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Testing The Social Media Waters - First Amendment Entanglement Beyond The Schoolhouse Gates

Lily M Strumwasser

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TESTING THE SOCIAL MEDIA WATERS - FIRST AMENDMENT ENTANGLEMENT BEYOND THE SCHOOLHOUSE GATES

By Lily M. Strumwasser

“Teachers, principals, legislators, and judges have been wrangling for decades in their attempts to find the right doctrinal formula for school speech.”

I. THE NEW AGE OF SOCIAL MEDIA

Social media has become an integral part of modern society. People of all generations use social media as an online platform to share information and interact with known and unknown contacts. There is an online resource for virtually every interest imaginable. People can share videos on YouTube, post pictures on Pinterest and offer status updates on Twitter. Professionals can network by displaying their resume on

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1 Graduates from The John Marshall Law School in May 2012. Lily is presently employed as a Law Clerk with the firm of Seyfarth Shaw LLP in Chicago, Illinois. Lily specializes in the area of labor and employment complex discrimination litigation. I would like to thank my parents, Jennifer and Ira Strumwasser for always believing in me. A special thanks to Conor F. McNulty for always offering guidance and encouragement. I would also like to thank Professor Theodore Sky for his insight and assistance on the development of this article. Finally, I am forever grateful to Leonard Amari, for helping me and so many others achieve our dreams.


5 Twitter, available at https://twitter.com/. “Twitter is handling 1.6 billion queries per day . . . 190 million average Tweets per day occur on Twitter (May 2011) . . . Twitter is adding nearly 500,000 users a day.” Jeff Bullas, 20 Stunning Social Media Statistics Plus Infographic, available at http://www.jeffbullas.com/2011/09/02/20-stunning-social-media-statistics/. Furthermore, “65% of the world’s top companies have an active
LinkedIn\(^6\) or through advertising their business on blogs.\(^7\) Reddit is a social news site that permits users to comment on posted items.\(^8\) The online dating industry is also a hot commodity – over 40 million people used websites such as EHarmony and Match.com in 2012.\(^9\) And then there is Facebook — the world’s largest social network. Facebook alone has 1.2 billion members.\(^10\)

A recent study examined the use of social networking websites and revealed that 79% of American adults use the internet, and 59% of adult Internet users report that they

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\(^6\) “91% of experienced social marketers see improved website traffic due to social media campaigns and 79% are generating more quality leads; 23% of Fortune 500 companies have a public-facing corporate blog; 53% of small businesses are using social media.” Cara Pring, THE SOCIAL SKINNY, GET THE INSIDE SCOOP ON ALL THINGS SOCIAL MEDIA, 99 New Social Media Stats for 2012 (May 10, 2012) available at http://thesocialskinny.com/99-new-social-media-stats-for-2012/.

\(^7\) LINKEDIN.COM, available at http://www.linkedin.com/.


\(^10\) An average Facebook user spends 15 hours and 33 minutes on Facebook per month. Mark Zuckerberg launched Facebook in 2004 when he was a student at Harvard University. Zuckerberg’s audience was originally college students, and membership was restricted to students of Harvard University. One year later, Facebook expanded to twenty-one universities. Shortly thereafter, also expanded to permit high school students to access the social networking device. By 2006, people ages 13 and older with a valid e-mail address could access Facebook. Now, virtually anyone – including companies – can create a Facebook profile. Ken Burbary, Facebook Demographics Revisited – 2011 Statistics, WEB BUSINESS, DIGITAL MARKETING, SOCIAL MEDIA, WEB TECHNOLOGY (Mar. 7, 2011) available at http://www.kenburbary.com/2011/03/facebook-demographics-revisited-2011-statistics-2/; Sid Yadav, Facebook – The Complete Biography, MASHABLE (Aug 25, 206) available at http://mashable.com/2006/08/25/facebook-profile/.
use at least one type of social networking website.\textsuperscript{11} Although adults have a clear presence in social media, teenagers and young adults largely dominate the industry. A striking 98\% of 18-24 year-olds are connected to social media.\textsuperscript{12}

Near constant connection to smart phones, iPads and laptop computers has made social media accessible almost anytime, anywhere. Students often set Facebook status updates to remind others of an on-campus meeting, party or sporting event. Some students even use social media to complain about a professor or student in their class.

The emergence of social media has created undeniable disruptions at schools – especially inside the classroom. School administrators are faced with the question of whether they may discipline students for content published on social media outlets. “The extent to which school officials may discipline or restrict students’ off-campus expression on the Internet consistent with the First Amendment has been a growing concern for more than a decade.”\textsuperscript{13} There are no clear guidelines that dictate the extent to which school administrators can discipline students for such speech. In fact, only a handful of circuit

\textsuperscript{11} Keith Hampton, Lauren Sessions Goulet, Le Rainie, & Kristen Purcell, \textsc{Pew Internet \& American Life Project}, \textit{Social networking sites and our lives} (June 16, 2011), available at http://www.pewinternet.org/~/media/Files/Reports/2011/PIP\%20-%20Social\%20networking\%20sites\%20and\%20our\%20lives.pdf.
courts have weighed in on this issue. Such decisions have “produced a welter of precedents reflecting divergent reasoning and less-than-predictable outcomes.”

Because legal issues involving technology and education are complex and unprecedented, it is only a matter of time until the Supreme Court addresses the question of when schools can discipline students for off-campus cyber speech. Until that time, however, school administrators are in a “flex” position – unsure whether disciplining a student for content on a social media website will violate the First Amendment. This article charts new territory and addresses the extent to which school administrators can regulate students’ off-campus cyber speech.

A. What Have Courts Decided And Where Do We Go From Here?

This article begins with a brief overview of the Supreme Court rulings “that provide the applicable body of law for determining when school administrators can restrict student speech although, notably, the Court has not yet spoken on the relatively new area of student internet speech.” Part I of this Article addresses Tinker v. Des Moines Independent Community School District, which provided the “most quoted adage in school law literature” – that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Supreme Court’s decision in Tinker defined the contours of student free speech within public schools. Part I of this article discusses the most transformative student speech cases following Tinker, which include Bethel School District No. 403 v. Fraser and Morse v. Frederick. Part II

14 Id.
15 Id.
16 Supra note 12, at 7.5-14; J.S ex rel. Snyder v. Blue Mountain School Dist, 493 F.3d 286, 296 (3d Cir. 2010).
summarizes the growing uncertainty among federal courts regarding the extent to which school authorities may discipline students for off-campus cyber speech. Part II analyzes different standards that federal courts apply in determining whether off-campus cyber speech is actionable. Part III recognizes the premise that is surfacing in rulings that schools may discipline students for off-campus cyber speech, if it creates a substantial disruption in the classroom. Perhaps most importantly, Part III attempts to clarify the varying standards and advocates recognition of a single standard. Ultimately, this article proposes that the Supreme Court adopt a two-step standard in determining whether off-campus cyber speech is actionable inside the schoolhouse gates.

B. Students’ First Amendment Rights Collide With School Authorities - Tinker v. Des Moines Independent Community School District

Freedom of speech is a fundamental right that our founders explicitly included in the First Amendment of the United States Constitution. Legal protections of the First Amendment are a critical component of democracy. Free speech supports the marketplace of ideas – the freedom to express conflicting ideas so that the truth will emerge. Free speech allows people to criticize the government, each other and to formulate their own ideas. Free speech encourages stability, neutrality, restraint on tyranny, corruption and ineptitude. It is designed in the hope that use of such freedom will “ultimately produce a capable citizenry.” Although the First Amendment protects

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18 U.S. CONST. amend. I.
19 Cohen v. California, 402 U.S. 15 (1971) (“The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests . . .”).
the fundamental right to free speech, this right is not absolute in its nature. Free speech rights are subject to restriction and in limited circumstances the prevention and punishment of speech is constitutional.\textsuperscript{20}

While parties have battled over free speech rights for decades, the emergence of social media has created a new genre of litigation. Cyber speech raises issues relating to the forum of speech and the audience in which it is heard. Now, more than ever, courts are faced with the question of whether school administrators can discipline students for their off-campus cyber speech.

The Supreme Court issued its ruling in \textit{Tinker v. Des Moines Independent Community School District} in the midst of the Vietnam War.\textsuperscript{21} The case began when John F. Tinker, with his friend and sister, created a plan to wear black armbands to their junior high school as a signal of their opposition to the war.\textsuperscript{22} The students’ intention was to make their views about the Vietnam War known, “and, by their example, to influence others to adopt [their views].”\textsuperscript{23} The school principal became aware of the students’ plan and implemented a policy “that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”\textsuperscript{24} Despite the school’s newly minted policy, the students proceeded with their plan and wore black armbands to school. Their political expression was “silent, passive . . . [and] unaccompanied by any disorder or disturbance on the part

\begin{thebibliography}{9}
\bibitem{21} \textit{Tinker}, 393 U.S. 503 (1969).
\bibitem{22} \textit{Id.} at 504.
\bibitem{23} \textit{Id.} at 514.
\bibitem{24} \textit{Id.}
\end{thebibliography}
Nevertheless, the school suspended the students and told them that they could not return to school until they removed their armbands.\textsuperscript{26} The students refused to remove their armbands, and accepted their suspension. Subsequently, the students’ fathers filed a complaint on their children’s behalf in the U.S. District Court for the Southern District of Iowa.\textsuperscript{27} The parents challenged the constitutionality of the school authorities’ action and argued that the suspension violated the students’ First Amendment freedom of speech rights.\textsuperscript{28} The District Court dismissed the parents’ complaint and the parents appealed to the Court of Appeals for the Eighth Circuit.\textsuperscript{29} The Eighth Circuit heard the case \textit{en banc} and affirmed the District Court’s decision. The parents then appealed the case to the Supreme Court, and \textit{certiorari} was granted.\textsuperscript{30}

The Supreme Court balanced the students’ First Amendment rights against the “school officials’ need to maintain the order requisite to educational endeavor.”\textsuperscript{31} The Court explained that disciplining a student is only permissible if the student’s conduct is disruptive and “intrude[s] upon the work of the schools or the rights of other students.”\textsuperscript{32} Based on this standard, the Court held that the students’ conduct of wearing the armbands was “entitled to comprehensive protection under the First Amendment.”\textsuperscript{33} The Court reasoned that only a few of the students wore armbands and there was no evidence that

\begin{itemize}
  \item \textsuperscript{25} Id. at 737.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id. 505.
  \item \textsuperscript{29} See \textit{Tinker}, 258 F. Supp. 971 (S.D. Iowa 1966), \textit{aff’d}, 383 F.3d 988 (8th Cir. 1967).
  \item \textsuperscript{30} \textit{Tinker}, 393 U.S. 503 (1969).
  \item \textsuperscript{31} \textit{Supra} note 12, at 7-10.
  \item \textsuperscript{32} Id.; see also \textit{supra} note 12, at 7-7.
  \item \textsuperscript{33} \textit{Tinker}, 393 U.S. 503 (1969).
\end{itemize}
“the work of the school or any class was disrupted.”34 Because the school provided no evidence that the students’ speech interfered with school order, the Court concluded that the school administrators’ action impinged on the students’ right to express their opinions in violation of the First Amendment.

_Tinker_ teaches school authorities that they may discipline “students constitutionally protected expressive activity, but only if they reasonably expect that the restricted speech or conduct will cause substantial disruption or material interference with the rights of others.”35 Furthermore, school officials’ “concerns about disruption must be based on more than an unsubstantiated fear that speech or other expressive conduct will spark opposition that [school officials] may not restrict a students’ personal expression merely to avoid the discomfort and unpleasantness that laws accompany and unpopular viewpoint.”36 Following _Tinker_, school authorities may restrict students’ speech if their expression will reasonably cause a substantial disruption or material interference with other students.37 Thus, it is important that school administrators have a clear understanding of what constitutes a substantial disruption.

As set forth in _J.C. ex rel. R.C. v. Beverly Hills Unified School District_, when determining whether a student caused an actionable disruption, courts consider four factors.38 First, courts consider the extent to which the student’s speech is discussed at school.39 “The mere ‘buzz’” about the incident, standing alone, is not sufficient to

34 _Id._
35 _Supra_ note 12, at 7-10.
36 _Id._
37 _Id._
39 _Supra_ note 12, at 7-10.
constitute a substantial disruption. Second, courts evaluate whether the student’s speech was violent or threatening. Several courts have held that violent or threatening speech merits discipline. The third factor “relevant to the substantial disruption inquiry is whether school administrators are pulled away from their ordinary tasks to respond to or mitigate the effects of a student’s speech.” If the student’s speech has such an effect, it is likely that it constitutes a substantial disruption. Last, courts consider if there is evidence or facts to support the school’s belief that a student’s speech or conduct would create a substantial disruption. A school administrator’s mere disapproval of the student’s speech is not enough to discipline a student for a foreseeable disruption.

40 Beverly Hills Unified Sch. Dist., 2010 WL 1914215 at 1112; see also Layshock v. Hermitage School Dist., 496 F.Supp.2d 587, 600 (W.D. Pa. 2007) (holding that students’ discussion about a MySpace profile was not enough evidence to discipline the student for creating a substantial disruption).

41 Ronna Greff Schneider, General Restrictions on Freedom of Speech in Schools, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION, 1 Edu. Law § 2:3 (citing J.C. ex rel R.C., 2010 WL 1914215 at *18.; LaVine v. Blaine School Dist., 257 F.3d 981 (2001)) (holding that the school permissibly disciplined a student where the school anticipated that a threatening poem he wrote that described a mass shooting of his classmates would create a substantial disruption); J.S. v. Bethlehem, J.S., 569 Pa. 638 (2002) (upholding the school’s discipline of a student for creating a threatening webpage that depicted a teacher with her head cut off); O.Z. v. Board of Trustees of the Long Beach Unified School Dist., No. 08-CV-5671, 2008 WL 4396895 (C.D. Cal., Sept. 9, 2008) (permitting a school to discipline a student for creating a violent graphic video that depicted her teacher’s murder); but see Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (holding that a student did not create a substantial disruption when he created a website that instructed viewers to kill a person in a violent manner).

42 J.C. ex rel R.C., 2010 WL 191425 at *1114.

43 Id. (citing Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008)). “For example, in Doninger v. Niehoff, the Second Circuit found that [the plaintiff’s] email message and blog post about a purportedly cancelled school event, “Jamfest,” created a substantial disruption because school officials were required to deal with a ‘deluge of calls and emails’ related to the event.” Id.

44 J.C. ex rel R.C., 2010 WL 191425 at *1115.

45 Id.; see Beussink v. Woodland R-IV School Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (finding that the school administrator disciplined the student based on his emotional...
Although J.C. ex rel. R.C. v. Beverly Hills Unified School District provides concrete factors to consider, the determination of whether a student’s actions are disruptive remains a fact-intensive analysis. Thus, courts have reached varying conclusions as to what constitutes a substantial disruption at school. For example, in B.W.A. v. Farmington R-7 School District, the Ninth Circuit Court of Appeals held that school administrators did not violate the First Amendment by restricting a student from wearing a shirt with a confederate flag on it. The Court reasoned that such clothing would reasonably result in disruption in the classroom.

Many courts follow the decision in B.W.A. v. Farmington R-7 School District and apply the Tinker “substantial disruption” standard that sets a high bar for school officials to meet in defending discipline of students’ First Amendment speech. For discipline of a student to be justified, the school must meet a “heavy burden” of establishing that the student’s conduct would create a foreseeable and “substantial disruption.” Scholars believe that Tinker is “the touchstone case supporting public school students’ First reaction to the student’s speech, and therefore holding that discipline was not warranted because there were not any facts to support the foreseeability of a substantial disruption); see also Killion v. Franklin Regional Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) (holding that a student’s “top-ten” list was rude but did not support a finding of a substantial disruption because the student attended school for nearly a week until the school imposed any discipline); but see West v. Derby Unified Sch. Dist. No 260, 206 F.3d 1358 (10th Cir. 2000) (upholding discipline of a student for drawing a Confederate flag because the school offered a well-founded expectation that the drawing would create a disruption because there was a prior history of such disruptions caused by such drawings).

46 B.W.A. v. Farmington R-7 School District, 554 F.3d 734 (8th Cir. 2009).
Amendment rights.”48 However, what Tinker giveth to students, subsequent Supreme Court rulings taketh away.49

C. Departing From The Disruptive Effect Analysis – Bethel School District No. 403 v. Fraser

For almost twenty years, Tinker was the “primary authority governing the scope of free expression in the schools.”50 In 1986, however, the Supreme Court issued its decision in Bethel School District No. 403 v. Fraser, where the Court “retreated somewhat from its speech protective position in Tinker.”51 In Fraser, a student gave a speech at a school assembly on the behalf of another student who was running for a student office position.52 His speech was sexually explicit and encouraged his classmates to vote for his friend in the upcoming election.53 The Assistant Principal of the school then notified the student that his speech violated the school’s “disruptive-conduct rule, which prohibited conduct that substantially interfered with the educational process.”54 As a result, the Assistant Principal suspended the student for three days and prohibited the student from running in a school-wide election to speak at his graduation ceremony.55

The student’s father filed a suit on his child’s behalf alleging that the school’s disciplinary actions violated his First Amendment right to freedom of speech and the Due Process Clause of the Fourteenth Amendment. The U.S. District Court for the Western

48 Andrew D.M. Miller, Balancing School Authority and Student Speech, 54 BAYLOR L. REV. 623, 635 (2002).
49 Id.
50 Schneider, supra note 34.
51 Id. (citing Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)) (hereinafter “Fraser”).
52 Id. at 3160.
53 Id. at 3160.
54 Id. (internal quotations omitted).
55 Id.
District of Washington agreed with the father and awarded the student “monetary relief and enjoined the School District from preventing him from speaking at the commencement ceremonies.” The School District appealed and the Ninth Circuit affirmed.

Following grant of certiorari, the Supreme Court did not apply the Tinker substantial disruption test to the student’s dispute in Fraser. Rather, in Fraser, the Supreme Court stressed that student’s speech rights are not the same as rights of adults and therefore, the “rights of students must be applied in light of the special characteristics of the school environment.” The Court held that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech … would undermine the school’s basic educational mission.” Thus, the Court reversed and remanded the lower court’s decision and upheld the disciplinary action taken against the student. The Court reasoned that the student’s speech was inappropriate for the audience of young students and that it was “wholly inconsistent with the fundamental values of public school education.”

The Supreme Court’s decision in Fraser is a triumph for school administrators. Fraser notes “the importance of permitting the expression of a variety of viewpoints in

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56 Id. at 675-76.
57 See Fraser, 755 F.2D 1356 (9th Cir. 1985).
58 Supra note 12.
59 Id.
60 Fraser, 478 U.S. at 675. The Court explained "that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."
61 Applying Fraser, lower courts have held that school officials may prohibit students from wearing t-shirts that display vulgar messages, “even if the messages were political, or the substance of the message conveyed was one supported by the school.” Schneider, supra note 38 (citing Pyle By and Through Pyle v. South Hadley School Committee, 861
the schools,” yet broadens school administrators’ deference in making discipline decisions. Writing for the majority of the Court, Chief Justice Burger “deferred to the school authorities’ conclusory determination that Fraser’s speech seriously disrupted the school’s educational activities.”

From Tinker and Fraser emerged two standards that are the bedrock of school law decisions. However, although courts “pay homage to the legacy of Tinker [and Fraser],” it “is not completely clear whether [Tinker] and Fraser appl[y] to off-campus student speech.” Id.

D. Testing The Limits Of Tinker And Fraser – Student Off-Campus Speech

Lower courts have “held that school authorities [can] restrict vulgar student personal speech either because the manner of expression [is] inappropriate or because disruption could be reasonably forecasted given the manner or content.” This section examines the extent to which schools may discipline students for off-campus misconduct. While some courts “have drawn a distinction between student conduct that occurs on or

F. Supp. 157, (D. Mass. 1994)). The standard set forth in Fraser “will generally allow school officials to restrict vulgar, lewd, or plainly offensive speech.” Schneider, supra note 38 (citing Chandler v. McMinnville School Dist., 978 F.2d 524 (9th Cir. 1992)).
63 Id.
64 Schneider, supra note 34 (citing Frederick v. Morse, 439 F.3d 1114, 1122 n.44 (9th Cir. 2006)).
65 Andrew D.M. Miller, Balancing School Authority and Student Speech, 54 BAYLOR L. REV. 623, 636 (2002).
off campus in determining whether school officials may take action against the
student[,]” the majority of court decisions invoke the principles set forth in Tinker.\(^{68}\) Generally, courts have found that “the arm of the school disciplinarian [is] long enough
to reach students whose misconduct occurs outside the school setting.”\(^{69}\) Off-campus
activity, however, is not a haven from school discipline. The Supreme Court expressed
this principal for the first time in *Morse v. Frederick*.\(^{70}\)

The Supreme Court’s decision in *Morse* supports the proposition that in certain
scenarios, schools do have the authority to discipline students for expression that occurs
beyond school property.\(^{71}\) In *Morse*, students gathered off school premises to watch the
Olympic torch pass by their school. As the torch went by, the students unrolled a banner
that read, “BONG HiTS 4 JESUS.” The school principal was at the event and ordered
the students to put away the banner. Fredrick refused to follow the principal’s
instructions. As a result, the principal took the banner from the Fredrick and
subsequently suspended him.\(^{72}\)

Frederick filed suit in the U.S. District Court for the District of Alaska and argued
that the principal’s action of suspending him and confiscating his banner violated his
First Amendment right to freedom of speech.\(^{73}\) Specifically, Fredrick argued that the
school could not suspend him for speech that occurred off the school’s premises.\(^{74}\) The

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\(^{68}\) Schneider, *supra* note 38; see also *The Civility-Police: The Rising Need to Balance
Students’ Rights to Off-Campus Internet Speech Against the School’s Compelling

\(^{69}\) *Supra* note 12, at 8-25.

\(^{70}\) *Morse v. Frederick*, 551 U.S. 393 (2007).

\(^{71}\) *Id.*

\(^{72}\) *Id.*; *supra* note 12, at 8-27.

\(^{73}\) *Frederick*, 439 F.3d 1114 (9th Cir. 2006), *vacated*, 551 U.S. 393 (2007).

\(^{74}\) *Morse*, 551 U.S. 393 (2007).
District Court granted summary judgment for the school, and Fredrick appealed to the Ninth Circuit Court of Appeals.\textsuperscript{75} On appeal, the Ninth Circuit affirmed the District Court’s decision.\textsuperscript{76}

\textit{Certiorari} was granted to the Supreme Court.\textsuperscript{77} Finding in favor of the school, the Supreme Court reasoned that it had the authority to discipline Frederick without violating the First Amendment because “[t]he special characteristics of the school environment’ . . . and the governmental interest in stopping student drug abuse . . . allowed schools to restrict student expression that they reasonably regarded as promoting illegal drug use.”\textsuperscript{78} The \textit{Morse} ruling stands for the proposition that school authorities do have the authority to control and restrict student speech that occurs off campus.\textsuperscript{79} In resolving this issue, the Court reasoned that under the \textit{Tinker} “substantial disruption” standard, disciplining Frederick “in absence of concern about disruption of educational activities” would violate his First Amendment rights.\textsuperscript{80} Thus, \textit{Morse} extended the reach of \textit{Tinker} to off-campus events and stands for the proposition that there must be a nexus between the student’s off-campus conduct and the school setting. In this case, the nexus was present because the event in question occurred at a school-sanctioned and school-supervised event.\textsuperscript{81}

In contrast to the above mentioned decision, in \textit{Klein v. Smith}, the U.S. District Court for the District of Maine held that the school did not provide sufficient facts to

\begin{footnotes}
\item[75] \textit{Id.}
\item[76] \textit{Id.}
\item[77] \textit{Id.}
\item[78] \textit{Supra} note 12, at 8-27 (\textit{citing Morse} 551 U.S. 393 (2007)).
\item[79] See generally \textit{supra} note 12, at 7-7.
\item[80] \textit{Id.} at 1118.
\item[81] \textit{Morse}, 551 U.S. 393, 393 (2007).
\end{footnotes}
support a nexus between the student’s off-campus conduct and the school setting. In *Klein*, a student, Jason Klein drove his car to an off-campus restaurant. His teacher, Ms. Clark was inside her car parked in front of the restaurant. Klein extended his middle finger towards his teacher. When Klein returned to school, the administration suspended him for 10 days “pursuant to a school rule that provides that students will be suspended for vulgar or extremely inappropriate language or conduct directed to a staff member.” Immediately after Klein’s suspension, he filed a motion for a temporary restraining order to enjoin the school from suspending him until the court reviewed the merits of the school’s action. The District Court granted Klein’s temporary restraining order and, after a full briefing on the matter, issued a decision regarding the permanent injunction against the school’s disciplinary suspension.

The District Court held that the school’s discipline violated Klein’s First Amendment right to freedom of expression. The Court reasoned that Klein’s conduct of “giving the finger” to his teacher was “far too attenuated” from the school grounds to support the school’s position that Klein violated the rule prohibiting discourteous conduct toward a teacher. In a footnote, Judge Gene Carter explained that Klein’s action would not cause a substantial disruption at school because the teacher’s “professional integrity,

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83 *Id.*
84 *Id.*
85 *Id.* at 1441.
86 *Id.*
87 *Id.*
88 *Id.*
personal mental resolve, and individual character are not going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy.”

The above mentioned decisions articulate the rules that courts follow when determining whether school administrators violate students’ First Amendment rights for issuing discipline for off-campus behavior. As such, school administrators are wise to keep the above mentioned decisions in mind when making disciplinary decisions.

II. “WHEN IT COMES TO STUDENT CYBER-SPEECH, THE LOWER COURTS ARE IN COMPLETE DISARRAY”

Although the Supreme Court has issued decisions and provided guidelines about the extent to which school authorities may discipline students for off-campus conduct, the Court has not yet examined whether school administrators may discipline students for off-campus social media speech. Many scholars and federal courts apply the tests set forth in Tinker, Fraser, and other off-campus decisions – but there is no Supreme Court authority on this issue. This section examines federal courts’ decisions that involve students’ use of off-campus social media and analyzes the impact that such decisions have on school law.

A. The Third Circuit’s Interpretation Of Student Cyber Speech

Courts that have considered the issues surrounding First Amendment speech rights of public school students. Courts have taken dramatically conflicting approaches in evaluating whether school administrators may discipline students for such off-campus speech. The extent of this problem is illustrated by two 2010 decisions the Third Circuit

89 Id. at 1442, n.4.
Court of Appeals. Both decisions dealt with students who published speech on the Internet from private off-campus computers. In *Layshock ex rel. Layshock v. Hermitage School District*, the Third Circuit applied *Tinker* and held that the school unconstitutionally disciplined a student who posed a faked Internet profile because there was no nexus between the off-campus speech and the school. However, the Third Circuit in *J.S. v. Blue Mountain School District* applied a different *Tinker* test and held that the school could discipline a student who fictitious profile on MySpace for off-campus speech because it was likely that it would create a substantial disruption in the classroom.

Thus, from these decisions – issued on the same day – emerged two different standards just within the Third Circuit for determining whether off-campus speech is actionable. This comment will refer to the standards as the “nexus” standard, and the “substantial disruption” standard. Since the Third Circuit panels in *Layshock* and *Blue Mountain* applied two conflicting standards, the Third Circuit granted *en banc* review. The discussion that follows examines the reasoning and logic behind *Layshock* and *Blue Mountain*. This section then concludes by proposing that the Supreme Court adopt a hybrid of both the nexus and substantial burden standards in determining whether a school may discipline students for off-campus cyber speech.


In *Layshock ex rel. Layshock v. Hermitage School District*, 593 F.3d 249 (3d Cir. 2010), the Third Circuit held that school officials violated a student’s First Amendment speech rights by disciplining him for creating a fake Internet profile of the principal on a social networking website. The case began “when Justin Layshock used his grandmother’s computer to access [MySpace,] a popular social networking Internet web
site where he created a fake Internet ‘profile’ of his high school principal.91 On the fake profile, Layshock posted a survey of questions and answers about the principal’s likes and dislikes. Layshock crafted all of the principal’s answers to use the word “big” because, the principal was “apparently a large man.”92 A synopsis of the fake profile appears below:

- Birthday: too drunk to remember
- Are you a health freak: big steroid freak
- In the past month have you smoked: big blunt
- In the past month have you been on pills: big pills
- In the past month have you gone Skinny Dipping: big lake, not big dick
- In the past month have you Stolen Anything: big keg93

Layshock’s friends and most of the school’s student body then viewed the profile.94 Eventually, the teachers found out about Layshock’s profile and parent meetings ensued. Layshock apologized to the principal for creating the profile, and the school required Layshock to attend an informal hearing about the profile he created. Afterwards, the school district found Layshock guilty of violating the school’s discipline code. As a result, the school suspended Layshock for ten days, banned him from participating in extracurricular activities, and prevented him from participating in his graduation ceremony.

The Layshocks filed a complaint in the U.S. District Court for the Western District of Pennsylvania. The District Court denied Layshock’s request for a temporary restraining order and ruled that a jury trial was necessary to determine damages and

91 Id. at 252. “MySpace is a popular social-networking website that allows its members to create online profiles, which are individual web pages on which members post photographs, videos, and information about their lives and interests.” Id. (citing Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007)).
92 Id.
93 Id.
94 Id. at 253.
attorneys’ fees. “The parties subsequently filed a joint motion in which they stipulated to damages and requested entry of final judgment while preserving all appellate issues pertaining to liability. The District Court then entered a consent judgment,” and an appeal and cross-appeal followed.\footnote{\textit{Id.}}

On appeal, the Third Circuit held that the profile Layshock created did not create a disruption under the standard set forth in \textit{Tinker}. The court explained that the case involved speech that “began with purely out-of-school conduct which subsequently carried over into the school setting.”\footnote{\textit{Id.} at 595.} The Court then discussed \textit{Morse v. Frederick} and held that \textit{Morse} was not the controlling law in this matter because \textit{Morse} involved school-related speech, whereas this case involved off-campus speech.\footnote{\textit{Id.} at 599.} Because this case involved off-campus speech, the Court explained that “the school must demonstrate an appropriate nexus” between the student’s off-campus speech and the school.\footnote{\textit{Id.}} Applying the \textit{Tinker} test, the Court, therefore, held that the school impermissibly disciplined Layshock, because “the School district did not establish a sufficient nexus between [Layshock’s] speech and a substantial disruption of the school environment.”\footnote{\textit{Id.} at 259 (citing \textit{Tinker}, 393 U.S. 503 (1969)) (internal citations omitted).} Therefore, the Court held that the expressive conduct occurred beyond the schoolhouse gates and did not cause a disruption, and the school district was therefore “not empowered to punish his out of school expressive conduct under the circumstances here.”\footnote{\textit{Id.}}
In support of its decision, the Third Circuit relied on public policy considerations. It stated that, “it would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.”\textsuperscript{101} The Court further reasoned that “[a]llowing the District to punish [Layshock] for conduct he engaged in using his grandmother’s computer, while at his grandmother’s house, would create just such a precedent[.]”\textsuperscript{102} The Third Circuit’s ruling relies on \textit{Tinker} to define the outer boundaries of First Amendment protections of off-campus cyber speech.

\textbf{C. The “Substantial Disruption” Requirement - \textit{J.S. v. Blue Mountain School District}}

On the same day that the Third Circuit issued \textit{Layshock}, a separate panel on the same Court issued a contradictory opinion, based on seemingly similar facts, in \textit{J.S. v. Blue Mountain School District}.\textsuperscript{103} In \textit{Blue Mountain}, J.S., an eighth grader, created a fictitious profile on MySpace from her home computer. The MySpace profile featured the school’s principal. J.S. put the principal’s photograph on the profile, “as well as profanity-laced statements insinuating that he was a sex addict and pedophile.”\textsuperscript{104} After the principal discovered the profile, [the principal] met with the school Superintendent and Director of Technology. At the meeting, the three determined that J.S.’s profile

\textsuperscript{101} \textit{Id.} at 260.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{J.S. v. Blue Mountain School District}, 593 F.3d 286 (3d Cir. 2010).
\textsuperscript{104} \textit{Id.} at 290. A synopsis of the fictitious profile read as follows: general detention. Being a tight ass. Riding the f-train. Spending time with my child (who looks like a gorilla). Baseball.my golden pen. Fucking in my office. Hitting on students and their parents.

\textit{Id.} at 291.
violated the school policies. The principal claimed that the “imposter profile” was a level-four infraction of the school’s discipline code. After meeting with J.S., the principal suspended her for ten days and threatened legal action. *Id.*

J.S. and her parents filed a complaint against the School District in the U.S. District Court for the Middle District of Pennsylvania, alleging, among other things, that the ten-day suspension violated her First Amendment free speech rights. The District Court held that the discipline was unconstitutional under *Tinker* because it did not substantially and materially disrupt the school. Nevertheless, the District Court ruled that the school did not violate her First Amendment rights by suspending her because “the lewd and vulgar off-campus speech had an effect on-campus[.]” On appeal, the Third Circuit affirmed the District Court and held that the profile that J.S. created “though created off-campus, falls within the realm of student speech subject to regulation under *Tinker.*” The Third Circuit did not consider of whether the off-campus speech came onto the school’s campus. The court reasoned that J.S.’s profile created a reasonable possibility of a future disruption due to the sexually explicit content of the speech. The Court reasoned that, because the profile was posted online, the profile was “a public means of humiliating [the principal].”

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105 *Id.* at 292.
106 *Id.* at 293.
109 *Id.* at 298.
110 *Id.*
111 *Id.* at 300.
The Third Circuit’s finding of a substantial disruption turned on the fact that the off-campus speech was posted on the Internet. The Court reasoned that “due to the technological advances of the Internet,” the profile that J.S. created “could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days.”\(^{112}\) Although the actual disruption that occurred was nonexistent, or minimal at best, the court reasoned that the substantial likelihood for future disruption was inherent, “especially in light of the . . . potential of the Internet to allow rapid dissemination of information.”\(^{113}\) In sum, the Court concluded that the off-campus speech created or reasonably threatened to create a substantial disruption within the school and, therefore, the school district could discipline J.S. regardless of the fact that the speech occurred off-campus.\(^{114}\)

In a strong dissent, Judge Chagares argued that the school impermissibly suspended J.S. “for speech that took place outside the schoolhouse gates, during non-school hours, and that indisputably caused no substantial disruption in school.”\(^{115}\) Judge Chagares explained that he “believe[d] that this holding vests school officials with dangerously overbroad censorship discretion.”\(^{116}\) Judge Chagares reasoned that just because J.S. published the profile online, it was impermissible to assume that the profile would create a substantial disruption inside the schoolhouse gates. To the contrary, Judge Chagares reasoned that in this case, “J.S.’s speech did not cause a substantial

\(^{112}\) Id. at 300-301 (citing Cf. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 617-19 (5th Cir. 2004)).
\(^{113}\) Id. at 301.
\(^{114}\) Id.
\(^{115}\) Id. at 308.
\(^{116}\) Id.
disruption in the school.” 117 Judge Chagares accused the majority of misinterpreting the necessary balance between students’ First Amendment rights and school administrators need to maintain a proper learning environment. Judge Chagares stated, “the majority attempts to overcome this considerable hurdle by adopting the standard put forth by several of our sister courts of appeals, which allows schools to meet the Tinker test by showing that a substantial disruption was “reasonably foreseeable.” Judge Chagares argued that the majorities’ position is contrary to the Tinker test. Even under that test, the facts do not reasonably support a forecast of disruption because J.S. “did not even intend for the speech to reach the school—in fact, she took specific steps to make the profile ‘private’ so that only her friends could access it.”

In sum, Layshock and Blue Mountain applied different variations of the Tinker standard, and reached opposite conclusions – on seemingly similar facts. These decisions, published by the Third Circuit on the same day, are the perfect example of the clear misunderstanding of what standard applies when evaluating students’ off-campus cyber speech. Because of the contradictory outcomes in Layshock and Blue Mountain, the Third Circuit vacated both rulings and granted an en banc rehearing.

D. The Third Circuit’s En Banc Review Of Layshock and Blue Mountain

On review, the Third Circuit relied on Tinker in finding that the School District’s actions in Blue Mountain violated J.S.’s First Amendment rights. The Court held that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” 118 Based on the facts in the record, the Court distinguished

117 Id.
the “undifferentiated fear or apprehension of disturbance” from a “reasonable forecast [of] substantial disruption or material interference.” The Court noted that J.S.’s assertion that the profile she created did not create a reasonable forecast of a substantial disruption. The court reasoned that the profile was created as a joke, and it was unlikely to be taken seriously. Moreover, the court held that the evidence supported J.S.’s assertion that she did not intend for the speech to reach the school because she took steps to make the profile “private” so that only her friends could access it. The Third Circuit’s en banc ruling affirmed that the Supreme Court has never “allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at the school.”

III. DON’T SIDESTEP THE ISSUE – TAKE A TWO STEP APPROACH

The discussion of Layshock and Blue Mountain sets forth the clear dichotomy among circuit courts applying Tinker to off-campus cyber speech. The cases demonstrate that courts are struggling to determine how Tinker applies to off-campus speech. Where Layshock focuses on the “nexus” between off-campus speech and the schoolhouse gates, Blue Mountain follows the logic and letter of Tinker and analyzes whether the off-campus speech created a foreseeable “substantial disruption.”

This dichotomy is further illustrated by recent cases involving students’ off-campus use of social media. Courts continue to struggle “to strike a balance between safeguarding students’ First Amendment rights and protecting the authority of school

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119 Id. at 930.
120 Id.
121 Id. at 933.
administrators to maintain an appropriate learning environment.” Federal Courts increasingly hold that schools can discipline students for off-campus cyber speech when there is a sufficient nexus between the speech and the schoolhouse gates. For example, in Wisniewski v. Board of Education of Weedsport Central School District, the Second Circuit held that it was “reasonably foreseeable” that the student’s AOL Instant Messenger icon depicting a pistol firing a bullet over a person’s head would cross the schoolhouse gates because the icon included the words “Kill Mr. VanderMolen” – the student’s teacher. The Court explained that there was, therefore, a sufficient nexus for the school to regulate the student’s off-campus cyber speech. As for Tinker’s substantial disruption requirement, the court held that “there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.”

One year later, in Doninger v. Niehoff, the Second Circuit similarly held that a risk of substantial disruption created by a student’s off-campus cyber speech was sufficient for the school to discipline the student. In 2007, the Sixth Circuit considered

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122 Id.
124 Id. at 40.
125 Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008). In Doninger v. Niehoff, students on the student council planned a school sponsored battle of the bands concert. The school re-scheduled the event. As a result, the Plaintiff, a student council member, sent an email from her father’s email address urging parents to contact the school administrators regarding the rescheduling of the concert. The Plaintiff also posted a message on her publicly accessible blog. On Plaintiff’s blog, she called the school administrator a “douche bag.” The school found out about Plaintiff’s blog, and subsequently barred Plaintiff from running in future student council elections. The student filed a lawsuit, alleging that the school violated her First Amendment freedom of speech rights. The District Court upheld the school’s disciplinary conduct and held that it did not violate the First Amendment. On appeal, the Second Circuit relied on Tinker and held that it was “it
whether the school could discipline a student for her off-campus cyber speech and held that “Tinker does not require school officials to wait until the horse has left the barn before closing the door. . . [it requires] only the forecast of substantial disruption be reasonable.”126 And most recently, in La Vine v. Blaine School District, the Ninth Circuit similarly held that “Tinker does not require school officials to wait until disruption actually occurs before they act.”127

A. The Proposal

Although off-campus cyber speech rulings apply facets of Tinker, the decisions leave school administrators wondering: How can they reconcile the inconsistent rulings? School administrators are in dire need of a clear remedy to resolve the split among Circuit Courts regarding how to answer the above question. A clear test will benefit students and school administrators in meeting one-another’s expectations and following the letter of the law. Perhaps most importantly, a clear test will assist school administrators in their goal of reducing educational disruption. The extent to which schools may discipline students for cyber speech is in many ways, unchartered territory. In addition to the developing case law discussed above, it is important to note that a Supreme Court ruling will put parameters on the realm that is cyber speech. Unlike speech in the classroom, or an in-person discussion, cyber speech has the ability to reach millions of people, instantaneously. Additionally, unlike an in-person conversation, cyber speech is permanent. Once something is written on the Internet - it is publicized

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was objectively reasonable for school officials to conclude [the Plaintiff’s] behavior was potentially disruptive of student government functions . . . and that [the Plaintiff] was not free to engage in such behavior while serving as a class representative.” Id. Accordingly, the Second Circuit affirmed the District Court’s holding.

126 Lowery v. Euverard, 497 F.3d 584, 591-93 (6th Cir. 2007)
127 La Vine v. Blaine School District, 257 F.3d 981, 989 (9th Cir. 2011).
forever. For these reasons, a student has the ability to cause far more disruption in the classroom through cyber space resources. As a result, clear guidelines must be set by the Supreme Court that clarify the extent to which school administrators can discipline students for such speech.

This article proposes that the Supreme Court adopt a two-step approach that is grounded in the laws that Tinker set forth in 1969. This article suggests that first, the Court consider whether a “substantial disruption” occurred at school. What constitutes a substantial disruption is determined by the plethora of case law discussed in this article. If the Court does not find that the student’s speech caused a substantial disruption, then the school may violate the student’s First Amendment freedom of speech rights if it disciplines the student. However, if the Court finds the cyber speech caused a substantial disruption, the Court then considers the second step. This article proposes that the second step is a determination of whether there is a nexus between the off-campus cyber speech and the schoolhouse gates. If such a nexus is present, the school may constitutionally discipline the student for the cyber speech. If both steps are not satisfied, the school may not invoke such discipline.

The suggested approach is neither innovative nor excessively demanding. Rather, the two-step approach re-works the approach of Tinker that has governed for over two decades. If the Supreme Court adopts this suggested two-step test, it will bring much needed clarity to both school administrators and students regarding the interwoven issues of cyber speech, discipline and freedom of speech. Because education laws relating to cyber speech are evolving, this article concludes by making the following suggestion to school administrators.
IV. Conclusion – A Word to the Wise

Both courts and school administrators have the common goal of preventing disruption of the educational process regardless of where the disruption takes place, so as to enhance the quality of education. Like all school law cases, the determination of whether such discipline is permissible is a fact-intensive decision-making process. Thus, school administrators are wise to preserve a clear record that provides evidence of a “nexus” between the off-campus conduct and the “substantial disruption” that occurs inside the school. While there are no hard and fast rules as to what constitutes a permissible nexus, this standard certainly requires more than the display of a student’s impermissible off-campus conduct. Furthermore, school administrators will be well-served to create a social media policy and distribute the policy to all students, faculty and parents, at the beginning of each school year. Such a policy will benefit both students and educators by setting the expectations of the school. Furthermore, a social media policy that includes constitutionally permissible restrictions will benefit school administrators and school districts in defending cyber speech lawsuits.