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Tinker's Facebook Profile:
A New Test for Protecting Student Cyber Speech

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ABSTRACT

This Article examines the unique legal nature of student cyber speech, particularly concentrating on social networking websites such as Facebook. Beginning with *Tinker v. Des Moines Independent Community School District,* the Supreme Court issued a series of rulings designed to protect student speech while still allowing public schools to limit student speech in certain circumstances. These cases, however, did not contemplate the modern world of student speech, in which websites like Facebook are an everyday tool of communication for today's students. Modern courts have struggled to apply Supreme Court precedent to student cyber speech, and have done so inconsistently. This Article offers a new test for analyzing student cyber speech. Unlike proposals from other commentators, the proposed test effectively adheres to the aims of *Tinker* and its progeny while maintaining the flexibility necessary to analyze the ever-changing world of Internet speech.

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I. INTRODUCTION

Katherine Evans was not very fond of her high school English teacher. In November 2007, she decided to vent her frustrations about her teacher online.[1] To express her dissatisfaction, Evans went to the increasingly popular social networking site Facebook.[2] While on Facebook, Evans created a group entitled "Ms. Sarah Phelps is the worst teacher I've ever met!," which featured a picture of the teacher and invited other students to join the group in order to "express [their] feelings of hatred."[3] Apparently, few students shared Evans' dislike of her English teacher.[4] In fact, only three students joined her Facebook group, and all three of them expressed praise for the teacher and admonished Evans for even creating the group.[5] Perhaps realizing her views of her

[1] Jennifer Mooney Piedra, *Facebook Face-Off: Student, Suspended for Blog Rant, Sues*, MIAMI HERALD, Dec. 10, 2008, at A1.

[2] *Id.*

[3] David Kravets, *Student Who Created Facebook Group Critical of Teacher Sues High School over Suspension*, WIRED.COM, Dec. 9, 2008, http://www.wired.com/threatlevel/2008/12/us-student-inte/.

[4] *See* Mooney Piedra, *supra* note 1.

[5] *Id.*

English teacher were uncommon, Evans decided to delete the Facebook group just two days after she created it.[6]

Unfortunately for Evans, her short-lived Facebook group eventually came to the attention of her school principal.[7] Two months after Evans removed the group from Facebook, the principal suspended her.[8] The school also transferred her from Advanced Placement to less honors-oriented classes.[9] Her principal stated that Evans' Facebook group constituted "cyberbullying" and "disruptive behavior."[10] According to one assistant director for the school district, the principal's decision was based on "the district's code book and policy."[11] Evans served her suspension time and ultimately graduated from high school.[12] Now in college, Evans is fearful of the damage done to her permanent record as a result of her suspension.[13] In response, Evans has sued her former principal, alleging that he violated her First Amendment rights.[14]

Unfortunately for the many students who use websites like Facebook, Evans' case is not unique. Schools across the country are increasingly punishing students for their Internet activities, particularly targeting behavior on social networking websites such as Facebook. Schools have struggled to discern, however, when they can properly discipline students for their online activities. The few judicial opinions examining student "cyber speech" have offered little clarity as to when educational institutions may properly sanction student Internet speech. Indeed, courts have struggled to apply Supreme Court precedent regarding student speech rights to the ever-expanding context of the Internet. As a result, those courts that have attempted to extend Supreme Court student speech jurisprudence to online speech have produced inconsistent and unclear rulings.

The purpose of this article is to examine the unique legal nature of student cyber speech, particularly concentrating on social networking websites such as Facebook. Additionally, this article will discuss the seminal Supreme Court precedents that address traditional public student speech and how those precedents may apply to student Internet speech. Moreover, there will be an analysis of the disparate treatment that current courts have given to students' First Amendment rights with regard to online speech. Finally, this article will summarize the tests that scholars have proposed for analyzing student Internet speech, and will add to the present scholarship by proposing a new test most appropriate for analyzing student cyber speech. Unlike present offerings, the proposed test addresses when courts should consider student Internet speech to be "on-campus,"

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[6] *Id.*

[7] *Id.* It is worth noting here that although Evans attended a charter high school, the school is run by the city in which it is located and follows the same disciplinary guidelines as the Broward County Public Schools. Indeed, the assistant director for the school district who oversees expulsions stated that Evans would have faced the same punishment had she been a county public high school student. *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See id.*

[14] *Id.*

and seeks to effectively balance the competing interests of students and schools, while recognizing the need for a flexible, contextually-driven analysis for addressing student speech in the ever-changing world of the Internet.

II. THE RISE OF FACEBOOK

Facebook has become one of the most popular websites in the world. In 2009, Facebook became the second most-visited website on the Internet.[15] Social networking sites like Facebook enable users to create profiles about themselves that other users are able to view.[16] Users can communicate with one another by sending private messages or by posting public messages on the profiles of other users.[17] Additionally, users can create or join groups that focus on particular or common interests, or create invitations for events, parties, and informal gatherings.[18]

Facebook also permits users to upload photographs of themselves and others onto the site, and allows users to "tag," or identify, people in the posted photos, which can then be accessed from the profile of a "tagged" user. Many Facebook users have hundreds of photos of themselves posted on the site. In addition, users can post their current "status" to communicate plans, thoughts, or quips. The statuses, along with all other recent activity undertaken by the user on Facebook, appear both in the user's profile and in a "news feed" that all friends of that user see when they log into the site.

Students comprise a significant portion of Facebook users. When Facebook was first launched in 2004, access to the site was limited to persons with ".edu" email addresses at universities which were approved by the administrators of Facebook, effectively limiting Facebook membership to the college community.[19] Gradually, however, Facebook has eased membership conditions, and recently removed the ".edu" requirement and now permits access to anyone with an email address.[20] According to a recent Harvard poll, seventy-five percent of college students have an account on Facebook, and most of them check it daily.[21] Facebook's popularity among students is apparent not only through the sheer number of students with accounts on the site but also through the frequency with which those students log in to their accounts. Nearly three-quarters of those with Facebook accounts log in at least once every twenty-four hours.[22] Perhaps even more telling of the site's popularity, Facebook has said that its average user

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[15] Alexa Top 500 Global Sites, http://www.alexa.com/topsites (last visited Nov. 6, 2009).

[16] Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*., 31 S. ILL. U. L.J. 95, 97 (2006).

[17] *Id.*

[18] *Id.*

[19] Jennifer Duffy, *Students Respond to Facebook Changes*, ARIZ. DAILY STAR, Sept. 28, 2006, at E1.

[20] *Id.*

[21] Heidi Przybyla, *Obama's 'Youth Mojo' Sparks Student Activism, Fueling Campaign*, BLOOMBERG.COM, May 7, 2007, http://www.bloomberg.com/apps/news?pid=20601070&refer=home&sid=aJ4wSyFVOGx8.

[22] Nancy Hass, *In Your Facebook.com*, N.Y. TIMES, Jan. 8, 2006, http://www.nytimes.com/2006/01/08/education/edlife/facebooks.html?_r=3.

signs into the site six times per day.[23]

Many students' lack of understanding of the consequences of posting information, commentary, and photos on the site is troubling. Though some student users are nervous about information that may be posted about them, many seem comfortable with the idea that vast amounts of potentially revealing information about them, such as their thoughts, actions, and photographs may be widely accessible.[24] As one student Facebook user stated, "[H]aving embarrassing pictures out there [of yourself] will [soon] be the norm."[25] Indeed, many students assume that what they say and do on the Internet is removed from fora traditionally reachable by school officials for disciplinary purposes.[26] One school administrator has poignantly summarized many students' view of the Internet and their use of it, observing that "[k]ids look at the Internet as today's restroom wall."[27]

III. THE CURRENT LAW OF STUDENT SPEECH RIGHTS

For many years, courts consistently held that students in public schools had no First Amendment right to free speech.[28] Beginning in the 1940s, however, the United States Supreme Court began to rethink its view of the rights of students.[29] In 1943, the Court prohibited schools from requiring students to participate in the Pledge of Allegiance, holding that courts must grant "scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[30] In three seminal cases decided between 1969 and 1988, the Supreme Court articulated the standards that govern student speech rights.

Prior to the rise of the Internet, student speech rights in public schools were seemingly well understood as a result of these decisions. In 2007, the Court again addressed student speech rights, though not in the context of Internet speech. These four cases, *Tinker v. Des Moines Independent Community School District*,[31] *Bethel School District No. 403, v. Fraser*,[32] *Hazelwood School District v. Kuhlmeier*,[33] and *Morse v.*

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 728-30 (2007).
[27] Andy Carvin, *Is MySpace Your Space as Well?*, Oct. 10, 2006, http://www.pbs.org/teachers/learning.now/2006/10/is_myspace_your_space_as_well.html (quoting Steve Dillon, director of student services for Carmel Clay Schools).
[28] *See, e.g.*, State *ex rel* Dresser v. Dist. Bd. of Sch. Dist. No. 1, 116 N.W. 232, 235 (Wis. 1908) (holding that a school's ability to punish students for ridiculing a principal is "essential to the preservation of order, decency, decorum, and good government in the public schools").
[29] Kara D. Williams, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 709-10 (2008).
[30] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
[31] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[32] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
[33] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Frederick,[34] are the baseline from which all student speech cases have been judged, whether the speech was online or not. Though none of these cases contemplate student Internet speech, any analysis of students' rights to free speech in an educational setting must begin under their precedents.

A. The *Tinker* Standard

In *Tinker*, the Supreme Court first addressed the speech rights of secondary school students.[35] Three high school students decided to wear black armbands to school to protest the Vietnam War.[36] The high school learned of the students' plans, and quickly instituted a policy stating that a student wearing "an armband to school would be asked to remove it."[37] If the student refused to remove the armband, he would be suspended until he returned to the school without it.[38] Three students wore armbands to school, were suspended, and sued the school district for violating their First Amendment rights.[39]

The Court answered the question of whether the school had the right to ban the students from wearing the armbands with a qualified "no."[40] For the first time, the Court established that a public school was not a black hole for a student's constitutional rights, stating that "[i]t can hardly be argued that students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[41] The Court held that schools cannot limitlessly regulate the free speech rights of their students.[42] "In the absence of a specific showing of the constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[43]

To determine what should be considered a "constitutionally valid reason" to regulate student speech, the Court devised what came to be known as the "substantial disruption" test.[44] Specifically, the Court held that schools could not punish student speech unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[45] Additionally, "undifferentiated fear . . . of [a] disturbance is not enough to overcome the right to freedom of expression."[46] The Court thus imposed a significant burden on schools to justify silencing student speech, despite the need for schools to assert significant control over students during the school day.

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[34] Morse v. Frederick, 551 U.S. 393 (2007).
[35] *See Tinker*, 393 U.S. 503.
[36] *Id.* at 504.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 506.
[42] *Id.*
[43] *Id.* at 511.
[44] *Id.* at 508; Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 147 (2003).
[45] *Tinker*, 393 U.S. at 513.
[46] *Id.* at 508.

B. The *Fraser* Standard

In 1986, nearly twenty years after *Tinker*, the Supreme Court limited the scope of the *Tinker* decision in *Bethel School District No. 43 v Fraser.*[47] In *Fraser*, the Court examined a nominating speech given by a high school student, Matthew Fraser, during a school election assembly.[48] School officials considered the student's speech sexually suggestive and lewd.[49] According to a school counselor present at the assembly, "some students hooted and yelled" in reaction to the speech, while others were "bewildered and embarrassed."[50] The day after the speech, the student was told that he had violated a school disciplinary rule that prohibited "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."[51] As a result of the sexually suggestive speech, the school suspended the student for three days and removed his name from a list of potential graduation speakers.[52] In response, Fraser sued the school district for violation of his First Amendment rights.[53]

Unlike *Tinker*, in which the Court created significant protections of student speech rights, the Court in *Fraser* expanded a school district's ability to regulate on-campus student speech for speech involving school-sponsored activities and events.[54] The Court distinguished between the political message involved in *Tinker* and the sexually suggestive speech at issue in *Fraser*,[55] stating that the freedom to advocate controversial views must be balanced by the societal interest of teaching students appropriate behavior.[56] Although the Court in *Tinker* clearly stated that the schoolhouse gate was not a passage through which First Amendment rights were shed, the Court in *Fraser* qualified its earlier holding, stating that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[57] Moreover, the Court held that threatening or highly offensive speech had little place in schools and that schools may limit such speech,[58] and accordingly, the Court exhibited deference to school officials in allowing them to punish speech that

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

[48] *Id.* at 677-78.

[49] *Id.* For an illustration of how Fraser's speech employed veiled sexual innuendos, see *id.* at 687 ("Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds.").

[50] *Id.* at 678.

[51] *Id.*

[52] *Id.* at 679; *see also id.* at 690 (stating that the student was allowed to return to school after serving only two of the three suspension days).

[53] *Fraser*, 478 U.S. 675.

[54] *Id.* at 676.

[55] *Id.* at 680.

[56] *Id.* at 681.

[57] *Id.* at 682.

[58] *Id.* at 685.

contravened the school's educational mission.[59] As one scholar has suggested, after *Fraser*, schools are permitted to prohibit and punish lewd and vulgar speech that occurs during school-sponsored functions.[60]

C. The *Kuhlmeier* Standard

The student speech rights articulated in *Tinker* were further limited by *Hazelwood School District v. Kuhlmeier*.[61] In *Kuhlmeier*, the Court addressed the validity of a high school principal's actions to censor several student-authored articles in the school newspaper.[62] The censored articles concerned two topics: three high school students' experiences with pregnancy,[63] and the impact of divorce on members of the student body.[64] Concerned about the sensitive nature of both articles, the principal withheld them from being published in the high school paper.[65] In response, the three student journalists sued the Hazelwood School District for violation of their First Amendment rights.[66]

In reviewing the principal's actions in *Kuhlmeier*, the Court saw a distinction between censoring a school newspaper and prohibiting the arm bands in *Tinker*, noting that "[t]he question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker*, is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[67] Describing student newspapers as curricular in nature, the Court said such school-sponsored speech can be considered part of the school curriculum, and therefore is subject to different standards than statements clearly not sanctioned by the school.[68]

The Court went on to address what standards schools are subject to when attempting to limit student speech in the curricular context. After *Kuhlmeier*, schools are not required "to promote speech that conflicts with the values held by the school system."[69] As a result, school officials could regulate both the "style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[70] The Court held that the need to protect the identity of pregnant students believed to be identifiable in the article and the

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[59] *Id.* at 685-86 (deeming appropriate a school's disassociation of itself from speech considered lewd or vulgar if such speech is inconsistent with the fundamental values of public school education).

[60] *See* David Hudson, *Matthew Fraser Speaks Out on 15-Year-Old Supreme Court Free-Speech Decision*, Apr. 17, 2001, http://www.freedomforum.org/templates/document.asp?documentID=13701.

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

[62] *Id.*

[63] *Id.* at 263.

[64] *Id.*

[65] *Id.* at 263-64.

[66] *Id.* at 264.

[67] *Id.* at 270-71.

[68] *Id.*

[69] Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WISC. L. REV. 1213, 1229-30 (citing *Kuhlmeier*, 484 U.S. at 270-271).

[70] *Kuhlmeier*, 484 U.S. at 273.

desire not to print a student's negative comments about one of her parents were legitimate pedagogical concerns.[71] As a result, the Court held that the principal's actions did not violate the students' speech rights.[72]

Taken together, *Tinker*, *Fraser*, and *Kuhlmeier* provide school administrators with significant power to limit student speech in school, during school-sponsored activities, or within school-sponsored publications. In the context of this article, however, these three cases provided little guidance on how to address student Internet speech, particularly when such speech is initiated from outside the "schoolhouse gate." Indeed, this trilogy of cases leaves unresolved the degree to which school officials can limit student speech that occurs off-campus.[73] In 2007, however, the Court appeared to have the opportunity to clarify the off-campus speech question.

D. *Morse v. Frederick*

Morse v. Frederick was the Supreme Court's first decision addressing student speech rights in nearly twenty years.[74] In *Morse*, the student body of an Alaskan high school was permitted to leave campus during school hours to watch the Olympic Torch Relay pass.[75] As the torch passed, Joseph Frederick, a senior at the high school who traveled to the torch passing from home, unfurled a banner that read, "BONG HiTS 4 JESUS," in full view of students and television cameras.[76] Frederick was disciplined under school policies that prohibited advocating the use of illegal drugs to minors.[77] Notably, these policies subjected students to the same rules of conduct during "social events and class trips" as during regular school hours.[78] In response, Frederick sued the school for violating his First Amendment rights.[79]

Although Frederick argued that his speech occurred off-campus, and therefore was outside the purview of the school's ability to limit his speech, the Court summarily dismissed that argument.[80] In the Court's view, even though Frederick went to the torch passing—an off-campus, school-sponsored event—from his home (and thus independently of any student procession from the school), his banner nevertheless was properly viewed under traditional on-campus, student speech analysis.[81] The Court did acknowledge, however, that there may well be ambiguity as to when such traditional on-campus analysis should be applied, noting that there is "some uncertainty at the outer

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[71] *Id.* at 274.
[72] *Id.*
[73] Tuneski, *supra* note 44, at 148.
[74] *Morse v. Frederick*, 551 U.S. 393 (2007).
[75] *Id.* at 397.
[76] *Id.*
[77] *Id.* at 398.
[78] *Id.*
[79] *Id.* at 399.
[80] *Id.* at 400 ("At the outset, we reject Frederick's argument that this is not a school speech case.").
[81] *Id.* at 401.

boundaries as to when courts should apply school-speech precedents."[82]

Through the course of the *Morse* opinion, the Court considered the traditional student speech trilogy: *Tinker*, *Fraser*, and *Kuhlmeier*.[83] Yet, the Court did not appear to find any of the three seminal cases to be particularly relevant.[84] Ultimately, the Court focused heavily on the promotion of illegal drug use, and how such promotion is a danger that schools must combat.[85] According to the Court, the high school principal ultimately acted properly in disciplining Frederick, as failing to confiscate the banner at issue could send the wrong message to students.[86]

Though *Morse* was not about student cyber speech, the case did provide the Supreme Court an opportunity to offer insight as to how schools might discipline speech that occurs on the Internet. Ultimately, however, the Court's holding was narrowly tailored as a case about the promotion of illegal drug use. Thus, student Internet speech plainly remains a square peg not easily passed through the round hole of present Supreme Court jurisprudence regarding student speech.

IV. STUDENT SPEECH ON THE INTERNET

In *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*, the Supreme Court established permissible limitations for student speech in various situations. However, the Court has yet to address the rights of students to create speech off-campus, after school hours, on the Internet. Though the "schoolhouse gate" language in *Tinker* may suggest that a school's right to limit student speech is limited to speech created on-campus, clearly school authority is not necessarily so limited.[87] What is unclear, however, is the extent of a school's authority over a student's speech on the Internet. Those schools that have punished off-campus student Internet speech have justified such punishment by attempting to link the off-campus speech to some type of on-campus event or disruption.[88] Courts that have ruled in favor of protecting the student's off-campus speech rights have typically applied the *Tinker* "substantial disruption" test to determine whether the school could in fact punish the student speaker.[89] More generally, however, courts addressing student cyber speech have usually taken one of three approaches.[90]

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[82] *Id.*

[83] *Id.* at 403-06.

[84] *Id.*

[85] *Id.* at 407.

[86] *Id.* at 410.

[87] *See, e.g.*, Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) ("It is clear that the test for school authority [over student speech] is not geographical.").

[88] Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123 (2000).

[89] Tuneski, *supra* note 44, at 140.

[90] *Id.* at 153.

A. Off-campus = Off-limits

The first of the three approaches taken by courts examining Internet speech prevents schools from punishing off-campus Internet speech, even when the speech is accessed and viewed on-campus by students. This approach is exemplified in *Mahaffey v. Aldrich*.[91]

In *Mahaffey*, a high school student created a website entitled "Satan's web page."[92] On the website, Mahaffey listed a weekly "mission" from Satan, including instructing readers to "[s]tab someone for no reason then set them on fire throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face."[93] Following the "mission," Mahaffey inserted a disclaimer, stating in part, "PS. NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN AND BLAMING IT ON ME. OK?"[94] A parent of a fellow high school student discovered the website and reported it to the police, who in turn reported the site to Mahaffey's school.[95] In response, the school suspended Mahaffey, later initiating expulsion proceedings against him.[96]

Although Mahaffey admitted that on-campus school computers "may" have been used to create the website,[97] the court appeared to require clear evidence that Mahaffey's speech occurred on-campus before Mahaffey could be subject to school discipline. Indeed, the district court in *Mahaffey* read *Tinker* to subject student speech to punishment only when such speech "occurred on school property."[98] Although the court in *Mahaffey* did examine *arguendo* whether the student's website had caused a "substantial disruption" to the school environment, the court made clear that none of the student's conduct at issue in the case occurred on school property.[99] As a result, the court found that the school had violated Mahaffey's First Amendment rights by punishing his online speech.[100]

B. Origination ≠ Destination

The second of the three approaches taken by courts when examining student Internet speech focuses not on where the speech initially occurred, but where the speech may have been ultimately viewed. This approach is exemplified by two cases, *Beussink v. Woodland R-IV School District*,[101] and *Layshock v. Hermitage School Dist.*[102]

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[91] Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002).
[92] *Id.* at 781.
[93] *Id.* at 782.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 784.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 790.
[101] Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

In *Beussink*, a high school student, Brandon Beussink, created a website at home on his own computer that used vulgar language to criticize his school, principal, and several teachers.[103] Although Beussink testified that he had not intended his website to be accessed or viewed at his high school,[104] a fellow student accessed the website from a school computer without his knowledge.[105] The student showed the website to a teacher, who immediately reported the site to the principal.[106] In response, the principal suspended Beussink first for five days and then ultimately for ten days.[107] Additionally, Beussink was ordered to either take down or clean up the website; Beussink chose to take the site down.[108]

The court in *Beussink* applied the *Tinker* "substantial disruption" test without analyzing the relevance of whether the speech had occurred on-campus or off-campus.[109] In the court's view, the speech had taken place on-campus, and thus *Tinker* applied.[110] Turning next to whether Beussink's speech on his website resulted in a "substantial disruption" of the school environment, the court ultimately held that the Internet speech was not substantially disruptive.[111] Yet, the court's holding implies that had the student's Internet speech created an on-campus disruption, the school may have been justified in punishing the student, even though such speech was created entirely off-campus. Thus, the court exhibited a willingness to expand the *Tinker* test beyond its originally contemplated limits.

In a more recent case, the court in *Layshock*[112] examined speech created by a student on MySpace, a popular social networking website similar to Facebook. Justin Layshock, a high school student, created a fake MySpace profile containing crude and vulgar language to parody his high school principal.[113] Layshock "created the parody by using his grandmother's computer during non-school hours; no school resources were used to create the parody," except for a photograph of the principal copied from the school's home page.[114] After creating the profile, Layshock told several of his friends about it, and news of the profile soon spread throughout the student body.[115] In response, the school suspended Layshock for, *inter alia*, causing a disruption to the school environment.[116]

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[102] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).
[103] *Beussink*, 30 F. Supp. 2d at 1177.
[104] *Id.*
[105] *Id.* at 1178.
[106] *Id.*
[107] *Id.* at 1179.
[108] *Id.*
[109] *Id.* at 1180.
[110] *Id.* at 1180 n.4.
[111] *Id.* at 1181.
[112] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).
[113] *Id.* at 591.
[114] *Id.* at 590.
[115] *Id.* at 591.
[116] *Id.* at 593.

The court in *Layshock* recognized early on that the speech at issue in the case constituted "purely out-of-school conduct."[117] However, though the court does acknowledge several cases concluding that school districts cannot punish students for off-campus speech, the court distinguishes *Layshock* because the speech at issue was subsequently "carried over into the school setting."[118] Thus, the court ultimately treated "out-of-school conduct" as punishable by the school.

Having decided that speech originating off-campus was not necessarily out of the reach of discipline by school officials, the court next addressed whether Layshock's parody constituted a "substantial disruption" under *Tinker*.[119] The fact that students viewed the MySpace profile on campus, the court held, was not sufficient to establish a substantial disruption.[120] More specifically, the court noted that the school was unable to demonstrate that the "buzz" about the parody profile around campus was caused by the reactions of the students and not the reactions of administrators.[121]

C. It's All About Disruption

The third approach used by courts when examining student Internet speech essentially disregards whether or not the speech took place on-campus or off-campus. This approach is exemplified in *J.S. v. Bethlehem Area School District.*[122]

In *J.S.*, an eighth-grade student created a website using his home computer entitled "Teacher Sux."[123] The site was highly critical of the student's algebra teacher and his school's principal,[124] and contained "derogatory, profane, offensive and threatening comments."[125] Specifically, the site contained threatening insults and drawings of the student's math teacher, and requested donations toward hiring a hit man to kill the teacher.[126] The school learned of the site and suspended the student both for harassing and threatening a teacher and for disrespecting the teacher and the school's principal.[127]

In reviewing the permissibility of the school's actions, the appellate court initially recognized that the student speech at issue took place off-campus.[128] Yet, the court concluded that there was a "substantial nexus" between the web site and the school campus because the record showed that the web site had been *viewed* on-campus.[129] In

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[117] *Id.* at 595.
[118] *Id.*
[119] *Id.* at 600.
[120] *Id*.
[121] *Id.*
[122] J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).
[123] *Id.* at 850-51.
[124] *Id.* at 851.
[125] *Id.*
[126] *Id.*.
[127] *Id.* at 852.
[128] *See J.S.*, 807 A.2d 847.
[129] *Id.* at 865.

finding such a nexus, the court essentially collapsed the on-campus vs. off-campus distinction into the *Tinker* "substantial disruption" test, stating that "consistent with the authority of school officials to bring order to the school environment, and the limitations on speech therein as set forth in Tinker, it is the issue of disruption, potential or actual, that dissemination of "Teacher Sux" caused to the work of the school that must finally be reviewed."[130] The only question for the court, then, was whether the student's off-campus speech was sufficiently disruptive to justify the school's actions against him.

The trial court in *J.S.* found that the student's punishment was justified given the disruptive nature of his speech.[131] As a result of the threats against the teacher posted on the site, the teacher suffered emotional injuries and ultimately went on medical sabbatical.[132] Additionally, the website allegedly caused poor morale among the school's staff and students.[133] Taken together, these two facts were sufficient disruptions in the court's view to justify the student's punishment.[134]

V. A NEW STANDARD FOR A NEW TYPE OF SPEECH

The Internet has created a forum that simply was not contemplated by *Tinker* and its progeny. Today, students can instantly communicate their thoughts, remarks, photographs, and more to an unlimited number of recipients via email, instant messaging, and blogging. Additionally, websites like Facebook give students not only the ability to opine about their fellow students or their teachers in a publicly accessible forum, but also the ability to impersonate and parody them. For today's students, the Internet is at the core of how they understand communication with one another.

The ubiquity of the Internet prevents a traditional, geographically-based analysis of where student speech occurs. Indeed, with the click of a mouse, any speech posted to the Internet from off-campus can instantaneously reach school grounds. As a result, a new test for the limits of student speech rights must be crafted to fit a world not fathomed by the Supreme Court of the 1960s. Fortunately, several commentators have offered possibilities.

A. *Tinker* with Teeth

Several observers have suggested that courts essentially apply the traditional *Tinker* analysis to student speech, but do so in a manner that skeptically views the ability of Internet speech to substantially disrupt the school environment.[135] In advocating this

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[130] *Id.* at 868.
[131] *Id.*
[132] *Id.* at 869.
[133] *Id.*
[134] *Id.*
[135] *See* Brandon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835 (2008); *see also* Sandy S. Li, *The Need for a New, Uniform Standard*: *The Continued Threat to Internet Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65 (2005).

approach to student speech cases, commentators have proposed a substantial threshold for what sort of disturbance to the school environment could properly be considered "disruptive" under the *Tinker* test.[136] The proper balance between the rights of school, students, and administrators, they argue, requires a significant showing of disruption before a student can be punished for his or her online speech.[137]

Commentators advocating the use of a heightened *Tinker* test have also suggested evidence that should be considered insufficient to justify punishing a student for his online speech. Specifically, the reaction of a thin-skinned student, teacher, principal, or other member of the school environment should not warrant punishment of the online student speaker.[138] Thus, for example, the student in *J.S.*[139] should not have been punished because his math teacher required a medical leave of absence after viewing the student's online speech about her.[140] Additionally, under this proposed *Tinker* analysis, courts should hesitate to condone the punishment of student Internet speech when that speech is directed at a singular student, teacher, or principal.[141] Such targeted speech, commentators argue, is unlikely to result in a substantial disruption of the school environment at large.[142] Finally, generalized descriptions of any speech's impact on the school environment, such as a "somber" environment resulting from a student's online speech, should similarly be insufficient to justify punishment of the student speaker.[143]

The benefit of this proposed application of *Tinker* to student Internet speech is clear. A heightened burden of proof that a school acted properly in punishing a student's online speech would likely result in increased protections to student First Amendment rights. There are two problems with this approach, however. First, as in *Beussink*[144] and *Layshock*,[145] the proposed test for student speech rights essentially ignores the on-campus/off-campus distinction articulated in *Tinker*. Thus, under such a test, a student's online activity thousands of miles away from her school could be treated in precisely the same manner as what the student does while on a computer in her school's computer lab. Consequently, this approach may improperly ignore the implicit requirement in *Tinker* that the "schoolhouse gate" serves as a natural geographic boundary beyond which school administrators cannot reach in order to punish student speech.

The second problem with this proposed application of *Tinker* is that it may in fact overly limit the rights of school officials to maintain an orderly school environment. If,

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[136] *See, e.g.*, Li, *supra* note 135, at 99-100 (suggesting that when courts are considering whether a student's online speech was substantially disruptive to the school environment, they should be unwilling to accept, *inter alia*, broad generalizations as sufficiently disruptive).

[137] *See* Denning & Taylor, *supra* note 135, at 884 (suggesting that courts should not "dilute" disruption).

[138] Li, *supra* note 135, at 100.

[139] *See* J.S., 807 A.2d 847.

[140] *See* Denning & Taylor, *supra* note 135, at 885.

[141] *Id.* at 884.

[142] *Id.*

[143] Li, *supra* note 135, at 100.

[144] Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

[145] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597-98 (W.D. Pa. 2007).

as the commentators suggest, a substantial disruption must occur *before* school officials may act to punish a student for his online speech, then the ability of administrators to proactively prevent such disruptions is necessarily diminished. As a result, schools would have little choice but to endure a disruption before they could respond to its cause.

B. Intent Is the Key

Some commentators have suggested that a determination of whether a student's online speech "occurred" on-campus should turn on whether the student speaker intended the speech to come onto or be distributed onto campus.[146] One author suggests that evidence of intent to disseminate speech on campus would include "opening a web page at school, telling others to view the site from school, distributing a newspaper as students enter school, and sending e-mail to school accounts."[147] As for what would not demonstrate intent to bring such speech on-campus, "[m]erely posting a web page or comments online would be a passive act that would be insufficient to make the expression fit into the category of on-campus speech."[148] If the student speaker's actions demonstrate intent to bring his speech onto a school campus, courts should classify the speech as on-campus and then employ the *Tinker* disruption test.[149]

An intent-based test offers the benefit of matching a student's punishment with the activity most easily understood to be punishable. That is, the instances in which a student is aiming to cause a disruption on campus with his online speech are precisely those instances that school administrators most want to prevent. By contrast, a school may have a more difficult time justifying punishing a student for her actions online if she can reasonably demonstrate that she did not intend to direct the speech toward her school or to cause disruption.

There are problems with an intent-based standard, however. First, the intent-based test assumes that courts can accurately determine the student's intent when she created her online speech. Yet, the opportunities to use the Internet for self-expression are seemingly unlimited, and the rate at which new Internet-based tools for communication are understood and ultimately adopted by users can vary wildly across various types of users. As a result, how one user understands her speech on the Internet can differ greatly from how another user understands the online speaker's intentions. Moreover, an intent standard that focuses on whether or not the student speaker intended for his online speech to become physically present on the school campus misunderstands

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[146] *See* Justin P. Markey, *Enough Tinkering With Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 150 (2007); Christopher E. Roberts, *Is MySpace Their Space?: Protecting Student Cyberspeech in a Post*-Morse v. Frederick *World*, 76 U. MO. KAN. CITY L. REV. 1177 (2008); *see also* Tuneski, *supra* note 44, at 177 (advocating both a geographical and intent-based test, suggesting that a student's internet speech that is authored off-campus should only be punishable if the speaker "take[s] additional steps to bring the material to a school campus").

[147] Tuneski, *supra* note 44, at 178.

[148] *Id*.

[149] Markey, *supra* note 146, at 150; Roberts, *supra* note 146, at 1178.

the nature of cyber speech. A student may well intend for his cyber speech to reach members of his school community without regard for whether or not they view his speech *while on campus*. Thus, a student may well intend for his Internet speech to affect and even disrupt the school campus, without necessarily intending for the speech to actually reach inside the schoolhouse gate.

A second problem with an intent-based standard is perhaps unique to social networking sites like Facebook. As one commentator notes, there is an "endemic narcissism" among those who commonly use sites like Facebook.[150] The use of such sites, the author argues, has resulted in the "democratization of fame," where every user's goal is to obtain notoriety amongst other users.[151] Because users post a wide variety of information and thoughts on their online profiles, it has become increasingly difficult to understand what the user intends as "public" information and what the user intends to be "private."[152] For example, a student who creates a topical Facebook group and invites a few of her classmates to join might understand that group to be essentially a private group. By contrast, school administrators viewing a Facebook group created for the purposes of communicating with fellow students may understand that group to be essentially public in nature, at least in that they believe it is intended to reach into and affect the campus community. Thus, how an outside viewer understands the actions of a student on Facebook may differ greatly from how other Facebook users understand that action, or even how the speaker herself understands the action.

C. Technological Choice

Kenneth R. Pike has suggested that the on-campus/off-campus distinction should be determined by the type of technology used by the student speaker when creating his online speech.[153] At its core, this proposed test operates like an intent test, but examines the technology employed in creation of online speech as essentially dispositive of the speaker's intent.[154] Different technologies enable speakers to demonstrate either an "active telepresence" or a "passive telepresence."[155] If a speaker's technological choice results in an "active telepresence" (and thus an intent to direct speech onto campus), then the speech itself should be considered on-campus speech.[156] From there, a traditional *Tinker* substantial disruption test can be applied.[157] By contrast, if a speaker's technological choice in creating speech demonstrates a "passive telepresence," the speech should be considered off-campus, and thus unreachable by school administrators.[158]

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[150] Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 16 (2007) (discussing the "narcissism endemic to the MySpace Generation").

[151] *Id.*

[152] *Id.*

[153] Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, BYU L. REV. 971, 1002 (2008).

[154] *Id.*

[155] *Id.*

[156] *Id.* at 1001-02.

[157] *Id.*

[158] *Id.*

Pike offers examples of technologies that would fall into both the "active" and "passive" categories of a user's "telepresence" on campus.[159] Telephone calls to campus, for example, exhibit a student speaker's "active telepresence," because the fundamental purpose of a phone call to campus is to "speak as though present."[160] Email and instant messaging, by contrast, are not so clearly demonstrative of an "active telepresence."[161] Unlike telephone calls, emails and instant messages create a permanent record of communication that others may redistribute.[162] To address this distinction, Pike states that such technologies should only create an "active telepresence" if "the student engaged in the challenged expression deliberately transmitted it directly to the school's network."[163] Finally, Pike addresses web sites, and struggles to determine how speech occurring on web sites may or may not demonstrate a "telepresence."[164] Ultimately, he admits that determination of "telepresence" from web site activity would "naturally be a fact-intensive analysis."[165]

There are two apparent problems with a technologically-based inquiry into whether a school may punish a student's online speech. First, because the test essentially operates as an inquiry of student intent, it contains the same weaknesses previously discussed with regard to purely intent-based tests. Second, it assumes a somewhat static state of available technologies for student speakers. Under a "telepresence" inquiry, each new technology available to Internet users would require a unique inquiry by a court into the technology's symbolic role as to the speaker's intent. Such a test would thus force courts to continually address the relevance of each new online communication tool or medium that is developed, creating little predictability or constancy with regard to student First Amendment rights.

D. A New Test for Student Internet Speech

Each of the proposed tests discussed above offers useful components for analyzing student speech on the Internet. However, each test has significant flaws that make it either difficult to apply, inconsistent with current Supreme Court precedent, or both. The challenge in analyzing student cyber speech, then, is to craft a test that is both true to the intended First Amendment student protections established in the *Tinker* trilogy and flexible enough to be applied consistently to the constantly-changing world of the Internet. I believe my proposed test accomplishes both of these aims, by establishing a two-pronged analysis that can be used by courts to address student Internet speech.

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[159] *Id.* at 1002-05.
[160] *Id.* at 1002-03.
[161] *Id.* at 1003-04.
[162] *Id.*
[163] *Id.* at 1004.
[164] *Id.* at 1004-05.
[165] *Id.* at 1004.

1. First Prong: Objective Intent

Though there are concerns with employing a student First Amendment analysis based solely on the intent of the speaker,[166] a student speaker's intention should play an important role in the analysis of her Internet speech. Specifically, given the difficulty courts face in applying a geographically-based test to student speech, intent is the best means by which the more traditional "schoolhouse gate" threshold should be analyzed. Nearly every case of schools punishing students for their Internet speech addresses speech that was created on the Internet with a computer that was *not* within the "schoolhouse gate." Thus, a traditional *Tinker* analysis would result in nearly all student Internet speech being outside the reach of punishment by school administrators. Given *Tinker*'s primary concern—that is, balancing the rights of students with the prevention of disruptive speech—such a result cannot reasonably be understood as one intended by the Supreme Court when it originally crafted the *Tinker* test. Thus, a new means for analyzing the legal location of student Internet speech is imperative to maintain the balance between student and school rights articulated in *Tinker*.

In a world where the Internet is central to modern student speech activity, student intent must be a critical variable in determining whether or not a student's speech has occurred within the schoolhouse gate. The schoolhouse gate threshold in *Tinker* should best be understood as a cognizable boundary inside which student speech can be limited in some circumstances. At its core, the schoolhouse gate symbol was focused on where the speech itself occurred, not where the speaker was located at the time of the speech. Indeed, it would have been hard to imagine at the time of *Tinker* that a speaker could be geographically separate from his own speech,[167] particularly in a manner now possible thanks to the Internet. Thus, if the *Tinker* test is really about the location of the speech, rather than the location of the speaker, then the on-campus/off-campus distinction most appropriately turns on the "location" of the speech itself, rather than the location of the speaker at the time of the speech. Moreover, implicit in *Tinker*'s focus on the "location" of speech was the premise that only speech that occurred on campus could in fact affect the campus. In today's world, however, a student can plainly affect a campus with his speech without actually creating that speech on campus.

Because *Tinker* aims to balance the First Amendment protections of students with the rights of school administrators to maintain an undisrupted campus, the best way to determine whether or not speech is on-campus is to begin by analyzing whether the speaker objectively intended that speech to affect the campus. An intent-based test for speech location maintains the balance of rights articulated in *Tinker* by permitting punishment for speech that was intended to reach the school grounds, yet affords courts the flexibility to protect student speech that inadvertently and unintentionally made its

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[166] *See supra* text accompanying notes 146-52 discussing the concerns with using only the intent of the speaker.

[167] Obvious exceptions might be a telephone call to a school campus or a letter sent to the campus. It is arguable that this speech would have been deemed to have occurred on campus under the *Tinker* test, even though the speaker initiated the speech from outside school grounds.

way onto a school campus.

Under the first prong of this test, a court analyzing the punishment of student Internet speech would first examine whether or not the student objectively intended her speech to affect the campus environment. Of course, a student that has been punished for his cyber speech will always argue that he did not intend for his speech to reach the campus. The intent inquiry, then, should focus on the student's objective intent, or what the nature of the student's actions objectively demonstrates about the student's intentions at the time he created his Internet speech. Taking all the circumstances of the student's speech into account, if a court determines that a student did not intend for her Internet speech to affect the school campus, the inquiry into whether or not the school may punish that speech should end.

Consider the case of Katherine Evans under the proposed intent prong. Her creation of a Facebook group ridiculing her teacher plainly demonstrates an objective intent to communicate to and thus affect her campus community. First, the title of the group, "Ms. Sarah Phelps is the worst teacher I've ever met!," is a title easily identified by her fellow students. Even more telling is the invitation to others to "express your feelings of hatred" about the teacher. Plainly, this invitation is directed toward her fellow students, as they are most likely to have an opinion of the teacher. Finally, the nature of the technology Evans used, Facebook, further supports the conclusion that she intended her speech to reach the campus. Facebook automatically updates a user's "friends" with all of the user's activity on the site, and would have informed all of Evans' "friends" (many of whom are likely her fellow students) that she had created the group about the teacher. Thus, taking all these facts together, it would be hard for Evans to successfully argue that she did not intend for her speech to affect the campus. By contrast, had Evans posted her airing of grievances on her own personal website or blog, without actively communicating its existence to other students, she likely could more successfully argue that she never intended her speech to reach the school campus.

2. Second Prong: Foreseeability

A test to determine whether or not student Internet speech should be considered on-campus cannot turn solely on the intent of the speaker. Given the myriad of Internet-based communication tools, properly determining the objective intent of the student speaker would necessarily be a difficult task. Additionally, even when considering a single means for communicating on the Internet, users may view that tool in very different ways. Moreover, how an Internet-based communication tool is viewed and used at one point in time may be very different from how it is viewed and used just months or a few short years later. After all, who could have imagined that Facebook would grow from a little-known, campus-based website in 2004 to the second most popular website in the world just five years later?

Clearly, the intent of a student creating speech on Facebook in 2004 may have been very different than the intent of a student creating speech on Facebook in 2009. Similarly, how a person understands and perceives Internet speech viewed on a site like Facebook is also likely to evolve over time, as the tool's popularity evolves. Given the

ever-changing opportunities to communicate via the Internet, and the unpredictable and varying perspectives that users have of these communication tools, an analysis of a single student's purpose in creating Internet speech is insufficient to determine whether or not that speech should be considered "on-campus."

Because the ever-changing popularity and efficacy of internet communication tools make the intent inquiry subject to inconsistency, the second prong of the proposed test aims to serve as a necessary check on the first. Thus, the second prong, foreseeability, would examine whether or not it was foreseeable at the time a student created his Internet speech that the speech would in fact reach the school campus in a manner that could be disruptive. Thus, under the proposed test, a court could uphold a school's punishment of student Internet speech only if it concluded both that a student objectively intended his Internet speech to affect the campus, and that the student should have foreseen when he created the speech that it could in fact reach the campus in a manner that could be disruptive.

The foreseeability prong serves as a necessary check on the intent prong in two respects. First, because the rapid pace of technological change makes it difficult to know when Internet speech will "reach" a school campus, the foreseeability prong precludes punishment of student Internet speech created via means that are not sufficiently within the cognizable awareness of the campus community itself at the time of the speech. Because the Internet offers seemingly endless opportunities to communicate with others, the foreseeability prong would address the question of whether a student's online speech was created in a manner that seemed likely to be sufficiently perceived by the campus community such that the speech could be disruptive. Thus, this prong of the test recognizes the role that the unique nature of the Internet plays in analyzing student First Amendment rights. Said differently, the foreseeability prong acknowledges the fact that not all Internet speech is created equally. Indeed, the foreseeability prong allows courts to analyze Internet speech in a manner that recognizes technological evolution as relevant to the impact a student's cyber speech may have on a school campus.

The foreseeability prong serves as a check on the intent prong in a second manner. Implicit in the intent prong is the risk that the ever-evolving nature of the Internet affects different individuals differently. Plainly, some people may just now be learning how to send an email, while others may be experienced with surfing the web, emailing, instant messaging, blogging, and using sites like Facebook. Indeed, students are quite often more tech-savvy than their parents, teachers, and school administrators, and may demonstrate a facility with new and evolving modes of online communication that their elders do not share. Thus, a fact-finder's understanding of an online communication tool may be very different than that of the student speaker or of the student's school campus generally. Because a fact-finder may not understand online speech in the same manner as its author or its intended audience, he may improperly inject his own understanding of that speech into his analysis of the speaker's objective intent in creating the speech. The foreseeability prong abates this risk by requiring a court to consider the likely impact of cyber speech on the school campus, based in large part on what technology the author used in creating his Internet speech, and how that technology is understood by the intended audience of the speech.

Consider again the case of Katherine Evans under the proposed foreseeability prong. Under this prong, after a fact-finder concluded that Evans intended her speech to affect the school campus, he would next consider whether Evans' speech could foreseeably create a disruption within the campus. Considering the widespread popularity of Facebook among students,[168] a fact-finder might initially believe that the Evans' Facebook speech could in fact be disruptive. However, when the fact-finder examines the nature of Facebook more specifically, and properly recognizes it as a part of student's everyday understanding of how they communicate with one another, he would likely conclude that the speech would not, in fact, be disruptive. Indeed, because Facebook users check the site so frequently,[169] it is unlikely that speech like that of Evans would be sufficiently noteworthy that the student body would react to it in a manner that could be disruptive to the school campus. Thus, the foreseeability prong would specifically consider the nature of the Internet tool used to create the student online speech, as well as how that tool is understood both by the speaker and by the intended audience of the cyber speech.

The ultimate utility of my proposed test is that it recognizes that there are modes of communication that we have not yet imagined that may someday be central to how we communicate with one another. At the same time, however, the two-pronged test of objective intent and foreseeability maintains the balance of rights between students and school administrators articulated by the Supreme Court in *Tinker*. Specifically, the objective intent prong properly focuses a court's inquiry on whether the student speech at issue was intended to affect the school campus. Moreover, the foreseeability prong addresses whether that speech could in fact affect the campus in a disruptive manner. Thus, the test provides courts with the flexibility to address student speech in the myriad contexts in which it will no doubt occur, while still employing a consistent means for determining the proper response to schools that attempt to punish student speech.

VI. CONCLUSION

When Katherine Evans created her Facebook group, she likely had no idea that her school could suspend her for venting her frustrations about her teacher. Unfortunately, Evans' experience is becoming more and more common across the country as schools seek to limit online speech they consider objectionable. Confounding the problem is the increasing popularity of the Internet in the campus environment, as students look to the Internet as a means of seemingly constant communication with others.

The fight between students and schools to determine the extent of a student's First Amendment rights has not yielded clear answers. While schools do have the right to proscribe student speech in some circumstances, it is not at all apparent how schools can or should respond to student Internet speech that may cause or has caused disruptions on campus. Unfortunately, the few cases that have attempted to apply traditional student

[168] *See* Hass, *supra* note 22.
[169] *See id.*

speech analysis to the Internet context have employed disparate, and thus unpredictable, analyses. The proposed test within this article can serve as a useful tool for courts attempting to properly balance the often competing rights of students and school administrators under the strictures of *Tinker*, while still affording courts the flexibility necessary in examining student speech in contexts not yet created by the ever-expanding nature of the Internet.