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Decoding Student Speech Rights: Clarification and Applica-tion of Supreme Court Principles to Online Student Speech Cases

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COMMENT

DECODING STUDENT SPEECH RIGHTS: CLARIFICATION AND APPLICATION OF SUPREME COURT PRINCIPLES TO ONLINE STUDENT SPEECH CASES

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INTRODUCTION

Imagine, as an adolescent, having the opportunity to broadcast every mindless or offensive thought that blew through your brain to a vast audience of your peers and complete strangers. Would you have used discretion? MySpace, Facebook, Twitter, Tumblr,[1] and independent blogs have made it possible for adolescents to have a widespread audience for their unfiltered speech.[2] The accessibility of the

* Editor's Note: Last year, the Golden Gate community was deeply saddened by Courtney's unexpected and untimely death. It is my humble privilege to publish her work here, posthumously. This piece is presented largely in its original form, having been minimally edited. We owe our deepest gratitude to Courtney's mother, Aundrea Turner, and her father, Jonathan Willard, for extending us the opportunity to publish this piece in Courtney's memory. We are ever-grateful for Professor Eric Christiansen's support and guidance on this Comment. Additionally, I must thank the Law Review Editorial Board, particularly Kyle Mabe and Jessica Rosen, for their unwavering dedication to this process.

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[1] *See* www.myspace.com; www.facebook.com; www.twitter.com; tumblr.com.

[2] *See*, Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1235 (2003) (arguing that the Internet is not only "ever-present but one can also quickly and easily disseminate its content to an infinite number of people").

Internet has grown exponentially, even within the last decade, creating an ever-increasing platform for speech.[3]

The most likely topics of angst among students relate to their school: teachers, friends, and extracurricular activities. Students flock to various social media websites to share their feelings about, among other things, these familiar topics.[4] Instantly, their thoughts are transmitted to their peers and whoever else may have access to the content. The opportunity to unleash personal sentiments into the blogosphere has undoubtedly helped multitudes of young people feel connected to their peers in unprecedented ways. It is the content of this unbridled speech, however, that has many troubled—especially school officials.[5] It has also given rise to several significant legal issues.

When may a school restrict student speech? What are the constitutional boundaries of a school's authority over student speech? When a student chooses the Internet as a sounding board for his offensive and possibly vulgar opinions of a teacher or fellow student, should the school have the authority to discipline the speech? If so, what types of school-targeted speech would warrant such disciplinary action?

The balance between a student's First Amendment right to freedom of expression and a school's responsibility to provide a safe environment for both students and staff has proved to be a difficult one to maintain.[6] The United States Supreme Court first set a standard to analyze the constitutional limits of student speech in the 1960s with the landmark decision of *Tinker v. Des Moines School District*.[7] Since then, the evolving modes of student speech have forced the Supreme Court to repeatedly reconsider the issue.[8] The result has been a myriad of

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[3] Erin Reeves, Note, *The "Scope of a Student": How To Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1128-29 (2008) ("Since its modest beginnings, the Internet has become an enormous presence in everyday life, with North America alone experiencing a usage growth of 120% just in the years 2000-2007.").

[4] Pew Research Ctr., *Trend Data (Teens)*, PEW INTERNET, www.pewinternet.org/Static-Pages/Trend-Data-(Teens)/Online-Activites-Total.aspx (last visited Feb. 6, 2013) (As of July 2011, 80% of teen Internet users use an online social networking site like MySpace and Facebook).

[5] *See* Reeves, *supra* note 3, at 1129 ("One area where Internet usage has been especially contentious is in the educational realm as administrators, teachers, students, and increasingly courts are attempting to determine how student activity on the Internet fits within current precedent regarding appropriate behavior of students, both on- and off-campus.").

[6] *See id.* at 1141-42 ("[D]ue to both the evolution of technology and students' willingness to test the boundaries of their First Amendment rights in schools, this precedent has proven to be murky, not easily applicable to the variety of cases that have arisen, and potentially outdated and wholly inadequate to address the new student speech issues facing courts today.").

[7] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[8] *See generally* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

decisions that chip away at the *Tinker* decision by creating narrow exceptions for certain circumstances of student speech.[9]

Instead of students peacefully donning black armbands in protest of the Vietnam War,[10] modern courts are faced with increasingly offensive student speech in the unrestricted realm of the Internet. Supreme Court decisions have not established a sufficient method for lower courts to uniformly analyze the modern limits of Internet student speech.[11] Without a clear standard, lower courts are obligated to force the facts of modern cases into narrowly defined exceptions, or otherwise simply assume the *Tinker* standard applies to situations previously unforeseen by the earlier Court. Uncertainty has caused courts to flounder and hand down conflicting decisions supported by incomplete precedent.[12]

This Comment identifies the underlying principles of Supreme Court precedent governing student speech rights and applies those principles, as appropriate, to analyze online student speech. Part I provides a background of the four Supreme Court cases governing student speech. Four factors are identified from the Supreme Court decisions that continue to guide the analysis of student speech rights: sponsorship, location, effect, and content. Part II explores lower courts' confusion in applying the four factors to online student speech cases.

Finally, Part III examines the factors applicable to online student speech and provides guidance for future courts to analyze online student speech rights. As the predominant Supreme Court precedent, the *Tinker* standard should be used to analyze online student speech cases because it correctly addresses the effect of a student's speech felt within the school. Further, three categories are presented that should guide courts' assessment of the content of online student speech: outrageous or inherently offensive speech; speech that is focused or targeted toward the

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[9] *Fraser*, 478 U.S. at 687 (holding that a student's free speech rights were not violated based on the content of a sexually suggestive speech during a school assembly); *Hazelwood*, 484 U.S. at 273 (holding that school officials could reserve the right to reasonably restrict certain portions of a high school newspaper published by students in class); *Morse*, 551 U.S. at 403 (holding that school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[10] *Tinker*, 393 U.S. at 504.

[11] Matthew I. Schiffhauer, Note, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into CyberSpace*, 24 ST. JOHN'S J. LEGAL COMMENT. 731, 746 (2010) ("Courts have applied the Tinker, Fraser, Kuhlmeier and, now, Morse standards in varying ways to decide Internet student speech cases. Moreover, some courts have found that school officials lack disciplinary authority over student Internet expression altogether because of the expression's off-campus nature." (footnote omitted)).

[12] Stephanie Klupinski, Note, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 625 (2010) ("With no clear understanding of when and how to evaluate Internet speech, the courts, as a result, have used an inconsistent application of standards and tests to the cases before them.").

school, students, or faculty; and general school-related speech. Lower courts need a standard to analyze student speech, but until the Supreme Court specifically rules on online student speech, the principles set forth in previous rulings must be consistently applied.

I. THE CURRENT STATE OF STUDENT SPEECH RIGHTS

Since the Supreme Court first ruled on students' free speech rights in 1969, the Court has revisited the area three times.[13] Each supplementary decision carved out an exception[14] to the original rule allowing restriction of student expression when the speech created a "material and substantial disruption" to the school.[15] The four Supreme Court decisions identified four general factors that govern student speech rights: a school's possible sponsorship of the speech, the location of the student's speech, the effect of the speech felt within the school, and the content of the speech.[16] Lower courts, having no other guidance, have inconsistently applied these factors to online student speech cases resulting in a "state of tumult about the precise scope of First Amendment rights possessed by students."[17]

A. SUPREME COURT PRECEDENT OF STUDENT SPEECH RIGHTS

1. *The Two-Prong Tinker Standard*

Set against the backdrop of civil unrest during the 1960s, it was the decision in *Tinker v. Des Moines Community School District* that declared, "It can hardly be argued that either students or teachers shed

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[13] *See generally Fraser*, 478 U.S. at 675; *Hazelwood*, 484 U.S. at 260; *Morse*, 551 U.S. at 393.

[14] *Fraser*, 478 U.S. at 687 (holding that a student's free speech rights were not violated based on the content of a sexually suggestive speech during a school assembly); *Hazelwood*, 484 U.S. at 273 (holding that school officials could reserve the right to reasonably restrict certain portions of a high school newspaper published by students in class); *Morse*, 551 U.S. at 403 (holding that school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[15] *Tinker*, 393 U.S. at 504.

[16] *Fraser*, 478 U.S. at 687 (holding that a student's free speech rights were not violated based on the content of a sexually suggestive speech during a school assembly); *Hazelwood*, 484 U.S. at 273 (holding that school officials could reserve the right to reasonably restrict certain portions of a high school newspaper published by students in class); *Morse*, 551 U.S. at 403 (holding that school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[17] Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1139 (2003).

their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] A group of adults and students within one school district chose to object to the Vietnam War by wearing black armbands to their respective schools.[19] As an attempt to preempt the political protest, the principals of the school district adopted a policy to punish any student who refused to remove his armband and suspend the student until he returned without the armband.[20] Three Tinker siblings were suspended when they chose to wear the armbands, and subsequently filed suit challenging the school's right to punish them for exercising their First Amendment right to free speech.[21]

The Court addressed the tension created when students' First Amendment free speech rights intersect with the duties and rules of school authorities.[22] Extracting language from the Fifth Circuit, the Court focused on whether the armbands "'materially and substantially interfer[ed] with the requirements of appropriate discipline in the operation of the school' [or] collid[ed] with the rights of others."[23] The facts showed that the armbands did provoke some hostile remarks and a dispute during class involving a protestor.[24] However, finding "no indication that the work of the schools or any class was disrupted," the majority found the school's disciplinary actions violated the students' First Amendment rights.[25]

Rejecting the lower court's ruling that the suspensions were based on a reasonable fear of disturbance, the Supreme Court confirmed the principle that "undifferentiated fear or apprehension of disturbance" will not overcome students' First Amendment right to freedom of expression.[26] The standard of material and substantial interference works to ensure school officials will not act under a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[27] The Tinker students were suspended because of a motivation to avoid the potential controversy regarding the Vietnam War protest, not disruption within the school.[28]

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[18] *Tinker*, 393 U.S. at 506.

[19] *Id.* at 504.

[20] *Id.*

[21] *Id.*; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967) (en banc) (per curiam), *rev'd*, 393 U.S. 503 (1969).

[22] *Tinker*, 393 U.S. at 507.

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

[24] *Id.* at 517.

[25] *Id.* at 508.

[26] *Id.* at 509; *see also Tinker*, 258 F. Supp. 971.

[27] *Tinker*, 393 U.S. at 509.

[28] *Id.* at 510.

The Court also refused to restrict freedom of expression to classroom hours.[29] A student—in or out of class—whose actions produce a material disruption in classwork, create substantial disorder, or invade the rights of others, will not be protected from punishment.[30] This standard has created a variety of conflicting decisions in the lower courts when attempting to apply the *Tinker* standard to online student speech cases.[31]

2. *Lewd and Obscene Student Speech*

Recognizing a need to address specific types of student speech, *Bethel School District v. Fraser* created a standard to apply to a student's use of lewd and obscene speech while on school campus.[32] During a mandatory high school assembly, Matthew Fraser delivered a speech containing an "elaborate, graphic, and explicit sexual metaphor" to the response of hooting, yelling, and sexually graphic gestures.[33] School officials suspended Fraser, referencing the *Tinker* standard and pronouncing his speech as "indecent, lewd, and offensive to the modesty and decency" of the audience.[34]

The Court held that the First Amendment did not prevent a school district from disciplining Fraser, but rather that the suspension was "perfectly appropriate,"[35] given that the conduct was "wholly inconsistent with the 'fundamental values' of public school education."[36] It is this standard, not *Tinker*'s "material and substantial interference" language, that the Court employed in deciding school officials did not violate Fraser's First Amendment rights.[37] The only *Tinker* analysis comes as a brief investigation on the possible embarrassment to teenaged school students, and the otherwise immature audience of 14-year-old teenagers.[38]

Confusing the newly founded standard, the Court alluded to other factors supporting its decision. The Court distinguished *Fraser* from

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[29] *Id.* at 512.

[30] *Id.* at 513.

[31] *See* Klupinski, *supra* note 12, at 625 ("With no clear understanding of when and how to evaluate Internet speech, the [lower] courts, as a result, have used an inconsistent application of standards and tests to the cases before them.").

[32] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680, 684-86 (1986).

[33] *Id.* at 678-79.

[34] *Id.*

[35] *Id.* at 685.

[36] *Id.* at 685-86.

[37] *Id.* at 685.

[38] *Id.* at 683-84.

Tinker, indicating the important difference between the political speech of the armbands and the sexual content of Fraser's speech.[39] Unlike the penalties enforced against a political viewpoint, sanctions based on lewd and indecent speech were "entirely within [the school's] permissible authority."[40] In addition, consideration was given to the young age and captive nature of the audience.[41] The Court failed to make clear which factor, or mixture of factors, was the most significant.[42]

3. *School-Sponsored Student Speech*

In *Hazelwood School District v. Kuhlmeier*, faced with student speech that was neither lewd nor offensive, and not actually uttered on school grounds, the Supreme Court imposed yet another standard to analyze the First Amendment challenge.[43] There, a principal eliminated two pages of the school newspaper to remove articles concerning teen pregnancy and the impact of divorce on students.[44] Giving weight to the school's curriculum guidelines, the Court found no First Amendment violation because the school newspaper was not an entirely public forum for student speech.[45]

Because *Tinker* merely answered the question of whether schools were required to tolerate particular student speech, the *Hazelwood* Court refused to apply the *Tinker* standard.[46] Instead, it decided an independent standard may be necessary to "determin[e] when a school may refuse to lend its name and resources to the dissemination of student expression."[47] Accordingly, no school offends the First Amendment when it restricts student speech "in school-sponsored expressive activities so long as [the administration's] actions are reasonably related to legitimate pedagogical concerns."[48]

The *Hazelwood* dissent immediately questioned the departure from *Tinker*.[49] It indicated that while the decision did not cast doubt on the viability of the long-standing precedent, it worked to create a "taxonomy

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[39] *Id.* at 680.

[40] *Id.* at 685.

[41] *Id.* at 684.

[42] Klupinski, *supra* note 12, at 615.

[43] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that school officials could reserve the right to reasonably restrict certain portions of a high school newspaper published by students in class).

[44] *Id.* at 263-65.

[45] *Id.* at 270.

[46] *Id.*

[47] *Id.* at 272-73.

[48] *Id.* at 273.

[49] *Id.* at 278 (Brennan, J., dissenting).

of school censorship" where *Tinker* may "appl[y] to one category [of student speech] and not another."[50] Consequently, this decision contributes to the confusion concerning the reach of *Tinker* as it applies to certain situations of student speech.[51]

4. *Student Speech Promoting Illegal Drug Use*

A banner reading "BONG HiTS 4 JESUS" was at the center of the Supreme Court's latest decision to examine students' rights under the First Amendment.[52] In *Morse v. Frederick*, a student unfurled the banner on broadcast television while at an arguably school-sponsored social event celebrating the Olympic Torch Relay.[53] School officials suspended him for encouraging illegal drug use.[54] In finding that the speech was both on-campus and non-political speech, the Court found no violation of the student's First Amendment rights.[55]

Struggling to apply precedent to this case, the Supreme Court found it necessary to create a distinct standard pertaining to student speech promoting illegal drug use. The Court decided it was not obligated to apply *Tinker*, because *Fraser* and *Hazelwood* both established and confirmed the reality that *Tinker* did not produce an immutable analysis for student speech rights.[56] Instead, the Court ruled that school officials may, without violating a student's First Amendment rights, restrict student speech at a school event "when that speech is reasonably viewed as promoting illegal drug use."[57]

From these four Supreme Court decisions, there are numerous circumstances under which school officials can discipline students for speech. The primary grounds for a school's restriction of student speech turns on whether the student's speech caused or could reasonably cause a material or substantial disruption, or collide with the rights of others as explained in *Tinker*.[58] *Fraser* allows punishment for a student's lewd or

[50] *Id.* at 281.

[51] Schiffhauer, *supra* note 11, at 746 ("Courts have applied the Tinker, Fraser, Kuhlmeier and, now, Morse standards in varying ways to decide Internet student speech cases. Moreover, some courts have found that school officials lack disciplinary authority over student Internet expression altogether because of the expression's off-campus nature." (footnote omitted)).

[52] Morse v. Frederick, 551 U.S. 393 (2007).

[53] *Id.* at 397-98.

[54] *Id.* at 398.

[55] *Id.* at 401-03.

[56] *Id.* at 405-06.

[57] *Id.* at 403.

[58] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that student's free speech rights are violated when restricted unless the effect of the speech was a

obscene speech.[59] *Hazelwood* allows a school's restriction of speech that may be interpreted to represent the school.[60] Finally, *Morse* allows the restriction of student speech that promotes illegal drug use.[61]

B. ANALYZING ONLINE STUDENT SPEECH: SPONSORSHIP, LOCATION, EFFECT, AND CONTENT

1. *Lessons Learned from Supreme Court Precedent*

Four main factors can be identified as guiding the Supreme Court's analysis of student free speech: sponsorship, location, effect, and content.[62] *Tinker* provides the foundation for analyzing student speech based on its location, effect, and content.[63] *Tinker* noted that within the boundary of the schoolhouse gate was an appropriate location for school officials to exert their authority over student speech.[64] The effect of the black armbands was the pivotal focus of the decision, which held that, to merit restriction by school authorities, speech must cause or be reasonably likely to cause a "material[] and substantial[] disruption" or "collid[e] with the rights of others."[65] Finally, the *Tinker* Court considered the content of the speech, finding that the political nature of the speech deserved strong protection.[66]

The content and location of the sexually explicit speech during a school assembly were the driving force in *Fraser*.[67] Likewise, the latest Supreme Court decision, *Morse*, focused on the location and content of the "BONG HiTS 4 JESUS" banner during a school event to restrict student speech that promotes illegal drug use.[68] *Hazelwood* authorizes a

material or substantial interference with the discipline of the school or the speech invades the rights of another student).

[59] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986) (holding that a student's free speech rights were not violated based on the content of a sexually suggestive speech during a school assembly).

[60] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that school officials could reserve the right to reasonably restrict certain portions of a high school newspaper published by students in class).

[61] *Morse*, 551 U.S. at 403 (holding that school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[62] Klupinski, *supra* note 12, at 643.

[63] *See Tinker*, 393 U.S. at 503.

[64] *Id.* at 506.

[65] *Id.* at 513.

[66] *Id.* at 510-11.

[67] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678-81 (1986).

[68] Morse v. Frederick, 551 U.S. 393, 400-01 (2007).

school's ability to restrict some student speech when the speech could be considered school-sponsored.[69]

2. *The Absence of a Supreme Court Ruling on Online Student Speech Has Left Lower Courts in Chaos*

The divergent nature of free speech cases, coupled with the "special characteristics of the school environment,"[70] may render one uniform rule inadequate to govern student speech cases.[71] However, the current array of Supreme Court precedent provides little to no guidance as applied to online student speech cases.[72]

It is unsurprising that lower courts have struggled in piecing together a coherent and consistent standard under which to analyze online student speech.[73] The Internet is a "unique medium"[74] that disseminates speech anywhere there is a connection to the web.[75] To the detriment of the proper adjudication of such a complex First Amendment issue, lower courts are currently left to decide cases with precedent that cannot easily be applied to online student speech.[76]

When the Court last addressed student speech rights in 2007, it missed an important chance to more carefully define the parameters of student speech that occurs outside of the traditional "schoolhouse gate."[77] Online student speech cases present a unique situation for schools, because otherwise applicable Supreme Court decisions limit school officials' authority to regulate student speech that occurs within

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[69] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[70] *Tinker*, 393 U.S. at 506.

[71] *See Bethel*, 478 U.S. at 685 (creating special exception to First Amendment protections allowing schools to punish lewd and obscene student speech at school functions); *Hazelwood*, 484 U.S. at 271 (creating special exception to First Amendment protections allowing schools to regulate school-sponsored newspaper speech); *Morse*, 551 U.S. at 418 (Thomas, J., concurring) (explaining "the Court creates another exception" to *Tinker*).

[72] Schiffhauer, *supra* note 11, at 753 ("As their decisions clearly demonstrate, lower courts are left to their own devices in determining the proper bounds of school authority over student Internet speech." (footnote omitted)).

[73] *See* Klupinski, *supra* note 12, at 625 ("With no clear understanding of when and how to evaluate Internet speech, the courts, as a result, have used an inconsistent application of standards and tests to the cases before them.").

[74] Reno v. ACLU, 521 U.S. 844, 851 (1997).

[75] Servance, *supra* note 2, at 1237.

[76] *See*, Louis John Seminski, Jr., Note, *Tinkering with Student Free Speech: the Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 176 (2001) (arguing that "in light of the 'fuzzy' precedents and their application to the Internet, many school boards settle the cases before trial in attempts to save on legal fees and taxpayer dollars").

[77] Morse v. Frederick, 551 U.S. 393 (2007); *see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

Tinker's "schoolhouse gate."[78] By focusing on the illegal drug use, the *Morse* Court also failed to provide a clear analysis for situations where the *Tinker* standard is inapplicable because the facts fall outside of the Court's narrow exceptions.[79]

Despite lower courts' calls for guidance and a need for an articulated standard, the Court has not shown any urgency in resolving the matter in the near future. Recently, the Supreme Court denied certiorari on three online student speech cases.[80] At least two of the cases seem to be at odds: one case authorizes the punishment of a student for her online attacks against a fellow student,[81] while the other finds the punishment of a student for his online attacks against his teacher a violation of his free speech rights.[82] Lower courts must have guidance from the Court to prevent this type of flagrantly inconsistent application of First Amendment speech protection.

II. LOWER COURTS' ANALYSIS OF ONLINE STUDENT SPEECH

Though lower courts have properly identified the important factors influencing student speech rights cases—sponsorship, location, effect, and content—confusion is evident in the application of these factors. Extending precedent to online student speech cases has resulted in haphazard decisions with judges admittedly unsure of which standard to apply.[83] A narrow reading of the Supreme Court's four factors has hindered the lower courts' ability to apply the principles to online student speech cases.

A. SPONSORSHIP

The precedent of *Hazelwood* is directly applicable to school-sponsored online student speech, and generally uncontested in student speech cases.[84] Under *Hazelwood*, school officials have authority to restrict student speech that may reasonably be interpreted as being

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[78] *Tinker*, 393 U.S. at 506.

[79] Reeves, *supra* note 3, at 1147.

[80] Blue Mountain Sch. Dist. v. J.S., 132 S. Ct. 1097 (2012) (cases below, 650 F.3d 915 (3d Cir. 2011) (en banc); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc)); Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095 (2012) (case below, 652 F.3d 565 (4th Cir. 2011)).

[81] *See generally* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011).

[82] *See generally* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc).

[83] Klupinski, *supra* note 12, at 625 ("With no clear understanding of when and how to evaluate Internet speech, the courts, as a result, have used an inconsistent application of standards and tests to the cases before them.").

[84] *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

school-sponsored.[85] Any legitimate pedagogical purpose will be sufficient to restrict this type of student speech given the school's continued interest in deciding when it chooses to "lend its name and resources to the dissemination of student expression."[86] A student's online speech that is reasonably interpreted to be school-sponsored, bears the school's name, or was created or disseminated using the school's resources should be bound by this precedent.[87] There is no difference between a school newspaper and a school blog when determining whether a student should be bound to the school's authority.

B. LOCATION

The Court famously noted in *Tinker*, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[88] *Tinker* allowed the regulation of certain student speech within the boundaries of the "schoolhouse gate."[89] The Internet, however, is a "unique medium"[90] that allows speech created and communicated within the comfort of a student's home to infiltrate the schoolhouse gate.[91]

The location of the student's online speech—a distinction between on-campus and off-campus speech—has proved to be a critical factor for courts in determining the constitutionality of online student speech regulation.[92] Acknowledging the importance of the distinction between on-campus and off-campus speech, but not knowing the appropriate ways in which to classify them,[93] courts are at a disadvantage from the beginning.

The distinction between on-campus speech and off-campus speech is considered of utmost importance, because it is commonly held that schools have much less, if any, authority to discipline students for their

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[85] *Id*. at 272-73.

[86] *Id*.

[87] *See id.* at 273.

[88] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[89] *Id*.

[90] Reno v. ACLU, 521 U.S. 844, 851 (1997).

[91] Servance, *supra* note 2, at 1235-36.

[92] *See* Klupinski, *supra* note 12, at 643 (explaining how location was a critical factor, with "all of the courts but one examined whether the speech did or could have reasonably reached the physical school campus").

[93] Reeves, *supra* note 3, at 1141 ("The facts presented in Morse arguably did not point as clearly to an on-campus determination, and while the Court provided some relevant factors to use when the on- versus off-campus distinction is not clear, it failed to give any discernible guidance or a stand-alone test for students, administrators, and courts to follow." (footnote omitted)).

off-campus online speech.[94] One justification for this distinction is that off-campus speech is less likely than on-campus speech to disrupt the school environment.[95] This justification, however, focuses on the potential location of the speech's effect within the school rather than the location of the speech's creation or reception.[96] Another justification for the on-campus and off-campus distinction calls into question the ability of school authorities to arbitrarily reach into students' homes to promote their own agenda.[97]

In attempting to apply the current Supreme Court precedent to the unique challenges presented by speech that begins within a student's home, lower courts have been inconsistent at best.[98] The very classification of on-campus and off-campus speech can be manipulated depending on whether a certain jurisdiction holds a narrow or expansive definition.[99] While a narrow definition may deprive school authorities of disciplinary actions for online student speech, an expansive definition may subject students to an overbroad regulation of online expression.[100]

Lower courts' attempts to manipulate facts in order to fit an already haphazard classification often result in further inconsistencies.[101] Particularly, dependence on a nexus between the speech and the school has thus far resulted in a tenuous geographic analysis.[102] According to some courts, any geographical nexus, no matter how thin, may warrant school authority over online student speech.[103] Reliance on a determination of the location of online student speech leads to decisions

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[94] *See* Schiffhauer, *supra* note 11, at 758.

[95] Sandy S. Li, Note, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 92 (2005).

[96] *Id*.

[97] *See* Schiffhauer, *supra* note 11, at 758.

[98] *See* Klupinski, *supra* note 12, at 625 ("With no clear understanding of when and how to evaluate Internet speech, the courts, as a result, have used an inconsistent application of standards and tests to the cases before them.").

[99] Schiffhauer, *supra* note 11, at 757.

[100] *Id*.

[101] *Id*. at 754.

[102] Klupinski, *supra* note 12, at 627 ("The geographical approach is arguably the easiest one courts can employ to determine whether Internet speech created off school campus can be subject to school discipline. This approach looks at whether a sufficient nexus exists between the speech and the school simply by determining whether the speech was physically created or ever accessed on school grounds.").

[103] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177-78 (E.D. Mo. 1998) (leaving the question of whether a student's online speech, which was accessed on campus without his permission, could subject him to discipline by the school); *see also* Kara D. Williams, Comment, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 720 (2008) ("First, courts have interpreted differently the distinction between on-campus and off-campus speech, with some courts defining on-campus speech much more expansively than other courts.").

that turn on an insubstantial detail, which results in an unclear understanding of students' First Amendment speech rights.

As a "borderless, ubiquitous medium,"[104] the Internet has the potential to invade the school environment, despite the fact that the actual expression almost always occurs physically outside school property.[105] The Internet is simply different than other, more traditional, means of communication.[106] Specifically, it is pervasive, it allows users to disseminate information to millions of people immediately and easily, and it can be accessed anywhere.[107] The growing accessibility of the Internet through mobile phones, personal laptops, and computer tablets further expands the problem of relying on location. Any online speech may be retrieved on school campus during school hours by the "click of a mouse."[108]

The distinction between on-campus and off-campus speech is antiquated and inapplicable to online student speech cases.[109] The physical location of the speech is irrelevant given the ability of the Internet to trespass upon the school environment.[110] Rather than labeling online speech as "on-campus" or "off-campus," the unique nature of the Internet should be embraced and online speech should be examined as a unique classification.[111]

C. EFFECT

The original student speech case, *Tinker*, was decided with a focus on the effect of the student's speech.[112] A student whose speech had the

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[104] Servance, *supra* note 2, at 1237.

[105] Schiffhauer, *supra* note 11, at 757 ("As a practical matter, the expression at issue in Internet-related student speech cases almost always occurs 'off-campus.'").

[106] Servance, *supra* note 2, at 1235 ("Not only is Internet speech ever-present but one can also quickly and easily disseminate its content to an infinite number of people.").

[107] Li, *supra* note 95, at 93 ("The Internet differs from other traditional mediums of expression, such as flyers, newspapers, and public speeches, for several reasons: (1) it is pervasive, (2) it allows users to disseminate information to millions of people immediately and easily, and (3) it can be accessed anywhere.").

[108] Reeves, *supra* note 3, at 1149.

[109] Servance, *supra* note 2, at 1235 ("Given this inherently different mode of expression, the old distinctions physically demarcating authority over student speech to on or off campus are not adequate, especially as applied to children in a school setting.").

[110] *See id.* at 1237.

[111] Li, *supra* note 95, at 93 (arguing for a separate standard for online speech: "Because the Internet is a unique medium that allows people to anonymously express their views, thereby encouraging free speech and ideas, a separate standard is needed to ensure that . . . the anonymous expression of students' views over the Internet will be protected." (footnote omitted)).

[112] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (focusing on the effect of the student's speech—a "substantial disorder or invasion of the rights of others"—as the basis for school authorities' ability to restrict student speech).

effect of "material[] and substantial[] interfer[ence] . . . in the operation of the school" or has "collid[ed] with the rights of others" may suffer appropriate discipline at the hands of school officials.[113] The Internet has exacerbated the already complex nature of student speech.[114] Online student speech may begin in a student's home, but it has a unique ability to carry on and have an effect on the school.[115]

Lower courts consistently analyze online student speech cases under the *Tinker* standard, but rarely rely on it as a sole justification for the proscription of online student speech.[116] Though the basis of the decision in *Tinker* was the effect of the students' speech, the famous boundary of the schoolhouse gate causes hesitation among judges to extend the boundary to speech that is created outside of the school but nevertheless permeates the school environment.[117] After performing a full *Tinker* analysis, courts abandon the *Tinker* focus on the effect felt within the school.[118]

The effect of a student's speech has long been an important factor in assessing student speech rights, and should continue to govern online student speech. This fundamental factor in assessing a student's rights should not be abandoned just because the speech is expressed through an ever-present means of communication. If a student's online speech causes, or could foreseeably cause, a substantial disruption within the school, school officials should maintain their interest in providing a safe learning environment.

D. CONTENT

Generally, speech may not be restricted based on its content.[119] There are, however, "special characteristics of the school environment"

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[113] *Id.*

[114] Seminski, *supra* note 76, at 182.

[115] Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.").

[116] Klupinski, *supra* note 12, at 625-41.

[117] *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc). *But see* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 575–76 (4th Cir. 2011) (school-imposed discipline for webpage created to ridicule another student, because it was likely that student's online speech would reach school, given that speech was targeted toward fellow students).

[118] *See* Klupinski, *supra* note 12, at 626 ("Some [courts] will only engage in a Tinker analysis, while others will also analyze under Fraser and examine the content of the speech to determine whether it is lewd or vulgar.").

[119] *E.g.*, Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) ("As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (internal quotation marks and brackets omitted)).

that allow school officials greater authority to control the content of the student speech in order to provide a safe learning environment.[120] *Fraser* and *Morse* defined narrow exceptions to the general *Tinker* rule that schools may not restrict student speech because of a simple desire to avoid unpopular viewpoints.[121] School officials have the authority to restrict the content of student speech if it is lewd or obscene, or if the speech promotes illegal drug use.[122]

The Internet, as an intangible medium, blurs the line between the completely unrestricted right to free speech students enjoy outside of the school environment and the right of schools to control the learning environment within the schoolhouse gate. There is a great fear that extending *Fraser* or *Morse* to online student speech will allow schools to reach into students' homes and restrict speech that would otherwise be protected under the First Amendment. Accordingly, lower courts are hesitant to rely exclusively on *Fraser* or *Morse* when analyzing online student speech.[123]

It is, however, the very content of online student speech that will impact any potential effect the speech has within the school. If the content of a student's online speech does not possess a clear connection to the school, it is unlikely to ever come to the attention of school officials. When, however, the content of online student speech connects the student's expression to the school environment such that it could materially or substantially disrupt the school or collide with the rights of other students, the school will likely be able to serve its function to prohibit certain speech in public discourse.[124]

III. FUTURE COURTS SHOULD FOCUS ON THE EFFECT AND CONTENT OF ONLINE STUDENT SPEECH

The location, effect, and content factors governing student speech cases have been interpreted inconsistently as applied to online student speech. The *Hazelwood* standard is directly applicable to online student

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[120] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[121] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Morse v. Frederick, 551 U.S. 393 (2007); *see also Tinker*, 393 U.S. at 509 ("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.").

[122] *Fraser*, 478 U.S. at 687 (holding that a student's free speech rights were not violated based on the content of a sexually suggestive speech during a school assembly); *Morse*, 551 U.S. at 403 (holding that school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[123] Klupinski, *supra* note 12, at 625.

[124] *See generally Fraser*, 478 U.S. at 683.

speech cases where the school could reasonably be seen to have sponsored the speech.[125] The location of online student speech has confused the application of *Tinker*, *Fraser*, and *Morse* because the disputed speech in each case was communicated within the boundaries of the schoolhouse gate, or during a school-sponsored event.[126] Online student speech can intrude on the school environment via mobile phones, personal laptops, computer tablets, or any Internet connection.[127] The on-campus and off-campus distinction drawn by lower courts is inapplicable to online speech cases, because it is irrelevant, given the ability of the Internet to intrude upon the school environment.[128] Instead, the effect and content of online student speech should guide the analysis of whether a school has the right to discipline a student for the student's online speech.

A. *TINKER* PROVIDES THE APPROPRIATE STANDARD TO ANALYZE ONLINE STUDENT SPEECH

Though the Internet has created a new and advanced medium through which students may communicate,[129] until the Supreme Court provides further guidance, the principles set forth by *Tinker* outline the proper guidelines under which to analyze online student speech. *Tinker* should be applied to online speech, because it sets the standard under which students may be punished for their speech while simultaneously providing constitutional safeguards to protect students' rights.[130] *Tinker* is the Supreme Court decision on student speech rights that provides an appropriately comprehensive, yet flexible, standard to embrace the growing arena of technology.

Under *Tinker*, school authorities may not proscribe student speech when the speech does not "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school,"

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[125] Klupinski, *supra* note 12, at 625-26 (explaining that "[a]t the outset, it must be noted that the cases involving school-sponsored speech generally do not pose issues for schools" when applied to Internet speech).

[126] *Id.*; *see Tinker*, 393 U.S. at 509; *Fraser*, 478 U.S. at 675; *Morse*, 551 U.S. at 393.

[127] Schiffhauer, *supra* note 11, at 757 ("As a practical matter, the expression at issue in Internet-related student speech cases almost always occurs 'off-campus.'").

[128] Servance, *supra* note 2, at 1237 ("[O]ff-campus status becomes a somewhat false barrier to school authority.").

[129] Reno v. ACLU, 521 U.S. 844, 850 (1997).

[130] *See Tinker*, 393 U.S. at 513 (stating that students may freely express their opinions as long as they do not materially and substantially interfere with school discipline or with the rights of others).

or when the speech does not "collid[e] with the rights of others."[131] Both prongs of *Tinker* are applicable and should be considered when analyzing online student speech.[132]

The first prong should be applied generally to grant schools the power to discipline a student whose online speech has created a substantial disruption within the school.[133] The idea that the student expression is created outside of the school should not eclipse the reality that online speech nevertheless has the ability to penetrate the school environment and cause a material disruption.[134]

The second prong of *Tinker*, the "invasion of the rights of others" prong, has been established as a legitimate justification for the proscription of certain student speech.[135] As applied to student speech cases, this prong is triggered when the speech amounts to "harassment or [has] some type of serious emotive impact."[136] Just as it was important for the Court to regulate speech that affects the overall ability of schools to maintain "appropriate discipline in the operation of the school,"[137] it is also important to protect every student's right "to be secure and to be let alone."[138]

In addition to offering a practical standard under which to analyze student speech, *Tinker* also deters impulsive actions by school authorities that may infringe upon students' free speech rights by providing clear guidelines for restriction of speech.[139] Allowing *Tinker* to govern online

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[131] *See id.* at 509 (holding that school officials may justify restriction on student expression only by demonstrating that they had reason to anticipate that the conduct would "'materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school' [or] collid[e] with the rights of others").

[132] *See generally* Schiffhauer, *supra* note 11, at 763-70.

[133] *Id.* at 768-69 ("If the school does not claim that the student's Internet expression was threatening or constituted harassment, or if the school fails to justify its punishment under the 'rights of others' prong, then the school must prove that the expression caused a 'material and substantial disruption' in the school environment. Here, the punishment should be subject to strict judicial scrutiny and courts should not relax the 'substantial disruption' prong, as some have in prior Internet-related student speech cases.").

[134] To the extent that it is possible, disruption caused by school authorities' investigation and reaction to the speech should be separated from disruption caused solely by the speech, when determining whether a material disruption occurred.

[135] *See* West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) ("[W]here school authorities reasonably believe that a student's uncontrolled exercise of expression might substantially interfere with the work of the school or impinge upon the rights of other students, they may forbid such expression." (internal quotation marks and citation omitted)).

[136] Schiffhauer, *supra* note 11, at 765.

[137] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[138] *Id.* at 508.

[139] *See id.* at 513 (explaining that students may freely express their opinions as long as they do not materially and substantially interfere with school discipline or with the rights of others).

student speech has led to fear that a school may have the ability to extend its control within a student's home to discipline students for "deviat[ing] from the values that the school wishes to promote."[140] *Tinker*, however, works to further ensure protection of students' free speech rights by holding the school responsible for showing that its disciplinary action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[141] This safeguard will be an important consideration, and any motivation to deter certain speech should be inspected carefully.[142]

The Supreme Court provided *Tinker* as an acceptable compromise between the free speech rights of students and school authorities' interest in maintaining authority within the school.[143] School authorities should be able to protect the school environment against online student speech, just as they are authorized to restrict expression that occurs within the "schoolhouse gate."[144] If a student's online speech substantially disrupts the school or impinges upon the rights of another person at the school,[145] an unmistakable nexus between the speech and the school has been formed. A complication of the boundless nature of the Internet emerges when a student's speech is disciplined before the speech has the opportunity to affect the school.

B. REASONABLE FORESEEABILITY

The First Amendment does not require schools to wait for disruption within the school in order to proscribe certain student speech.[146] To the contrary, school officials have a duty to prevent such disruption from occurring in the first place.[147] *Tinker* not only authorizes restriction of student expression when there is an actual disruption felt within the school, but also if there is reasonable forecast of such

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[140] Schiffhauer, *supra* note 11, at 758.

[141] *Tinker*, 393 U.S. at 509.

[142] Schiffhauer, *supra* note 11, at 768-69 ("Here, the punishment should be subject to strict judicial scrutiny and courts should not relax the 'substantial disruption' prong, as some have in prior Internet-related student speech cases.").

[143] *See Tinker*, 393 U.S. at 503.

[144] *Id.* at 506.

[145] *Id.* at 513.

[146] *See* Lowery v. Euverard, 497 F.3d 584, 591-92 (6th Cir. 2007) ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* 'require certainty that disruption will occur.'. . . *Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable.").

[147] *See* Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973) ("[T]he First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances." (footnote omitted)).

disruption.[148] The possibilities for free speech violations against students could be insurmountable if schools are not merely authorized, but rather required, to discipline online student speech that has the mere potential to reach the school and have an effect.

The Second Circuit, in *Wisniewski v. Board of Education*, affirmed school officials' authority to discipline a student for his online expression, finding it reasonably foreseeable that the expression would come to the attention of school officials.[149] Appropriately applying *Tinker*,[150] the court found the risk of substantial disruption "not only reasonable, but clear."[151]

The *Wisniewski* decision presents possible factors to be considered when determining whether it is reasonably foreseeable that certain online student speech may substantially disrupt the school.[152] In that case, a student created a drawing of a gun firing a bullet at a person's head, including images of splattered blood, captioned "Kill Mr. VanderMolen."[153] The icon was displayed for three weeks and the student sent instant messages with the icon to fifteen people, at least some of which were his classmates.[154] The court determined that the "extensive distribution of it, . . . during a three-week circulation period, made [the risk of the speech coming to the attention of school authorities] at least foreseeable to a reasonable person, if not inevitable."[155]

Because of the boundless nature of the Internet, any online speech has the potential to reach the school. The *Wisniewski* court did not identify the distinguishing factor that will determine how the threat of disruption caused by online speech will cross the threshold of

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[148] *Tinker*, 393 U.S. at 509 (suggesting that the decision in the case might have been different if there had been "evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students").

[149] *See* Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007) ("We are in agreement, however, that . . . it was reasonably foreseeable that the [instant message] icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.").

[150] *See id.* at 40 (finding, after an analysis of the facts, that there could 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").

[151] *Id*.

[152] *See id.* at 39-40 (listing four factors to justify the student's punishment: the content of the speech, the "extensive distribution" of the speech, the targeting of classmates as the audience for the speech, and the circulation period of the speech).

[152] *Id*. at 36.

[153] *Id*.

[154] *Id*.

[155] *Id*. at 39-40.

"reasonable foreseeability."[156] One standard that embraces the *Wisniewski* decision looks to the context in which a student communicates online speech—if the student communicates online speech within the scope of his or her position as a student, it is more reasonably foreseeable that the speech will have an effect within the school.[157]

Speech occurs "within the scope of a student" if the speech would not have occurred, but for the fact that the speaker was a student.[158] For example: "[W]hen a student posts a message on his or her website that contains derogatory references to his or her principal, the but-for inquiry would be answered in the negative: But for the fact that the speaker was a student at the principal's school, the speech would not have occurred."[159] While this standard has been offered to reconcile the on-campus/off-campus distinction,[160] it has bearing on whether the student's speech will be subject to school authority based on the effect of that speech. If the controversial online speech occurred "within the scope of his or her status as a student,"[161] the odds increase that the speech has the reasonable foreseeability to reach the school and ultimately have an effect.

Online speech targeting an audience of other students will also increase the likelihood of the online speech reaching the attention of school officials.[162] Purposefully targeting members of the school by accessing the speech at school, inviting other students to view the speech, or informing other students of the speech and how to access it will work to "facilitate[] the on-campus nature of the speech," and bring it under the umbrella of *Tinker*.[163]

The effect of online student speech is at the center of analyzing online student speech cases. *Tinker's* standard is highly applicable and

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[156] *See id.* at 39 ("We are in agreement, however, that, on the undisputed facts, it was reasonably foreseeable that the [instant message] icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.").

[157] *See* Reeves, *supra* note 3, at 1157-62 (arguing that online speech communicated within the scope of a student's status as such should be within school authority to restrict).

[158] *Id.* at 1157.

[159] *Id.* at 1157-58.

[160] *Id.* at 1154 (applying the "scope of a student" standard to decipher whether the online student speech should be considered on-campus or off-campus speech).

[161] *Id.* at 1157.

[162] *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011) (explaining that it was likely a student's online speech would reach the school, given that the speech was targeted toward fellow students).

[163] *See* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) ("J.S., nevertheless, facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site.").

should be used when a school has a "constitutionally valid reason to regulate" such speech.[164] Reconciling the problem of whether it is reasonably foreseeable that online student speech may cause an effect within the school, courts should look to whether the speaker communicated as a student.[165] As a contributing factor to the effect of a student's online speech, the very content of the student's expression must also be scrutinized.

C. THREE CATEGORIES SHOULD GUIDE COURTS IN ASSESSING THE CONTENT OF ONLINE STUDENT SPEECH: OUTRAGEOUS OR INHERENTLY DISRUPTIVE SPEECH, FOCUSED OR TARGETED OFFENSIVE SPEECH, AND GENERAL SCHOOL-RELATED SPEECH

Certainly not every Internet communication made by a student in his or her home will be subject to consequences imposed by school authorities. Though the effect of student speech determines the ultimate standard under which schools may proscribe student speech, it is the content of the speech that presents schools with disciplinary authority. *Tinker* originally announced the need to protect the content of student speech under the First Amendment.[166] *Fraser* provided that the content of students' speech alone, when it is lewd or obscene, may provide an immediate basis for schools to dispense appropriate punishment.[167] Likewise, *Morse* rendered student speech promoting illegal drug use strictly unprotected within the school environment.[168]

The Supreme Court has provided narrow categories governing the First Amendment protections of student speech.[169] Lower courts, however, should analyze the content of online student speech more broadly to better apply Supreme Court precedent. This Comment offers three categories that should serve as a guideline under which to analyze

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[164] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

[165] *See* Reeves, *supra* note 3, at 1157 (arguing that online speech communicated within the scope of a student's status as such should be within school authority to restrict).

[166] *See Tinker*, 393 U.S. at 513 (holding that students may freely express their opinions as long as they do not materially and substantially interfere with school discipline or with the rights of others).

[167] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986) (holding that a student's free speech rights were not violated based on the content of a sexually suggestive speech during a school assembly).

[168] Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[169] *See* discussion *supra* Part I.

the content of the expression in online student speech cases: outrageous or inherently disruptive speech, focused or targeted offensive speech, general school-related speech.

1. *Outrageous or Inherently Disruptive Speech*

There are certainly some types of speech that need not be tolerated in a school setting.[170] While the First Amendment provides citizens with wide latitude to free speech,[171] some categories of speech have been deemed simply unacceptable in public discourse.[172] Courts have defined narrow categories of speech that the state may punish, including libel, obscenity, and incitement.[173] Types of conduct that are unprotected in general society are just as intolerable in the educational system.[174] Moreover, "the special characteristics of the school environment" further restrict the behaviors considered acceptable in schools.[175] Speech that falls outside of the constitutional expression of opinion will not even be afforded the protection of *Tinker*.[176]

The category of outrageous or inherently disruptive speech is meant to classify speech that may invade upon the rights of others so greatly that, by its very nature, it will "materially disrupt[] classwork or involve[] substantial disorder."[177] Just as some types of speech are so inappropriate that they may warrant punishment when delivered in a school auditorium,[178] students should be held accountable for outrageous and inappropriate speech that invades the school but was expressed through the Internet. When a student is the subject of a targeted attack by another student, it will undoubtedly result in the loss of at least part of

[170] *Fraser*, 478 U.S. at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

[171] U.S. CONST. amend. I.

[172] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[173] *See, e.g.*, *N.Y. Times Co.*, 376 U.S. at 254; *Miller*, 413 U.S. at 15; *Brandenburg*, 395 U.S. at 444.

[174] *See* Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1604 (2009) ("[S]tatutes in many states allow a school to suspend a student who is charged with a felony committed on or off campus, and expel a student who is convicted of a felony if the school administrator determines that 'the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.'" (quoting MASS. GEN. LAWS ch. 71, § 37H1/2 (1996))).

[175] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[176] Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-39 (2d Cir. 2007).

[177] *Tinker*, 393 U.S. at 513 (1969).

[178] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

the targeted student's opportunity to learn.[179] If this results, the school has failed in its ability to maintain a safe learning environment. Two examples of when a students' online speech will be inherently within the domain of school officials are true threats and "cyberbullying."

a. True Treats

True threats are not a constitutionally protected expression of speech, and are therefore never accepted in public discourse.[180] In light of the events at Columbine High School in 1999 and similar subsequent events, school administrators have become increasingly vigilant about student speech that threatens the safety of students and teachers alike.[181] If a court determines a student's online speech amounts to a true threat, it will not be protected within the umbrella of *Tinker*.[182]

b. Cyberbullying

"Cyberbullying" has been a topic controversial enough to warrant a recent conference hosted at the White House by President Barack Obama and First Lady Michelle Obama.[183] Though bullying is not a new concept, the Internet makes it easier for bullies to prey on their victims.

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[179] *See* Schiffhauer, *supra* note 11, at 767 ("If the student's Internet expression constituted 'severe, pervasive, and objectively offensive' harassment and interfered with another student's 'opportunity to learn,' then punishment will be justified under Tinker's 'rights of others' prong." (footnote omitted)).

[180] *See* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371 (9th Cir. 1996) ("Threats of physical violence are not protected by the First Amendment under either federal or state law, and as a result, it does not matter to our analysis that Sarah Lovell uttered her comments while at school. To resolve the federal claim, we need not rely upon the Supreme Court cases that limit students' free speech rights; because we hold that threats such as Lovell's are not entitled to First Amendment protection in any forum, it does not matter that the statement was made by a student in the school context.").

[181] *See* Li, *supra* note 95, at 66 ("The primary issue addressed in Internet-related student speech cases is whether the school violated the student's First Amendment rights when it disciplined the student for posting allegedly vulgar, violent, or lewd material on the Internet unrelated to any school-sponsored activity or event. Many of these cases cited the Columbine tragedy to support the proposition that schools must be given greater authority to effectively minimize violent student behavior." (footnotes omitted)).

[182] *See Lovell*, 90 F.3d at 371 ("Threats of physical violence are not protected by the First Amendment under either federal or state law, and as a result, it does not matter to our analysis that Sarah Lovell uttered her comments while at school. To resolve the federal claim, we need not rely upon the Supreme Court cases that limit students' free speech rights; because we hold that threats such as Lovell's are not entitled o First Amendment protection in any forum, it does not matter that the statement was made by a student in the school context.").

[183] The Office of the White House, *President Obama & the First Lady: Conference on Bullying Prevention* (Mar. 10, 2011), *available at* www.whitehouse.gov/photos-and-video/video/2011/03/10/president-obama-first-lady-conference-bullying-prevention/.

"Cyberbullying" is defined as a "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[184] As of January 2013, forty-nine states require school policies prohibiting cyberbullying and forty-three states allow schools to implement sanctions against cyberbully students.[185] Because, according to the Department of Education, legal action can be taken against schools that do not address this harassment, schools must respond appropriately to cyberbullying.[186]

Though the legislature has made it clear that Internet harassment should be a priority of school officials, the Supreme Court recently denied certiorari on a case disputing the constitutionality of a school's disciplinary actions against a student for an online attack upon a fellow student by creating an interactive discussion group on MySpace.[187] The Fourth Circuit punished the student who invited approximately one hundred people, including at least two dozen of her classmates, to join a MySpace group entitled "S.A.S.H."—an acronym for "Students Against Shay's [the targeted student's] Herpes."[188] The responses garnered from the school's students, in the form of comments and pictures, amounted to no less than a hate campaign against the targeted student.[189] While the most offensive speech did not come from the original speaker, she created the forum and fueled the hateful speech with approving comments.[190]

This type of personal attack through the Internet will inescapably collide with the victim's right "to be secure and to be let alone,"[191] and ultimately prevent the school from providing each student the opportunity to learn.[192] For this reason, when online student speech

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[184] SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 5 (2009).

[185] SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE CYBERBULLYING LAWS (Jan. 2013), *available at* www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

[186] U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: BULLYING AND HARASSMENT, WHITE HOUSE CONFERENCE MATERIALS 2011, at 83, *available at* www.stopbullying.gov/resources-files/white-house-conference-2011-materials.pdf.

[187] Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095 (2012).

[188] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567-68 (4th Cir. 2011).

[189] *Id.* at 568-69 ("School administrators concluded that Kowalski had created a 'hate website,' in violation of the school policy against 'harassment, bullying, and intimidation.'").

[190] *Id.* at 568 ("Parsons uploaded a photograph of himself and a friend holding their noses while displaying a sign that read, 'Shay Has Herpes,' referring to Shay N. The record of the webpage shows that Kowalski promptly responded, stating, 'Ray you are soo funny!=).'").

[191] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[192] *See* West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) ("[W]here school authorities reasonably believe that a student's uncontrolled exercise of expression might substantially interfere with the work of the school or impinge upon the rights of other students, they may forbid such expression." (internal quotation marks and citation omitted)).

amounts to true threats or cyberbullying, courts should authorize discipline without the protection of *Tinker*.

2. *Focused or Targeted Offensive Speech*

Lewd, vulgar, or otherwise patently offensive online student speech causes a unique dilemma for schools.[193] While this type of speech has plagued schools for decades and quite possibly centuries, the Internet takes the speech from adolescents' private conversations or passed notes to an infinitely public platform. Distasteful, and sometimes downright nasty, Internet remarks about teachers, other students, or school-related activities have left many questions unresolved, resulting in inconsistent case law.[194] While bullying is its own unique category, online offensive speech directed toward the school continues to leave school authorities searching for a strategy to protect its own officials and other students.[195]

Fraser and *Tinker* would normally be the most applicable Supreme Court precedents for analyzing offensive speech within schools.[196] While *Fraser* has historically been limited to on-campus speech,[197] the principles supporting the ruling should still be applied to online speech. The *Fraser* Court endorsed punishment of the student's lewd speech, because the Court deemed it a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[198] It further explained that schools were not limited by the Constitution from "insisting that certain modes of expression are inappropriate and subject to sanctions."[199] The speech in question was sexually explicit in nature, but the Court expanded its ruling to include

[193] *See* Klupinski, *supra* note 12, at 626 ("Further complicating matters, these courts also differ on which standards to apply if the speech is considered student speech. Some will only engage in a Tinker analysis, while others will also analyze under Fraser and examine the content of the speech to determine whether it is lewd or vulgar.").

[194] *See* Jacob Tabor, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 591 (2009) ("The question of school regulation of off-campus cyberspeech is a challenging one that the Supreme Court has not directly resolved.").

[195] *See* Klupinski, *supra* note 12, at 626 ("Further complicating matters, these courts also differ on which standards to apply if the speech is considered student speech. Some will only engage in a Tinker analysis, while others will also analyze under Fraser and examine the content of the speech to determine whether it is lewd or vulgar.").

[196] *See generally* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). The lewd and vulgar content of Fraser's speech was the focus of the justification for punishment. *Id.* at 685–86.

[197] *See generally id.* The Court included the location of the speech—in front of a young, captive audience—as a justification for the student's punishment. *Id.* at 684–86.

[198] *Id*. at 684.

[199] *Id*.

vulgar and lewd speech that may "undermine the school's basic educational mission."[200]

Fraser alone could not adequately justify authorizing school authorities to punish all students for their lewd, vulgar, or offensive online speech.[201] The underlying principles of *Tinker* and *Fraser* should be used to analyze offensive online speech that is targeted at the school. While schools have the ability to "prohibit the use of vulgar and offensive terms in public discourse,"[202] schools must be held accountable by showing a disruption to the school or invasion upon the rights of another student and justify restrictions on a particular expression of opinion.[203]

a. Parody Profiles

The Supreme Court recently denied certiorari on two exceptionally similar cases involving two unrelated Pennsylvania students' creation of parody MySpace profiles of their respective school principals.[204] Both students created the profiles in their homes, used school resources only to obtain a picture of the principal, and incorporated offensive, if not cruel, language in the parody profiles.[205] The Third Circuit, sitting en banc, struggled with analysis of all previous student speech Supreme Court cases only to ultimately decide *Tinker* is the applicable rule, because of the off-campus nature of the speech.[206]

Under *Tinker*, these cases are only subject to the material and substantial disruption analysis, because the *Tinker* Court specified that the rights of other *students*—not school officials—be protected from invasion.[207] *Fraser*, however, may provide respite for teachers from offensive attacks while the requirement that schools show more than

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[200] *Id.* at 685.

[201] *See* Doninger v. Niehoff, 514 F. Supp. 2d 199, 213 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008). The court reasoned that applying *Fraser* alone would allow a school to censor speech it deemed vulgar, offensive, or otherwise contrary to the school's mission, without having to show substantial disruption. *Id.*

[202] *Fraser*, 478 U.S. at 683.

[203] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[204] Blue Mountain Sch. Dist. v. J.S., 132 S. Ct. 1097 (2012) (cases below, 650 F.3d 915 (3d Cir. 2011) (en banc); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc)).

[205] *See generally* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc).

[206] *See generally J.S.*, 650 F.3d 915; *Layshock*, 650 F.3d 205.

[207] Schiffhauer, *supra* note 11, at 765 ("If the student's Internet expression constituted 'severe, pervasive, and objectively offensive' harassment and interfered with another student's 'opportunity to learn,' then punishment will be justified under *Tinker*'s 'rights of other's' prong." (footnote omitted)).

"undifferentiated fear or apprehension of disturbance"[208] will place significant safeguards to prevent against knee-jerk reactions by school officials to protect against healthy disapproval.

b. Indecent Photographs

The use of social networking websites[209] centered on sharing personal pictures has created an entire sub-section of student conduct that school officials attempt to address through school discipline.[210] Though the pictures may not target the school specifically, school officials have exerted their authority and disciplined students nevertheless.[211] Future courts should apply *Tinker* and *Fraser* principles to online student speech cases involving possibly indecent photographs.

Judge Philip P. Simon said it best when he declared, "Not much good takes place at slumber parties for high school kids, and this case proves the point."[212] Two high school students, fifteen and sixteen years old, were suspended for posing for and posting "raunchy" pictures of themselves on their MySpace, Facebook and Photo Bucket accounts.[213] The pictures displayed the girls fully clothed or in lingerie in suggestive positions and were taken at a series of slumber parties during the middle of the summer.[214] Captions describing the pictures were lewd, making reference to the male anatomy in less than decent terms.[215] Though the pictures were taken in the summer within a student's home, printouts of the pictures were brought to the school by parents who were concerned about the effects of the pictures.[216] Both students were disciplined because the principal found that the pictures had a "potential for causing disruption of student activities."[217]

Though the pictures were indecent,[218] they were found to be an attempt at a "particularized message of crude humor likely to be understood by those they expected to view the conduct"[219] rather than

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[208] *Tinker*, 393 U.S. at 508.

[209] *See, e.g.*, Tumblr.com; instagr.am/.

[210] *See, e.g.*, T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011).

[211] *See, e.g.*, *id.*

[212] *Id.* at 771.

[213] *Id.*

[214] *Id.* at 772.

[215] *Id.*

[216] *Id.*

[217] *Id.* at 772-73.

[218] The district court found the pictures not to be obscene according to the legal definition, and therefore not inherently offensive. *Id.* at 778.

[219] *T.V.*, 807 F. Supp. 2d at 776.

"deviate sexual conduct."[220] The court assumed, without definitively deciding, that was the default rule applicable to this case after an initial attempt to incorporate *Fraser* was defeated by a classification of "off-campus" speech.[221] Ultimately, the court found nothing in the record that would "come close to meeting" the *Tinker* standard, and held that school officials did violate the students' constitutional rights.[222]

A school's interest in "prohibit[ing] the use of vulgar and offensive [speech] in public discourse"[223] should be considered in offensive online student speech cases. Even if there is an overwhelming interest for the school to restrict lewd and obscene speech within the public discourse, as described in *Fraser*, the *Tinker* standard would still work to prevent the school from punishing students for indecent pictures if they do not "material[ly] disrupt[] classwork or involve[] substantial disorder or inva[de] . . . the rights of others."[224]

3. *General School-Related Speech*

Allowing schools to reach into students' homes and wield control over any language created within the scope of the speaker's status as a student would be unconstitutional.[225] General school-related speech does not trigger the second prong of *Tinker*—a collision with the rights of other students—because it does not include speech directed at any specific student. Online student speech that generally relates to the school will be subject to *Tinker*'s "material and substantial disruption" prong,[226] and will be punishable accordingly.

It is an established concept that even when online speech is expressed outside of the school, it may nevertheless have an effect within the school.[227] In the Second Circuit, a student council member posted a lewd, inaccurate blog post regarding a school-sponsored social event.[228]

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[220] *Id*. at 778.

[221] *Id*. at 779.

[222] *Id*. at 779-85.

[223] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[224] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[225] Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 161 (2003) ("Schools that punish students for wearing Marilyn Manson t-shirts or waving confederate flags at school do not attempt to discipline students for doing so off-campus, yet off-campus criticism of school authority is far more likely to result in academic punishment.").

[226] *Tinker*, 393 U.S. at 513.

[227] Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.").

[228] Doninger v. Niehoff, 527 F.3d 41, 46 (2d Cir. 2008).

School officials postponed the event multiple times when a final postponement due to technical arrangements upset the Senior Class Secretary enough to send a mass email to school members and post to her personal blog about the issue.[229] Though the event was merely postponed, the contentious blog entry claimed it was cancelled due to the "douchebags in central office."[230] In both the email and blog entry, the student calls for outraged students to contact school officials—specifically her superintendent—who she claimed got "pissed off" and decided to call off the event.[231]

Mildly vulgar by today's standards, the blog entry would likely not trigger the *Fraser* interest of the school.[232] Instead, it is the directed call of action encouraging phone calls and emails to school officials that caused a disruption.[233] In response to the students' online speech, both the principal and superintendent received such an influx of both phone calls and emails regarding the event that they arrived late to, or were forced to miss, several school-related activities for at least two consecutive days.[234]

While acknowledging the "vulgar" nature of the speech, the court found that the "potentially incendiary language"[235] did cause a "foreseeable risk of substantial disruption to the work and discipline of the school."[236] The school did not violate the student's rights based on three distinct justifications: first, because the language was both plainly offensive and potentially disruptive of efforts to resolve the ongoing controversy; second, because the effort to solicit more calls and emails made it foreseeable that school operations may be disrupted; and finally, because the student's role as a school government leader risked both disruption and frustration of the proper operation of the school's government.[237]

The court's rationale appropriately incorporated the consideration of both the effect of the speech and the content of the speech. The second and third justifications properly place emphasis on the effect of the speech—the foreseeability of the speech having an effect, and her role as

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[229] *Id.* at 44-45.

[230] *Id.* at 45.

[231] *Id.*

[232] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[233] *Doninger*, 527 F.3d at 50.

[234] *Id.* at 46 (citing case below, Doninger v. Niehoff, 514 F. Supp. 2d 199, 206 (D. Conn. 2007)).

[235] *Id.* at 51.

[236] *Id.* at 53.

[237] *See id.* at 50-52.

a student increasing the likelihood of such an effect.[238] The first justification correctly places focus on the "potentially disruptive" content of the speech.[239] *Tinker*'s first prong requires that "material or substantial disruption to the work and discipline of the school" should govern generally school-related online speech.[240] Though online student speech that generally relates to the school will not come under the authority of school officials, the opposite is true for online speech that directly triggers *Tinker*.

CONCLUSION

While creating a boundless forum for expressive speech, the Internet has caused disorder in the balance between students' free speech rights and school authorities' interest in maintaining a disciplined school environment. The lack of guidance from the Supreme Court has created chaos in the lower courts' adjudication of online student speech cases.

Consistent with current Supreme Court precedent, courts ultimately look to four factors when analyzing student speech cases: sponsorship, location, effect, and content.[241] Sponsorship is drawn from the *Hazelwood* standard, which allows school officials to restrict student speech that could be seen as school-sponsored.[242] This standard is directly applicable to online student speech cases. As applied to online student speech, the location of the speech is inconsequential given the boundless nature of the Internet and its ability to intrude upon the school environment. Ultimately, the effect and the content of online student speech are the most applicable factors to assess when determining student's free speech rights.

The effect and content of online student speech should be analyzed to determine student's free speech rights in the Internet age. As the principal Supreme Court precedent, the two-prong effects test of *Tinker* should be applied to online speech cases because it both designates the appropriate standard and allocates the necessary safeguards to students' constitutional rights. The content of the online student speech should not be ignored, but rather examined according to three distinct classifications: inherently disruptive speech, focused or targeted speech, or general school-related speech.

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[238] *Id.* at 52.

[239] *Id.* at 51-52.

[240] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[241] Klupinski, *supra* note 12, at 643.

[242] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Inherently disruptive speech will directly trigger the *Tinker* standard, and should be punishable if the speech creates a material disruption within the school. Online student speech that is focused or targeted at the school should be analyzed under both *Tinker* and *Fraser* standards, because they provide the appropriate balance between students' First Amendment rights and the school's duty to provide a safe learning environment. Finally, general school-related speech should be outside the authority of school officials, unless it creates a substantial or material disruption within the school.