of the student’s speech but the effect it has on the school itself. Based on Tinker, it does not matter where the speech takes place inside of the school. Speech that takes place in the cafeteria, in the classroom, on the

65 Ceglia at 957.
playground, or in the hallway are all treated the same way – if the speech meets one of the two prongs of \textit{Tinker} it is unprotected, if it does not meet either prong it is protected. If a student’s online posting meets one of the two prongs it should be analyzed in the same fashion. Effect of the speech is what motivated the Supreme Court to create the two prongs of \textit{Tinker} and effect of student online speech should be what motivates the Court to treat off-campus social media speech the same as in-school student speech. Both sets of speech should be analyzed under the \textit{Tinker} test.

\textbf{Recent Federal Cases Applying \textit{Tinker} and Finding Punishment Constitutional}

There has been some recent activity in our nation’s federal courts on the issue of off-campus online student speech. \textit{Doninger} involves a student’s blog posting and \textit{Kowalski} involves a student’s MySpace page. The mode of both students’ speech was social media, but the effect upon the brick-and-mortar school building was material and amounted to a substantial disruption of the school’s operation. Both students’ punishments were upheld by the district courts and the \textit{Tinker} framework was applied in both cases.

In \textit{Doninger}, Avery Doninger posted a vulgar and misleading message on her blog about the supposed cancellation of an upcoming school event.\textsuperscript{66} Doninger blogged that the school event was cancelled due to “douchebags” in central office, when in fact it was not actually canceled but was to be operated in a manner that Doninger opposed.\textsuperscript{67} Lewis Mills High School disqualified Doninger from running for Senior Class Secretary because of the blog.\textsuperscript{68}

\textsuperscript{66} \textit{Id.} at 45.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 46.
Doninger sued the school, the superintendent and the principal for allegedly violating her First Amendment rights. The district court concluded that Doninger had failed to show a sufficient likelihood of success on the merits to award her the preliminary injunction motion for a new Student Government election in which she would be eligible. Additionally, because Doninger’s blog post created a foreseeable risk of substantial disruption at her high school, the appellate court concluded that the district court did not abuse its discretion and affirmed. This language is taken directly from the opinion in Tinker.

In this case, the appellate court did not hesitate to apply Tinker’s first prong (substantial disruption of a high school) because the student’s blog posting was authored off of school grounds. Even though the student’s speech originated in her home, the effect of that speech was in the school since the content of the blog focused on school administrators in the central office. The trial court found that the blog itself created a foreseeable risk of substantial disruption at Doninger’s high school, likely because the student chose to address the school employees in the central office as “douchebags” and also noted that the district superintendent got “pissed off” about Doninger’s preferred school event organization and chose a different route. Additionally this blog posting followed up a similar mass email to the same effect.

The court relied on the fact that the blog was a publicly accessible blog that received many views and comments in a short period of time to determine that Doninger’s speech created

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69 Id. at 46-47.
70 Id. at 47.
71 Id. at 54.
72 Tinker at 513.
73 “The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression, like Doninger’s does not occur on school grounds or at a school-sponsored event. 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.” Doninger at 48, citing Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 40 (2d Cir. 2007).
74 Doninger at 50.
75 Id. at 44.
a foreseeable risk of substantial disruption at her public high school.\textsuperscript{76} Several students posted comments to the blog, including one in which the author referred to the school district superintendent as a “dirty whore.”\textsuperscript{77} Doninger’s intent was to get as much attention and in-school publicity to her position as she could, and she succeeded after the mass email and the blog.\textsuperscript{78} The evidence was enough for the court to determine that Doninger’s off-campus social media speech violated \textit{Tinker}’s first prong by creating a foreseeable risk of substantial disruption at her high school, and therefore her speech was unprotected by the first amendment.\textsuperscript{79} Since Doninger’s speech was not protected, the high school did not violate Doninger’s first amendment rights (or lack thereof) in disqualifying her from the Senior Class Secretary election.\textsuperscript{80}

Within the \textit{Doninger} opinion, the court cites \textit{Tinker}, \textit{Fraser}, and \textit{Morse}.\textsuperscript{81} The court mentioned that the verbiage of “douchebags” and “pissed off” may have been enough to constitute “plainly offensive lewd, indecent and vulgar” speech under \textit{Fraser}.\textsuperscript{82} However, the court chose not to apply \textit{Fraser} to off-campus speech, instead noting that if Doninger’s speech had occurred on campus, it surely would have violated \textit{Fraser} and would have rendered her speech regarding the school event and the school administrators as unprotected under the First Amendment.\textsuperscript{83}

\textsuperscript{76} \textit{Id.} at 45.
\textsuperscript{77} \textit{Id.} 51.
\textsuperscript{78} “Indeed, the district court found that her posting, although created off-campus, “was purposely designed by Avery to come onto the campus.” \textit{Doninger}, 514 F. Supp. 2d at 216. The blog posting directly pertained to events at Lewis Mills High School, and Avery’s intent in writing it was specifically “to encourage her fellow students to read and respond.” \textit{Id.} at 206. As the district court found, “Avery knew other high school community members were likely to read her posting,” \textit{Id.} at 217. Several students did in fact post comments in response to Avery and the posting managed to reach school administrators.” \textit{Doninger} at 50.
\textsuperscript{79} \textit{Id.} at 52.
\textsuperscript{80} \textit{Id.} at 53.
\textsuperscript{81} \textit{Id.} 48.
\textsuperscript{82} \textit{Id.} at 49.
\textsuperscript{83} “Avery’s language, had it occurred in the classroom, would have fallen within \textit{Fraser} and its recognition that nothing in the First Amendment prohibits school authorities from discouraging inappropriate language in the school environment.” \textit{Id.}
The trial court noted that the record amply supported its conclusion that Doninger’s speech through her blog was reasonably foreseeable to reach school property. In fact, although Doninger’s speech was created off-campus, the purpose of her speech was intentionally designed by Doninger to come onto the campus. The blog posting directly pertained to events at Doninger’s high school, and Doninger’s specific intent in her writing was to encourage her fellow students to read, respond and act upon the content of the blog at school. Based on the circumstances, it was reasonably foreseeable that other Lewis Mills High School students would view the blog and that the school officials would become aware of it.

Also, the fact that Doninger inaccurately announced that the school event was canceled when in fact it had not been canceled was characterized by the court as misleading information that was disseminated amongst uncertainty at the school regarding the potential cancellation of the event. Based on this context, it was also foreseeable that school operations might well be disrupted further by the need to correct misinformation as a consequence of Doninger’s post.

While Doninger argued that an actual substantial disruption did not occur at her high school and so Tinker’s first prong was not violated, she misinterpreted the doctrine and framework of Tinker. Tinker does not require a showing of actual disruption to justify a restraint on student speech. If a reasonable foreseeability of a substantial interference or disruption of a school’s activities can be shown by the school, then Tinker’s first prong is

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84 Id. at 50.  
85 Id.  
86 Id.  
87 Id. at 51.  
88 Id.  
89 Id.  
90 “Although Doninger argues that Tinker is not satisfied here because the burgeoning controversy at Lewis Moore High School may have stemmed not from Avery’s posting, but rather from the mass email of April 24, this argument is misguided insofar as it implies that Tinker requires a showing of actual disruption to justify a restraint on student speech” Doninger at 51.  
91 Id.
achieved and the student’s speech is not protected by the First Amendment. “School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.” Tinker does not require school officials to wait until disruption actually occurs before they may act.

The question is not whether there has been an actual disruption, but whether school officials might reasonably portend disruption from the student expression at issue. The trial court found that Doninger’s blog, given the circumstances revolving around the uncertainty of the cancellation of the school event, coupled with the offensive remarks made towards the superintendent and the central office employees, posed a substantial risk that Lewis Mills High School administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over the school event’s purported cancellation.

Within the framework of the issue of student off-campus social media speech, Doninger represents the fact that off-campus speech can have on-campus consequences. Doninger, as it is a 2008 case from a federal appellate court (the Second Circuit), should be viewed as persuasive authority for the application of Tinker to cases in which a student utilizes social media to offer an opinion about a school figure or figures which foreseeably creates the risk of a substantial interference or disruption of school activities. The fact that Doninger’s blog was posted while she was off-campus in her home was of little concern for the court in her case, as the effect of her social media speech was intended to be upon her own high school peers and that

92 Id.
93 Id. citing Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007).
94 Id. citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).
95 Id.
96 Doninger at 51-52.
97 Id. at 48.
intention was successful. Based on the content and effect of Doninger’s blog, the trial court applied the school speech test of *Tinker* to the case, and the Second Circuit affirmed the analysis.\(^98\)

\[\text{Kowalski cited Doninger, as it was decided three years later, and followed the analysis and Tinker framework announced in Doninger quite closely. In Kowalski}\(^99\), Kara Kowalski created a MySpace page that was dedicated to ridiculing a fellow student by calling her a “slut” and alleging she has Sexual Transmitted Diseases, among other offensive things.\(^100\) After inviting over one hundred fellow high school students to become friends with her Students Against Sluts Herpes parody MySpace profile, two dozen students responded to Kowalski and joined the group profile.\(^101\) It was shown at trial that some of the students joined the MySpace group profile from Berkeley High School’s computers.\(^102\) Eventually, the student who was being belittled and harassed for her imaginary case of herpes discovered the page, told her father, who then notified the school officials of the page created by Kowalski.\(^103\) School administrators concluded that Kowalski had created a hate website and promptly suspended her from school for ten days and placed her on ninety days social suspension, which prohibited her from attending any school event in which she was not a direct participant.\(^104\)

Kowalski brought a 42 U.S.C. § 1983 action against the Berkeley County School District and five of its officers and contended that in disciplining her, the defendants violated her free speech and due process rights under the First and Fourteenth Amendments.\(^105\) The Fourth

\(^{98}\) *Id.* at 54.
\(^{100}\) *Id.* at 567.
\(^{101}\) *Id.* at 568.
\(^{102}\) *Id.*
\(^{103}\) *Id.*
\(^{104}\) *Id.* at 568-69.
\(^{105}\) *Id.* at 570.
Circuit affirmed the Northern District of West Virginia and held that the defendants did not violate Kowalski’s free speech rights by suspending her for creating and posting to the webpage and the defendants also did not violate Kowalski’s due process rights by suspending her, without a hearing, for her conduct. 106

The Berkeley County School District and its administrators contended that school officials “may regulate off-campus behavior insofar as the off-campus behavior creates a foreseeable risk of reaching school property and causing a substantial disruption to the work and discipline of the school.”107 Relying on Doninger, the defendants noted that Kowalski created a web-page that singled out student “Shay N.” for harassment, bullying and intimidation; that it was foreseeable that the off-campus conduct would reach the school; and that it was foreseeable that the off-campus conduct would “create a substantial disruption in the school.”108 The court agreed with the defendants’ theory and ruled in their favor.

The Fourth Circuit noted that although the Supreme Court had not dealt specifically with a factual circumstance where student speech targeted classmates for verbal abuse; in Tinker the Court recognized the need for regulation of speech that interfered with the school’s work and discipline, describing that interference as speech that “disrupts classwork,” creates “substantial disorder,” or “collides with” or “invades” “the rights of others.”109 The court found that the language of Tinker supports the conclusion that public schools have a “compelling” interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment or bullying.110

106 Id. at 577.
107 Id. at 571, citing Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).
108 Kowalski at 571, relying on Tinker at 513.
109 Id.
110 Kowalski at 572, citing DeJohn v. Temple Univ., 537 F.3d 301, 319-20 (3d Cir. 2008).
The court also mentioned how much of a problem bullying has become in schools across the country and how legislation has been passed in many states to combat this trend. Such a concern reinforces Tinker’s goal to protect the classroom settings of our nation’s young people from substantial interferences of expression. One student bullying another student would in many cases serve as a material interference of a school’s operation because bullying tends to draw a crowd of students which obligates school personnel to alter their teaching occupation into a safety and policing role. Also, an act of bullying deprives the bullied student of his rights (the second prong of Tinker), including the right to feel safe in school and the right to enjoy personal bodily autonomy. In this current time period where social media is becoming more-and-more prevalent for our nation’s youth, it is logical for states and schools to create laws and rules to be able to combat online social media bullying by one student upon other just as they can combat in-school bullying through legislation.

Practically speaking, giving a school the ability to punish in-school bullying while at the same time disallowing that same school to punish online bullying would defeat the purpose of the in-school regulation itself. If students gained the knowledge that bullying in school will lead to suspensions while horrible, unrelenting online social media bullying will result in no punishment of any kind, the social environment within schools could become quite nasty indeed when students are actually seeing each other face-to-face the morning after an evening of

111 “According to a federal government initiative, student-on-student bullying is a “major concern” in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. See StopBullying.gov, available at www.stopbullying.gov (follow “Recognize the Warning Signs” hyperlink). Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, see Morse, 551 U.S. 393, schools have a duty to protect their students from harassment and bullying in the school environment, cf. Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir.2007) (“School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place”). Far from being a situation where school authorities “suppress speech on political and social issues based on disagreement with the viewpoint expressed,” (Alito, J., concurring), school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.” Kowalski at 572.

112 Kowalski at 572.
aggressive, combative social media postings. While proponents of liberal free speech doctrines may argue that schools should have no place in punishing online speech that is posted outside of school grounds, educational learning environment may become negatively impacted when online peer-to-peer bullying takes place over the weekend or at night while school is in session, and that is precisely where Tinker can play its intended part.

The court found that Kowalski’s MySpace social media speech caused the interference and disruption at Berkely County High School that was described in Tinker, and was immune from First Amendment protection.\textsuperscript{113} The court mentioned that the content of the speech Kowalski posted on the MySpace profile is not the kind of speech that our educational system is required to tolerate, as schools attempt to educate students about “habits and manners of civility” or the “fundamental values necessary to the maintenance of a democratic political system.”\textsuperscript{114} The court applied the straightforward framework of Tinker and found that Kowalski’s speech could be punished based on the first prong of Tinker (material and substantial interference of the school’s operation) as well as Fraser (vulgar and lewd school speech).\textsuperscript{115} The analysis and organization of this opinion follows the Supreme Court’s school speech case law precedents very closely. After discovering that Kowalski’s speech clearly interfered with the work and discipline of the school, because of the multiple students that had seen the MySpace profile and had commented on it, the Fourth Circuit affirmed the appellate court and held that the school was authorized to discipline Kowalski because of her online social media speech that affected fellow classmates.\textsuperscript{116}

\textsuperscript{113} Id.
\textsuperscript{114} Id. at 573, citing Fraser at 681.
\textsuperscript{115} Id. at 573.
\textsuperscript{116} Id. at 577.
Recent Federal Cases Applying Tinker and Finding Punishment Unconstitutional

While the preceding argument for the application of Tinker’s first prong to student off-campus social media speech is articulated above and has support in various jurisdictions within the United States, this is far from a cut-and-dry issue. Some courts have held that Tinker should not be applied to student’s off-campus online speech because the speech did not occur within the school and therefore should not be considered school speech at all. Many of these cases find that online social media speech by students should be given First Amendment protection, regardless if the content involves a school figure or not. Other cases do apply the Tinker framework to off-campus online student speech, but find that the student’s expression should be protected by the First Amendment as the school could not have reasonably forecasted a substantial disruption of the school’s operation and ability to discipline students based on the speech alone.

One example of such a case is Snyder.117 This case was decided very close in time to the Kowalski case discussed above, but Snyder comes to the opposite result – one which does not appear to be distinguishable based on the similarity of the facts in the two cases. In Snyder, J.S. made a MySpace page that made fun of her High School principal.118 J.S. called her principal a sex addict, alleged that he had a small penis, and also alleged that he had sex with the school guidance counselor within the school.119 When the MySpace account was made aware to administrator’s at J.S.’s middle school, the superintendent and principal explored the possibility of pressing charges against J.S., but instead decided to suspend him for ten days.120

J.S.’s parents filed a 42 U.S.C. § 1983 action against the school district, claiming that J.S.’s free speech, due process and state law rights were violated when the school decided to

118 Id. at 920-21.
119 Id. at 921.
120 Id. at 922.
suspend J.S. for ten days because he created a MySpace account from his home computer.\footnote{Id. at 923.} While the district court granted summary judgment for the school district and the appellate court affirmed, the Third Circuit reviewed the case en banc and vacated the prior opinions.\footnote{Id. at 924.} The court held that (1) the school district could not have reasonably forecasted substantial disruption of, or material interference with, the school when J.S. created the MySpace profile.\footnote{Id. at 928.} While this language is borrowed directly from \textit{Tinker}, the court determined that the school could not punish J.S. for a reasonably foreseeable substantial interference with school operations based on the MySpace profile alone, and any suspension based on that theory was improper.\footnote{Id. at 931.}

Additionally, the court held that (2) the school district could not punish J.S. for use of profane language outside the school during non-school hours\footnote{Id. at 932.}, and (3) J.S.’ lewd, vulgar, and offensive speech that was made off-campus had not been turned into on-campus speech when another student brought a printed copy of the MySpace profile to school at the express request of the school’s principal.\footnote{Id. at 933.} The court’s articulated reasoning for the second holding was that on-campus profane speech may be punished (\textit{Fraser}) because vulgar and offensive speech may be restricted by a school, but that since J.S.’s speech occurred off-campus, \textit{Fraser} was inapplicable to his speech and therefore it should be protected and not reviewed under the general \textit{Tinker} school speech framework.\footnote{Id. at 932.} The reasoning for the third holding substantiated the reasoning for the second holding in that \textit{Tinker} should not be applied to this case at all, because J.S.’s speech did not occur on-campus and therefore should not be considered school speech at all.\footnote{Id. at 933.} Even
under Tinker’s language of “substantial interference of a school’s operation”, the principal asking another student to bring in a copy of the MySpace profile cannot be considered a substantial interference, and the fact that a copy of J.S.’s off-campus speech showed up on school grounds at all should be attributed more to the principal’s direct request as compared to the actual natural effect of J.S.’s speech.

The court noted, “Because J.S. was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school, the School District’s suspension of J.S.’s First Amendment free speech rights.”129 Again, this language mirrors the wording so typically found in school speech cases under the framework and analysis of Tinker.130 The majority opinion in Snyder found that it was not reasonably foreseeable to forecast that J.S’s speech would lead to a substantial disruption in the school, but the dissent in the case believed that substantial disruption, based on the offensive, crude and sexually explicit nature of the MySpace profile’s content, was reasonably foreseeable.131

In the end, Blue Mountain School District’s ten day suspension of Snyder was found to unconstitutionally violate his First Amendment freedom of speech rights, but that finding was determined by the court’s application of the Tinker framework.132 The court concluded that Tinker’s first prong was not actually achieved and that J.S.’s online, off-campus speech could not reasonably be forecasted to cause a foreseeable substantial interference and disruption of school activities, and so such a suspension was both premature and unconstitutional.133

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129 Id. at 920.
130 Tinker at 513.
131 Snyder at 941.
132 Id. at 931.
133 Id.
Snyder recognizes that the authority of public school officials is not boundless and that
the First Amendment unquestionably protects the free speech rights of students in public
school. Students do not shed their constitutional rights to freedom of speech or expression at
the schoolhouse gate. Soon after this recognition, the court in Snyder expressly said “The
Supreme Court established a basic framework for assessing student free speech claims in Tinker,
and we will assume, without deciding, that Tinker applies to J.S.’s speech in this case.” The
court then mentioned Tinker’s first prong, “to justify prohibition of a particular expression of
opinion, school officials must demonstrate that the forbidden conduct would materially and
substantially interfere with the requirements of appropriate discipline in the operation of the
school.” While there was no dispute as to whether J.S.’s MySpace profile actually caused a
substantial disruption in school (it did not), the crucial issue that was decided in this case was
whether J.S. should be punished based on facts which might reasonably have led school
authorities to forecast substantial disruption of or material interference with school activities.
The majority found that forecasting such a disruption would not be reasonable while the dissent
found differently.

Based on the fact that the MySpace page was so aggressively offensive and alleged
highly inappropriate activities by both the principal and the school’s nurse, the court should have
defferred to the school’s determination that it was reasonable to forecast a substantial interference
of the school’s operation. The dissent’s argument in Snyder, was quite persuasive and
convincing, as the MySpace account was openly viewable to the public, the student’s written
expression on the social media page was quite shocking and offensive, and it involved school

134 Id. at 926 citing Morse at 396.
135 Snyder at 926, quoting Tinker at 506.
136 Snyder at 926.
137 Snyder at 926 quoting Tinker at 509.
figures. Based on those facts, the school administrators beliefs that the MySpace page would cause a substantial disruption in school was reasonable. The court’s ability to look back on the actions that took place following the student’s postings on MySpace were akin to “hindsight 50-50” while the decision to punish the student occurred because of a reasonable forecasting of a material interference of the operation of the school. Also, given the facts of Snyder are so similar to Kowalski, Kowalski serves as persuasive precedent for deferring to the school administrator’s determination that punishment was warranted in this case based on their reasonable calculation of the effect the off-campus social media speech would have on the school, before such action was to occur.

As mentioned, the facts of Kowalski and Snyder are remarkably similar; both students created offensive and fake MySpace profiles in an attempt to make fun of, embarrass, harass and ridicule a fellow student (Kowalski) or the school’s principal (Snyder). The main difference between the cases was that Kowalski’s suspension was upheld as her MySpace account was found to be unprotected school speech while Snyder’s suspension was found to be unconstitutional as his MySpace account was found to be protected First Amendment speech that was not considered school speech at all. However, in looking at the language both courts used to arrive at these conclusions, the phraseology of Tinker’s first prong is used very closely in both cases. While the holding of the cases basically boils down to “suspension upheld” and “suspension unconstitutional”, the real difference is that the Second Circuit found that Kowalski’s MySpace profile created a reasonably foreseeable risk that a substantial disruption would take place within her school that would interfere with the school’s operations while the Third Circuit found that Snyder’s MySpace profile could not be reasonably forecasted to identify such a risk. While Kowalski’s speech is considered “school speech” that was punishable and
Snyder’s speech was considered protected non-school speech, the analytical framework both courts applied in order to reach the two conclusions were impressively similar. That framework used in both factually similar cases was the Tinker test, and that test should continue to apply to cases that involve student speech on school property, as well as cases that involve student off-campus online speech.

Also, another recent Third circuit case Layshock held that a school district did not have authority to punish a student for expressive conduct outside of the school that the district considered lewd and offensive. Layshock involved yet another case in which a high school student, Justin Layshock, created a parody MySpace profile of his principal. On the parody MySpace profile webpage, Layshock insinuated that his principal was an alcoholic, used steroids, smoked marijuana, abused prescription drugs, had a small penis, was a thief and was interested in transsexuals. After the school district discovered the MySpace profile, it suspended Layshock for ten days, placed him in an alternative education program, banned him from all extracurricular activities and disallowed him from participating in graduation ceremonies. Layshock’s parents then brought a 42 U.S.C. § 1983 action against the school district, superintendent, principal and co-principal alleging that the defendants had violated Layshock’s First Amendment rights by disciplining him for creating a fake social media profile of the principal off campus.

The Third Circuit Court of Appeals held that Hermitage School District did not have authority to punish Layshock for expressive conduct outside of school that district considered

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138 Layshock ex rel. Layshock v. Hermitage School Dist., 650 F.3d 205 (3rd Cir. 2011)
139 Id. at 219.
140 Id. at 207.
141 Id. at 208.
142 Id. at 208.
143 Id. at 210.
lewd and offensive. The court began its reasoning by citing Tinker as the recognized framework for school speech cases. The court then cited further school speech jurisprudence including Fraser, Morse, and Hazelwood. The court wrote “it is against this legal backdrop that we must determine whether the District’s actions here violated Layshock’s First Amendment rights.”

In analyzing whether Tinker’s first prong, substantial disruption of the school’s operation, was met, the court rather descriptively penned, “because the School District concedes that Justin's profile did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Layshock while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.” In the court’s view, the school district had no authority or ability to punish Layshock for speech he created in his grandmother’s house, not to mention speech that did not actually cause a substantial disruption within the school.

The court also mentioned that the term “school” no longer should be recognized as a strict adherence to within the doors of the building. Midway through its analysis, the court mentioned, “We realize, of course, that it is now well established that Tinker’s “schoolhouse gate” is not constructed solely of the bricks and mortar surrounding the school yard.

144 Id. at 219.
145 Id. at 211-12.
146 Id. at 212.
147 Id. at 213.
148 Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). In Hazelwood the Supreme Court held that a principal’s deletion of school articles on teen pregnancy from a school sponsored newspaper did not violate the First Amendment because the school could exercise editorial control over the newspaper since it was not opened up to the public forum and reasonably related to pedagogical concerns.
149 Layshock at 214.
150 Id. at 216.
151 Id.
152 Id.
Nevertheless, the concept of the “school yard” is not without boundaries and the reach of school authorities is not without limits.”  This shows that when Layshock was decided in 2011, the Third Circuit was open to the idea that “school speech” need not necessarily take place within the classrooms or hallways of the school building itself.

While the court in Layshock did determine that Layshock’s speech entered the school to a small extent, the school district failed to establish a sufficient nexus between Layshock’s speech and a substantial disruption of the school environment. The school chose to argue that an actual disruption had occurred within the school (though it was quite minor based on the facts) instead of the possible “reasonably foreseeable risk of a substantial disruption” option that Tinker’s first prong allows. The court cited Thomas, “Our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.” The court did not attempt to define the precise parameters of when the school district’s arm of authority could reach beyond the school house gate, and instead concluded its opinion with the holding that “the District is not empowered to punish Layshock’s out of school expressive conduct under the circumstances here.” While the court decided that the school could not punish Layshock for his off-campus online speech, the court made this determination after utilizing the framework of Tinker and its progeny.

It is unfortunate that the school district chose to only argue that an actual substantial disruption had occurred within the school instead of choosing to argue in the alternate that their

153 Id.
154 Id. at 214.
156 Layshock at 219.
157 Id.
158 Id.
159 Id. at 211-19.
decision to punish Layshock was warranted based on a reasonable forecasting of a substantial disruption. The school district appeared to have a much better case if they had made both arguments, because a reasonable forecasting of a substantial disruption is much easier to show than an actual material interference or substantial disruption of a school’s operation. Especially because the school district was able to show a disruption at some level (deemed by the court to not be “substantial”) relying on the fact that the student’s MySpace profile demeaning the school’s principle was offensive and controversial could have gone a long way to show that the school had a reasonable reaction to punish Layshock because of his off-campus online speech. Had the school district cited and followed the court’s reasoning in Doninger and Kowalski, the court in Layshock would have had an even “closer call” and perhaps could have upheld the suspension as a reasonably forecasted substantial disruption in accordance with the first prong of Tinker.

An Alternative Framework: A Recent State Supreme Court Case On This Issue

A recent, well-written case that could be influential on this issue of student off-campus online speech is Tatro. At the time of this article (December of 2012), Tatro, which was decided on June 20, 2012, is one of the most recent appellate-level cases decided on this issue. In Tinker, Amanda Tatro, a student in the University of Minnesota’s mortuary sciences program, was put on probation for the remainder of her undergraduate career and given an “F” in her mortuary anatomy lab course as a result of four Facebook posts that occurred while she was enrolled in that class. The four Facebook posts that resulted in the disciplinary reaction by the University were:

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160 Tatro v. University of Minnesota, 816 N.W.2d 509 (Minn. 2012).
161 Tatro at 515.
(1) Amanda Beth Tatro: gets to play, I mean dissect, Bernie today. Let’s see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it under my sleeve . . .

(2) Amanda Beth Tatro: is looking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar

(3) Amanda Beth Tatro: Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend my evening updating my “Death List #5” and making friends with the crematory guy. I do know the code . . .

(4) Amanda Beth Tatro: Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity. Bye, bye Bernie. Lock of hair in my pocket.\footnote{Tatro at 512-13 (emphasis added).}

“Bernie” was the name that Tatro had given to the human cadaver on which she and her anatomy laboratory group members were training.\footnote{Id. at 513.} The University of Minnesota disciplined Tatro because she violated the Student Conduct Code’s provision prohibiting threatening conduct.\footnote{Id. at 514.} The University’s Campus Committee on Student Behavior (CCSB) changed Tatro’s mortuary anatomy lab grade to an “F”, ordered her to complete a directed reading on clinical ethics, demanded that she write the professor a letter addressing the issue of respect within the program and the profession, required that she undergo a psychiatric evaluation at the student health service clinic and placed her on probation for the remainder of her undergraduate career.\footnote{Id. at 514-15.}

Tatro brought her claim to the Minnesota court of Appeals after her institutional appeals to the CCSB and the University of Minnesota were denied.\footnote{Id. at 515.} Her lawsuit’s theory was that\footnote{Tinker} should not apply to her case because her Facebook posts were not school speech and were

\begin{itemize}
\item \footnote{Tatro at 512-13 (emphasis added).}
\item \footnote{Id. at 513.}
\item \footnote{Id. at 514.}
\item \footnote{Id. at 514-15.}
\item \footnote{Id. at 515.}
instead protected speech by the First Amendment.\textsuperscript{167} Alternatively, \textit{Tatro} cited \textit{Healy}\textsuperscript{168} to argue that state colleges and universities are not enclaves immune from the sweep of the First Amendment, and that the college classroom and its surrounding environs is peculiarly the “marketplace of ideas.”\textsuperscript{169} Tatro argued that public university students are entitled to the same free speech rights as members of the general public with regard to Facebook posts.\textsuperscript{170}

The Minnesota Supreme Court recognized that courts often apply \textit{Tinker}’s first prong, the substantial disruption or interference standard, as the court of appeals did in \textit{Tatro}, to the regulation of student speech over the Internet.\textsuperscript{171} The court cited \textit{J.C. ex rel. R.C.}\textsuperscript{172} in observing that “the majority of courts will apply \textit{Tinker} where speech originating off-campus is brought to school or to the attention of school authorities.” The court then noted that the Second Circuit has concluded that a high school student may be disciplined for “expressive conduct” in a publicly accessible blog posting “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.”\textsuperscript{173} The court also mentioned that the Pennsylvania Supreme Court concluded that a school could punish an eighth grade student for creating a threatening website directed at his algebra teacher where the website “created disorder and significantly and adversely impacted the delivery of instruction” at the school.\textsuperscript{174} However, the

\textsuperscript{167} \textit{Id.} at 517-18.
\textsuperscript{169} \textit{Healey} at 180.
\textsuperscript{170} \textit{Tatro} at 517.
\textsuperscript{171} \textit{Id.} at 518.
\textsuperscript{173} \textit{Tatro} at 519, \textit{citing Doninger v. Niehoff}, 527 F.3d 41, 48 (2d Cir. 2008) (\textit{quoting Wisniewski v. Bd. of Educ.}, 494 F.3d 34, 40 (2d Cir. 2007)).
\textsuperscript{174} \textit{Tatro} at 519, \textit{citing J.S. v. Bethlehem Area Sch. Dist.}, 807 A.2d 847, 869 (Pa. 2002).
court remarked that courts have refused to allow schools to regulate out-of-school speech where the speech did not or was not likely to cause a substantial disruption of school activities.\textsuperscript{175}

The Minnesota Supreme Court adopted a new standard which focused upon the student conduct handbook manual that Tatro was found to have violated by the University of Minnesota’s CCSB.\textsuperscript{176} The court held that the university may regulate student speech on Facebook that violates established professional conduct standards – in this case the professional conduct standards for morticians.\textsuperscript{177} So, the Minnesota Supreme Court, with its holding in \textit{Tatro}, created a new framework, separate from \textit{Tinker}, to determine that Amanda Tatro could be punished by the University of Minnesota for Facebook statuses she posted off campus. This “Ends-Means” balancing test presumes that the university can discipline the student, based on the binding student conduct manual that the student agreed to at the beginning of her college career at the institution. The “ends” in this analysis is student conduct for each individual University of Minnesota student, while the “means” is the student conduct code that each student signs before they begin their academic career at the University. But, such discipline can only be handed down when the student violates established conduct standards.

\textsuperscript{175} \textit{Tatro} at 519, \textit{citing J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.}, 650 F.3d 915, 930-31 (3d Cir. 2011) (concluding that a school district could not have reasonably forecast a substantial disruption after a student created on her home computer a MySpace profile that made fun of her middle school principal and took specific steps to make the profile private), \textit{cert. denied} ___ U.S. ___ (2012); \textit{Layshock ex rel. Layshock v. Hermitage Sch. Dist.}, 650 F.3d 205, 217 (3d Cir. 2011) (concluding that a high school could not punish a student merely because his creation of a “parody” MySpace profile of his principal outside of school reached inside the school), \textit{cert. denied} ___ U.S. ___ (2012).

\textsuperscript{176} “We acknowledge the concerns expressed by Tatro and supporting amici that adoption of a broad rule would allow a public university to regulate a student’s personal expression at any time, at any place, for any claimed curriculum-based reason. Nonetheless, the parties agree that a university may regulate student speech on Facebook that violates established professional conduct standards. \textit{This is the legal standard we adopt here}, with the qualification that any restrictions on a student’s Facebook posts must be narrowly tailored and directly related to established professional conduct standards. Tying the legal rule to established professional conduct standards limits a university’s restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards. And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, we limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student’s personal life outside of and unrelated to the program.” \textit{Tatro} at 521 (emphasis added).

\textsuperscript{177} \textit{Id.}
The Minnesota Supreme Court’s holding in *Tatro* could be described as “sidestepping” *Tinker* as it references *Tinker* but then applies its own framework without overruling or distinguishing *Tinker*. The reasoning utilizes in *Tatro* is persuasive, but it does avoid the framework analysis that the U.S. Supreme Court formulated in *Tinker*. It is highly unlikely that the U.S. Supreme Court will grant certiorari and hear Tatro’s case if she appeals, as the Supreme Court typically hears cases where lower circuit court rulings are in irreconcilable and conflict with each other (a “circuit split”). Tatro’s case was brought in Minnesota state court, and it is more likely that the Supreme Court will take a “wait and see” approach on this topic before considering a case. The U.S. Supreme Court will likely choose to wait until there is a more obvious federal circuit court split before determining the issue of student off-campus social media speech.

Additionally, in rather sad news, Amanda Tatro passed away on June 25, 2012. Her husband found her unresponsive on the couch when he returned home; she was 31 years old when she died. The fact that Tatro has passed away makes it even more unlikely that her attorneys would appeal her case to the U.S. Supreme Court, especially since her punishment at the University of Minnesota were not extremely damaging while she was living.

**The Difference Between High School and College Student Speech**

Some would argue that *Tinker*’s applicability should not only vary based on whether the speech occurs on campus or off campus, but also that it should depend on whether the student is in a middle school, high school, or a college setting. The argument is that the learning environment in a high school is intended to be stricter and more organized so that a teacher may

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present educational materials to a classroom in an orderly fashion while a college classroom is more likely to encourage open discussions and potentially controversial questions. Arguably, high schools have a greater duty to protect its students than colleges do, because high school students are minors and college students are adults. Given that the content and intellectual quality of university classroom discussions are likely to be heightened as compared to high school classrooms, perhaps it would be wise to end Tinker’s applicability at high school graduation and allow for unfettered discourse within our nation’s colleges and universities.

Such an argument has its merits, and logically colleges and universities should be treated differently by the law as compared to middle schools and high schools. High schools have a heightened “duty of protection” over its students, since they are minors, as compared to colleges and universities who offer an education to adults. But, the purpose of Tinker is still vital and applicable to college classrooms – an education is still being obtained by each student, and no single student should be entitled to speech which causes a substantial disruption to that educational setting, which is protected by the First Amendment.\textsuperscript{179} Tinker remains the correct framework for the question of student off-campus social media speech, even when college students are the ones being suspended for the effect of their speech. While a court should undoubtedly take into consideration the fact that they are dealing with the suspension or punishment of a college student instead of a high school student, the aim of Tinker is accomplished in both settings: the protection and assurance of a classroom that will be free from substantial disruptions and interferences by fellow students, with the threat of constitutional punishment for violators.

\textsuperscript{179} Tinker cites Epperson v. Arkansas, 393 U.S. 97 (1968) three times in the opinion. Epperson involved an Arkansas statute which prohibited the teaching of evolution and mandated the teaching of creationism. However, Tinker cited Epperson at 104, in which the Court stated, “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”
In Robert C. Post’s article, “Racist Speech, Democracy and The First Amendment”, a section is dedicated to “The First Amendment and Harm to The Educational Environment.”\textsuperscript{180} Within this section, Mr. Post gives a nice introductory paragraph which explains some of the Supreme Court’s precedent in regards to the First Amendment as it affects university students. Mr. Post writes,

Although the Supreme Court has often held that “the First Amendment rights of speech and association extend to the campuses of state universities,” and even that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum,” in fact state institutions of higher learning are public organizations established for the express purpose of education. The Court has always held that “a university's mission is education” and has never construed the first amendment to deny a university's “authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.” The Court has explicitly recognized “a university's right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education.” Thus student speech incompatible with classroom processes may be censored; faculty publications inconsistent with academic standards may be evaluated and judged; and so forth.\textsuperscript{181}

That being said, universities have an interest in having classes being taught in an ordered, organized, civil and safe environment for the benefit of its students, its professors and for the institution itself. While a college classroom will be more prone to open discussions in a less structured and rigid format similar to a high school class, such a “democratic education”, like democratic government in the United States, has its limits in regards to participatory behavior.

While college classrooms and campuses are different from high school classrooms and school buildings, the protection \textit{Tinker} affords students who are seeking to obtain an education without substantial disruption or interference applies, perhaps socially proportionally, to both high schools and universities. The First Amendment should take a greater concern in protecting the educations of middle school and high school student because they are minors as compared to

\textsuperscript{181} \textit{Id.} at 318.
adult college students. Ongoing minor disciplinary actions (detentions, in and out of school suspensions, and Saturday School) is a more prevalent part of a middle school or high school student’s educational experience, whereas such discipline is more cut-and-dry and severe with adult students attending colleges (probation, suspension, expulsion). Attention to speech that can reasonably be forecasted to cause a substantial disruption of a school’s operation should be more focused and attenuated when minor children are the subjects of the Tinker framework, while college students are hopefully more mature and less likely to cause such a material interference with their expression, although rallies and protests are more common on college campuses.

While the Tinker standard of material interference of a school’s operation remains the same for both high schools and colleges, the more liberal and participatory college environment lends itself to more flexible student speech and expression (making it harder to cause a substantial disruption) while discipline may be more appropriate for a student who says nearly the same thing while they are in high school (where it is easier to cause a substantial disruption). At bottom, the key inquiry is whether the student’s speech caused a substantial disruption or not. It is important to realize that the acceptable degree of controversy or polarization may be higher in colleges than it is in middle schools and high schools, so material interferences with a school’s operation may be more difficult to achieve on a college campus less concerned with ongoing remedial discipline of students.

Also, in Paul Horowitz’s article, “Universities As First Amendment Institutions: Some Easy Answers and Hard Questions”, Mr. Horowitz includes a section entitled “Universities as First Amendment Institutions.”\(^{182}\) Within that section, the author notes that courts have already

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\(^{182}\) Paul Horwitz, Universities As First Amendment Institutions: Some Easy Answers and Hard Questions, 54 UCLA L. Rev. 1497, 1513 (2007).
accepted that universities play a distinct role in our First Amendment analysis.\textsuperscript{183} Courts have consistently extolled the unique function played by universities in the pursuit of advancing the knowledge of our nation’s young adults through public discourse and unfettered debate.\textsuperscript{184}

Courts have also typically “tread lightly” around any suggestion that general rules that are otherwise applicable under standard First Amendment doctrine would apply in the same way in the university context.\textsuperscript{185}

Mr. Horowitz’s article beautifully describes universities by saying,

> Universities at their best are places of discovery, innovation, and heterodoxy. They provide knowledge, debate, and a meaningful foundation to the intellectual, professional, and civic life of students; resources, collegial support, and a haven for the free and unfettered work for scholars; and direct and indirect collateral benefits for the broader society. Academic speech—again, at its best—is characterized by “its commitment to truth . . . its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism.” It can “provide our most important model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational.” These are virtues well worth protecting.\textsuperscript{186}

While it is true that the intellectual product that comes from colleges and universities is likely more beneficial and ultimately more tangible to society as compared to middle school and high schools, that is all the more reason to protect the operation of such higher education institutions through a freedom of speech framework where protection of speech is the rule, and lack of protection is the exception. \textit{Tinker} does exactly that: all lively, productive and academically-oriented speech will be protected by the First Amendment. Even speech that is controversial, polarizing and energized will be protected. The only speech that will not be protected, and therefore open to constitutional punishment by the educational institution, is

\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 1514.
speech that is so politically incorrect, or so hateful or so obnoxious that it substantially disrupts the classroom or the school’s operations. While even hate speech and polarizing controversial speech may have presumptive constitutional value in other settings in American society, within the framework of Tinker and school speech in general, the key inquiry is simply whether that speech caused a substantial interference or not. As mentioned above, the content of the speech itself or its origin should not be the focus of courts across the country hearing litigation cases on this issue. The primary issue for courts to analyze should be whether the direct or indirect effect of student online speech substantially disrupted, or was reasonably forecasted to substantially disrupt, the school’s operation.

**Analyzing On-Point Law Review Articles**

In John T. Ceglia’s article “The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age”, the author argues that Internet speech originating off-campus should not be regulated under the current two-pronged Tinker standard.\(^\text{187}\) Rather, Ceglia argues that courts should apply only the second prong of the Tinker test and make the determining factor of First Amendment protection whether the student’s off-campus speech “collides with the rights of others.”\(^\text{188}\) Ceglia is rather focused on protecting the safety concerns of students in school buildings and finds substantial interferences and disruptions to be less integral to the off-campus online student speech issue.\(^\text{189}\)

While a concern for other students’ rights is laudable, stripping Tinker of its first prong weakens the protection that the Tinker framework seeks to offer students who are not implicated in the social media expression at issue. Stopping the analysis at whether the speech violates the

\(^{187}\) Ceglia at 943.

\(^{188}\) Id. at 985.

\(^{189}\) Id. at 974.
rights of other students is not enough; such an analysis is underinclusive because some speech that should be rendered unprotected by the First Amendment would not violate the rights of others, but would certainly constitute a substantial disruption of the school’s operation. Under Ceglia’s model, as long as off-campus online speech does not collide with the rights of others, it is protected. Meanwhile, on-campus speech would be analyzed under both prongs of *Tinker*. This distinction of off-campus and on-campus speech ignores the aim of *Tinker*, which is to promote an environment conducive to learning for all citizens. By stripping *Tinker* of its first prong, Ceglia’s proposed off-campus online speech framework does not do enough to protect students from the distractions and interruptions that substantially disruptive speech may bring. Both substantially disruptive speech and speech violating other students’ rights should be unprotected by the First Amendment, regardless of the origin of the speech.

In Meggen Lindsay’s note, “*Tinker* Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students – Tatro v. University of Minnesota,” the author argues that while *Tinker* is the proper framework for intermediate and secondary educational institutions in the United States, *Tinker* is improperly applied to university settings. Lindsay believes the *Tinker* standard should be restricted to K-12 student speech, not extended to adults at the post-secondary level. Lindsay also argues in the alternative that even if *Tinker* were the proper lens through which to view university student speech, *Tinker* should not be applied to online off-campus speech that does not occur at a school sponsored event. As such, Lindsay believes college off-campus online speech that is disassociated with the

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191 *Id.* at 1473.
192 *Id.*
193 *Id.* at 1474.
university at the time of its posting should be considered protected conduct under the rubric of school-speech cases.\textsuperscript{194}

While Lindsay is not alone in her belief that off-campus social media speech authored by college students should be considered completely protected by the First Amendment, \textit{Tinker} has value in protecting the learning atmosphere in classrooms on college campuses. While protection from substantial interferences and speech that collides with other students’ rights (the two prongs of \textit{Tinker}) is less necessary on college campuses as compared to high schools and middle schools, protection should be afforded to the learning environments nonetheless and to an appropriate degree. As discussed above, the focus of a court’s analysis should not be where the speech was authored but where it had its effect. Since punishments will be handed down by a university’s disciplinary committee, the effect of the student’s speech will have been upon the university in some capacity – and the magnitude of disruption that speech, or the reasonably forecasted magnitude of disruption, should be the crux of a court’s analysis and decision whether to protect the speech under \textit{Tinker}.

Lastly, in Darryn Catheryn Beckstrom’s article, “Who’s Looking At Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students’ Online Speech,”\textsuperscript{195} the author advocates for the use of university student conduct codes to determine whether speech is protected by the First Amendment or not.\textsuperscript{196} The analysis used in this article runs parallel to the analysis used by the Minnesota Supreme Court in the \textit{Tatro} case, although this article was published four years prior to that opinion. Beckstrom also notes that in order to protect the First Amendment rights of college students to free speech, colleges should not discipline students for

\textsuperscript{194} Id.  
\textsuperscript{195} Darryn Cathryn Beckstrom, \textit{Who’s Looking At Your Facebook Profile? The Use Of Student Conduct Codes To Censor College Students’ Online Speech}, 45 Willamette L. Rev. 261 (Winter, 2008).  
\textsuperscript{196} Id. at 265.
their off-campus cyberspeech unless such speech presents a true threat or constitutes a crime under state or federal law. Beckstom proposes a standard which would discipline college students for their off-campus speech only when such speech constitutes a true threat or a crime.

The main difference between Beckstrom’s article and this one is where the line is drawn between protected and unprotected off-campus online college student speech. This article relies on Tinker’s two prongs to determine what online speech should be unprotected (expressions that cause a material interference or substantial disruption, or speech that violates other students’ rights) while Backstrom would not protect speech that presents a true threat or constitutes a crime under federal or state law. While this article’s line can be considered more “strict” in that more speech will be unprotected as compared to the line that Backstrom’s article draws, the reason for that is likely due to this article’s dedication and belief in the protection of the classroom setting and Tinker’s at least implicit aim to foster an educational environment conducive to learning. A healthy learning environment and how to maintain it was discussed in Backstrom’s article as well, but not to the same depth as this article. Backstrom’s article was more focused on protecting as much off-campus online university speech as possible, stopping protection short at only real safety threats and breaches of the law. This article believes that less speech than “everything but threatening and criminal speech” should be protected by the First Amendment, for the purpose of protecting the learning setting of each individual student not implicated in the off-campus social media speech in the first place.

Additionally, Backstrom notes the prevalent use of University student conduct codes which are signed by every student before they take their first class. Student conduct codes
should not be the determining factor in First Amendment university student off-campus social media speech. Universities and students should not be able to contract (student conduct codes) outside of the constitutional law on this topic. The law in this area of First Amendment jurisprudence is Tinker and its progeny, not an ends-means test (ends of upholding a healthy, safe, and learning-conducive campus through the means of a student conduct code) that is contracted out between the university and its powerless student. Students do not have much of a choice, they must sign the conduct code or they will not be able to begin their post-secondary academic career at that institution. Under such circumstances, student conduct codes should not determine whether a student’s speech is protected or unprotected by the First Amendment.

Conclusory Remarks – Apply Tinker

The framework argued for in this article regarding student off-campus social media speech is not just a workable standard, it is an ideal standard. Tinker is strong enough to give students, professors and judges solid guidance and analytical framework as to what types of speech will be protected and what types of speech will not be protected (speech causing and effecting a substantial disruption of the school). Tinker is also flexible enough to be applied in middle schools, high schools and colleges as judges can understand what is to be expected of student behavior and the educational setting every step of the way. Tinker is the ideal format for student off-campus online social media speech.

So, to answer the question presented in this article’s title of “Student Speech, What You Can’t Say Off-Campus and Why”: it is not about what a student says but the effect that student’s speech has upon a school. Whether a student’s expression is authored on the school’s campus or off of it, the speech would be considered unprotected under Tinker if such speech could be
reasonably forecasted to create the risk of a substantial disruption or interference of the school’s ability to discipline and operate. Regardless of content or location of the expression, if the student’s speech causes a substantial disruption of the school’s operation, it should be unprotected by the First Amendment and punishable pursuant to Tinker.