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ESSAYS

THE UNREALISTIC GEOGRAPHIC LIMITATIONS OF THE SUPREME COURT'S SCHOOL-SPEECH PRECEDENTS: *TINKER* IN THE INTERNET AGE

Lee C. Baxter*

I. INTRODUCTION

*Tinker v. Des Moines Independent Community School District*¹ is regarded as one of the most influential decisions of the United States Supreme Court.² *Tinker* owes its distinguished status to its position as the Court's first decision to affirmatively uphold students' First Amendment rights and to the popularity of public school cases. These cases do, after all, draw more than their fair share of attention because "a single case can tremendously change longstanding community paradigms."³ In time spent, public schools are a second home to most American children; hence, the rules applicable to schools vividly impact the country. The *Tinker* Court held that a student retains her First Amendment rights while at school so

* 2012 graduate of the University of Montana School of Law. My interest in the topic of free-speech in America's schools began with my participation in the 2011 National Moot Court competition. The author thanks University of Montana professors Larry Howell and Andrew King-Ries, whose insightful coaching helped me develop the topic of this paper, and fellow moot-court teammates Sarah Mazanec and David Bigger for their patience at practices that helped me hone this argument through trial and error. The author specially thanks fellow Montana Law graduate and friend Katharine Leque for her insightful (and many times ruthless) edits.

1. 393 U.S. 503 (1969).

2. See e.g. Street Law, *Landmark Cases of the U.S. Supreme Court*, http://www.streetlaw.vorg/en/landmark/cases/tinker_v_des_moines (accessed May 15, 2012).

3. Jesulon S. R. Gibbs, *Student Speech on the Internet: The Role of First Amendment Protections* 18 (LFB Scholarly Publishing LLC 2010). (Gibbs uses the example of *Brown v. Board of Education*, 347 U.S. 483 (1954) to demonstrate this principle.); see also *Morse v. Frederick*, 551 U.S. 393, 410–425 (2007) (Thomas, J., concurring).

long as her speech does not “materially and substantially disrupt” the school.⁴ *Tinker* can be seen as a quid-pro-quo balancing of student rights and school responsibilities: while at school, a student’s First Amendment rights necessarily yield to the school’s duty to teach required subjects and keep order; while at home, however, a student enjoys full First Amendment rights because his or her speech does not have the potential to interrupt school activities. While this arrangement reflected the reality of technological limitations in 1969, the proliferation of internet use changed the second part of the equation by empowering a student to impact the operation of the school from home.

Indeed, internet use among teenagers is now “nearly universal.”⁵ Students are using it for more than homework: they are also using the internet to bully fellow students.⁶ While traditional bullying was done face-to-face, internet bullying, or “cyberbullying,” need not take place within the school. But the effects of cyberbullying are carried into the classroom.⁷ Fellow students are not the only victims, as students are also using the internet to attack teachers, resulting in disruption to operations of the school.⁸

Montana is no different. In a recent interview, a Billings middle-school resource officer described off-campus “cyberbullying” as an “epidemic.”⁹ During the 2013 Legislative Session, Representative Ellie Hill of Missoula introduced House Bill 527, which proposed to make cyberbullying a misdemeanor crime.¹⁰ To paraphrase, the Bill made it illegal for someone to post malicious content about a minor on the internet, create fictitious social media pages, or post or encourage others to post on the internet “private, personal or sexual information” about a minor if done so “with the purpose to

4. *Tinker*, 393 U.S. at 512–514.

5. *J.S. ex rel. Snyder v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 951 (3d Cir. 2011) (Fisher, J., dissenting with whom Scirica, Rendell, Barry, Jordan, and Vanaskie, JJ., joined) (citing Amanda Lenhart, et al., *Pew Internet & American Life Project: Teens and Social Media 2* (2007) (noting 93% of teenagers use the internet and 61% use it daily)).

6. See e.g. *Kowlaski v. Berkeley Co. Schools*, 652 F.3d 565 (4th Cir. 2011); see also Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 Wis. L. Rev. 1213, 1214 (2003).

7. Servance, *supra* n. 6, at 1214 (“Internet harassment . . . may originate outside of school . . . but carry its sting into the classroom.”). Servance further explains that bullying “manifests a wide range of emotional harm, from low self-esteem, anxiety, and depression to social withdrawal. Eventually, some bullied children strike back with violence, either toward the bully or more random targets.” Servance, *supra* n. 6, at 1216–1217.

8. See e.g. *J. S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851–852 (Pa. 2002).

9. Rob Rogers, *SD2 Grapples with Rogue, Derogatory High School Facebook Pages*, *The Billings Gazette* (Mar. 22, 2013).

10. Mont. H. 527, 63d Leg., Reg. Sess. (Feb. 18, 2013) (available at <http://legiscan.com/MT/text/HB527>).

terrify, intimidate, threaten, harass, or torment a minor[.]”¹¹ The Bill did not pass, however.¹²

With a vacuum of legislation, school officials have stepped in by disciplining students who create websites attacking other students and teachers. Montana’s Board of Public Instruction has added “anti-bullying guidelines” to its required criteria for Montana’s public schools.¹³ Each school district must “develop . . . methods of documenting bullying, protecting the victim and disciplining the bully.”¹⁴ However, school officials stepping beyond the schoolhouse to discipline students for online bullying has resulted in lawsuits across the country.¹⁵ While these lawsuits vary in many aspects, one common thread is that all of the students allege the *Tinker* exception to the First Amendment does not apply to student speech outside of school.

This article outlines the problem courts encounter when strictly applying *Tinker*’s geographical test in the internet age. Section II provides a brief overview of the four Supreme Court “student-speech” cases and explains that the Court has not addressed off-campus internet speech. Through the example of the Court’s personal jurisdiction cases, Section III shows the Court previously has revised its constitutional rules to ensure that its rulings are not outpaced by advances in technology. Section IV demonstrates that lower courts are in disarray as to schools’ ability to discipline off-campus internet speech and argues that the Court should revise its school-speech framework to encompass such speech. Section V proposes a two-part test to deal with student internet speech: first, courts should determine whether the internet speech has a “sufficient nexus” to the school environment so as to deem it “school speech,” and if so, courts should then apply *Tinker* to determine whether it was reasonably foreseeable the internet speech would cause a substantial and material disruption to the operation of the school.

II. THE SUPREME COURT’S SCHOOL-SPEECH PRECEDENT DOES NOT ADDRESS OFF-CAMPUS, INTERNET SPEECH

The Supreme Court has addressed school speech in four cases. First, under *Tinker*, a school may discipline a student for speech that materially and substantially disrupts school.¹⁶ Second, consistent with *Bethel School District Number 403 v. Fraser*,¹⁷ a school may also discipline a student for

11. Mont. H. 527, 63d Leg., Reg. Sess. at 1 (available at <http://legiscan.com/MT/text/HB527>).

12. Mont. H. 527, 63d Leg., Reg. Sess. (available at <http://legiscan.com/MT/text/HB527>).

13. Associated Press, *Montana Schools Step in After Legislature Refuses Anti-Bullying Bills*, *The Missoulian* (June 9, 2013).

14. *Id.*

15. *Infra* Section IV.

16. *Tinker*, 393 U.S. at 514.

17. 478 U.S. 675 (1986).

speech that is offensively lewd or vulgar.¹⁸ Third, under *Hazelwood School District v. Kuhlmeier*,¹⁹ a school may restrict speech “that students, parents, teachers, and members of the public might reasonably perceive to bear the imprimatur of the school.”²⁰ And finally, under *Morse v. Frederick*,²¹ schools may discipline a student for speech “promoting illegal drug use.”²² However, none of these cases deal with off-campus speech.

The Court’s first school-speech case was *Tinker*. There, several students planned to wear black armbands to school to promote a military truce during escalation of the United States’ involvement in the Vietnam War.²³ School officials discovered the plan and adopted a policy that prohibited students from wearing armbands in school.²⁴ Mary Beth Tinker and two of her brothers wore armbands anyway.²⁵ Upon their arrival at school, the Tinkers were suspended and their father subsequently sued the Des Moines School District.²⁶

The Court began its analysis with one of its most famous passages: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁷ The Court’s language implies that students retain the full gamut of First Amendment rights outside the schoolhouse gate and the school does not have the authority to discipline students for speech outside that gate.²⁸ Ultimately, the Court held that the First Amendment protected the Tinkers’ speech (wearing armbands) because there was no evidence that could have reasonably led the Des Moines School District to “forecast substantial disruption of or material interference with school activities”²⁹

While the Court was careful not to limit its holding to classroom settings—by explaining the principle also applied to speech taking place in the cafeteria, on the playing field, or on the campus during authorized hours—nothing in the Court’s decision can be read as extending school authority to

18. *Id.* at 684–685.

19. 484 U.S. 260 (1988).

20. *Id.* at 271.

21. 551 U.S. 393.

22. *Id.* at 408.

23. *Tinker*, 393 U.S. at 504.

24. *Id.* at 504.

25. *Id.*

26. *Id.*

27. *Id.* at 506.

28. Kyle W. Brenton, *BONGHITS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech through the Lens of Personal Jurisdiction*, 92 Minn. L. Rev. 1206, 1223 (2008).

29. *Tinker*, 393 U.S. at 514.

off-campus speech.³⁰ Combining this notable absence with the Court's reliance on the "special characteristics of the school environment" as the foundation for its holding, *Tinker* itself did not contemplate school authority over off-campus speech.

During the 1980s, the Supreme Court added to its school-speech framework by deciding *Bethel School District Number 403 v. Fraser*³¹ and *Hazelwood School District v. Kuhlmeier*.³² In *Fraser*, a student, Matthew Fraser, gave a speech at a school assembly that included "an elaborate, graphic, and explicit sexual metaphor."³³ The Court ultimately upheld Fraser's suspension, but did so without applying the substantial and material disruption test under *Tinker*.³⁴ Instead, the Court added a new prong to its student-speech analysis, concluding that schools could restrict student speech that was offensively lewd or vulgar, even if that speech did not cause a *Tinker* disruption.³⁵ Justice Brennan concurred in the judgment, writing separately to explain that schools only had the authority to punish students for *Fraser* type speech at school: "If [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."³⁶

Two years after *Fraser*, the Court considered the scope of the school's authority to censor the content of a student newspaper. In *Kuhlmeier*, the principal of a Missouri high school deleted two articles from the newspaper he deemed inappropriate.³⁷ Three staff members of the newspaper sued the school district for violating their First Amendment rights.³⁸ The Court began its First Amendment analysis by distinguishing the type of speech in *Tinker* and *Fraser* from that of censoring a school newspaper—namely, that the former cases dealt with silencing "student[s'] personal expression that happens to occur *on school premises*," while the latter deals with whether the school must affirmatively "promote particular speech."³⁹ The Court answered the second inquiry in the negative, holding that schools properly had the authority to exercise editorial control over the content of their newspapers as long as the censorship was related to "legitimate pedagogical con-

30. *Id.* at 512–513.

31. *Bethel*, 478 U.S. at 675.

32. *Hazelwood*, 484 U.S. at 260.

33. *Bethel*, 478 U.S. at 677–678.

34. *Id.* at 680–683.

35. *Id.* at 683.

36. *Id.* at 688 (Brennan, J., concurring).

37. *Hazelwood*, 484 U.S. at 263–264 (The first article chronicled Hazelwood students' experiences with pregnancy, while the second "discussed the impact of divorce on students at the school.").

38. *Id.* at 262, 264.

39. *Id.* at 270–271 (emphasis added).

cerns.”⁴⁰ The Court found the principal’s actions in conformance with this standard.⁴¹ *Kuhlmeier* adopted Justice Brennan’s *Fraser* concurrence: “A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”⁴²

The Court’s most recent school-speech opinion is commonly referred to as the “Bong Hits 4 Jesus!” case.⁴³ Joseph Frederick, a high school student, unfurled a 14-foot banner that bore that phrase during a school-sanctioned field trip to watch the Olympic Torch Relay pass through Juneau, Alaska on its way to Salt Lake City.⁴⁴ The school principal, Deborah Morse, immediately demanded Frederick take it down.⁴⁵ Morse explained after the incident that she believed the banner “encouraged illegal drug use,” which was against school policy.⁴⁶ Frederick refused to remove the banner. Morse then suspended Frederick for ten days, and Frederick subsequently sued Morse for violating his First Amendment rights.⁴⁷ The Supreme Court upheld Frederick’s suspension even though he was on a public sidewalk at the time of the episode, and not on the school premises.⁴⁸ Essentially, the Court rejected Frederick’s geographical limitation on school authority over student speech, instead reasoning that school authority over student speech extends to field trips: “Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”⁴⁹ Notably, the Court did recognize there was “some uncertainty” as to the “outer boundaries” of school authority over student speech, but “not on [*Morse*’s] facts.”⁵⁰ Citing the “special characteristics of the school environment” and schools’ interest in curbing illegal drug use, the Court held that schools may discipline students for speech that they “reasonably regard as promoting illegal drug use.”⁵¹ The *Morse* Court carefully explained that its holding applied only to speech that occurred on-campus. The Court made this point by using *Tinker*’s special characteristics language and pointing out that its other cases were similarly tethered to the

40. *Id.* at 273.

41. *Id.* at 274–275.

42. *Id.* at 266 (internal quotation marks and citation omitted).

43. See e.g. Rodney A. Smolla, *School-sanctioned Events: Morse v. Frederick the “Bong Hits 4 Jesus” Case*, 2 Smolla & Nimmer on Freedom of Speech § 17:4.50 (2013).

44. *Morse*, 551 U.S. at 397.

45. *Id.* at 398.

46. *Id.* at 398.

47. *Id.* at 398–399.

48. *Id.* at 400–401.

49. *Id.* at 401 (quotation marks and citation omitted).

50. *Morse*, 551 U.S. at 401.

51. *Id.* at 408.

school environment: “Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”⁵²

From these cases, lower courts have concluded that *Tinker* forms the general rule and *Fraser*, *Kuhlmeier*, and *Morse* form exceptions. Thus, schools may discipline students for lewd, vulgar, or profane language, speech that could be interpreted as the school’s own, and speech that promotes illegal drug use regardless of disruption. And speech “falling outside of these categories is subject to *Tinker*’s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others.”⁵³

Currently, as students move the forum of their speech from within the schoolhouse gate and onto the internet, these decisions are being stretched beyond their holdings. This article argues that the reality of teaching in the internet age necessitates the extension of *Tinker* to internet speech under certain circumstances—specifically when the speech has a sufficient nexus to the school environment.⁵⁴ The Court has, after all, revised its constitutional doctrines in other areas when technological advances have outgrown its jurisprudence. One lucid example is the Court’s personal jurisdiction decisions.

III. THE NOT-SO “ETERNAL PRINCIPLES” OF PERSONAL JURISDICTION⁵⁵

The Supreme Court has revised its personal jurisdiction holdings to meet the difficulties of advancing technology. This article argues that the internet is such a technological shift in the student-speech realm as to warrant a revision of the Court’s school-speech framework.

As early as 1813, individual members of the United States Supreme Court called the rule that a court could not exert its jurisdiction over persons found outside its geographical boundaries one of the “eternal principles of justice”⁵⁶ In the 1877 case *Pennoyer v. Neff*,⁵⁷ the Court formally adopted this “eternal principle,” holding that an Oregon state court violated

52. *Id.* at 405.

53. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001).

54. For an explanation of what constitutes a sufficient nexus, see *infra* Section V.

55. While it draws an analogy to personal jurisdiction cases, this article does not argue that courts should apply personal jurisdiction principles to student speech. For an excellent discussion of this position not taken, see generally Brenton, *supra* n. 28.

56. *Mills v. Duryee*, 11 U.S. 481, 486 (1813) (Johnson, J., dissenting). In *Mills*, the plaintiff sought to enforce a debt order issued by a New York court. The defendant pleaded *nil debet*—a plea that he did not owe the money and should not have to pay it. David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L.J. 1584, 1648 (2009). The question presented was whether the Full Faith and Credit Clause of the Constitution prevented the defendant from pleading *nil debet* (that he should not have to pay the New York judgment). *Mills*, 11 U.S. at 483 (majority). The Court ruled that the Judiciary Act of 1790 required the court to honor the judgment. *Mills*, *id.* at 483–484 (majority). Justice Johnson dissented because he believed allowing the *nil debet* plea was the only way to ensure a court enforcing

due process when it asserted its adjudicatory power over a defendant who was not present within Oregon's borders.⁵⁸

Yet following *Pennoyer*, courts struggled to apply its rule.⁵⁹ As a leading treatise explains, it was the wrong tool for the job:

The philosophy underlying *Pennoyer v. Neff* may well have been adequate at a time when the average person's mobility was limited, commerce was local in character, and territorial notions did not represent too great an impediment on a plaintiff's ability to institute his action But as the United States became a mobile, industrialized society, the doctrine of *Pennoyer* proved to be inadequate and the courts were forced to deviate from its principles and adjust them to the changing times.⁶⁰

Simply put, as technology made it easier for people to conduct activities across state borders, the bright-line *Pennoyer* rule became harder to defend, and courts began to stray. In the 1930s, for example, the Court dealt with an increasingly mobile society by holding that the state of a defendant's domicile had personal jurisdiction over the defendant regardless of the defendant's location at the time he was personally served.⁶¹ And, in 1927, the Court upheld "implied consent" statutes that created personal jurisdiction over non-resident defendants who used state highways.⁶² Corporations also pushed *Pennoyer*'s territorial rule to the breaking point. As heavy users of advancing technology, corporations "simply refused to remain penned up within their own states of incorporation."⁶³

This history illustrates that courts faced with an outdated framework will find a way around it. In *International Shoe Company v. Washington*,⁶⁴

another's judgment would be able to determine whether the first court had proper jurisdiction. *Id.* at 486 (Johnson, J., dissenting).

57. 95 U.S. 714 (1877).

58. *Id.* at 733.

59. Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 Mo. L. Rev. 753, 755 (2003).

60. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* vol. 4 § 1064, 345 (3d ed., West 2002) (italics added).

61. *Id.* at 410–450. The Court first decided *Blackmer v. United States*, 284 U.S. 421 (1932), where it upheld a federal statute allowing service of United States citizens in foreign countries. *Id.* at 438 ("The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them."). Then, in *Milliken v. Meyer*, 311 U.S. 457 (1940), the Court applied this principle to the states. *Id.* at 464 ("The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state . . .").

62. See *Hess v. Pawloski*, 274 U.S. 352, 354, 356 (1927) (upholding Massachusetts's statute that conferred personal jurisdiction over non-resident drivers who committed torts on its highways, even if the defendant was served outside Massachusetts); *Kane v. N.J.*, 242 U.S. 160, 165–166, 169 (1916) (upholding conviction for failing to comply with New Jersey statute requiring non-resident drivers to submit an application consenting to service on an appointed agent outside New Jersey).

63. *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 126 (2d Cir. 1963).

64. 326 U.S. 310 (1945).

the Court reviewed its post-*Pennoyer* decisions and acknowledged that it had strayed from its territorial rule.⁶⁵ The Court approved the deviation, however, and subsequently rejected *Pennoyer*'s rigid formula in favor of the flexible "minimum contacts" test.⁶⁶ The territorial restriction on personal jurisdiction requiring the defendant's physical presence in the forum state was no longer an "eternal principle of justice."

Following *International Shoe*, the Court refined the minimum contacts test in numerous opinions not relevant here.⁶⁷ But the Court's 1984 decision *Calder v. Jones*⁶⁸ does bear import to connecting personal jurisdiction and school-speech jurisprudence, as it was the Court's first application of the minimum contacts test to speech. In that case, a California actress sued two *National Enquirer* employees,⁶⁹ alleging they wrote and edited an article that libeled her.⁷⁰ The defendants, who resided in and prepared the article in Florida, moved to dismiss the lawsuit, arguing that due process prevented California courts from exercising personal jurisdiction over them.⁷¹ The Supreme Court disagreed, even though the defendants showed that they were not responsible for the *National Enquirer*'s distribution of the article in California, because "California [was] the focal point both of the story and the harm suffered."⁷² Essentially, the Court reasoned that the defendants could not write and edit a story aimed at a California audience (*National Enquirer* had a large California readership) knowing the story would impact the California actress, and claim immunity from California court authority.⁷³ The *Calder* Court had once again added to the due process analysis by adopting the "effects test."⁷⁴

In sum, the Court's willingness to revise the doctrine of personal jurisdiction, from *Pennoyer*, to *International Shoe*, to *Calder*, ensured that its rulings continued to reflect reality instead of steadfast adherence to prior holdings. In a span of just over 100 years, the Court went from proclaiming geographical limitations of personal jurisdiction as an "eternal principal of

65. *Id.* at 316 (noting that *Pennoyer*'s requirement that the defendant be present "within the territorial jurisdiction of the court" had given way to the requirement that the defendant have "certain minimum contacts with [the territorial jurisdiction] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (citations and quotations omitted).

66. *International Shoe*, 326 U.S. at 316 (citing *Milliken*, 311 U.S. at 463 (1940)).

67. See Wright & Miller, *supra* n. 60, at 403–462 (annotations for cases subsequent to *International Shoe* that clarified and elaborated on the minimum contacts test).

68. 465 U.S. 783 (1984).

69. One employee was a reporter, the other was the president and editor. *Id.* at 785–786.

70. *Calder*, 465 U.S. at 784–786. (The article alleged that the actress, Shirley Jones, drank so heavily "as to prevent her from fulfilling her professional obligations.") *Id.* at 788 n. 9.

71. *Id.* at 784–786.

72. *Id.* at 789.

73. *Id.* at 789–790.

74. *Id.* at 787.

justice” to upholding personal jurisdiction over individuals who resided in a state thousands of miles away from the forum state because the individuals had purposefully targeted the forum state. Just as the Court revised its personal jurisdiction framework to account for technological advances, the Court should likewise update its school-speech framework to permit schools to combat disruptive student speech that takes place on the internet.

IV. LOWER COURTS’ STRUGGLES TO DISCERN THE SCOPE OF SCHOOL AUTHORITY IN THE INTERNET AGE

Just as lower courts strayed from *Pennoyer*’s holding, lower courts have strayed from *Tinker*’s geographical limitations. Indeed, not a single circuit has adhered to geographical boundaries. Instead, these courts take several approaches.

Some courts have ignored its limitations and applied *Tinker* “without regard to the location where the speech originated (off-campus or on-campus).”⁷⁵ For example, the Ninth Circuit in *LaVine v. Blaine School District*⁷⁶ upheld a school’s emergency expulsion of a student who wrote a graphic poem about killing his classmates.⁷⁷ The student wrote the poem over the summer while at home and did not turn it in to his English teacher until months later to get her opinion.⁷⁸ The school expelled him.⁷⁹ The Ninth Circuit analyzed the student’s speech under *Tinker* after reiterating the generally accepted framework that speech that is lewd or vulgar falls under *Fraser*, speech that bears the school imprimatur falls under *Kuhlmeier*, and speech that does not fall under those cases is governed by *Tinker*. Reasoning that the poem was not *Fraser* or *Kuhlmeier* speech, the Ninth Circuit analyzed the school’s actions under *Tinker*’s substantial disruption test and upheld the suspension because the poem could reasonably be seen as a “cry for help” from a student who was “intending to inflict harm on himself or others.”⁸⁰ The jurisdictions that follow this approach have deviated the furthest from *Tinker*’s geographically-tethered holding.

Other courts have considered the location of the speech important to the analysis. Before applying *Tinker*, the Second Circuit first asks whether it was reasonably foreseeable that the speech “would reach school property

75. *J. C. ex rel. R. C. v. Beverly Hills Unified Sch. Dist.*, 711 F.Supp.2d 1094, 1103 (C.D. Cal. 2010) (collecting cases that apply this standard).

76. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001).

77. *Id.* at 983.

78. *Id.* at 983–984.

79. *Id.* at 986.

80. *Id.* at 989–990.

and have disruptive consequences there.”⁸¹ In *Doninger v. Niehoff*,⁸² for example, the court held that a school had the authority to discipline Avery Doninger for her blog post that criticized the school’s postponement of a concert and encouraged other students to add comments and contact school officials.⁸³ The court concluded that the content and context of Doninger’s post brought her within the purview of school authority because the post “directly pertained” to a school event and invited other students to contact other school officials to complain.⁸⁴ The court next determined that Doninger’s post was “potentially disruptive to the degree required by *Tinker*.”⁸⁵ The school received a “deluge of phone calls and emails,” taking administrators away from their normal duties for two days, and a group of students gathered outside the principal’s office in protest.⁸⁶ The Second Circuit held that discipline was proper for the off-campus post because it was reasonably foreseeable the post would be brought to the school’s attention; it pertained to school activities and targeted fellow students as its audience—and the post was potentially disruptive under *Tinker*. This test is narrower than the Ninth Circuit’s test, outlined above, which applies *Tinker* regardless of where the student speaks. A panel of the Eighth Circuit adopted the foreseeability test plus *Tinker* in *D.J.M. ex rel. D.M. v. Hannibal Public School District Number 60*.⁸⁷

The Third Circuit remains coy about the appropriate test for off-campus speech, even though *J.S. ex rel. Snyder v. Blue Mountain School District*⁸⁸ and *Layshock ex rel. Layshock v. Hermitage School District*⁸⁹ presented en banc panels with strikingly similar facts in 2011.⁹⁰ In *J.S. ex rel. Snyder*, a middle school student created a mock Myspace profile of her principal.⁹¹ The profile included a picture of the principal and contained “adult language and sexually explicit content.”⁹² After some students told J.S. they thought the profile was funny, J.S. made the profile “private,” limiting public access of the page but giving access to approximately 22

81. *Doninger v. Niehoff*, 642 F.3d 334, 348 (2d Cir. 2011); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007).

82. *Doninger*, 642 F.3d 334.

83. *Id.* at 348.

84. *Id.*

85. *Id.* at 349.

86. *Id.* at 349.

87. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011).

88. *J.S. ex rel. Snyder v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc).

89. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc).

90. On June 13, 2011, the Third Circuit handed down *J.S. ex rel. Snyder*, 650 F.3d 915 and *Layshock ex rel. Layshock*, 650 F.3d 205.

91. *J.S. ex rel. Snyder*, 650 F.3d at 920.

92. *Id.* at 920–921. The profile stated the principal’s interests as, *inter alia*, “fucking in my office, hitting on students and their parents,” and that he was a “sex addict, fagass” and put on the “world with a small dick”

fellow students.⁹³ One teacher had to tell students to stop talking about the profile and return to their schoolwork, and the principal's wife (a guidance counselor at the school) cancelled student appointments for one day to deal with the posting.⁹⁴ The principal suspended J.S., who subsequently sued the school district for violating her First Amendment right to free speech.⁹⁵ The district court granted summary judgment for the school district, even though it found the disruptions were not substantial under *Tinker*.⁹⁶ Instead, the district court ruled that the school district could discipline J.S. under *Fraser* because the profile was lewd, vulgar, and offensive and had a sufficient connection to the school.⁹⁷

On appeal, the Third Circuit reversed, holding that *Fraser* was limited to lewd, vulgar, or offensive speech that occurs on-campus.⁹⁸ The court next turned to whether *Tinker* authorized the school district's actions.⁹⁹ Notably, the Third Circuit acknowledged that there was still a question as to whether *Tinker* applies to off-campus speech: "we will assume, without deciding, that *Tinker* applies to J.S.'s speech in this case."¹⁰⁰ Since the district court ruled there had not been an actual substantial disruption, the school district defended its actions by asserting it was reasonable for the school to forecast that there would have been such a disruption.¹⁰¹ The court disagreed, reasoning that J.S. took "specific steps" to restrict access to the profile when she made it an invite-only page and the disruption only arose because of the principal's disproportionate response.¹⁰² Although the court admitted it had not formally decided *Tinker* was appropriate, its use of the test demonstrates the court did not believe *Tinker*'s geographical restrictions are a bright-line rule.¹⁰³

93. *Id.* at 921.

94. *Id.* at 922–923.

95. *Id.* at 920, 923.

96. *Id.* at 923.

97. *J.S. ex rel. Snyder*, 650 F.3d at 923. In determining there was a connection with the school, the district court noted the profile was about the school's principal, was targeted at fellow students as an audience, a paper copy of the website was brought into the school and was viewed by the principal, and J.S. created the website to retaliate for being disciplined for dress-code violations.

98. *Id.* at 932–933 ("In other words, *Fraser*'s 'lewdness' standard cannot be extended to justify a school's punishment of J.S. for her use of profane language outside the school, during non-school hours.").

99. *Id.* at 926.

100. *Id.* The court acknowledged it was using *Tinker* out of convenience: "The appellants argue that the First Amendment 'limits school official[s]' ability to sanction student speech to the schoolhouse itself.' While this argument has some appeal, we need not address it to hold that the School District violated J.S.'s First Amendment free speech rights." *Id.* at 926 n.3.

101. *J.S. ex rel. Snyder*, 650 F.3d at 928 (citation omitted).

102. *Id.* at 930–931.

103. Five members of the en banc court did, however, write separately to assert *Tinker* should not apply to off-campus speech. *J.S. ex rel. Snyder*, 650 F.3d at 936 (Smith, J., with McKee, C.J., Sloviter, Fuentes, and Hardiman, JJ., joining) ("I would hold that [*Tinker* does not apply to off-campus speech],

On the same day, the Third Circuit handed down *Layshock*. Once again, the court avoided deciding whether *Tinker* applied to off-campus speech.¹⁰⁴ Rather, the court applied *Tinker* out of convenience because there was no substantial disruption.¹⁰⁵ Like *J.S.*, Justin Layshock created a parody Myspace page of his principal using a picture from the school's website; the profile depicted the principal as a steroid user, alcohol abuser, drug addict, and sexually promiscuous.¹⁰⁶ Layshock granted access to his fellow students, and talk of the profile "spread like wildfire," inspiring copy-cat pages.¹⁰⁷ The principal's daughter, a fellow student, saw the page and told her father.¹⁰⁸ The principal was distressed about the profile, which he found "degrading, demeaning, demoralizing, and shocking."¹⁰⁹ In response to students' accessing the profile at school, the school limited computer access to times when students could be supervised.¹¹⁰ The school district suspended Layshock,¹¹¹ arguing its actions were proper under *Fraser* and *Tinker*.¹¹² The district court rejected the proposition that *Fraser* applied to off-campus speech¹¹³ and found the school district was unable to show Layshock's profile caused a substantial disruption at the school.¹¹⁴ On appeal, the school district did not challenge the district court's conclusion that there was not a substantial disruption.¹¹⁵ Instead, the school district argued *Fraser* should apply to vulgar and offensive speech that takes place off-

and that the First Amendment protects students from engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.").

104. *Layshock ex rel. Layshock*, 650 F.3d at 219–220 (Jordan and Vanaskie, JJ., concurring) (noting that neither *Layshock ex rel. Layshock* nor *J.S. ex rel. Snyder* resolved whether *Tinker* applies to off-campus speech).

105. *Id.* at 214 ("At the outset, it is important to note that the district court found that the [School] District could not establish a sufficient nexus between Justin's speech and a substantial disruption of the school environment, and the School District does not challenge that finding on appeal. Therefore, the School District is not arguing it could properly punish Justin under the *Tinker* exception for student speech that causes a material and substantial disruption of the school environment." (internal citations omitted)).

106. *Id.* at 207–208.

107. *Id.* at 208.

108. *Id.*

109. *Id.* at 209 (individual quotations in original removed).

110. *Layshock ex rel. Layshock*, 650 F.3d at 209.

111. *Id.* at 210 (The school district suspended Layshock for ten days. It also moved Layshock into a program for students with behavior problems, and prohibited him from participating in extracurricular activities and graduation.).

112. *Layshock v. Hermitage Sch. Dist.*, 496 F.Supp.2d 587, 599 (W.D. Pa. 2007) ("Defendants seek to justify their punishment of Justin under either the *Tinker* or *Fraser* tests.").

113. *Id.* at 599–600.

114. *Id.* at 600 ("As to the *Tinker* test, the Court concludes that, even construing the evidence in a light most favorable to Defendants, they have not established a sufficient nexus between Justin's speech and a substantial disruption of the school environment.").

115. *Id.* at 214.

campus but has a sufficient nexus to the school.¹¹⁶ Layshock's actions were sufficiently connected to the school, the district argued, because Layshock entered the school's property (its website) to obtain the principal's picture and the profile targeted the school district community.¹¹⁷

The Third Circuit correctly declined to extend *Fraser*, reasoning the Supreme Court had explicitly limited *Fraser* to on-campus speech.¹¹⁸ The Third Circuit rejected the proposition that the school should be able to discipline vulgar, lewd, and offensive speech simply because it was targeted at the school environment and was likely to come to the attention of school officials.¹¹⁹ The Third Circuit did acknowledge the circumstances would be different had Layshock's profile caused a substantial disruption: "We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because, as we noted earlier, the district court found Justin's conduct did not disrupt the school, and the District does not appeal that finding."¹²⁰ In distinguishing its decision from other decisions upholding school discipline for off-campus speech, the Third Circuit noted those cases involved speech that substantially disrupted the school.¹²¹ Those cases, the court reasoned, "stand for nothing more than the unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here."¹²²

With these two opinions, the Third Circuit made clear that it would not extend *Fraser* to off-campus speech. Whether, and under what circumstances, the Third Circuit will approve school discipline for student off-campus speech that substantially disrupts the school environment remains a viable question, however.

While most western states have not had court cases addressing the proper jurisdictional boundaries of school authority, a survey of student handbooks shows school authority varies by school district. In response to cyberbullying, many school districts have responded by expanding their jurisdiction to off-campus activities that have the effect of disrupting school work. For instance, the Anchorage School District purports to have jurisdiction over off-campus activities "if the [student's] behavior clearly has nega-

116. *Id.*

117. *Id.*

118. *Layshock ex rel. Layshock*, 650 F.3d at 216 (In *Morse v. Frederick*, the Supreme Court stated: "Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected." 551 U.S. at 405 (2007)).

119. *Id.* at 216–219.

120. *Id.* at 219.

121. *Id.* at 217 (distinguishing *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002)).

122. *Layshock ex rel. Layshock*, 650 F.3d at 219.

tive consequences for the welfare, safety, or morals of other students”¹²³ This broad jurisdiction rings of applying unmodified *Tinker*—if the speech substantially disrupts on-campus activities, the location of the speech is not relevant. On the other hand, in Montana, Helena School District #1 purports to limit its jurisdiction to only those activities taking place while the student is under the “supervision and control of the school.”¹²⁴ This far narrower jurisdiction would prohibit school authority from reaching student internet activity that takes place outside of *Tinker*’s schoolhouse gate.

Two courts struck the correct balance. First, the Pennsylvania Supreme Court considered the location of the speech relevant but not dispositive to the inquiry in *J.S. v. Bethlehem Area School District*.¹²⁵ In that case, J.S. created a webpage that made “derogatory, offensive, and threatening comments” primarily targeted at his algebra teacher.¹²⁶ News of the website spread and came to the school’s attention.¹²⁷ After viewing the website, the teacher was unable to return to work that year and the school district granted her leave for the remaining school year.¹²⁸ After he was expelled, J.S. sued in Pennsylvania state court, asserting the school district violated his First Amendment rights.¹²⁹ The trial court and intermediate appellate court affirmed the school district’s expulsion, and J.S. appealed to the Pennsylvania Supreme Court.¹³⁰

123. Anchorage School District, *2012–13 High School Student Handbook* III, (2012) (available at http://www.asdk12.org/forms/uploads/HS_handbook.pdf). The entire jurisdictional statement reads: “The following rules apply on school grounds, at school activities on and off school grounds, on school buses, and at school bus stops. These rules also apply to acts that: 1. Begin on school grounds and end off school grounds; or 2. Begin off school grounds and continue on school grounds; 3. Pose a likelihood of disruption of education or conduct at the school; or 4. Occur when the student is on the way to school or leaving school. In addition, students may be disciplined for behavior on or off school grounds that takes place at any time if the behavior clearly has negative consequences for the welfare, safety, or morals of other students or a person employed or volunteering at the school. The District should not exercise this jurisdiction with respect to conduct that has little or no actual or likely impact on the school community.”

124. Capital High School, *2012–2013 Student/Parent Handbook* 66 (2012) (available at <http://www.helena.k12.mt.us/images/documents/handbooks/CHS%20Handbook%202012-2013.pdf>). The entire jurisdictional statement reads: “A student shall not: 1.1 Engage in Disruptive Behavior - Behavior displayed verbally or through action toward a school official or policy of the school so the normal routine of the classroom or activity is significantly disrupted. This includes both verbal and physical hazing, conduct on school premises, going to and from school, while riding on any school transportation, or attending or participating in any school sponsored activity while within the jurisdiction, supervision, and control of the school.”

125. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (Pa. 2002).

126. *Id.* at 851.

127. *Id.* at 851–852.

128. *Id.* at 852.

129. *Id.* at 853.

130. *Id.*

In an opinion also affirming the school district's expulsion of J.S., the Court pointed out that times had changed since 1969: "*Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multimedia web site, accessible to fellow students, teachers, and the world."¹³¹ In outlining the appropriate analysis, the Court stated the location of the speech (i.e., on-campus or off-campus) was a "threshold issue."¹³² The Court then looked to case law to determine whether the website qualified as on-campus or off-campus speech and adopted the approach that speech originating off-campus can nonetheless morph into on-campus speech in certain circumstances.¹³³ The Court held: "speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator . . . will be considered on-campus speech."¹³⁴ The Court was careful, however, not to foreclose the possibility that off-campus speech could become on-campus speech, even without the originator accessing the website from school, if others accessed it while at school.¹³⁵

Since it determined J.S.'s website was on-campus speech, the Court next had to decide whether it could rule *Fraser* made discipline proper for the unquestionably vulgar and offensive speech or whether the school was required to make a showing of actual or potential disruption under *Tinker*.¹³⁶ The Court applied both cases and concluded that "application of either case results in a determination in favor of the School District."¹³⁷ Under *Tinker*, the Court determined the website caused an actual substantial disruption to the school when Mrs. Fulmer took leave for the rest of the school year, requiring numerous substitute teachers; when students sought counselors because they were feeling anxious about their safety; and when "there was a feeling of helplessness and low morale" in the school.¹³⁸

The Fourth Circuit, in *Kowalski v. Berkeley County Schools*,¹³⁹ has likewise applied *Tinker* to off-campus, internet speech, so long as the

131. *J.S. ex rel. H.S.*, 807 A.2d at 864.

132. *Id.*

133. *Id.* at 864–865 (collecting cases that have analyzed speech originating off-campus that made its way on-campus).

134. *Id.* at 865.

135. *Id.* ("While the fact that J.S. personally accessed his website on school grounds is a strong factor in our assessment, we do not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.")

136. *Id.* at 866–867 (collecting cases).

137. *J.S. ex rel. H.S.*, 807 A.2d at 867.

138. *Id.* at 869.

139. *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).

speech has a “sufficient nexus” to the school environment.¹⁴⁰ In 2005, Kara Kowalski used her home computer after school hours to create a webpage titled “S.A.S.H.” or “Students Against Sluts Herpes.”¹⁴¹ After creating the page, Kowalski invited 100 friends, including two dozen fellow students, to access and post pictures and comments on the page about another classmate, Shay N.¹⁴² Students, including Kowalski, posted comments accusing Shay N. of having herpes and being sexually promiscuous.¹⁴³ One student also posted two pictures of Shay N.¹⁴⁴ On the first, he drew “red dots on Shay N.’s face to simulate herpes and added a sign near her pelvic region, that read, ‘Warning: Enter at your own risk.’”¹⁴⁵ On the second picture, the student “captioned Shay N.’s face with a sign that read, ‘portrait of a whore.’”¹⁴⁶ Fellow students responded by commenting on how funny the pictures were and calling Kowalski “awesome” and a “hero” for creating the webpage.¹⁴⁷ The morning following the webpage’s creation, Shay N. and her parents showed school administrators a printout of the “S.A.S.H” website.¹⁴⁸ Shay N. did not attend school that day because she felt uncomfortable about attending class with those who had posted comments on the webpage.¹⁴⁹ After school administrators suspended Kowalski, she sued the school for violating her First Amendment rights, arguing the school was prohibited from disciplining her for “private out-of-school speech.”¹⁵⁰

On appeal, the Fourth Circuit rejected Kowalski’s assertion of a strict geographical limitation on school authority, noting that her argument was based on a “metaphysical” distinction that did not make sense in the internet age.¹⁵¹ Instead, the panel held that the relevant inquiry was whether

140. *Id.* at 572–573. The Fourth Circuit first determined Kowalski’s speech “caused the interference and disruption described in *Tinker* as being immune from First Amendment protection.” *Id.* at 572. The court then went on to note “the nexus of Kowalski’s speech to [the school’s] pedagogical interests was sufficiently strong to justify” the school’s actions. *Id.* at 573.

141. *Id.* at 567.

142. *Id.* at 567.

143. *Id.* at 568.

144. *Id.*

145. *Kowalski*, 652 F.3d at 568.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 568.

150. *Id.* at 567–569.

151. *Kowalski*, 652 F.3d at 573 (“[Kowalski’s argument] raises the metaphysical question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer’s keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.”).

there was a sufficient nexus between the speech and the school.¹⁵² The court concluded the webpage's content focused on a student, Shay N., and Kowalski's target audience was students.¹⁵³ The court then turned to *Tinker* and determined the school district's actions were warranted because there was an actual substantial disruption (Shay N. was unable to attend school) and, alternatively, a potential substantial disruption was real because, absent punishment, students would be likely to continue to harass Shay N. and might create "copy-cat" webpages.¹⁵⁴ The Fourth Circuit, therefore, allows schools to discipline students for off-campus, internet speech, if the speech has a sufficient nexus to the school environment and satisfies *Tinker*.

V. A PROPOSED SOLUTION: THE "SUFFICIENT NEXUS" TEST

The Supreme Court should revise its rule regarding student speech to reflect modern technological advances like the internet, just as it allowed its personal jurisdiction rules to evolve. Not a single circuit has held a school may not punish students for speech that originates off-campus. The Court should adopt the Fourth Circuit's sufficient nexus test to determine whether the speech is on- or off-campus. To determine if speech is sufficiently connected to the school environment to be considered on-campus speech, courts should look to: (1) the topic of the speech; and (2) the intended audience of the speech.¹⁵⁵

If the topic of the speech is school-related (i.e., the speech is about a teacher, staff member, or student the speaker only knows through a school relationship), then the first prong is satisfied. This requirement is necessary to ensure speech unrelated to the school's legitimate pedagogical concerns is not ensnared. To borrow an example: "If Mary Beth Tinker had appeared on the evening news to protest the Vietnam War, it could have caused a greater disruption of her school than her black armband"¹⁵⁶ This speech would not satisfy the first prong, however, because it is not related to the school environment.

The second prong—the speaker's targeted audience—likewise narrows the speech that is punishable by requiring courts to determine whether the student is using the internet as a proxy to get away with speech that would not be allowed at school. While this prong is admittedly broad (after

152. *Id.* at 577 ("Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem.").

153. *Id.* at 567.

154. *Id.* at 574.

155. See *Kowalski*, 652 F.3d at 573–574 (concluding Kowalski's speech was targeted to a student audience and was regarding a fellow student).

156. Brenton, *supra* n. 28, at 1227.

all, most students speak to their peers), it is not automatic, and it will filter out private speech such as online journals and webpages with limited access.¹⁵⁷ If a court determines the speech satisfies both prongs, then it is on-campus speech and is subject to *Tinker*'s substantial disruption test.

Tinker stands as the final protector of a student's speech. While the circuits differ on what satisfies *Tinker*, it is fair to say *Tinker* is not automatic approval for school districts. For instance, both of the Third Circuit decisions noted above, *J.S. ex rel. Snyder* and *Layshock*—in which students created websites that accused their principals of being, among other things, pedophiles, sex addicts, and drug users—were decided in favor of the student because there was not a disruption sufficient under *Tinker*.

VI. CONCLUSION

The United States Supreme Court should ensure that schools' authority to discipline speech is not frozen in 1969 with *Tinker* by adopting the sufficient nexus test, which accounts for the realities of teaching in the internet age. The Court has updated its jurisprudence in other areas. In the personal jurisdiction context, the Court expanded upon the once-thought "eternal principal of justice" that limited personal jurisdiction over a defendant to the state in which that defendant resided when technology made that principle obsolete. Now, the Court stands at a similar crossroad with its school-speech precedent. The only question is whether the Court will realize that technology has made *Tinker*'s geographic limitations obsolete. Just as most schools no longer employ gates to demarcate the boundaries of the school, the physical premises of the school no longer demarcate where a student's speech can affect the operation of the school.

157. See *J.S. ex rel. Snyder*, 650 F.3d at 940 (noting J.S. took affirmative steps to limit dissemination of the parody profile by making the profile "private"); see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (reasoning that a student's drawing of his school under siege was not on-campus speech because he kept the drawing at home in a cabinet for two years and never intended for his brother to accidentally take his drawing pad to school where a teacher saw the drawing).

