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Abstract—The Supreme Court's recent decision in *Mahanoy Area School District v. B. L. ex rel. Levy* partially answered the long-standing question of when schools can police student speech that takes place online. But *Mahanoy* largely ignored decades of scholarship, and opinions by lower courts, all of which assumed online speech was governed by the Court's earlier student speech cases—especially the seminal *Tinker v. Des Moines Independent Community School District*.

This Note argues that *Mahanoy* and *Tinker* are consistent with each other, and both are consistent with the Court's decisions governing another distinctive kind of speech: public employee speech. It introduces a framework for online student speech that is based on the framework for public employee speech, one focused on official duties and public concern. By grounding student speech in the public employee framework, I harmonize *Mahanoy*'s idiosyncratic approach with established law.

INTRODUCTION

The United States Supreme Court's recent decision in *Mahanoy Area School District v. B. L. ex rel. Levy* went part of the way toward clarifying when schools can police students' online speech without offending the First

[*] Northwestern University Pritzker School of Law, J.D., 2022.

Amendment.[1] The Court considered whether a school district could punish a cheerleader who, after failing to make the varsity squad, posted a Snapchat story from an off-campus location.[2] The post was laced with profanity and was critical of the school's cheerleading program.[3] In an 8-1 decision, the Court held that the school could not punish the student.[4] Although they declined to announce a single rule governing student speech online, the Court articulated three broad principles for lower courts to consider in future cases: (1) most off-campus speech should be controlled by parents rather than schools, (2) courts should be skeptical of allowing schools to regulate off-campus speech because that would empower them to regulate all student speech during the 24-hour day, and (3) schools have an interest in protecting their students' unpopular speech.[5]

The *Mahanoy* decision, however, is curiously untethered from precedent. In the five paragraphs Justice Breyer uses to articulate the three principles, he includes no citations whatsoever.[6] Breyer only contends with the Court's earlier decisions about student speech in passages rejecting the Third Circuit's reasoning below, and when rejecting several arguments raised by the parties.[7] But the applicability of those foundational cases to future online speech is not clear from the three announced principles.

Student speech that takes place in school is governed largely by a body of law that never anticipated school without a corporeal schoolhouse. The Supreme Court's 1969 case *Tinker v. Des Moines Independent Community School District* contemplates a physical "schoolhouse gate" marking the threshold between general free speech protections and a specific version of free speech enjoyed by students.[8] With no threshold—no schoolhouse gate—does *Tinker* still apply? And if so, how does it apply?

Tinker's applicability to internet speech was hotly debated prior to *Mahanoy*.[9] A large body of legal scholarship offering new and responsive frameworks to online student speech emerged, theorizing *Tinker*'s "schoolhouse gate" but without a physical school.[10] Off-campus speech, for

[1] Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2040 (2021).

[2] *Id.* at 2043.

[3] *Id.*

[4] *Id.* at 2048.

[5] *Id.* at 2046.

[6] *Id.*

[7] *See, e.g.*, *id.* at 2047–48 (rejecting three arguments citing earlier student speech cases).

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

[9] *See infra* Part II.

[10] *See, e.g.*, Watt Lesley Black, Jr. & Elizabeth A. Shaver, *The First Amendment, Social Media, and the Public Schools: Emergent Themes and Unanswered Questions*, 20 NEV. L.J. 1 (2019); Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-Campus*

many, became a matter of on-campus effect.[11] This pre-*Mahanoy* scholarship could not have envisioned the extent to which the Court's first statement about online student speech would ignore their own precedent about in-school speech.

In fact, *Mahanoy* bears more resemblance to the Court's precedent governing public employee speech than student speech. Like those cases, *Mahanoy*'s seemingly lenient principles suggest that schools will need to evaluate online speech for its effects on members of the community—and their ability to perform their roles within that community—before administrators can dole out any discipline. Similarly, public employees are subject to a series of tests to determine whether their speech falls within their official duties, and whether it addresses a matter of public concern.[12]

This Note argues that the analogy to public employee speech represents a viable and preferable alternative to *Tinker* as an avenue for grounding online student speech in Supreme Court precedent. Reconfiguring the public employee speech framework for student speech maintains much of *Tinker*'s spirit, while avoiding *Tinker*'s focus on geography.

In Part I, I explore the *Tinker* line of cases along with several attempts to apply those cases to online speech. I aim to show that this framework is unable to answer questions posed by the Internet, but also to show that it implicitly relies on notions of duty and public concern—hallmarks of public employee speech analysis. Part II addresses the pre-*Mahanoy* scholarship surrounding online student speech, and the varying degrees of success scholars have had updating student speech frameworks. Finally, Part III introduces a proposed solution in the form of a reimagining of the public employee framework for student speech. The proposed framework harmonizes *Mahanoy*'s stated principles with *Tinker*'s underlying concerns, while also incorporating specific Supreme Court precedent—albeit largely from the public employee cases rather than the student speech cases.

Online Speech in the Age of Social Media, 52 WILLAMETTE L. REV. 405 (2016); Lindsay J. Gower, Note, *Blue Mountain School District v. J.S. Ex Rel. Snyder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709 (2013); David L. Hudson, Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621 (2012).

[11] *See, e.g.*, Joe Towslee, *The "Nexus" Test vs. the "Reasonably Foreseeable" Test: How Off-Campus Student Speech Can Cause On-Campus Consequences*, 13 IDAHO CRITICAL LEGAL STUD. J. 1 (2019).

[12] *See* Connick v. Myers, 461 U.S. 138, 143–49 (1983) (refusing protection for public employee speech that was in course of the employee's official duties); Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., IL, 391 U.S. 563, 574 (1968) (upholding speech of a public-school teacher on the basis that the speech was on a matter of public concern).

I. *TINKER* AND ONLINE SPEECH

A. The Tinker Test

Tinker involved a protest against the Vietnam War, a clue about its applicability in the Internet Age. Three schoolchildren planned to wear black armbands, signifying support for a truce in Vietnam, to school during the holiday season.[13] School officials became aware of the protest in advance and implemented a policy against armbands, resulting in the students' suspension.[14] The district court dismissed the complaint.[15] The Supreme Court's Opinion, delivered by Justice Fortas, is remembered largely for the command: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16] Recognizing that students' free speech rights exist even while in school, the Court required school officials to establish a reasonable basis "to forecast substantial disruption of or material interference with school activities. . . ."[17] The officials failed to meet this standard, and the district court's ruling was reversed and the case remanded.[18]

Tinker revealed the Court's focus on individual duties in student speech cases. The students in *Tinker* wore armbands, yes, but they also attended class and carried out their other normal duties as students. If their own conduct had taken them away from their normal duties as students, they would have contributed to a disruption. In this sense, *Tinker* is much more about the duties of various members of the campus community than it is about a physical schoolhouse, its signature quote notwithstanding.

The Court's opinion also focused on the political implications of the students' speech. Fortas quoted approvingly from *West Virginia State Board of Education v. Barnette* on "educating the young for citizenship," and not "strangl[ing] the free mind."[19] He warned that "state-operated schools may not be enclaves of totalitarianism,"[20] and he dutifully cited the "marketplace of ideas."[21] The implication was clear: the Court would look favorably on political speech, speech that might be described in a public employee context as speech on a matter public concern.

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[13] Tinker 393 U.S. at 504.
[14] *Id*.
[15] *Id*. at 504–05.
[16] *Id*. at 506.
[17] *Id*. at 514.
[18] *Id*.
[19] *Id*. at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
[20] *Id*. at 511.
[21] *Id*. at 512.

Similar principles were at work in the Court's other foundational student speech opinion: *Bethel School District No. 403 v. Fraser*.[22] There, the court distinguished *Tinker* by upholding sanctions against a student who had given an inuendo-laced speech supporting another student for student council. In reversing the lower ruling, the Court pointed to the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case. . . ."[23] The Court again stressed the school's responsibility to teach citizenship, managing to tie in Thomas Jefferson's *Manual of Parliamentary Practice* and The Beards' *New Basic History of the United States*.[24] Since the speech at issue in *Fraser* lacked the political import of the *Tinker* armbands, the Court reasoned, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[25]

The *Fraser* Court maintained *Tinker*'s focus on the rights of other school actors to perform their usual duties. In the Court's opinion, Chief Justice Berger quoted *Tinker*'s observation that the armbands did not affect the "work of the schools or the rights of other students."[26] In both cases, the Court considered whether student speech would cause a disruption in the physical space of the schoolhouse. But the decision in both cases hinged less on the physical location of the speech, and more on the effect that the speech had on students, teachers, and administrators.

Despite their similarities, however, *Tinker* and *Fraser* clearly establish two separate rationales for policing student speech. The Court's analysis in *Fraser* does not address *Tinker*'s substantial disruption.[27] Instead, the two frameworks each proceed from the notion that students' constitutional rights are constrained by the interest that administrators have to run their schools.[28]

Subsequent cases have extended *Fraser*'s analysis to school sponsored newspapers[29] and to off-campus, school-sponsored trips.[30] In *Hazelwood School District v. Kuhlmeier*, the Court considered whether a school district could censor certain articles in the school newspaper.[31] The Court upheld the

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[22] 478 U.S. 675 (1986).

[23] *Id*. at 680.

[24] *Id*. at 681–82.

[25] *Id*. at 685–86.

[26] *Id*. at 680 (quoting *Tinker*, 393 U.S. at 508).

[27] Morse v. Frederick, 551 U.S. 393, 405 (2007) ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.").

[28] *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 682–83.

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

[30] *See generally* Morse v. Frederick, 551 U.S. 393 (2007).

[31] *Hazelwood Sch. Dist.*, 484 U.S. at 260.

censorship, carving out another exception to *Tinker* for "school-sponsored expressive activities [when] reasonably related to legitimate pedagogical concerns."[32] In *Morse v. Frederick*, the Court considered schools' ability to police off-campus speech when students displayed a banner reading "BONG HiTS 4 JESUS" during a school-sponsored trip.[33] The Court refused to apply *Tinker*, reasoning that *Fraser* shows that "*Tinker* is not the only basis for restricting student speech."[34]

Online speech touches on all of the Supreme Court's *Tinker* exceptions. All online audiences are, in a sense, captive in that they have no warning that a harmful post is harmful until they have read it. Online speech also has an ambiguous relationship with a school's curriculum: if all school is online, which online speech is curricular, and which is not? Finally, as in *Morse*, the physical boundary of the schoolhouse gate is no barrier to students who wish to violate school rules during school-sponsored activities. All of these issues necessitate a reimagining of *Tinker*'s underlying ideals into a framework that anticipates the complexities of online learning.

B. Moving Tinker Online

Attempts to apply *Tinker* and its exceptions to online speech betray the serious challenges posed by the Internet. Notably, the Supreme Court itself has not offered any guidance about how its school speech jurisprudence might apply to online speech affecting campus.

In *J.S. ex rel. Snyder v. Blue Mountain School District*, the Third Circuit Court of Appeals, hearing the case *en banc*, refused to allow Blue Mountain School District to suspend a middle school student who made an unflattering MySpace profile mocking her school principal.[35] The profile was a mixture of sexually themed vulgarity and over-the-top absurdity, and it was firmly rooted in the aesthetic sensibilities of a middle schooler.[36]

In deciding that the district could not punish this off-campus speech, the court relied on both *Tinker* and *Fraser*. Applying *Tinker*, the court determined that there was no actual "substantial disruption," which was not disputed by the school district, and that there was also no reasonable basis for the school to forecast a disruption.[37] The student's profile was set to "private," it did not identify the school or principle by name, the profile was

[32] *Id*. at 261.
[33] *Morse*, 551 U.S. at 393.
[34] *Id*. at 406.
[35] 650 F.3d 915 (3d Cir. 2011).
[36] *Id*.
[37] *Id*. at 928–30.

so outrageous that it could not be taken seriously, and the school's computers blocked MySpace.[38]

Fraser, the court determined, could also not support liability because *Fraser* does not apply to off-campus speech: "the Supreme Court emphasized that Fraser's speech would have been protected had he delivered it outside the school."[39] The court was also not swayed by the argument that the speech made its way to campus after the principal printed the profile and brought it to campus.[40]

Snyder teaches two important lessons. First, *Tinker*'s application to online speech depends on a reasonable forecast that the speech will disrupt the physical campus. Second, *Fraser* simply does not apply off campus.

In *Doninger v. Niehoff*, school administrators punished a high school student's online speech by preventing her from running for class secretary.[41] The student, Doninger, had become frustrated by the administration's interference in the scheduling of a battle of the bands event.[42] The offending online speech included both a publicly available blog post[43] and an email, sent from the school's computer lab, asking various students and parents to contact the administration and advocate for the event.[44]

As part of their decision upholding the district court, which signed off on the school district's punishment, the Second Circuit panel considered the question of whether the record presented a triable matter of fact as to whether Doninger's off-campus speech created a material and substantial disruption under *Tinker*.[45] The court developed several factors to consider, including: (1) Doninger's potentially disturbing language, (2) misleading or false information in the blog post,[46] (3) a "deluge of phone calls and emails,"[47] (4) "several disrupted schedules," and (5) several apparently disturbed students.[48]

These factors suggest two basic rationales for policing online speech, both of which are familiar. First, factors 3, 4, and 5 suggest that Doninger's offline speech hampered the ability of other members of the school community to perform their usual duties. Factors 1 and 2, however, have

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[38] *Id*. at 929.
[39] *Id*. at 932.
[40] *Id*.
[41] 642 F.3d 334, 339–42 (2d Cir. 2011).
[42] *Id.* at 340.
[43] *Id*. at 340–41.
[44] *Id*. at 339.
[45] *Id*. at 348–49.
[46] *Id*. at 348 (citing Doninger v. Niehoff, 527 F.3d 41, 50–51 (2d Cir. 2008)).
[47] *Id*. at 349.
[48] *Id*.

little to do with any actual forecast of disruption. Instead, they suggest that Doninger was not acting in good faith, and that the speech was therefore less worthy of protection.

In *Ex rel Layshock*—another case relating to a parody social media profile—a panel of the Third Circuit complicated online speech analysis by refusing to apply *Doninger* absent a showing of substantial disruption.[49] The court expressed doubt that *Doninger*'s penalty was above constitutional board: "we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there."[50]

Layshock posited two enduring challenges to *Tinker* analysis. First, how should courts weigh the reasonableness of a forecast of substantial disruption absent a real showing in the record? Second, the *Layshock* court introduced a sliding scale where the speech is weighed against the punishment. Barring a run for student council is one thing, but a suspension improperly infringed on the First Amendment.

Courts, then, are in disagreement about how, when, and even if *Tinker* applies to online speech—a disagreement that *Mahanoy* does little to resolve. The lack of a clear standard has forced courts to draw different lines and adopt approaches that seem ad hoc and inconsistent.

II. EXISTING FRAMEWORKS

The problem of online student speech is well covered in scholarly literature, but far too often that scholarship focuses on the relation between speech and a physical schoolhouse. Even those approaches that make no mention of a physical school rely on one implicitly or propose solutions that would not function in a totally online context.

Philip Lee has identified five basic analytical approaches that courts have taken to analyze online student speech: (1) some courts have found that schools enjoy no authority to police online speech, (2) some courts treat off-campus speech as identical to on-campus speech, (3) some courts require schools to establish a nexus between off-campus speech and one or more members of the school community, (4) some courts employ a reasonability standard as to whether off-campus speech will reach campus, and (5) some courts hold that schools can only police threats.[51]

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[49] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 218 (3d Cir. 2011).

[50] *Id*.

[51] Philip Lee, *Evading the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 848 (2016).

The nexus test, Lee's third category, is the only one of the five that both ignores geography and attempts a fact-specific analysis. But even within the broad category of nexus tests, important differences exist. Lee defines nexus tests as treating "online expression as on-campus speech when it is made off campus, but either aimed at a specific school or subsequently brought to or accessed on campus."[52] For Lee, the physical school can help create a nexus, but is by no means necessary.

Some scholars have advanced a "curricular nexus test" for policing online speech on college campuses.[53] Under this test, schools would need to "to demonstrate a legitimate curricular or pedagogical justification to restrict independent student speech."[54] However, these justifications could well go beyond the kind of curricular justification in *Hazelwood*. The authors, for example, cite the curricular justifications for professionalism standards: "courts have generally recognized heightened institutional authority to regulate college student speech . . . triggering curricular concerns, such as the enforcement of professionalism standards."[55]

Policing online speech as a curricular concern, justified by the need for schools to teach professional standards as part of their curriculum, offers a compelling basis outside of the school's physical location. However, it also offers potential pitfalls that might limit its applicability. For example, curricular justifications cannot constitute a broad mandate to police any online speech that administrators find distasteful.

The inquiry requires an administrator to tie any censorship to a standard of which the students have sufficient notice and that actually operates in a given professional community. For example, in *Tatro v. University of Minnesota*, the Minnesota Supreme Court upheld punishment for Facebook posts that violated student conduct rules and professionalism standards for a mortuary science program.[56] The opinion cited an amicus brief by the American Board of Funeral Service Education endorsing the school's conduct code.[57] Tying censorship to clearly-articulated standards of community norms, like those of the ABFSE, prevents schools from exercising authority arbitrarily, gives students fair warning of speech standards, and ensures that any imposed rules are narrowly-tailored.[58]

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[52] *Id*. at 852.

[53] Jeffrey C. Sun, Neal H. Hutchens & James D. Breslin, *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49, 51 (2013).

[54] *Id*. at 52.

[55] *Id*. at 65.

[56] *Id*. at 81–85 (citing Tatro v. Univ. of Minnesota, 816 N.W.2d 509, 509 (Minn. 2012)).

[57] *Id*. at 83.

[58] *See id*. at 85.

The above survey shows that any workable framework should try to properly weigh the interests of students, teachers, and administrators, instead of favoring one group and disregarding the others. It should focus on curriculum rather than physical location. Still, tying online behavior to curriculum requires something analogous to a professionalism component. This does not mean teaching first graders to curate their LinkedIn profiles; it means developing and circulating standards for students to engage productively in the public square.

III. PROPOSED FRAMEWORK

A. The Public Employee Framework in Schools

My proposal for addressing student speech online is to abandon the framework of *Tinker*, while maintaining its ideals of citizenship, public debate, and equal access to education. In place of *Tinker*'s framework, I propose adopting a version of *Connick/Pickering* analysis.[59] In applying the public employee framework to school speech, it will be important to remain mindful of the crucial differences between the two groups. For example, students cannot change schools when their speech rights are not respected. Further, public employee speech can educate the public in a way that student speech rarely does. Nonetheless, adapting the public employee framework harmonizes the citizenship rationale of *Tinker* with the non-geographical principles announced in *Mahanoy*.

In *Pickering*, the Court considered whether a school district could dismiss a teacher for a critical letter that was published in the local newspaper. The Court rested its decision largely on the public importance of school funding and on the teacher's informed perspective.[60] The only limitation the Court placed on this protection was when the speaker made defamatory statements known to be false or with reckless disregard for the truth.[61]

In *Connick v. Myers*, the Court further refined the framework for public employee speech by distinguishing speech made in the course of performing one's official duties.[62] In that case, the Court considered the dismissal of a district attorney after she circulated a questionnaire "soliciting the views of her fellow staff members concerning office transfer policy, office morale,

[59] *See* Connick v. Myers, 461 U.S. 138 (1982); Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., IL, 391 U.S. 563 (1968).

[60] *Pickering*, 391 U.S. at 571–72.

[61] *Id*. at 573 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968)).

[62] 461 U.S. at 166–67.

the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[63] The Court concluded that Myers's speech was, largely, not a matter of public concern.[64] As such, Myers's speech was not entitled to full First Amendment protections and fared poorly under *Pickering*'s balancing test.[65] Myers's speech on a limited, private concern was not sufficient to outweigh her public employer's interest in an effectively-run workplace.

To this framework, the Court added an important exception in *Garcetti v. Ceballos* for employee speech made pursuant to an employee's official duties.[66] The case involved a deputy district attorney who suffered several adverse employment actions after questioning the legitimacy of an affidavit, writing a memo to that effect, and testifying about his doubts in court.[67] The Court specifically distinguished the case from precedent on the grounds that the memo was within Ceballos' official duties.[68]

The key question, then, in applying the *Garcetti* test, is what speech counts as part of a speaker's official duties?[69] Is speech produced in an official job somehow government speech, which the employer created and can therefore control?[70] Or is some speech better characterized as an aspect of job performance than it is speech, and not protected on that ground?[71]

In trying to apply *Garcetti* to a school speech, the second reading is more natural. In many ways, schools already exert significant control over work product. If a student writes a bad essay and gets a D, nobody argues that their First Amendment rights are at risk. But if the government prevents that student from publishing or disseminating the essay, it is clearly an infringement.

Indeed, the narrow focus on work product is likely the Court's true intention in *Garcetti*. Kermit Roosevelt identifies six different quotes from the opinion supporting the work-product interpretation, and notes that "nothing in the facts or reasoning of Garcetti require us to push any farther."[72]

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[63] *Id*. at 141.

[64] The only exception was Myers's speech about whether or not district attorneys were pressured to work on political campaigns. *Id*. at 149.

[65] *Id*. at 154 ("The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.").

[66] *See* 547 U.S. 410 (2006).

[67] *Id.* at 414–15.

[68] *Id.* at 411.

[69] Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 635 (2012).

[70] *Id.* (quoting *Garcetti*, 547 U.S. at 422).

[71] *Id.*

[72] *Id.* at 646.

This narrow reading of *Garcetti* is particularly adaptable to the Internet because it focuses on statements produced while performing tasks, rather than statements made in a particular physical location. If one student bullies another student in a classroom, they should expect sanctions for that speech; the same should be true in the online classroom.[73]

The most salient difference between student speech and public employee speech is that public employees, unlike students, work at their own pleasure; they can quit at any point. It follows that any attempt to repurpose *Connick/Pickering* should relax speech limitations to account for students' inability to sign off on those limitations in advance.

A second tension between the two systems is the latitude afforded to speech on a matter of public concern.[74] It is not clear that the private/public distinction maps cleanly onto school speech. Specifically, the public does not benefit from a student's contributions to an open debate in the same way that it does from contributions of public employees, which presumably come with an insider's vantage point and expertise.[75]

Furthermore, how public is public? The United States' involvement in the Vietnam War is undeniably a matter of public concern, but what about a cancelled battle of the bands?[76] If schools are supposed to provide a training ground for civic debate—a functional democracy in miniature—it seems fair to assume that the public concerns of the school community should be afforded similar protections as the public concerns of society at large. If the debate over a battle of the bands helps teach students how to debate matters

[73] Under a system like the one described here, courts would need to define the boundaries of student work product. Under the current regime, courts use a variety of methods to determine if online speech causes a substantial disruption on campus, often either a foreseeability test or a nexus test. Lee, *supra* note 51, at 848–58. An analogous inquiry for work product would need to contend with questions about what kinds of posts constitute student work product, and whether speech affecting work product should receive protection. For example, does a direct message between students who are working together on a class project constitute work product? What about cyberbullying on Facebook that prevents its victim from creating their own work product?

[74] Recall that *Tinker* focused on substantial disruption as the applicable legal standard but placed considerable emphasis on the importance of the "marketplace of ideas" within schools, and on the vital need to protect constitutional freedoms in schools so that students can be exposed to a wide range of ideas. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[75] According to the Pickering Court: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent." Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., IL, 391 U.S. 563, 572 (1968).

[76] The Second Circuit might have thought so: they cited an opinion highlighting the importance of allowing debate on matters important to the school community. *See* Doninger v. Niehoff, 642 F.3d 334, 347 (2d Cir. 2011) (citing Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring)).

of national significance someday, then administrators should try to facilitate that process as much as possible.

B. Tinker and Citizenship

One way to facilitate productive debate is by teaching professionalism. In *Tatro*, professionalism formed the nexus between online speech and the curriculum of a professional school. This solution to the curricular nexus test does not fit well into the K-12 context, both because that kind of schooling does not prepare students for a particular profession, and because there is no professional association that can vouch for any standards as genuine.

Yet school speech cases make clear that public schools do have a preparatory function beyond history and arithmetic—citizenship. *Mahanoy*'s third principle—protecting unpopular speech—is rooted in this traditional free speech rationale.[77] In this light, citizenship is akin to professionalism. Both involve teaching and reinforcing behavior rather than information. Both focus on student's lives after graduation. And both, at least to some extent, can be reduced to a series of rules.

The rules at issue in *Tatro* were apparently approximations of the standards that professional morticians try to uphold. They were verified as accurate by ABFSE, but not adopted from that organization. This makes sense, since a school may want to instill a higher ethical standard than the bare minimum established by a professional organization. The same logic could be applied to public schools' citizenship mandate. One could imagine a school adopting a code of citizenship that serves a similar function to ethical standards in professional schools. In both instances, the point is not to mirror the real-world standards exactly, but to educate and inculcate students with certain standards of behavior.

Schools should ensure that standards of citizenship comport with the vision of *Tinker*, including the rights of non-speakers to avoid disruption and the fostering of democratic values. *Tinker* did not promote curricular citizenship generally, but a particular form of curricular citizenship that helped schools run more efficiently by focusing less on the rights of the speaker.

Therefore, a true return to the spirit of *Tinker* involves a return to a conception of the First Amendment that is, as Genevieve Lakier has put it, antisubordinating. [78] For Lakier, the Supreme Court changed its First Amendment jurisprudence during the 1970s, from protecting "the

[77] Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021) ("America's public schools are the nurseries of democracy.").

[78] Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018).

marginalized and the disenfranchised" to "a tool of economic deregulation and corporate power."[79] Before this shift, the Court recognized that the First Amendment's "guarantee of expressive liberty is a guarantee of expressive equality—that freedom of speech means not only the right to speak but the right to speak on equal terms as other speakers."[80] According to Lakier, since the 1970's, the Court has read the First Amendment's equality guarantee to require only "formally equal treatment at the government's hands."[81]

Under Lakier's thesis, then, the *Tinker* court's conception of the interrelated system of school administration, curricular citizenship, and student speech may be quite different than the conception of modern courts. One area in which the Court's subordinating turn is particularly apparent is the area of public employee speech. For Lakier, *Garcetti* is emblematic of this broader shift.[82] *Garcetti* represents an effort by the Court to place government employees on equal footing with private employers, who are free to premise adverse employment actions on speech that happens within an employee's duties.[83]

Yet, in appealing to equality between private and public employers, the Court interpreted the First Amendment to exacerbate inequality in other areas "by ignoring important economic, political, or—in this case—institutional differences between the groups it equates for purposes of First Amendment analysis."[84] This case, along with other cases like *Citizens United v. Federal Election Commission*, evince a trend away from liberty and towards a certain kind of equality.[85] But in so doing, it runs counter to *Tinker*, which recognized an antisubordinating First Amendment as crucial to citizenship as it should be taught to students. Lakier's reading suggests that *Garcetti* should be read narrowly in order to comport with *Tinker*.

C. A Proposed Framework

As the foregoing discussion makes clear, any workable standard for student speech online should attempt to tie together several distinct threads. Student work-product should not be afforded significant—if any—constitutional protection. Standards should be tied to the school's function of teaching citizenship. That citizenship should be read in context to support an antisubordinating First Amendment: one that ensures everyone is able to

[79] *Id.* at 2118.
[80] *Id.* at 2119.
[81] *Id.* at 2120.
[82] *Id.* at 2135–39.
[83] *Id.* at 2137.
[84] *Id.* at 2138.
[85] *Id.*

speak and participate in conversation, rather than protecting individual speakers from government censorship. Other school actors should be free to perform their own duties, absent substantial disruption. Finally, part of citizenship involves robust debate on matters of public concern.

In general, the public employee framework provides a useful guide for sorting out these overlapping and conflicting interests. After *Garcetti*, the public employee framework essentially proceeds by asking two separate questions. First, was the employee acting as a citizen or performing their job? Speech is protected, but job performance is not. Next, it weighs the public interest in speech against the government's interest in running an efficient workplace.

A school speech framework should ask slight variations on the same two questions. Students enjoy no protection for what they write in a homework assignment, but they do enjoy protection when talking to their friends on the weekend. So, the first question I propose is whether a given student's speech was in the course of their official duties as a student. Again, many situations will be less than clear cut, but the rule should, like *Garcetti*, be narrowly interpreted in order to remain properly antisubordinating.

Unlike *Garcetti*, however, for school speech, this inquiry serves to establish whether the school has any say over the student's speech: protection is the rule, rather than the exception. In *Garcetti*, speech in the course of official duties is unprotected, and other speech is subject to balancing. In order to account for students' broader rights than those of at-will employees, speech in the course of their duties as students should be subject to balancing, whereas speech at home is protected.[86] This is already implicit in *Mahanoy*'s focus on the responsibility of parents to police most student speech outside of school.[87]

The second inquiry, then, is whether the speech at issue furthers the school's goal of teaching citizenship. In considering this question, courts and schools should weigh several factors. Did the speech cause a substantial disruption? Did the speech impede others' access to the educational experience? Are the standards of citizenship consistent with the school's

[86] Protecting speech at home from discipline at school, however, should not protect it from any consequences whatsoever. For example, the proposed framework here would not allow a high school to discipline a student about an offensive or inappropriate Facebook post, so long as it did not interfere with their own duties as a student or with the duties of a fellow student. But that same student could face serious consequences from a college admissions office, who would be well within their rights to decline or even revoke admission on the basis of offensive posts. *See* Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN'S L. REV. 611, 623 (2017) (explaining that courts generally afford college admissions decisions significant deference).

[87] Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

educational goal? Most importantly, was the speech on a matter of public or private concern?

Still, the public benefits less from student speech on public concerns than they do from public employees. Yet, as in *Tinker*, allowing students to contribute productively to public debate fulfills part of schools' curricular citizenship mission. Since the function here is curricular and not informing the public, speech on matters of school-wide significance should likely weigh in favor of protection.

D. A Student Speech Controversy During COVID

Several student speech controversies have emerged during the COVID-19 pandemic. One in particular demonstrates the utility of a duty-based approach to student speech.

In a high-profile case in Dallas, Georgia, a high school student took and posted a photograph of a packed hallway in her high school.[88] The photograph was taken on the first day of the fall semester, when students had not been to school since shutting down for the COVID-19 pandemic in March of 2020.[89] There were few masks to be seen, and little evidence that students or administrators were taking social distancing guidelines seriously.[90] The photos eventually went viral, coming "to symbolize a chaotic first week back in U.S. classrooms."[91] The student was initially suspended for five days, but the suspension was eventually reversed after her mother filed a grievance.[92]

This case raises questions about where a student's duties as a student begin and end. Measured temporally, perhaps a student's speech can be censored during the school day. But that would not cover a good deal of possible student speech in asynchronous learning situations. Could *Tinker*'s geographical focus be maintained as part of the official duties inquiry?

In either case, there is little indication that posting the photo substantially interfered with the administration's ability to run their school. In fact, the opposite is true. The superintendent made clear that he would not change any rules or enforcement on campus: "Wearing a mask is a personal

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[88] Giulia McDonnell & Nieto Del Rio, *'The Photo Does Not Look Good': Georgia School's Crowded Halls Go Viral and Suspension of the Student Who Posted the Photos Lifted*, CHICAGO TRIBUNE (Aug. 7, 2020, 5:20 PM), https://www.chicagotribune.com/coronavirus/ct-nw-nyt-georgia-hallway-picture-suspension-20200807-oz6rqzltr5hjbettpx62wnymoe-story.html [https://perma.cc/UV7A-QWPR] (originally published in the N.Y. Times).

[89] *Id*.

[90] *Id*.

[91] *Id*.

[92] *Id*. The suspension was officially for violating a school policy against filming other students without their consent and posting the images online. *Id.*

choice, and there is no practical way to enforce a mandate to wear them."[93] The speech is also on a matter of public concern. The student was quick to defend her actions in similar terms: "My mom has always told me that she won't get mad at us if we get in trouble as long as it's 'good trouble.'"[94] Further, the extent to which the picture took off online is testament to its centrality in an ongoing public debate.

Under the proposed framework, this speech would likely be protected, which accords nicely with the ideals of *Tinker*: students should be allowed to weigh in on issues of national importance when doing so does not disrupt the school's ability to operate. The first question is whether the speech was part of the student's duties as a student. She was in the hallway, moving between classes, which she would not have been doing absent her duty to attend class. So, perhaps this is within the range of duties associated with being a student, but not amounting to student work product. But the second question weighs in favor of protection, because the student was speaking on a matter of obvious public concern. This is exactly the sort of speech that an anti-subordinating First Amendment should protect: dissenting speech that does not affect other school actors from fulfilling their own duties.

CONCLUSION

The tension between school speech and online speech became especially pronounced during the COVID-19 pandemic, but there is little reason to suspect it will be resolved by the end of the pandemic. Even when all schools return to their pre-pandemic in-person capacity, students, teachers, and administrators will have been exposed to any number of online learning tools and some will inevitably catch on.[95] Even those online tools that compliment in-person instruction will continue the trend of moving instruction (and therefore student speech) online.[96] In its December 2018 report on The Future of Schools, the design and consulting firm Arup Group identified the effect of technology "integrated in school and at home" as one of six key trends affecting schools in the future.[97] The same report further identified cyberbullying as an area of concern that would grow as technology forces more student speech online.[98] The COVID-19 pandemic only

[93] *Id*.

[94] *Id*.

[95] Douglas N. Harris, *How Will COVID-19 Change Our Schools in the Long Run?*, BROOKINGS INST.: BROWN CENTER CHALKBOARD (Apr. 24, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/04/24/how-will-covid-19-change-our-schools-in-the-long-run/ [https://perma.cc/9RLN-J87D].

[96] *Id.*

[97] ARUP, FUTURE OF SCHOOLS, 5 (2018).

[98] *Id.* at 38.

accelerated the process of moving student speech online and outside the remit of the *Tinker* decision.

Tinker established an ideal for translating First Amendment rights to the classroom. *Mahanoy* announced certain abstract principles for resolving student speech cases but failed to explain how those principles overlap with *Tinker*. The *Tinker* court, of course, never contemplated facts presented in cases involving online speech—facts that have become increasingly commonplace. The framework proposed here maintains *Tinker*'s ideals, and layers them onto the existing framework for public employee speech. It also endeavors to ground an online student speech framework clearly in Supreme Court precedent, rather than abstract principles.