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The Disappearing Schoolhouse Gate: Applying *Tinker* in the Internet Age

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I. INTRODUCTION

For decades, the proverbial “schoolhouse gate” has acted as a delineation between on-campus behavior subject to in-school punishment and off-campus acts outside the realm of school administrators’ regulation.¹ Since the Supreme Court’s 1969 decision in *Tinker v. Des Moines Independent Community School District*,² the schoolhouse gate delineation has been well-established and easily applied by courts and school administrators alike.³ But the advent of computer technology, and particularly the Internet, has upended what were formerly simple delineations. As the Internet permeates further and further into the daily lives of Americans, it continues to blur the once well-established separations between home and work, and school and play.⁴

1. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”). But see *Morse v. Frederick*, 551 U.S. 393 (2007) (regulating student speech at an off-campus event that was considered a school-approved event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (regulating student speech in a school-sponsored newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (regulating vulgar or lewd student speech while on campus).

For the purpose of this Comment, the term “schoolhouse gate” will be used to distinguish between student conduct that occurs on the physical premises of the school and conduct that occurs off the physical premises of the school. All conduct within the so-called schoolhouse gate is considered on-campus, regardless of the presence of an actual gate, fence, or other distinguishing marker present at the school in question.

2. 393 U.S. 503. In *Tinker*, the Court laid out a two-prong test for determining whether student speech, on- or off-campus, is immunized from regulation or discipline by school administrators. If the student speech does not (1) “materially and substantially interfere” with the school operations, or (2) interfere with the rights of other students or teachers, school administrators cannot regulate it under *Tinker*. See *id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); see also *infra* note 41 and accompanying text.

3. *Tinker* can only apply to public, taxpayer-funded schools. See *Tinker*, 393 U.S. at 515–16 (Black, J., dissenting). Private schools, by their very nature, can regulate the conduct of students in ways that public schools cannot, and this Comment does not discuss them.

4. While the so-called “schoolhouse gate” delineation was well established and easily applied by courts and school administrators following the Court’s 1969 *Tinker* decision, the standard is no longer so easily applied. See *infra* notes 75–76 and accompanying text; see also *Morse*, 551 U.S. at 418 (Thomas, J., concurring) (“I am afraid that our jurisprudence now says that students have a right

As our public school administrators face school environments increasingly influenced by off-campus online activity, they have struggled to apply *Tinker* and its progeny to a school environment that the Court could never have fathomed when it crafted the schoolhouse gate distinction.⁵ Rather, the schoolhouse gate has rapidly disappeared as student activity during off-campus hours at off-campus locations can now be instantly accessed within the schoolhouse gate. Without any Supreme Court guidance, lower courts have been left to craft a patchwork of precedent, yielding inconsistent and unpredictable results.⁶

to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators.”).

5. Because technology has so radically transformed the school environment in recent decades, the decades-old Supreme Court jurisprudence seems even more difficult to apply to modern student speech:

As the Supreme Court has never addressed a student-speech case where the on-campus or off-campus distinction was muddled by technology, it has fallen on the lower courts to determine the extent—if any—to which technology impacts their analysis. What is interesting about such cases is that the lower courts tend to look immediately to *Tinker*, at least in part because cyber-speech is difficult to see as factually congruent with *Fraser* or *Kuhlmeier*. But not every court relies on *Tinker*, or relies in the same way as other courts. Some apply *Tinker* to all student speech whether on or off the Internet; some assume that Internet speech is necessarily on-campus speech; and others treat Internet speech as strictly off-campus expression. So, when it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles.

Kenneth R. Pike, *Locating the Misplaced Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 990 (internal footnotes omitted).

6. In the absence of Supreme Court guidance, scholars have noted that courts generally take one of three approaches when deciding Internet-related student speech cases. See Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 153 (2003). The first approach some courts have adopted is the *Tinker* substantial disruption test, wherein courts analyze whether speech created on- or off-campus, but accessed on-campus, creates a substantial disruption to the school environment. *Id.* Second, some courts have adopted the approach that all Internet speech created off-campus is protected because it occurred off-campus. *Id.* at 154. Finally, many courts have adopted the *Tinker* substantial disruption test without regard to whether the speech was created or accessed on- or off-campus. *Id.* at 155; see also *infra* Part IV.

Additionally, a recently resolved split within the Third Circuit demonstrates the inconsistent and unpredictable results under the current law. See *infra* notes 7–13 and accompanying text. News accounts continue to detail the real-life implications of this patchwork of precedent. Nearly every news account today involves online student speech that originated at an off-campus location. See, e.g., Carmen Gentile, *Student Suspended for Facebook Page Can Sue*, N.Y. TIMES (Feb. 15, 2010), <http://www.nytimes.com/2010/02/16/education/16student.html> (allowing a lawsuit by a student against her school district to proceed where the student was suspended for posting a Facebook page criticizing her English teacher); Elisa Hahn, *Dozens of Students Suspended for Facebook Cyberbullying*, KING5.COM (Jan. 14, 2010, 10:39 PM), <http://www.king5.com/news/More-than-20-students-suspended-for-FB-cyberbullying-81629692.html> (describing the suspension of twenty to

Two recent federal district court decisions in Pennsylvania demonstrate the variegated applications of the *Tinker* standard to electronic off-campus student speech.⁷ Both *J.S. ex rel. Snyder v. Blue Mountain School District* and *Layshock ex rel. Layshock v. Hermitage School District* involved students that created “parody” profiles of school officials on online social networking websites.⁸ Both students used personal computers at off-campus locations to create the profiles, and both students were punished for their conduct.⁹ In the *Blue Mountain* appeal, a split panel of the Third Circuit found that the school district’s discipline of the student did not violate her First Amendment free speech rights.¹⁰ Conversely, in *Layshock*, a different Third Circuit panel ruled that the school’s disciplinary action did violate the student’s First Amendment rights.¹¹ The Third Circuit reheard the cases en banc and determined that school administrators were incorrect to punish a student for off-campus electronic expression where they could not reasonably forecast that the Internet profile at issue would cause a substantial disruption of, or material interference with, the school’s operation.¹² The Supreme Court recently denied certiorari in *Blue*

thirty middle school students at the same school for “friending” or becoming “fans” of a Facebook page “maligned” a particular classmate); *Oak Park Student Suspended Over List of Girls*, CBS CHICAGO (Jan. 18, 2011, 6:33 AM), <http://chicago.cbslocal.com/2011/01/18/oak-park-student-suspended-over-list-of-girls/> (describing the suspension of a high school student who listed and ranked fifty female classmates based on their looks and later distributed his rankings list on-campus); *Student Suspended for Facebook Posting*, ABC 7 NEWS (Feb. 23, 2010), <http://abclocal.go.com/wls/story?section=news/local&id=7291780> (describing the suspension of a high school student who created a Facebook page that criticized a teacher and included a derogatory name). Some students have been punished for online expression concerning activities that remained strictly off-campus in which there existed no possibility that it might be brought onto campus or distract from the learning environment. See Satarupa Bhattacharya, *Students Beware: What Do You Share on Facebook?*, INT’L BUS. TIMES (Jan. 4, 2011, 9:49 AM), <http://www.ibtimes.com/articles/97266/20110104/facebook-students-social-media-law-schools.htm> (describing the suspension of eight high school students for violating the school district’s code of conduct after posting photographs of themselves drinking alcohol at an off-campus event).

7. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07CV585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), *aff’d on other grounds*, 593 F.3d 286, 290 (3d Cir. 2010), *aff’d in part, rev’d in part*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007), *aff’d*, 593 F.3d 249 (3d Cir. 2010), *aff’d in part, rev’d in part*, 650 F.3d 205 (3d Cir. 2011) (en banc).

8. *Blue Mountain*, 2008 WL 4279517, at *1; *Layshock*, 496 F. Supp. 2d at 590–92; see also *infra* Part IV.A–B.

9. *Blue Mountain*, 2008 WL 4279517, at *1–2; *Layshock*, 496 F. Supp. 2d at 590–91.

10. *Blue Mountain*, 593 F.3d at 290; see also *infra* notes 112–21 and accompanying text.

11. *Layshock*, 593 F.3d at 260; see also *infra* notes 102–09 and accompanying text.

12. *Blue Mountain*, 650 F.3d at 920. Additionally, speech made by the student at an off-campus location on the Internet could not be converted into “on-campus” speech when it crossed through the figurative schoolhouse gate after another student brought a printed copy of that speech to school. *Id.* at 932–33. An en banc panel of the Third Circuit reheard *Layshock* on the same day that it reheard *Blue Mountain*. In *Layshock*, the en banc panel unanimously affirmed the lower court holding invalidating the suspension of a student for his off-campus Internet activity as a violation of his First Amendment rights. *Layshock*, 650 F.3d 205. This opinion is not discussed at length here, however,

Mountain.¹³ Without Supreme Court guidance,¹⁴ such unpredictable holdings will continue, and school administrators—even those within the same jurisdiction—will remain uncertain how, or even if, they can regulate off-campus student speech.

This Comment argues that Internet speech originating off-campus cannot be regulated under the current two-pronged *Tinker* standard. Rather, this Comment argues that courts should apply only the second *Tinker* prong (*Tinker Two*),¹⁵ which will strike the proper balance between student safety and students' First Amendment rights.¹⁶ Part II provides a detailed look at *Tinker* and its progeny relating to off-campus student speech.¹⁷ Part III examines the evolving nature of student expression in the Internet age.¹⁸ Part IV details the lower court conflict in applying Supreme Court precedent to cases involving online student speech originating off-campus.¹⁹ Part V argues that the best approach courts can take is to apply only *Tinker Two*, in effect balancing student safety concerns with First Amendment protections.²⁰ Part VI concludes.²¹

because the court did not apply *Tinker* and the school district did not argue that *Tinker* should apply. *Id.* at 214 (“[T]he School District is not arguing that it could properly punish Justin under the *Tinker* exception for student speech that causes a material and substantial disruption of the school environment.”). Rather, the court resolved the case on the narrow grounds that the school district’s argument that *Morse v. Frederick*, 551 U.S. 393 (2007), did not permit regulation of lewd or vulgar off-campus student expression. *Layshock*, 650 F.3d at 216–19.

13. *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, No. 11-502, 132 S. Ct. 1097 (Jan. 17, 2012).

14. The Supreme Court recently denied certiorari in two cases, maintaining the uncertain legal backdrop against which school administrators seek to adequately perform their jobs without running afoul of the First Amendment. See *Blue Mountain*, No. 11-502, 132 S. Ct. 1097 (Jan. 17, 2012); *Kowalski v. Berkeley Cnty. Schs.*, No. 11-461, 132 S. Ct. 1095 (Jan. 17, 2012). Media coverage noted the frustration on both sides of the aisle over the Supreme Court’s continued silence on this issue. See Maryclaire Dale, *Court Rejects Appeals in Student Speech Cases*, CNS NEWS, Jan. 17, 2012, <http://cnsnews.com/news/article/court-rejects-appeals-student-speech-cases-0> (“Lawyers on both sides were disappointed that it will be at least another year before the high court wades into the issue. Federal judges have issued a broad range of opinions on the subject.”). A lawyer for the National School Boards Association pointed out the need for Supreme Court intervention. *Id.* (“We’ve missed an opportunity to really clarify for school districts what their responsibility and authority is. . . . This is one of those cases where the law is simply lagging behind the times.”).

15. For clarity, this Comment will refer to the second prong of the *Tinker* standard as “*Tinker Two*” and the first prong as “*Tinker One*.” *Tinker Two* allows school administrators to restrict speech that “[invades] the rights of others.” See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Application of this prong allows school administration to restrict speech that would represent a danger to the life or liberty of other students. See *infra* Part II.A.

16. See *infra* Part V.

17. See *infra* notes 22–76 and accompanying text.

18. See *infra* notes 77–93 and accompanying text.

19. See *infra* notes 94–153 and accompanying text.

20. See *infra* notes 154–263 and accompanying text.

II. EXISTING SUPREME COURT PRECEDENT CONTROLLING REGULATION OF OFF-CAMPUS STUDENT SPEECH

The Constitution affords every citizen—including students in public schools—the right to speak freely.²² However, the Supreme Court has expressly declared that not all speech is protected. In general, speech falls in one of two categories: “protected speech” or “unprotected speech.”²³ Where

21. See *infra* notes 264–66 and accompanying text.

22. U.S. CONST. amend. I; see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (internal citations omitted)) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”). Scholars have considered the First Amendment within the context of its historical underpinnings. See, e.g., LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 220–81 (1985) (indicating that the Framers intended to model the First Amendment after common law notions of free speech). However, some scholars have noted the existence of another prominent perspective on the historical underpinnings behind the First Amendment. See Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, CTR. FOR SAFE & RESPONSIBLE INTERNET USE, at 2 (Aug. 2, 2010) [hereinafter Willard, *School Response*], available at http://www.csriu.org/documents/documents/cyberbullyingsextinglegal_000.pdf (citing the “natural rights philosophy” advocated by John Locke). Between the two differing approaches, it appears that while the Supreme Court has never examined the First Amendment within either historical context, it has applied both in its school speech jurisprudence:

The essential difference in these two philosophies is that under the English common law approach, government has the authority to determine what speech is contrary to the public good, including such social values as order, morality, and religion. Whereas under the natural rights philosophy, the role of government is to enforce the fundamental rights of other individuals, if those rights are injured by the exercise of speech by another.

Id. *Tinker* appears to be grounded in the natural rights approach, while *Fraser* and *Kuhlmeier* appear to be grounded in the English common law approach. See *id.* at 3; see also *infra* Part II.A–C.

23. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Unprotected speech takes many forms. See *United States v. Williams*, 553 U.S. 285 (2008) (offers to engage in illegal behavior); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (child pornography); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (true threats); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*) (incitement); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). This Comment is not concerned with student expression that would be unprotected outside of the school environment. Rather, it is focused on off-campus student speech that would otherwise be permissible outside of the public school context.

In general, however, the Supreme Court is hesitant to impose restrictions on speech. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (“[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”). Additionally, there is an emerging circuit split concerning Internet obscenity cases, another indication of just how much the Internet has muddled previously clear precedent. Prior to the advent of the Internet, courts had little trouble in establishing a relatively uniform test for obscenity—the local community standard. The local community standard judged whether speech was obscene according to the attitude of a town or area where the speech occurred. See *Miller v. California*, 413 U.S. 15 (1973). Following the advent of the Internet, some Supreme Court Justices advocated for utilizing a “national community standard” because the previous local community standard would impose the most restrictive view of obscenity taken by any town or community in the nation upon speech found on the Internet. See *Ashcroft v. ACLU*, 535 U.S. 564 (2002). “[The local community standard] would potentially suppress an inordinate amount of expression.” *Id.* at 587 (O’Connor, J., concurring in part and concurring in the judgment). The Ninth Circuit has since adopted Justice O’Connor’s suggested “national community standard.” See *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009). The Eleventh Circuit declined to follow the Ninth Circuit

student speech is protected, courts apply *Tinker* and its progeny with unpredictable results.²⁴ While courts routinely recognize that constitutional rights are necessarily limited within public education facilities,²⁵ they have struggled to determine how far, and under what circumstances, those rights may be curtailed when the speech does not originate on campus.²⁶

A. *Tinker v. Des Moines Independent Community School District*

The Supreme Court first addressed student speech in public schools in *Tinker*, a case where the Court left little to school administrators' discretion and laid out a clear two-pronged rule for schools to follow when regulating student speech.²⁷ More than forty years later, courts and schools alike continue to apply *Tinker* and its progeny when faced with student speech regulations that may conflict with First Amendment protections.²⁸

and kept the traditional local community standard for Internet obscenity speech. *See United States v. Little*, 365 F. App'x 159 (11th Cir. 2010).

24. *See infra* Part II.A–D; *see also Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 418 (S.D.N.Y. 2008) (“(1) [S]chools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent or plainly offensive speech, (2) if the speech at issue is ‘school-sponsored,’ educators may censor student speech so long as the censorship is ‘reasonably related to legitimate pedagogical concerns,’ (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies.” (internal citations omitted) (quoting *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006))).

25. *See Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (“[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” (alteration in original) (quoting *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968))).

26. *See Kathryn S. Vander Broek et al., Schools and Social Media: First Amendment Issues Arising From Student Use of the Internet*, 21 INTELL. PROP. & TECH. L.J., no. 4, 2009, at 11, 16 (“Internet-based, off-campus student speech is an evolving area of First Amendment law producing decisions that are highly fact-specific.”).

27. While *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), may be the first case to consider the issue of student speech, *Tinker* remains the foundation upon which almost every student speech case rests. In *Barnette*, the Court considered the constitutionality of a school district's requirement that all students salute the flag or face expulsion. *Id.* at 626. Though recognizing the school's important role in “educating the young for citizenship,” the Court ultimately held that the Bill of Rights cannot be trampled in the process. *Id.* at 637.

28. *See, e.g., J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 260, 264 (3d Cir. 2010), *aff'd in part, rev'd in part*, 650 F.3d 205 (3d Cir. 2011) (en banc); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35–36 (2d Cir. 2007); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611 (5th Cir. 2004); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010); *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 223–24 (D. Conn. 2009); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003); *see also infra* Part IV.

In December 1965, members of the Tinker family, along with others, developed a plan to publicize their objections to the Vietnam War by wearing black armbands during the holiday season.²⁹ The school administration became aware of the plan and met to create and adopt a policy forbidding armbands within Des Moines schools.³⁰ Under the adopted policy, any student wearing an armband would be asked to remove it, and if the student refused, he or she would be suspended.³¹ John and Mary Beth Tinker, and their friend Christopher Eckhardt, knowing the school district's policy forbidding armbands, wore black armbands to school and were suspended.³² The students, through their parents, brought suit against the school district claiming that their suspension was an unconstitutional denial of their right to express their opinion under the First Amendment.³³

The district court dismissed the Tinkers' complaint, finding the school district's suspension was a reasonable measure to prevent disturbance of school discipline.³⁴ On appeal, an equally divided en banc panel of the Eighth Circuit upheld the decision of the district court without opinion.³⁵ The Supreme Court granted certiorari.³⁶ Justice Fortas, writing for the Court, began his analysis by recognizing that wearing an armband constitutes symbolic speech³⁷ that is entitled to comprehensive protection

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

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 504–05. In its holding, the district court cited to, but expressly refused to follow, a similar case from the Fifth Circuit. *Id.* at 505. That case, *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966), involved the wearing of “freedom buttons.” The Fifth Circuit held that the school could not forbid the students from wearing the symbols “unless it ‘materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.’” *Tinker*, 393 U.S. at 505 (quoting *Burnside*, 363 F.2d at 749). Justice Fortas, writing for the *Tinker* majority, pointed out that it was “instructive” that the same panel of the Fifth Circuit reached an opposite result on different facts in *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966). *Tinker*, 393 U.S. at 505 n.1. The *Blackwell* court refused to enjoin the enforcement of a policy forbidding “freedom buttons” in a public school where the students wearing the buttons “harassed” students who did not wear the buttons. *Id.*

35. *Tinker*, 393 U.S. at 505.

36. *Id.*

37. The *Tinker* Court differentiated between “symbolic speech” and “pure speech”:

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . . As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

Id. at 505–06 (citations omitted).

under the First Amendment, even within the context of public schools.³⁸ Following a discourse on the extensive Supreme Court jurisprudence on school interference with student speech or expression,³⁹ the Court framed the issue as one in which “students in the exercise of [their] First Amendment rights collide with the rules of the school authorities.”⁴⁰

In deciding whether a school regulation of student expression collides with the First Amendment, the *Tinker* Court developed a two-pronged rule. According to this rule, student expression can only be suppressed or regulated by school authorities if the expression would (1) substantially interfere with the work of the school, or (2) obstruct the rights of other students.⁴¹ In so doing, the Court demonstrated that students maintain strong

38. *Id.* Indeed, Justice Fortas declared that the Court has protected the freedom of speech or expression within public schools “for almost 50 years.” *Id.* at 506.

39. *See id.* at 506–07 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968) (finding that states may not require school curricula to align with the views of a particular religion); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (holding a New York regulation requiring university faculty members to disclose membership in the Communist Party unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (determining that government-directed prayer in public schools violates the First Amendment); *Shelton v. Tucker*, 364 U.S. 479 (1960) (finding Arkansas legislation compelling every teacher to disclose associational ties before hiring to be in violation of his or her right to association); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (reversing a college professor’s contempt conviction for refusing to answer questions about the content of his lectures as an invasion of his academic and political expression rights); *Wieman v. Updegraff*, 344 U.S. 183, 194–98 (1952) (Frankfurter, J., concurring) (finding an Oklahoma statute requiring that teachers take an oath of loyalty to be in violation of the Due Process Clause and specifically noting the special role that teachers play in a democracy); *Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948) (holding that use of public school facilities by religious organizations for the purpose of providing religious instruction violates the First Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (finding that statutes forcing students to salute the flag and recite the Pledge of Allegiance violate the First Amendment); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (invalidating an Oregon statute requiring attendance at public schools and forbidding attendance at private schools); *Bartels v. Iowa*, 262 U.S. 404 (1923) (finding that the Due Process Clause prevents legislation forbidding the teaching of a foreign language); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same)).

Justice Fortas distinguished *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934). *See Tinker*, 393 U.S. at 506 n.2. *Hamilton* held that states may attach certain conditions to attendance at state universities that require persons to violate their religious convictions. *Id.* However, Justice Fortas stated: “The [*Hamilton*] decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees.” *Id.*

40. *Tinker*, 393 U.S. at 507.

41. *Id.* at 509. Scholars have suggested that historically *Tinker* One is the only test routinely applied by courts. *See, e.g.*, Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1042 (2008) (“[V]irtually all the student speech cases applying *Tinker* have focused on its material-and-substantial-disruption prong . . .” (footnote omitted)). Meanwhile, *Tinker* Two appears to have taken on new importance in recent times. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171, 1178 (9th Cir. 2006) (affirming as constitutional the

First Amendment rights to free expression and speech, even within the schoolhouse gate.⁴²

Applying the newly-created rule to the facts of the case, the *Tinker* Court determined that the student expression—wearing black armbands in protest of the Vietnam War—did not interfere with the school’s work or obstruct the rights of other students or teachers.⁴³ Instead, the Court took this opportunity to chastise the school administrators for suppressing expression merely because the expressed idea did not comport with the individual beliefs of the administrators.⁴⁴ Where, as in *Tinker*, the school did not prohibit any other forms of speech, there were no actual or threatened disruptions of classwork, and there were no actual or threatened infringements on the rights of others, school administrators are not justified in suppressing unpopular student expression.⁴⁵

Subsequent cases have widely cited *Tinker* as the leading authority on the contentious issue of whether schools may permissibly regulate on-campus student expression, and it has also been widely applied to regulations of off-campus student expression.⁴⁶ It seems that Justice Fortas foresaw *Tinker*’s application in the off-campus context when he said, “A student’s rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions”⁴⁷ In the years that

decision of school administrators to prohibit a student from wearing a shirt emblazoned with the message “HOMOSEXUALITY IS SHAMEFUL” because it implicated the rights of other students), *vacated*, 549 U.S. 1262 (2007).

42. Justice Fortas stated that the school district “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509. In a particularly revealing footnote, Justice Fortas went so far as to surmise that the school administrators in *Tinker* aimed to suppress this particular demonstration and make known to the public that “the schools are no place for demonstrations.” *Id.* at 509 n.3.

43. *Id.* at 508. The Court stated:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.

Id.

44. *Id.* at 511. “[S]chool officials cannot suppress ‘expressions of feelings with which they do not wish to contend.’” *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

45. *Id.* at 509–11.

46. *See, e.g., Morse v. Frederick*, 551 U.S. 393 (2007) (regulating student speech at an off-campus event that was considered school-approved).

47. *See Tinker*, 393 U.S. at 512–13. Justice Fortas expressly applied the two-pronged *Tinker* rule to the off-campus context:

When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfer[ing] with

followed, the Court narrowed the expansive *Tinker* holding, continuing to walk a fine line between protecting the coveted expression rights enshrined in the First Amendment and insulating the nation's public schools from disruptive or unsafe behavior.⁴⁸

B. Bethel School District No. 403 v. Fraser

Nearly two decades after the landmark *Tinker* decision, the Supreme Court again took up the issue of the extent to which students may freely express themselves *within* the schoolhouse gate.⁴⁹ Chief Justice Burger, writing for the Court, marked a shift in the Court's jurisprudence on student speech rights. The Court upheld the discipline of student Matthew Fraser's "offensively lewd and indecent speech" at a school assembly.⁵⁰ Arguably departing from *Tinker*'s two-pronged test,⁵¹ the *Fraser* Court was far more concerned with allocating significant deference to school administrators tasked with the ultimate responsibility of educating students of the "fundamental values necessary to the maintenance of a democratic political system."⁵²

School administrators suspended Fraser from his public high school for two days⁵³ after his speech at the school assembly.⁵⁴ He delivered his remarks during school hours at a voluntary assembly that approximately 600 students attended.⁵⁵ During the remarks, Fraser referred to another student

the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.

Id. (quoting *Burnside*, 363 F.2d at 749).

48. See *Morse*, 551 U.S. at 393 (regulating student speech at an off-campus event that was considered a school-approved event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (regulating student speech in a school-sponsored newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (regulating vulgar or lewd student speech made while on campus).

49. *Fraser*, 478 U.S. at 675.

50. *Id.* at 685.

51. Conversely, some courts have determined that the Supreme Court's post-*Tinker* jurisprudence marks only narrow exceptions to the otherwise "general rule" established by *Tinker*. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (en banc) ("*Tinker* sets the general rule for regulating school speech, and that rule is subject to several narrow exceptions."); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) ("Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption.")

52. *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

53. Fraser was originally suspended for three days; however, on appeal, pursuant to the school district's grievance procedures, his suspension was reduced to two days. *Id.* at 678-79.

54. *Id.*

55. *Id.* at 677. Most of the students in attendance were approximately fourteen-years-old. *Id.*

“in terms of an elaborate, graphic, and explicit sexual metaphor.”⁵⁶ Additionally, during his remarks the audience was audibly hooting and yelling, and some were imitating the sexual activities that Fraser discussed.⁵⁷ Prior to delivering his remarks, Fraser consulted with several teachers, and at least two advised him against delivering the speech.⁵⁸ The teachers further advised Fraser that the remarks would violate the school’s “disruptive-conduct rule” and that they might result in negative consequences.⁵⁹

Fraser brought suit against the school district.⁶⁰ The district court found for Fraser and held that the punishment infringed on his First Amendment rights.⁶¹ On appeal, the Ninth Circuit upheld the district court’s holding, finding that Fraser’s remarks were indistinguishable from the armbands worn in protest in *Tinker*.⁶² Departing from its strong defense of student speech rights in *Tinker*, the Supreme Court reversed the lower courts, signaling a renewed deference to school administrators in restricting student expression.⁶³

C. Hazelwood School District v. Kuhlmeier

Kuhlmeier marked yet another shift in the Court’s attitude towards student speech, permitting far more deference to school administrators’ decisions than previously permitted under *Tinker* or *Fraser*.⁶⁴ *Kuhlmeier*

56. *Id.* at 678.

57. *Id.* The Court noted that other students in the audience appeared to be “bewildered and embarrassed.” *Id.* Additionally, one teacher reported that because of Fraser’s speech, it was necessary to forego her ordinary lesson and discuss the speech with her students. *Id.*

58. *Id.*

59. *Id.* The school district’s policy stated, “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” *Id.*

60. *Id.* at 679.

61. *Id.* Because of the district court’s finding, Fraser, who had been elected as his school’s commencement speaker, was permitted to deliver remarks at his June 1983 graduation. *Id.*

62. *Id.*

63. *Id.* at 680. While expanding the deference granted to school administrators, *Fraser* does not apply to off-campus student speech. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 317 (3d Cir. 2010) (Chagares, J., concurring in part and dissenting in part) (“*Fraser* does not apply to off-campus speech.” (italics added)), *aff’d in part, rev’d in part*, 650 F.3d 915 (3d Cir. 2011) (en banc). However, the court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District* did note one exception to the *Fraser* limitation. 711 F. Supp. 2d 1094, 1110 n.8 (C.D. Cal. 2010) (“The Court is aware of an unreported case from the Middle District of Pennsylvania that applied *Fraser* to off-campus speech that was posted on the Internet. . . . This Court finds the reasoning in *J.S.* unpersuasive. . . . Furthermore, when [*J.S.*] was reviewed on appeal, the Third Circuit declined to apply *Fraser* to the student’s off-campus speech.” (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07CV585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008))).

64. See Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1302 (2008) (“Scholars typically argue that, as compared to *Tinker*,

gives school administrators broad discretion to regulate or restrict any student speech that may be considered part of a school-sponsored activity.⁶⁵ However, Justice White, writing for the majority, defined the issue as “whether the First Amendment requires a school affirmatively to promote particular student speech.”⁶⁶ Thus, *Kuhlmeier*, while marking a significant shift away from *Tinker*, applies in entirely different circumstances.⁶⁷

The *Kuhlmeier* Court upheld the decision of a high school principal to “censor” the school-sponsored newspaper by removing two pages of articles

Fraser and *Kuhlmeier* mandate increased judicial deference to school authorities and provide less protection for student rights.”).

65. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The Court indicated that the power to restrict student speech under *Kuhlmeier* would not be limited by either of the *Tinker* prongs, and instead created a broad exception to *Tinker* that permits school administration to restrict any speech that is “inconsistent with its ‘basic educational mission.’” *See id.* at 266–67 (quoting *Fraser*, 478 U.S. at 685).

In what may be seen as an about-face by the *Kuhlmeier* Court from the Supreme Court’s previous holding in *Tinker*, the Court clearly stated that judicial intervention in the legitimate decisions of school administration should be few and far between:

This standard is consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. . . . It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so “directly and sharply implicate[d],” as to require judicial intervention to protect students’ constitutional rights.

Id. at 273 (alteration in original) (internal citations and footnotes omitted).

66. *Id.* at 270–71.

67. Justice Brennan dissented, joined by Justices Marshall and Blackmun. *Id.* at 277–91 (Brennan, J., dissenting). He argued that the Court “struck the balance” in deciding *Tinker* and the majority was incorrect to carve out yet another exception to the *Tinker* standard. *Id.* at 280–81. Justice Brennan went further, arguing that *Kuhlmeier*’s holding permits school administrators to suppress student speech because they do not personally agree with it. *Id.* at 280; *see also id.* (“If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could . . . convert[] our public schools into ‘enclaves of totalitarianism’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969))).

Additionally, Justice Brennan refused to accept the distinction drawn by the majority between speech of a personal nature and school-sponsored speech. *Id.* at 282 (“[T]his Court [has not] ever intimated a distinction between personal and school-sponsored speech in any other context.”). He argued that all regulation of speech in public schools must satisfy the *Tinker* test:

Even if we were writing on a clean slate, I would reject the Court’s rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators “greater control” over school-sponsored speech than the *Tinker* test would permit: the public educator’s prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school’s need to dissociate itself from student expression. None of the excuses, once disentangled, supports the distinction that the Court draws.

Id. at 282–83 (citations omitted).

discussing divorce and teenage pregnancy and referencing specific students.⁶⁸ Under the *Kuhlmeier* holding, any “expressive activities that students, parents, [or] members of the public might reasonably perceive to bear the imprimatur of the school” may be regulated by school administration.⁶⁹ Thus, the *Kuhlmeier* Court further expanded the deference given to school administrators under *Fraser* and continued the trend away from the *Tinker* standard.

D. *Morse v. Frederick*

In the most recent, and perhaps most limited,⁷⁰ opinion addressing student speech and public school punishment, the Supreme Court upheld the suspension of a student for displaying a banner promoting drug use during an off-campus school event.⁷¹ Frederick challenged his suspension in court, arguing that the school could not suspend him for exercising his First Amendment rights at an off-campus event.⁷² The Supreme Court rejected Frederick’s argument, finding that, because the banner was unfurled at a school-sanctioned event during normal school hours, and because teachers and administrators were present and were responsible for supervising the students, the speech *did* take place “on-campus.”⁷³ Thus, the limited holding of *Morse* permits school administrators to regulate any on-campus speech (including technically off-campus speech that meets certain criteria such that it will be considered on-campus) that advocates illegal drug use.⁷⁴

Morse is particularly revealing in illustrating the confusion, even among Supreme Court Justices, regarding student speech rights. In his concurring opinion, Justice Thomas detailed the patchwork of precedent applicable to school speech regulations and concluded that *Tinker* remains in operation,

68. *Id.* at 263–66 (majority opinion).

69. *Id.* at 271.

70. The *Morse* Court took extraordinary pains to limit and explain its holding. Perhaps fearful of developing another exception to the *Tinker* standard, the majority and concurring opinions in *Morse* dedicate much of their opinions to defending the Court’s reasoning. The majority details the reasons for not applying prior student speech precedent. See *Morse v. Frederick*, 551 U.S. 393, 405–06 (2007) (instructing that *Kuhlmeier* does not control because the banner Frederick displayed did not bear the school’s imprimatur). Justice Alito’s concurrence further demonstrates the narrowness of the Court’s holding, stressing that *Morse* “stand[s] at the far reaches of what the First Amendment permits.” *Id.* at 425 (Alito, J., concurring).

71. *Id.* at 396, 410 (majority opinion). The banner read “BONG HiTS 4 JESUS,” which the school principal interpreted as advocating and promoting illegal drug consumption. *Id.* at 397–98. The principal directed the students to remove the banner, but Frederick refused. *Id.* at 398. The principal subsequently confiscated the banner and suspended Frederick for ten days. *Id.*

72. *Id.* at 399.

73. *Id.* at 400–01.

74. *Id.* at 410 (Thomas, J., concurring) (“The Court today decides that a public school may prohibit speech advocating illegal drug use.”).

but also noted that it is unclear when or how it operates.⁷⁵ Justice Thomas concluded that the current Supreme Court jurisprudence provides students “a right to speak in schools except when they do not.”⁷⁶

III. THE EVOLVING NATURE OF STUDENT SPEECH IN THE INTERNET AGE

In 1969, when the Supreme Court decided *Tinker*, the Internet was but an experimental pipedream and the schoolhouse gate threshold was easy to identify.⁷⁷ But by the mid-1990s, the Internet became largely accessible to most of the developed world,⁷⁸ and it continues to further embed itself as a staple in nearly every American’s daily life.⁷⁹ In 1969 the problems confronting public schools regarding student speech were smaller in scope

75. *Id.* at 418. Justice Thomas described the increasingly muddled state of the law:

Today, the Court creates another exception [to the *Tinker* rule]. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.

Id. at 418–19 (citations omitted).

76. *Id.* at 418.

77. The Air Force first conceived a network similar to the Internet in 1951, which stemmed from Project Lincoln, an Air Force project to design an early-warning network to protect the United States against a Soviet nuclear bomber attack. See Mitch Waldrop, *DARPA and the Internet Revolution, in 50 YEARS OF BRIDGING THE GAP 78–79* (Apr. 2008), available at <http://www.darpa.mil/WorkArea/DownloadAsset.aspx?id=2554>. They wanted to create a network to connect all the radar surveillance, target tracking, and other data to common computers housed in twenty-three centers across the country. *Id.* at 79. The Air Force envisioned transmitting the data among the data centers over telephone lines. *Id.* The project was successful and resulted in a “continent-spanning system” of data centers capable of simultaneously tracking up to 400 airplanes. *Id.*

However, the Internet as it is today (widely accessible to large populations at a reasonable cost) could not have been envisioned in 1969 when the Court decided *Tinker*. By the mid-1960s, one “couldn’t hope to give anyone a stand-alone personal computer . . . not with the cheapest machines still costing hundreds of thousands of dollars.” *Id.* Thus, due to the prohibitive costs associated with networked computers, they were largely limited to the government, military, and institutions of higher education. See *id.* Additionally, the world’s first online community, Project MAC at the Massachusetts Institute of Technology, was still being developed in the mid-1960s. *Id.* Project MAC included novel ideas, such as online bulletin boards and e-mail. *Id.*

78. In the mid-1990s the Internet growth rate exploded to over 100% per year. See K.G. Coffman & A.M. Odlyzko, *The Size and Growth Rate of the Internet*, AT&T LABS-RESEARCH, 1 (Oct. 2, 1998), available at <http://www.dtc.umn.edu/~odlyzko/doc/internet.size.pdf>.

79. As of May 31, 2011, there were 2,099,926,965 Internet users worldwide. See *Internet World Users by Language: Top 10 Languages*, INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS (May 31, 2011), <http://www.internetworldstats.com/stats7.htm> (last visited Feb. 25, 2012).

and in their ability to disrupt the educational environment or threaten school safety than the problems associated with electronic speech that are confronting—and confounding—courts and school administrators today.⁸⁰

Following the advent of the Internet, the creation and subsequent widespread utilization of social networking has had a radical effect on the ways that Americans of all ages locate and communicate with one another.⁸¹ In particular, younger Americans are generally more comfortable than older generations with viewing and sharing information about themselves and others online.⁸² Recent studies have indicated that more than 87% of Americans between the ages of twelve and seventeen use the Internet, and more than 64% of them create online content in the form of a social networking website, profile, blog, online journal, or in another manner.⁸³

80. For example, the disruption at issue in *Tinker* consisted of several students displaying black armbands to silently express their objections to the Vietnam War. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). Unlike electronic protests against issues important to students or against teachers or school administrators in the form of parody MySpace profiles or otherwise, the protest in *Tinker* could not be viewed after the protest ended and could not be sent or viewed by other students without limitation. See *id.* But see J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07CV585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008) (middle-school student created an online parody profile for her principal from her home computer, including statements that he was a sex addict and pedophile), *aff'd on other grounds*, 593 F.3d 286, 290 (3d Cir. 2010), *aff'd in part, rev'd in part*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 590–92 (W.D. Pa. 2007) (high-school student created a MySpace parody profile for his principal that portrayed him as a marijuana smoker and a bigot), *aff'd*, 593 F.3d 249 (3d Cir. 2010), *aff'd in part, rev'd in part*, 650 F.3d 205 (3d Cir. 2011) (en banc).

81. While there are innumerable methods of networking over the Internet, several prominent websites predominate modern online social networking. Facebook, MySpace, Twitter, and YouTube permit Americans of all ages to view and post pictures, videos, and information (both true and false) about one another. See, e.g., FACEBOOK, <http://www.facebook.com> (last visited Mar. 30, 2012); MYSPACE, <http://www.myspace.com> (last visited Mar. 30, 2012); TWITTER, <http://www.twitter.com> (last visited Mar. 30, 2012); YOUTUBE, <http://www.youtube.com> (last visited Mar. 30, 2012).

82. See Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 1 (2009–2010) (“The world has embraced social networking with a fervor rarely seen.”). Social networking websites have been overwhelmingly embraced by today’s interconnected culture, as well illustrated by the millions of documented users:

In April 2009, Facebook announced that it had over 200 million active users worldwide. In the same month, Twitter, the new kid on the social networking block, reached over 14 million users in the United States. LinkedIn claims over 48 million members worldwide and Plaxo over 40 million. . . . These networks are rapidly becoming a part of everyday life to an increasing number of people . . .

Id. at 1–2.

83. See Caitlin May, “Internet-Savvy Students” and Bewildered Educators: Student Internet Speech is Creating New Legal Issues for the Educational Community, 58 CATH. U. L. REV. 1105, 1105 (2009) (citing Press Release, Pew Internet & American Life Project, More Teens are Creating and Sharing Material on the Internet (Dec. 19, 2007), http://www.pewinternet.org/press_release.asp?r=150).

Online social networking has created new venues for students to express themselves.⁸⁴ On its own, social networking that takes place at off-campus locations cannot be regulated under existing Supreme Court precedent.⁸⁵ However, schools and courts alike have struggled with defining whether, and if so, when, speech conducted in an off-campus online venue can be considered on-campus speech.⁸⁶ As school districts have embraced

84. These new venues also include sites that provide anonymity to students wishing to gossip or spread rumors. See, e.g., Dennis Carter, *Controversial Student Gossip Site Folds*, ECAMPUS NEWS (Feb. 6, 2009), <http://www.ecampusnews.com/top-news/controversial-student-gossip-site-folds/> (describing a controversial and now defunct gossip website offering students a forum to anonymously post salacious comments about one another). JuicyCampus was but one of many sites where students could gossip online. See John A. Byrne, *From Gossip Site Founder to Web Reputation Defender*, CNN MONEY (Oct. 12, 2011), <http://management.fortune.cnn.com/2011/10/12/from-gossip-site-founder-to-web-reputation-defender/> (“[Matt Ivester, JuicyCampus’s founder,] watched in awe and horror as students began posting intimate and often offensive remarks about their peers—including sexual histories, accusations of drug use, and threats of violence.”).

The Supreme Court has set forth two reasons for protecting anonymous speech under the First Amendment: (1) anonymity may encourage authors reluctant to enter the marketplace of ideas for fear of retaliation to do so, and (2) an author is generally “free to decide whether or not to disclose his or her true identity.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995); see also Andrew M. Henderson, *High-Tech Words Do Hurt: A Modern Makeover Expands Missouri’s Harassment Law to Include Electronic Communications*, 74 MO. L. REV. 379, 386 (2009).

85. See *Tinker*, 393 U.S. at 511 (“In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”). Student speech originating off-campus but brought on campus in some manner can be regulated under *Tinker* and its progeny if it (1) substantially interferes with the work of the school or (2) impinges upon the rights of other students. *Id.* at 509. For example, if a student accesses online material on a computer located within the school, the *Tinker* standard may be satisfied. See *Blue Mountain*, 2008 WL 4279517, at *7 (upholding the punishment of a student for off-campus electronic speech that was accessed at least once on a school computer). Additionally, where a paper copy of speech originally produced off-campus was brought on campus, regulation was found to be acceptable. See *id.*

It remains debatable whether school authorities may regulate off-campus student speech that remains off-campus and this Comment will propose a revised *Tinker* test to allow regulation of off-campus expression in some limited circumstances. See *infra* Part V. For an alternative approach, see Benjamin L. Ellison, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 813 (2010) (proposing a test wherein off-campus speech would be protected unless the speaker intends for the speech to reach campus, and the speech actually does reach campus).

The Supreme Court has, however, opined generally on the First Amendment rights implicated by the advent of the Internet. See Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 151 (2003) (“[T]he landmark Supreme Court decision [of *Reno* held] that the Internet should be treated as a public forum for robust discourse, just like newspapers, books, streets, and parks.” (citing *Reno v. ACLU*, 521 U.S. 844 (1997))).

86. See *Blue Mountain*, 2008 WL 4279517, at *7 n.5. Courts have found it particularly difficult to determine whether speech originally made in an off-campus venue can be considered on-campus speech for purposes of disciplining the speaker:

computers and the Internet as fundamental educational tools, they have also struggled with preventing their use for inappropriate purposes, including as conduits for bringing off-campus online expression on campus.⁸⁷

Whereas previous generations of students were forced to affirmatively decide whether to bring their potentially disrupting or threatening speech on campus, today's students need not make such a choice.⁸⁸ Modern cellular telephones provide students with unfiltered access to the Internet at any time and in any place.⁸⁹ Thus, students now have the ability to bring off-campus

We acknowledge that the line between on-campus and off-campus speech is blurred with increased use of the internet and the ability of students to access the internet at school, on their own personal computers, school computers and even cellular telephones. As technology allows such access, it requires school administrators to be more concerned about speech created off campus—which almost inevitably leaks onto campus—than they would have been in years past.

Id.; see also *infra* Part IV.

87. See Vander Broek et al., *supra* note 26, at 1. Scholars have noted the “complex and delicate task” presented to school administrators by the myriad of rules and regulations related to the presence of Internet-enabled computers in the classroom:

The Internet has brought to the classroom's door a fundamental paradox confronting our legal and educational systems. Specifically, students using the Internet must be protected from inappropriate content or predatory practices, while the First Amendment protects the rights of those who speak, write, or convey ideas or display symbols over the Web. One of the Internet's unfortunate byproducts is that in today's digital era, school administrators are being called upon with increasing frequency to balance the use of Internet-based tools that enrich learning against the need to maintain order and a safe learning environment. Balancing these competing concerns is a complex and delicate task.

Id. (internal footnote omitted).

88. See, e.g., *Tinker*, 393 U.S. at 504. John F. Tinker and others prepared to make their declaration against the Vietnam War by wearing black armbands to school on December 16, 1965. *Id.* *Tinker's* facts are illustrative of the time when the protest took place. Conversely, modern student speech can take place in any number of ways and may be brought onto campus by others seeking to share and distribute material, regardless of the declarant's intention. Unlike modern student speech, which can take place via text messaging, e-mail, instant messaging chats, or any other number of online methods, student speech at the time of *Tinker* required an affirmative act by the declarant seeking to bring the speech onto campus. Moreover, unlike student speech in the 1960s, modern electronic speech can be easily shared with a limitless number of people in many places within a matter of seconds.

Alternatively, some scholars have argued that today's students are simply employing a different means to accomplish the same goals as previous generations. See Papandrea, *supra* note 41, at 1036 (“Although social networks, blogs, and text messaging are relatively new technologies, what young people do with them is, at bottom, not that much different from what prior generations did without technology.”).

89. See, e.g., Sam Grobart, *10 Ways to Get the Most Out of Technology*, N.Y. TIMES (Dec. 29, 2010), <http://www.nytimes.com/2010/12/30/technology/personaltech/30basics.html> (promoting the use of “smartphones” due to ease of use and the practical benefits of “having immediate access to your e-mail, photos, calendars and address books, not to mention vast swaths of the Internet, [which] makes life a little easier.”). Additionally, smartphones continue to evolve at a rapid pace, giving students access to even more venues for self-expression through technology and the ability to bring that expression onto campus and share it with their peers. See, e.g., Steve Lohr, *Computers That See You and Keep Watch Over You*, N.Y. TIMES (Jan. 1, 2011), <http://www.nytimes.com/2011/01/02/science/02see.html?pagewanted=all> (describing recent innovations in smartphone technology,

student speech on campus without the school's knowledge and beyond the school's ability to regulate the content brought onto school grounds.⁹⁰ While student speech within public schools can ordinarily be regulated under existing Supreme Court precedent,⁹¹ the Internet has muddled this already unsettled area of the law and presents schools and courts alike with challenges when determining whether and how to regulate off-campus online student speech.⁹² Indeed, the oft-cited schoolhouse gate designation

including an application called "Google Goggles," which allows users to take a photograph with a smartphone and search the Internet for matching photographs); Josh Sunshine, *App Store Beats iTunes to 10 Billion Downloads By 6 Years*, GIGAOM (Jan. 14, 2011, 10:30 AM), <http://gigaom.com/apple/app-store-beats-itunes-to-10-billion-downloads-by-6-years/> (documenting the rapid adoption of mobile phone technology and the increasing pace with which the technology is being consumed compared to previous technological innovations).

90. Most, if not all, school districts have some sort of regulation against the use of cellular telephones during class hours. See Alex Johnson, *Some Schools Rethink Bans on Cell Phones*, MSNBC.COM (Feb. 3, 2010, 9:11 AM), http://www.msnbc.com/id/35063840/ns/technology_and_science-tech_and_gadgets/t/some-schools-rethink-bans-cell-phones.html (noting that 69% of schools in America have banned cell phone "use or even possession on school grounds"); see also *Price v. N.Y.C. Bd. of Educ.*, 855 N.Y.S.2d 530, 535 (App. Div. 2008) (stating that cell phone use at school can seriously disrupt the school environment). While outright bans on cell phone possession within schools have been suggested and even adopted in some school districts, fears for student safety in a post-Columbine environment have made this approach difficult to implement. See Anemona Hartocollis, *School Cellphone Ban Violates Rights of Parents, Lawsuit Says*, N.Y. TIMES (July 14, 2006), <http://www.nytimes.com/2006/07/14/nyregion/14phones.html> (describing a lawsuit filed by parents arguing that a total cell phone ban in New York City public schools interferes with the parents' constitutional rights to keep their children safe and raise them as they wish); see also *infra* notes 159–64 and accompanying text. Most school districts have opted for policies short of an outright ban. See, e.g., INDEP. SCH. DIST. NO. 1, LEWISTON SCHOOL DISTRICT ELEMENTARY HANDBOOK 12, available at <http://www.lewistonschools.net/Handbooks/ElementaryHandbook.pdf> ("If a child brings a cell phone to school, it must be turned off when he/she arrives at school and stored in a backpack or left with a designated adult.").

91. See *supra* Part II.

92. See Victoria Kim, *Suit Blends Internet, Free Speech, School*, L.A. TIMES (Aug. 3, 2008), <http://articles.latimes.com/2008/aug/03/local/me-youtube3> ("[T]he Web has catapulted such fights [among students] to a new dimension, where slander becomes far more public and can be forwarded and reproduced in a matter of seconds.").

School administrators may be reluctant to regulate student speech under the current unsettled law. However, they remain responsible for ensuring the safety of their students and maintaining an effective learning environment. See *Tinker*, 393 U.S. at 507; see also *infra* notes 209–16 and accompanying text. Courts need Supreme Court guidance to clarify the state of the law and relieve lower courts of a burgeoning caseload and muddled precedent. In turn, this will give school administrators the clarity they need when developing such policies. See *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009) ("The various and inconsistent outcomes among lower courts in attempting to apply precedent to this emerging area of law necessitate action by higher courts in determining specifically what standards apply to Internet speech." (citing Brian Oten, *Disorder in the Courts: Public School Student Expression on the Internet*, 2 FIRST AMEND. L. REV. 403, 422 (2004))), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir. 2011).

trumpeted in *Tinker* has all but disappeared in a modern world dominated by technology that knows no physical boundaries or demarcations.⁹³

IV. LOWER COURT CONFUSION

Supreme Court guidance⁹⁴ on restricting student speech may not be applicable to off-campus electronic speech, leaving the lower courts to craft opinions without any definitive idea as to the controlling law.⁹⁵ Applying a patchwork of varying interpretations of *Tinker* and its progeny, the lower district and circuit courts have issued opinions generally fitting within one of two categories—geographic nexus or impact upon campus.⁹⁶

A. *Geographic Nexus Application of Tinker and Its Progeny*

Many courts have taken a simple “geographic nexus” approach when analyzing whether school administrators have the constitutional authority to punish students for their speech or expression. Courts using this geographic nexus approach require that the student expression occur on the actual school premises in order to be regulated by school authorities.⁹⁷ The Fifth Circuit adopted this approach in *Porter v. Ascension Parish School Board*, holding that a school district could not punish a student for a violent drawing depicting his school “under a state of siege by a gasoline tanker truck,

93. See Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220–21 (3d Cir. 2011) (en banc) (Jordan, J., concurring) (“For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.”).

94. See *supra* Part II.

95. See Papandrea, *supra* note 41, at 1054 (“All four of the Court’s student speech cases involve situations where the student expression at issue either took place on school grounds or during a school-sanctioned activity off campus (*Morse*, *Fraser*, and *Tinker*) or was considered school-sanctioned speech (*Hazelwood*).” (internal footnotes omitted)); see also Caplan, *supra* note 85, at 140 (“[T]he *Tinker* standard has fallen on hard times in the lower courts.”). Since *Tinker*, courts have struggled to strike a balance “between safeguarding students’ First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.” *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc).

The lower court holdings are numerous. For the purpose of this Comment, because the majority of online student speech cases have been decided within the past ten years, and because of the rapid adoption of technology among students within that same timeframe, only lower court holdings from the past ten years will be considered in this Part.

96. This categorization was derived from and inspired by the court’s opinion in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010).

97. Additionally, some courts determine that speech regulations that do not bear a sufficient nexus to the physical school campus are unconstitutionally overbroad. See, e.g., *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003).

missile launcher, helicopter, and various armed persons.”⁹⁸ The student created the drawing off-campus two years before his suspension and his younger brother brought it onto campus without his knowledge two years later.⁹⁹ Finding that the student took “no action that would increase the chances that his drawing would find its way to school,” the Fifth Circuit found the student’s off-campus speech was protected and the student could not be punished for it.¹⁰⁰

The geographic nexus test becomes more difficult for school administrators to apply when the speech is electronic.¹⁰¹ In the recent *Layshock ex rel. Layshock v. Hermitage School District* case, the Third Circuit declined to find a sufficient nexus between a student’s off-campus electronic speech and the physical school campus.¹⁰² An en banc panel of

98. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611 (5th Cir. 2004). The drawing also contained “obscenities and racial epithets directed at characters in the drawing, a disparaging remark about EAHS principal Conrad Braud, and a brick being hurled at him.” *Id.*

99. *Id.* at 611–12. It appears that the younger brother showed the drawing to his school bus driver, Diane McCauley. *Id.* at 611. While showing her the sketchpad, the brother stated, “Miss Diane, look, they’re going to blow up EAHS.” *Id.* The bus driver confiscated the sketchpad, turned it over to the school principal, and punishment proceedings followed. *Id.* at 611–12.

100. *Id.* at 615. The student created the drawing two years prior, and it was stored in a closet within his home for that entire period. *Id.* at 611. The punished student made no effort to bring the drawing to school; rather he was entirely unaware that the drawing had left his closet until he was told about it by the school principal. *Id.* at 611–12. The court explained that “[t]his is not exactly speech on campus or even speech directed at the campus.” *Id.* at 615. Thus, the court indicated that students who participate in off-campus speech, but later move that speech on campus, can be punished for that speech. *Id.* In such an instance, the speech would appear to permeate the so-called “schoolhouse gate.”

101. Compared with speech that occurs via tangible mediums—for example, speech on a sketchpad like in *Porter*—electronic speech cannot be so easily analyzed. For instance, the *Porter* court easily applied the geographic nexus line of reasoning to determine whether or not the declarant (not his brother) brought, or intended to bring, the sketchpad onto the school campus. *Id.* The speech on the sketchpad in *Porter* was confined to that medium. Electronic speech, conversely, can be brought to the school campus via many mediums and may be instantly accessed, distributed, or copied at any time during the school day by the declarant or others. Thus, electronic speech has confounded courts attempting to apply the geographic nexus line of reasoning due to the difficulty in establishing a true geographic nexus between the intangible electronic expression and the school’s physical campus.

102. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 260, 264 (3d Cir. 2010), *aff’d in part, rev’d in part*, 650 F.3d 205 (3d Cir. 2011) (en banc). The school district argued that there was a sufficient nexus between the student’s speech and the school’s physical campus:

[A] sufficient nexus exists between Justin’s creation and distribution of the vulgar and defamatory profile of Principal Trosch and the School District to permit the School District to regulate this conduct. The “speech” initially began on-campus: Justin entered school property, the School District web site, and misappropriated a picture of the Principal. The “speech” was aimed at the School District community and the Principal and was accessed on campus by Justin. It was reasonably foreseeable that the profile would come to the attention of the School district and the Principal.

the Third Circuit subsequently affirmed the decision.¹⁰³ The school district in *Layshock* suspended a student for ten days¹⁰⁴ after he created a parody MySpace profile representing his high school principal Eric Trosch in a defamatory and arguably vulgar light.¹⁰⁵ While the student created the profile at an off-campus location, he utilized school computers to access the profile at least twice, and he copied the profile photo of Principal Trosch from the school district's website.¹⁰⁶ Nonetheless, the Third Circuit determined that the student's expressive conduct did not disturb the classroom environment and was not related to any school-sponsored event.¹⁰⁷ Thus, in the absence of any legitimate nexus between the expressive conduct and the actual school campus, the school could not punish the student for his conduct.¹⁰⁸

In *Layshock*, the school district made a second claim that the student's expressive conduct could be treated as on-campus speech because it "was aimed at the School District community and the Principal."¹⁰⁹ However, the Third Circuit summarily rejected the school district's argument, stating, "[O]ur willingness to defer to the schoolmaster's expertise in administering

Id. at 259 (citing Brief of Petitioner-Appellant at 9, *Layshock*, 593 F.3d 249). The Third Circuit rejected this contention. *Id.* at 264.

103. *Layshock*, 650 F.3d 205.

104. In addition to the ten-day suspension, the student was forced to attend classes in the Alternative Education Program for the remainder of the school year, banned from extracurricular activities (including academic extracurricular activities), and was not permitted to participate in his high school commencement ceremony. *Layshock*, 593 F.3d at 254.

105. *Id.* at 252–54. The parody MySpace profile included a photo of Principal Trosch and "bogus" answers to a survey. *Id.* at 252. Among the contents of the profile, the Third Circuit detailed some of the answers that the student posted online in response to a survey, including responses alleging that Principal Trosch smoked marijuana, consumed pills, stole a "big keg," was a "big whore," shoplifted from K-Mart, and consumed illegal drugs. *Id.* at 252–53. In addition, the student listed "Transgender" and "Appreciators of Alcoholic Beverages" as Principal Trosch's interests. *Id.* at 253.

106. *Id.* at 252–53.

107. *Id.* at 251.

108. *Id.* at 251–52, 258–59 ("[I]t is important to note that the district court found that the [School] District could not 'establish[] a sufficient nexus between Justin's speech and a substantial disruption of the school environment' . . ." (citing *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007))). Additionally, in a particularly strongly worded statement, the Third Circuit stressed the dangers of permitting school administrators to regulate off-campus student speech:

It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the [School] District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the [School] District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

Id. at 260.

109. *Id.*

school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.”¹¹⁰

B. Impact Upon Campus Application of Tinker and Its Progeny

Because the application of the geographic nexus line of reasoning has posed significant difficulties for courts when it comes to electronic off-campus student speech, many courts have used a different approach—analyzing the impact that the student’s expressive conduct has on the campus, regardless of whether the speech is made on, or enters onto, the physical school campus.

Inspired by the two-part *Tinker* standard,¹¹¹ courts such as the Third Circuit in *Blue Mountain* have upheld the regulation of off-campus student expression where it poses a substantial disruption to the school’s activities.¹¹² In *Blue Mountain*, an honor roll student was suspended following her creation of a parody MySpace profile representing her middle school principal James McGonigle.¹¹³ The student created the profile at an off-campus location, it was viewed off-campus by approximately twenty-two students,¹¹⁴ and was not viewed on school computers by any students.¹¹⁵ However, the Third Circuit upheld the punishment of the student not because it actually substantially disrupted the school

110. *Id.* at 263 (alteration in original) (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044–45 (2d Cir. 1979)).

111. *See supra* Part II.A.

112. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *aff’d in part, rev’d in part*, 650 F.3d 915 (3d Cir. 2011) (en banc). The en banc *Blue Mountain* decision is discussed *infra* at Part IV.C.

113. *See Blue Mountain*, 593 F.3d at 290. Unlike the parody MySpace profile in *Layshock*, this profile “did not identify McGonigle by name, school, or location, but instead created the page to appear to be a self-portrayal of a middle school principal named ‘m-hoe=].’” *Id.* at 291. In the “Interests” section, the student listed: “General detention. being a tight ass. riding the fraintain. spending time with my child (who looks like a gorilla). baseball. my golden pen. . . . hitting on students and their parents.” *Id.* (errors in original).

114. The student testified that she originally made the profile viewable to the public; however, she quickly made it “private,” such that only students that she approved could view the profile and its contents. *Id.* at 292. The student granted access to approximately twenty-two other students. *Id.*

115. *Id.* When Principal McGonigle learned of the profile, he asked a student identified by the court as “B” to determine who created it and to bring him a printed copy of the profile. *Id.* McGonigle stated that to the best of his knowledge, the printed copy B brought him was the only copy that ever actually physically entered the school’s campus. *Id.* Additionally, school computers automatically blocked the MySpace website, therefore ensuring no students viewed the profile on school computers. *Id.* Of course students with smartphones on campus could still view the profile.

environment,¹¹⁶ but because it “*threatened* to substantially disrupt” the school environment.¹¹⁷

In a lengthy dissent from the First Amendment ruling, Judge Chagares placed the blame for any disruption caused within the school environment on the school administrators themselves.¹¹⁸ He feared that holdings under the “impact upon campus” line of reasoning set a dangerous precedent.¹¹⁹ Noting the absolute absence of Supreme Court guidance on this issue, the dissent argued that “[n]either the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored and that caused no substantial disruption at school.”¹²⁰ Worrying that decisions such as *Blue Mountain* confer “dangerously overbroad censorship discretion” upon school administrators, the dissent emphasized the need for a new standard.¹²¹

Another recent case in the Central District of California, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, found that school administrators could regulate off-campus student speech where the speech either threatens violence or has posed, or foreseeably could pose, a substantial disruption to the school environment.¹²² In *Beverly Hills Unified*, several students met at an off-campus location and recorded a video discussing a classmate, C.C., in a derogatory and insulting manner.¹²³ After uploading the video recording onto YouTube, J.C. notified a number of her classmates and personally notified C.C. that she had posted the video.¹²⁴

116. *Id.* at 299. The court cited the Second Circuit to support its assertion that no showing of an actual disruption needs to be made to justify a restraint on student speech. *Id.* (describing as “misguided” the idea “that *Tinker* requires a showing of actual disruption to justify a restraint on student speech” (citing *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008))).

117. *Id.* at 308 (emphasis added). The Third Circuit cited threats including the profile’s references to Principal McGonigle’s “interest or engagement in sexually inappropriate behavior and illegal conduct.” *Id.*

118. *See id.* at 301 n.7. It does appear that Principal McGonigle sought out information about the MySpace profile that had not, to the best of his knowledge, ever been brought onto the school’s campus. *Id.* at 291; *see also supra* note 115.

119. *See Blue Mountain*, 593 F.3d at 308 (Chagares, J., concurring and dissenting in part).

120. *Id.*

121. *See id.*

122. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1111–12 (C.D. Cal. 2010). It has been argued that this case is the first case involving student speech aimed at another student. *See* Nancy Willard, *There Is No Constitutional Right to be a Cyberbully: Analysis of J.C. v. Beverly Hills Unified School District*, CTR. FOR SAFE & RESPONSIBLE INTERNET USE, 6 (Dec. 16, 2009) [hereinafter Willard, *Cyberbully*], available at <http://csriu.org/documents/documents/JCcyberbullyingcase.pdf> (“There have not been any other cases involving speech targeting other students.”).

123. *See Beverly Hills Unified*, 711 F. Supp. 2d at 1098. In the video, one of the students stated that C.C. was a “slut” and was “spoiled.” *Id.* The video was laced with profanity and sexual innuendo about C.C. *Id.* Plaintiff J.C. could be heard encouraging her fellow peers to discuss C.C. further. *Id.*

124. *Id.* J.C. sent the link to five to ten of her classmates. *Id.*

The following day J.C. was suspended for her participation in the making of the video.¹²⁵ J.C. filed suit,¹²⁶ arguing that the speech at issue did “not take place on school grounds, at a school function, or by means of school resources, [and therefore] a school cannot punish [J.C.] without violating her First Amendment rights.”¹²⁷

In its ruling, the *Beverly Hills Unified* court declared that “any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school.”¹²⁸ Despite this finding, the court nonetheless ruled for J.C., finding that “there was no substantial disruption, or reasonably foreseeable risk of substantial disruption, of school activities as a result of the video, and thus, discipline of [J.C.] violated the First Amendment.”¹²⁹ Thus, despite acknowledging the school district’s “noble” intentions in punishing J.C. for her conduct,¹³⁰ the court ultimately declined to allow the school to regulate student speech simply to protect another vulnerable student.¹³¹

125. *Id.* at 1099. The school suspended J.C. for two days for her participation in the video production after C.C. reported it to her school counselor. *Id.* at 1098–99. C.C. was upset and informed her school counselor that she did not want to return to class. *Id.* J.C.’s prior disciplinary history may have been a factor in determining her suspension for the video’s production. *See id.* at 1099. In April 2008, approximately one month before J.C. produced the video, she was suspended for secretly videotaping her teachers on the school campus. *Id.* The record is not clear whether these prior acts contributed to her punishment.

126. J.C. filed suit through her father, who also represented her in the case. *Id.* at 1097.

127. *Id.* at 1105 (quoting Plaintiff’s Motion for Summary Adjudication at 8, J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (No. CV08-03824 SVW)).

128. *Id.* at 1107. In so holding, the court also considered the geographic nexus line of reasoning. *See id.*; *see also supra* notes 97–110 and accompanying text. The *Beverly Hills Unified* court analyzed several Second Circuit cases approaching the geographic nexus line of reasoning and found that, while a geographic nexus finding was not required under any binding Ninth Circuit precedent, there was nonetheless a nexus between J.C.’s speech and the actual school campus. *See Beverly Hills Unified*, 711 F. Supp. 2d at 1108–10. Some facts pointing towards a geographic nexus include the fact that the video was viewed within the school, J.C. told other students about the video, and the speech was such that a parent would likely bring it to the school administrators’ attention upon discovering the video posted on a publically available website. *See id.* at 1108–09.

129. *Beverly Hills Unified*, 711 F. Supp. 2d at 1094.

130. *Id.* at 1123. The court recognized the likelihood that the school administrators were well-intentioned in taking disciplinary action against J.C.: “The Court accepts that C.C. was upset, even hysterical, about the YouTube video, and that the School’s only goal was to console C.C. and to resolve the situation as quickly as possible. Unfortunately for the School, good intentions do not suffice here.” *Id.* at 1122.

131. *See id.* at 1123. The court was clear to base its holding solely in legal reasoning and not on any psychological harm C.C. may have suffered: “[T]he Court is not aware of any authority . . . that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This Court declines to be the first.” *Id.*

C. *The Recently Resolved Third Circuit Intra-Circuit Split*

Perhaps the most glaring demonstration of the confusion that off-campus Internet speech has caused the courts lies in the recently resolved intra-circuit split within the Third Circuit.¹³² Upon rehearing the conflicting *Layshock* and *Blue Mountain* cases en banc,¹³³ the court remained nearly equally divided regarding how, or even if, *Tinker* and its progeny apply to online student expression originating beyond the “schoolhouse gate.”¹³⁴ However, the majority of the *Blue Mountain* en banc panel ultimately determined that online student expression originating off campus cannot be regulated by school administrators where there is no reasonably foreseeable substantial disruption of, or material interference with, the operations of the school.¹³⁵ Continuing the trend of ignoring, or, at the very least, marginalizing *Tinker Two*, the en banc panel focused solely on *Tinker One* (the “substantial and material disruption” prong) in its analysis.¹³⁶ The result was a deeply divided en banc panel of the Third Circuit and very little, if any, clarification in the state of the law.¹³⁷

The eight-member majority’s opinion, focusing solely on the actual or foreseeable disruption to the school environment that the student speech did or could cause, ruled a regulation on student expression violative of the First Amendment because the speech at issue “could not reasonably have led school officials to forecast [a] substantial disruption in school.”¹³⁸ While recognizing that “the precise issue” of off-campus electronic student expression was one of first impression for the Third Circuit, the en banc court relied on *Tinker* and its progeny to establish a rule requiring school officials to “forecast substantial disruption in school” before they may

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

133. *See supra* notes 102–10 (discussing *Layshock*); *supra* notes 112–21 (discussing *Blue Mountain*). The Third Circuit reheard both *Layshock* and *Blue Mountain* en banc, however only the *Blue Mountain* decision garnered a split decision. *See Blue Mountain*, 650 F.3d 915; *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc) (resolving the case on its facts and limited by the school district’s concession that *Tinker* did not apply to the student’s conduct).

134. *See Blue Mountain*, 650 F.3d at 920; *see also Layshock*, 650 F.3d at 220 (Jordan, J., concurring) (“[T]here remains an issue of high importance on which we are evidently not agreed and which I note now, lest there be any misperception that it has been resolved by either *J.S.* or our decision here. The issue is whether the Supreme Court’s decision in [*Tinker*] can be applicable to off-campus speech.”).

135. *Blue Mountain*, 650 F.3d at 933.

136. *Id.* at 923–24, 930.

137. In fact, the Third Circuit’s en banc decision created a split with the Second Circuit. *Compare id.* at 950 (Fisher, J., dissenting) (“Our decision today causes a split with the Second Circuit.”), with *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35–36 (2d Cir. 2007) (determining that off-campus student expression on the Internet considered hostile and offensive and directed at a school official constituted a substantial disruption of the classroom environment under *Tinker*).

138. *Blue Mountain*, 650 F.3d at 920.

permissibly regulate any student expression, especially if it originates off campus.¹³⁹

In concluding, the majority indicated its apprehension in permitting school administrators wide discretion to regulate student speech originating off campus, and held to the “logic and letter” of *Tinker* and its progeny in forbidding the regulation of student expression originating off campus.¹⁴⁰ However, the court noticeably avoided discussion of whether *Tinker* and its progeny are the sole basis for the regulation of electronic student expression, and whether a case with less attenuated geographic ties to the actual school campus would find solution in the majority’s holding.¹⁴¹

In a concurring opinion, five judges took issue with the majority’s failure to address whether *Tinker* applies to electronic student expression originating at an off-campus location.¹⁴² Ultimately, the concurring judges concluded that *Tinker* cannot be applied to regulate speech originating outside of the so-called “schoolhouse gate.”¹⁴³ While noting the distinct division among the lower courts in how or whether *Tinker* applies to off-campus student expression,¹⁴⁴ the concurring opinion made a compelling

139. *Id.* at 925. In addition, the court noted that “*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance” to justify regulation. *Id.* at 926 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001)). The court’s tone appears to signal its apprehension about the regulation of electronic speech in this manner.

140. *Id.* at 933. The majority explained that to hold otherwise would “significantly broaden school districts’ authority over student speech and would vest school officials with dangerously overbroad censorship discretion.” *Id.*

141. *See id.* at 936 (Smith, J., concurring) (“[T]he majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place.”). The majority did note that the district court briefly mentioned *Tinker Two* in a footnote, stating, “the protections provided under *Tinker* do not apply to speech that invades the rights of others.” *See id.* at 924 (majority opinion); *see also* J.S. *ex rel.* *Snyder v. Blue Mountain Sch. Dist.*, No. 3:07CV585, 2008 WL 4279517, at *6 n.4 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)), *aff’d on other grounds*, 593 F.3d 286, 290 (3d Cir. 2010), *aff’d in part, rev’d in part*, 650 F.3d 915 (3d Cir. 2011) (en banc). However, the en banc panel did not further address this portion of the *Tinker* test. The court may have been well served by analyzing the facts of this case under *Tinker Two*. *See infra* Part V.

142. *Blue Mountain*, 650 F.3d at 936 (Smith, J., concurring).

143. *Id.* at 936–37 (“[T]he First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.”).

144. *See id.* at 937. *Compare* *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 620 (5th Cir. 2004) (finding that *Tinker* does not apply to off-campus student expression), *Thomas v. Bd. of Educ.*, *Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050, 1053 n.18 (2d Cir. 1979) (distinguishing *Tinker* in a case involving off-campus expression), *and* *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986), *with* *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 & n.4 (2d Cir. 2007) (holding that *Tinker* applies to off-campus expression in certain circumstances), *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1104, 1107 (C.D. Cal. 2010) (same), *and* *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 454–55 (W.D. Pa. 2001).

argument that *Tinker* cannot cross the schoolhouse gate.¹⁴⁵ It is perhaps telling of the ongoing debate surrounding this issue that the five concurring judges refused to apply the majority’s reasoning, and instead argued that *Tinker* may not apply to off-campus expression in any circumstances in order to avoid creating precedent with “ominous implications.”¹⁴⁶

A sizeable six-judge dissent vigorously argued against the majority’s application of *Tinker* One to the facts of the case, and warned that its decision “leaves schools defenseless to protect teachers and school officials against such [vulgar and obscene] attacks and powerless to discipline students for the consequences of their actions.”¹⁴⁷ Notably absent from the dissent (and from the majority and concurring opinions) is any discussion of *Tinker* Two.¹⁴⁸ Rather, the dissent argued that the majority’s analysis of the facts at bar did present the type of speech causing a material and substantial disruption that *Tinker* permits school administrators to regulate.¹⁴⁹ Rather than establishing clear precedent, the Third Circuit seemed to continue the trend of muddled and difficult-to-follow case law regarding electronic student speech that originates off campus.¹⁵⁰ The Third Circuit’s en banc *Blue Mountain* decision only further demonstrates the need for Supreme Court clarification on this area of the law.

Regardless of whether courts apply the geographic nexus approach or the impact upon campus approach, inconsistent holdings—like the Third and Second Circuit’s recent decisions—will continue unless the Supreme Court provides guidance (guidance that will not be forthcoming any time soon as the Court recently denied certiorari in the *Blue Mountain* case out of the Third Circuit).¹⁵¹ The solution must respect bedrock constitutional rights,¹⁵²

145. *Blue Mountain*, 650 F.3d at 937 (Smith, J., concurring) (“In my view, the decisions holding that *Tinker* does not apply to off-campus speech have the better of the argument.”).

146. *See id.* at 939 (“Applying *Tinker* to off-campus speech would create a precedent with ominous implications.”).

147. *Id.* at 941 (Fisher, J., dissenting).

148. *See id.* (noting only that the majority’s “holding severely undermines schools’ authority to regulate students who ‘materially and substantially disrupt the work and discipline of the school’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))).

149. *See id.* at 943–52.

150. *See id.* at 952 (“I fear that our Court has adopted a rule that will prove untenable.”).

151. While necessary, the Supreme Court continues to decline to accept certiorari in electronic student speech cases. *See Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (Jan. 17, 2012) (denying certiorari); *see also Doninger v. Niehoff*, 594 F. Supp. 2d 211, 223–24 (D. Conn. 2009) (“First Amendment jurisprudence will need to evolve in order to address this new environment [T]he contours of the law in this area are still unclear”), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir. 2011). “If courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators . . . to predict where the line between on- and off-campus speech will be drawn in this new digital era.” *Doninger*, 594 F. Supp. 2d at 224.

affirm the special requirements demanded by the educational environment to protect student safety,¹⁵³ and be clearly and easily applied by students and school administrators alike.

V. TINKERING WITH THE TEST: COURTS SHOULD ONLY APPLY
TINKER TWO

Modern times call for a modern approach to student speech regulation that protects the safety of students and their constitutional rights while balancing conflicting concerns regarding school safety and the physical and psychological well-being of students.¹⁵⁴ A standard that permits public school administrators to regulate only student expression that represents a threat to the physical and psychological safety of a student or students (or teacher, staff member, or otherwise) does just that.¹⁵⁵

152. Students retain constitutional rights, even within the schoolhouse gate, and any future standard must continue to adequately respect those rights. *See Tinker*, 393 U.S. at 511 (“Students in school as well as out of school are ‘persons’ under our Constitution.”).

153. *See infra* Parts V.A., V.C.; *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (noting that the rights of students “must be ‘applied in light of the special characteristics of the school environment’” (quoting *Tinker*, 393 U.S. at 506)). The special characteristics of the school environment include “increasing school violence and government oversight,” and the school’s “compelling interest in acting quickly to prevent violence on school property.” *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007); *see also* *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (“School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.”).

Furthermore, following the passage of the No Child Left Behind Act of 2001, school districts gained even further incentive to protect school safety. The Act requires every public school receiving federal education funding to allow students attending persistently dangerous schools or schools where they have been victims of violent crime to transfer to a different school that they consider safe. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, tit. IX, § 901, 115 Stat. 1425, 1984 (2002).

154. *See, e.g.*, Tuneski, *supra* note 6, at 139–40 (“Since the landmark decision in *Tinker v. Des Moines Independent Community School District*, courts have grappled with the challenge of protecting the rights of students to speak freely off-campus while simultaneously preserving the authority of school officials to protect the school environment from disruption. . . . Today, the threat of disruption from off-campus student speech has risen significantly because of the advent of the internet and continued efforts to integrate the medium into the classroom setting.” (italics added) (internal footnotes omitted)); *see also* *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879–80 (7th Cir. 2011) (“A school has legitimate responsibilities, albeit paternalistic in character, toward the immature captive audience that consists of its students, including the responsibility of protecting them from being seriously distracted from their studies by offensive speech during school hours.”).

155. This standard represents only *Tinker Two*. *See supra* Part II.A. For the problems with applying *Tinker One* to modern electronic student speech, *see infra* Part V.B. *See also* Pike, *supra* note 5, at 1005 (“[I]f the First Amendment is to be taken at all seriously, the school’s response [to

A. *Context: School Administrator Concerns Over Student Safety and Well-Being*

School administrators, torn between protecting student health and safety and other students' constitutional rights, are becoming increasingly inundated with a variety of differing instructions regarding student speech regulation from a host of sources. Social activist groups and the news media are pressuring school administrators to prevent suicides prompted by bullying.¹⁵⁶ State legislatures are imposing regulations on school administrators in an effort to prevent harmful bullying.¹⁵⁷ District and circuit courts are promulgating a variety of opinions that are contrary to Supreme Court precedent concerning student speech regulation.¹⁵⁸ One can see how difficult it is for the average school administrator to interpret and apply these various, inconsistent, and ever-evolving mandates and how evident the need is for the clarity that a single Supreme Court opinion could offer.

1. *Effects of Columbine, Bullying, and Harassment*

Just as evolving technology has created perplexing issues for school administrators in regulating student speech,¹⁵⁹ the physical and emotional safety of public school students has become an issue of paramount importance among American school administrators. Violence associated with bullying has been documented in public schools as far back as 1974,¹⁶⁰ and many remember the tragedies that occurred at Columbine High School,¹⁶¹ Virginia Tech University,¹⁶² and hundreds of other schools

off-campus speech that creates a hostile on-campus environment] cannot be to discipline those who have a very natural right to dislike and, for that matter, snub their peers.”).

156. See *infra* notes 165–67 and accompanying text.

157. See *infra* notes 168–77 and accompanying text.

158. See *supra* Part IV; *infra* notes 178–93 and accompanying text.

159. See *supra* Part IV.

160. See U.S. SECRET SERVICE & U.S. DEP'T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 47 (July 2004), available at <http://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf> (detailing thirty-seven “incidents of targeted school violence” between 1974 and 2000); VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL PRESENTED TO GOVERNOR Kaine, COMMONWEALTH OF VIRGINIA, at L-8 to L-11 (Aug. 2007) (detailing eighteen incidents of targeted school violence between 2000 and 2007).

161. See Jerald J. Block, *Lessons from Columbine: Virtual and Real Rage*, 28 AM. J. FORENSIC PSYCHIATRY, no. 2, 2007 at 1. The 1999 massacre at Columbine High School in Columbine, Colorado was one of America's worst school violence incidents. *Id.* (“In a pre-9/11 world, the immensity of the terror was startling.”). The massacre resulted in the deaths of twelve students, one teacher, and the two perpetrators; twenty-four others were wounded. *Id.*

162. See VA. TECH REVIEW PANEL, *supra* note 160, at 5. On April 16, 2007, a senior student at Virginia Polytechnic Institute and State University shot and killed thirty-two students and faculty members, and injured another seventeen in one of the deadliest school shootings in U.S. history. *Id.*

throughout the nation.¹⁶³ As schools and communities have worked diligently to ensure such tragedies are never repeated, they have often clashed with advocates of constitutional protections who cry censorship.¹⁶⁴

Most recently, schools have been increasingly concerned with the unexpected rise of bullying (more specifically, cyberbullying)¹⁶⁵ within public schools.¹⁶⁶ A recent rash of student suicides has drawn much-needed attention to bullying within America's public schools and brought forward serious questions regarding the school administrator's ability or duty to protect America's students.¹⁶⁷ Within this context, school administrators are

163. See THE NAT'L SCH. SAFETY CTR., REPORT ON SCHOOL ASSOCIATED VIOLENT DEATHS 48–49 (2010), available at <https://docs.google.com/viewer?a=v&pid=sites&srcid=c2Nob29sc2FmZXR5LnVzIG5zc2N8Z3g6NWFlZDdjZjBjMGY1Yjc3Mw> (documenting 468 school associated violent deaths between 1992 and 2010). The report identified school associated violent deaths—defined as “any homicide, suicide, or weapons-related violent death in the United States in which the fatal injury occurred” at school, on the way to school, or at a school-sponsored event—in all fifty states. *Id.* at 1, 49.

164. See Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1091 (2003) (“Quite simply, the events at Columbine gave high school administrators all the reasons—legitimate or illegitimate—they needed to trounce the First Amendment rights of public school students in the name of preventing violence. The first wave of censorship cases that swelled up in the year immediately following Columbine is now well documented. But the fear of Columbine-like violence that gave rise to that wave has not subsided in the years since. As *The Washington Post* observed in December 2002, many school administrators across the country ‘are still on edge’ since the tragedy at Columbine High School.” (internal footnotes omitted)). It has also been suggested that the events at Columbine High School, and others like it, are now used as justification to suppress any controversial expression. See *id.* at 1095 (“It could be that Columbine provided a ready excuse to justify restricting other forms of disagreeable student expression, not simply those with an allegedly violent theme or intimidation.”).

165. Cyberbullying has been defined as “the use of electronic communication technologies to intentionally engage in repeated or widely disseminated acts of cruelty towards another that results in emotional harm.” Willard, *School Response*, *supra* note 22, at 1.

166. See Cat Koo, *The High Price of Bullying in the US*, BBC (Oct. 25, 2010, 8:11 AM), <http://www.bbc.co.uk/news/world-us-canada-11618079> (finding that approximately twenty percent of American high school students report experiencing “repeated, intentional bullying” at school). While bullying has been a problem in schools throughout history, technology has had an amplifying effect on that bullying, causing it to be more pervasive and potentially more fatal. See *id.* (identifying several instances of young American students committing suicide due to “relentless” bullying and cyberbullying); see also *id.* (“As younger generations dive headfirst into a kaleidoscope of digital media that their parents did not grow up with, the voice of a bully has the ability to be amplified.”).

167. Recent months have tragically seen a rash of student suicides. At high schools and college campuses, students are confronting the reality that their words can adversely impact the lives of their peers. See, e.g., Erik Eckholm & Katie Zezima, *Questions for School on Bullying and a Suicide*, N.Y. TIMES (Apr. 1, 2010), <http://www.nytimes.com/2010/04/02/us/02bully.html?pagewanted=all> (detailing the suicide of a high school student following three months of “taunt[ing] and threat[s],” and the acrimony following the suicide regarding the school administrator's response and prevention efforts). Especially in an era when increasing technology advancements allow one student's words

increasingly pressed between protecting their students' physical and emotional safety and protecting their constitutional speech rights.

2. State Bullying Legislation

In response to the wave of concern sweeping the nation regarding cyberbullying and electronic student speech, states have increasingly passed legislation mandating anti-bullying policies, many of which have attempted to codify or modify the *Tinker* standard. For example, a newly enacted Washington statute requires "each school district [to] adopt . . . a policy and procedure that at a minimum . . . prohibits the harassment, intimidation, or bullying of any student."¹⁶⁸ Additionally, the Washington legislature recognized the potential problems that electronic student speech can present to school administrators.¹⁶⁹ Thus, while not regulating off-campus electronic student speech at this time, the Washington legislature has clearly expressed its intent to do so in the future.¹⁷⁰

to multiply and spread quickly, students and school administrators must be more aware than ever of the potential power their words may have. See, e.g., Brian Stelter, *Web Suicide Viewed Live and Reaction Spur a Debate*, N.Y. TIMES (Nov. 25, 2008), <http://www.nytimes.com/2008/11/25/us/25suicides.html> (detailing the suicide of a nineteen-year-old student and the online forum where others of a similar age "egged [him] on . . . [and] encouraged him to swallow the antidepressant pills that eventually killed him."). "The anonymous nature of these [online] communities only emboldens the meanness or callousness of the people [online] Rarely does it bring out greater compassion or consideration." *Id.* (quoting Professor Jeffrey Cole of the University of Southern California, a professor who studies technology's effects on society).

168. WASH. REV. CODE § 28A.300.285(1) (2010). "Harassment, intimidation, or bullying" is defined as:

[A]ny intentional *electronic*, written, verbal, or physical act, including but not limited to one shown to be motivated by any characteristic in[cluding race, color, religion, ancestry, national origin, gender, or sexual orientation, or a mental, physical, or sensory handicap], or other distinguishing characteristics, when the intentional, *electronic*, written, verbal, or physical act: (a) Physically harms a student or damages the student's property; or (b) Has the effect of substantially interfering with a student's education; or (c) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or (d) Has the effect of substantially disrupting the orderly operation of the school.

Id. § 28A.300.285(2) (emphasis added); see also *id.* § 9A.36.080(3) (defining protected classes).

169. The Washington legislature expressly directed the Washington State School Directors' Association and the Washington State Superintendent of Public Instruction to convene an advisory committee for the purpose of drafting "a model policy prohibiting acts of harassment, intimidation, or bullying that are conducted via electronic means by a student while on school grounds and during the school day." *Id.* § 28A.300.285(5). In essence, the Washington legislature recognized the differences between the on- and off-campus acts of students by expressly limiting its instruction to the School Directors' Association and State Superintendent of Public Instruction to regulate only acts committed "while on school grounds and during the school day." *Id.* Thus, the Washington statute provides no means for school administrators to regulate student speech that occurs off-campus or after school hours.

170. The Washington legislature directed that a "model policy" regarding electronic student speech be made available on school district websites, disseminated to parents, and submitted, along with "a recommendation for local adoption," to the governor and the legislature. *Id.*; see also

Oregon statutes permit school administrators more discretion than the statute in Washington. Oregon allows school administrators to look beyond the so-called “schoolhouse gate,” even if only slightly, to discourage student speech considered bullying that “[t]akes place on or immediately adjacent to school grounds.”¹⁷¹ Additionally, Oregon law expressly addresses electronic student speech, albeit only in the on-campus context.¹⁷² Thus, it appears that while both Oregon and Washington have considered the current state of student speech in light of evolving technology, neither state’s legislation permits school administrators to discipline a student for their off-campus electronic speech.

As of February 2012, forty-eight states and the District of Columbia have laws against school speech that constitutes bullying,¹⁷³ and six states

GOVERNOR’S OFFICE OF THE EDUC. OMBUDSMAN, SPECIAL REPORT: HARASSMENT/BULLYING IN PUBLIC SCHOOLS 1 (Dec. 2008), *available at* http://www.governor.wa.gov/oeo/reports/bullying_report.pdf (noting that “student-to-student harassment” in Washington public schools has not declined significantly since anti-bullying laws were first promulgated in Washington in 2002).

171. OR. REV. STAT. § 339.351(2)(b) (2009). In addition to broadening the geographic area of responsibility for school administrators to regulate bullying speech, the Oregon statute also codifies several Supreme Court cases regulating school speech:

“Harassment, intimidation or bullying” means any act that (a) Substantially interferes with a student’s educational benefits, opportunities or performance; (b) Takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop; (c) Has the effect of: (A) Physically harming a student or damaging a student’s property; (B) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; or (C) Creating a hostile educational environment

Id. § 339.351(2). The codified cases are: *Tinker* (disruption to school activity), *Kuhlmeier* (school-sponsored activity), and *Fraser* (on-campus offensive speech). *See also supra* Part II.

172. OR. REV. STAT. § 339.351(1) (2009). “‘Cyberbullying’ means the use of any electronic communication device to harass, intimidate or bully.” *Id.* Cyberbullying, under the Oregon statute, is regulated in the same manner as “traditional” bullying—by applying the same standard developed with guidance from the Supreme Court student speech jurisprudence. *See id.*

173. Only Montana and South Dakota do not have a bullying law on the books. *See* ALA. CODE §§ 16-28B-1 to -9 (2010); ALASKA STAT. § 14.33.200 (2010); ARIZ. REV. STAT. ANN. § 15-341(A)(37) (2010); ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2011 Legis. Sess.); CAL. EDUC. CODE §§ 234.1, 32261, 32270, 48900 (West Supp. 2011); COLO. REV. STAT. § 22-32-109.1 (2010); CONN. GEN. STAT. ANN. § 10-222d (West 2010); D.C. MUN. REGS. tit. 5, §§ 2401.12, 2405.5 (2011); DEL. CODE ANN. tit. 14, § 4112D (2007); FLA. STAT. ANN. § 1006.147 (West 2009); GA. CODE ANN. §§ 20-2-751.4 to .5 (West 2009); 2011 Haw. Sess. Laws 214 (H.B. 688), *available at* http://www.capitol.hawaii.gov/session2011/bills/HB688_.HTM; IDAHO CODE ANN. § 18-917A (2011); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West 2010); IND. CODE ANN. §§ 20-33-8-0.2, 28-33-8-13.5 to -15 (West 2010); IOWA CODE ANN. § 280.28 (West 2010); KAN. STAT. ANN. § 72-8256 (2010); KY. REV. STAT. ANN. §§ 158.440, .444 (West 2010); LA. REV. STAT. ANN. § 17:416.13 (2011); ME. REV. STAT. ANN. tit. 20-A, § 1001(15) (2010); MD. CODE ANN., EDUC. §§ 7-424, -424.1 (West 2010); MASS. GEN. LAWS ANN. ch. 71, § 37O (West 2011); MICH. COMP. LAWS ANN. § 380.1310b (West 2011); MINN. STAT. ANN. § 121A.0695 (West 2010); MISS. CODE ANN. §§ 37-11-67, -69 (West 2010); MO. REV. STAT. § 160.775 (2011); NEB. REV. STAT. §§ 79-2, 137

allow schools to discipline students for off-campus expression.¹⁷⁴ However, with the quick evolution of technology, states have had to rush to keep pace. Five states amended or enacted new legislation in 2010.¹⁷⁵ As students are increasingly able to influence and bully their peers from their home computers, states have struggled to balance the constitutional protections inherent in the First Amendment with the care and protection of students. New Jersey's recent amendments to its anti-bullying laws, which have been called the "nation's toughest,"¹⁷⁶ regulate off-campus student speech in a manner that many other states have avoided. New Jersey law now requires school districts to respond to harassment, intimidation, or bullying that occurs "off school grounds."¹⁷⁷ Thus, in the absence of Supreme Court guidance, state legislatures are enacting increasingly complex legislation and creating a myriad of laws that may infringe on the First Amendment rights

(2010); NEV. REV. STAT. ANN. §§ 388.122 to .135 (West 2010); N.H. REV. STAT. ANN. §§ 193-F:1 to :9 (2011); N.J. STAT. ANN. §§ 18A:37-13 to -32 (West 2010); N.M. CODE R. § 6.12.7 (LexisNexis 2010); N.Y. EDUC. LAW §§ 11–15 (West, Westlaw through 2011 legislation) (effective July 1, 2012); N.C. GEN. STAT. ANN. §§ 115C-407.15 to .18 (West 2010); N.D. CENT. CODE ANN. §§ 15.1-19-17 to -22 (West 2011); OHIO REV. CODE ANN. §§ 3301.22, 3313.666 to .667 (West 2011); OKLA. STAT. tit. 70, §§ 24-100.2 to -100.5 (2011); OR. REV. STAT. ANN. §§ 339.351 to .359 (West 2010); 24 PA. STAT. ANN. § 13-1303.1-A (West 2010); R.I. GEN. LAWS ANN. §§ 16-21-33 to -34 (West, Westlaw through 2011 Reg. Sess.); S.C. CODE ANN. §§ 59-63-120 to -150 (2010); TENN. CODE ANN. §§ 49-6-1014 to -1019 (West 2011); TEX. EDUC. CODE ANN. §§ 25.0342, 37.001, 37.0832 (West, Westlaw through 2011 Reg. Sess.); UTAH CODE ANN. §§ 53A-11a-101 to -402 (West 2011); VT. STAT. ANN. tit. 16, §§ 11(a)(26), (30), (32), 165(a)(8), 565 (West 2011); VA. CODE ANN. § 22.1-279.6 (West 2011); WASH. REV. CODE ANN. §§ 28A.300.285, .600.480 (West 2011); W. VA. CODE ANN. §§ 18-2C-1 to -6 (West 2011); WIS. STAT. ANN. § 118.46 (West 2010); WYO. STAT. ANN. §§ 21-4-312 to -315 (West 2011).

174. Currently six states—Arkansas, Connecticut, Louisiana, Massachusetts, New Hampshire, and New Jersey—allow school administrators to regulate off-campus expression. *See supra* note 173 (citing each state's anti-bullying legislation). In addition, federal anti-bullying bills have been proposed, but have thus far failed to pass. *See* Safe School Improvement Act of 2010, S. 3739, 111th Cong. (2010); Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2010).

175. Richard Pérez-Peña, *Christie Signs Tougher Law on Bullying in Schools*, N.Y. TIMES (Jan. 6, 2011), <http://nytimes.com/2011/01/07/nyregion/07bully.html> ("New Jersey becomes the fifth state to adopt a new law in the past year; New York was among the others.").

176. *Id.* ("New Jersey on Thursday enacted the nation's toughest law against bullying and harassment in schools . . .").

177. *See* Anti-Bullying Bill of Rights Act, N.J. STAT. ANN. §§ 18A:37-13 to -32 (West 2010). In New Jersey, "harassment, intimidation or bullying" now includes:

[A]ny gesture, any written, verbal or physical act, or *electronic* communication . . . that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or *off school grounds* . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . .

Id. § 18A:37-14 (emphasis added). Specifically referring to harassment, intimidation, or bullying that occurs off school grounds, the New Jersey law requires that the punishment for such acts occurring or originating off school grounds be consistent with the other school disciplinary provisions, essentially treating on-campus student speech the same as off-campus student speech. *See id.* § 18A:37-16.

of students as they seek to resolve a growing bullying crisis within American public schools.

3. There Is No Constitutional Right to Be a Bully: Judicial Constraints on School Anti-Bullying Policies

Circuit courts—particularly the Third Circuit—have taken a harder line against student speech that infringes on the rights or liberties of other students. In a pair of cases addressing the constitutionality of two school anti-harassment policies, the Third Circuit addressed the issue of student speech that inflicts emotional harm on other students.¹⁷⁸

In *Saxe v. State College Area School District*, Judge Alito—now Justice Alito—declared a Pennsylvania school district’s anti-bullying policy unconstitutional because it was overbroad.¹⁷⁹ The policy prohibited any student speech that would “substantially interfer[e] with a student’s educational performance.”¹⁸⁰ This reading of the policy largely mirrors the *Tinker* standard that schools may regulate student speech that would interfere with the work of the school.¹⁸¹ Judge Alito compared the facts in *Saxe* to the *Tinker* standard, stating that the school district’s anti-bullying policy “may satisfy the *Tinker* standard[, and t]he primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.”¹⁸²

Judge Alito also noted the lack of guidance from the Supreme Court on the issue of student speech, stating that the Court has been “unclear” in defining the exact scope of *Tinker*.¹⁸³ The Third Circuit found that student

178. See *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The issue in these cases involved emotional harm inflicted upon other students, not physical harm as contemplated by the previous Supreme Court precedent in *Tinker*. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Thus, the current *Tinker* rule is not as well-adapted to respond to the emotional needs of students that have become more important in the last few years due to rising concerns about bullying. See *supra* Part V.A.1. The *Sypniewski* and *Saxe* courts recognized this and attempted to address it with an evolving standard.

179. *Saxe*, 240 F.3d at 214.

180. *Id.* at 216.

181. See *Tinker*, 393 U.S. at 509.

182. *Saxe*, 240 F.3d at 217.

183. *Id.* (“The precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress.”). Judge Alito cited a Pennsylvania district court opinion and *Kuhlmeier* as evidence of the inconsistent application of *Tinker*. See *Kuhlmeier v.*

speech that is simply offensive to a listener or group of listeners is not sufficient.¹⁸⁴ There must be some “threshold showing of severity or pervasiveness” in order to punish the student speech.¹⁸⁵ Thus, it appears that *Saxe* does not permit school administrators to respond to merely offensive speech, but does give administrators license to regulate or restrict speech that would substantially interfere with a student’s educational goals or performance.¹⁸⁶

One year later, the Third Circuit in *Sypniewski v. Warren Hills Regional Board of Education* again considered the constitutionality of a school district’s anti-bullying policy.¹⁸⁷ The *Sypniewski* court greatly expanded the call for school administrators to regulate student speech deemed offensive.¹⁸⁸ Rather than adhere to prior Supreme Court precedent requiring school administrators to regulate only potentially disruptive or harmful speech,¹⁸⁹ lewd speech,¹⁹⁰ or school-sponsored speech,¹⁹¹ the *Sypniewski* court declared that “school authorities are expected to control or prevent” certain types of speech, “including intimidation by name calling.”¹⁹² The *Sypniewski* court made clear its position on student speech that has an adverse effect on the physical or emotional well-being of other students, stating that “[t]here is no constitutional right to be a bully.”¹⁹³

B. *Tinker One: Problems With the First Tinker Prong*

The first *Tinker* prong (*Tinker One*) permits school administrators to restrict or regulate student speech that substantially interferes with the work

Hazelwood Sch. Dist., 795 F.2d 1368, 1375 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260 (1988); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991).

184. *See Saxe*, 240 F.3d at 217.

185. *See id.*

186. *See Willard, Cyberbully*, *supra* note 122, at 4 (“[U]nder *Saxe*, school officials can respond to student speech that is sufficiently severe or pervasive, but not simply ‘offensive,’ if that speech will substantially interfere with a student’s educational performance.”).

187. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

188. *Id.*

189. *See supra* Part II.A (discussing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

190. *See supra* Part II.B (discussing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

191. *See supra* Part II.C (discussing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

192. *See Sypniewski*, 307 F.3d at 264 (“Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent.”).

193. *Id.* Additionally, the members of the Third Circuit recently noted that although some online student expression may appear to be facially without value, it may provide a non-violent method for students to “vent their frustrations,” which may otherwise be expressed in a more violent or disruptive manner. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (en banc) (Smith, J., concurring). The Third Circuit stated: “We ought not to discount the importance in our society of such a ‘safety valve.’” *Id.* (citing *RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY* 13 (1992)).

of the school.¹⁹⁴ However, the Supreme Court promulgated this test in 1969, a time before the Internet existed, and a time in which the Justices could not fathom the methods by which students routinely communicate with one another today.¹⁹⁵ In fact, an overbroad application of *Tinker One* does little to further the ideals that *Tinker* envisioned,¹⁹⁶ and instead encapsulates most, if not all, off-campus Internet speech in one way or another. Indeed, *Tinker One* cannot be applied to modern electronic speech, as the oft-cited “schoolhouse gate” cannot exist in a world where speech is electronic, intangible, and can be instantly transmitted and accessed.¹⁹⁷

1. *Tinker One* Does Little to Ensure Student Safety

An overbroad application of *Tinker One*, such as permitting school authorities to regulate the conduct of a student within the walls of his or her private home, does little to actually ensure that schools are safer.¹⁹⁸ The exercise of school authority regardless of the student’s geographic location does little to ensure that the school environment is not disrupted.¹⁹⁹ If school

194. See *Tinker*, 393 U.S. at 509; see also *supra* Part II.A.

195. See *supra* Part III; see also Ellison, *supra* note 85, at 810–11 (“[I]n recent years the forms of electronic communication have multiplied, with instant messaging, text messaging, MySpace, Facebook, blogs, YouTube, Twitter, and many more technologies. These allow students to reach each other more and more.” (internal footnotes omitted)).

196. See *Tinker*, 393 U.S. at 506; see also *supra* Part II.A.

197. See Ellison, *supra* note 85, at 811 (“While some . . . forms of student expression may originate off campus, they can eventually have a great impact on the campus environment, sometimes without ever being accessed from school. The disruption caused by such students can wreak havoc on individuals at school and the entire school environment, as though the words were uttered in the classroom.”).

198. For example, a recent news story detailed the expulsion of a high school student for cursing on his online Twitter account during off-school hours. Fox Van Allen, *School Expels Student for Swearing on Twitter During Non-School Hours*, TECCA (Mar. 27, 2012, 3:08 PM), <http://www.tecca.com/news/2012/03/27/garrett-high-school-expels-student-over-tweets/>. The “tweet” contained a number of swear words but was otherwise non-threatening and was not directed at any particular individual. *Id.* Even more alarming, the school district’s computer system “actively tracks the social media presence of its students,” and because the student logged onto his Twitter account during school hours, the district’s computer system flagged his account. *Id.* Such regulation of student expression does little to further the school administration’s safety goals and expends scarce resources better utilized elsewhere.

199. See *Sullivan v. Hous. Indep. Sch. Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969). Even in 1969, one judge found *Tinker One* difficult to consider:

In this court’s judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student’s behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same

administrators attempt to regulate the conduct of students on the Internet, they will surely waste scarce time and resources that could be better spent educating or regulating speech within the “schoolhouse gate.”²⁰⁰ In addition, *Tinker One* is subject to misuse by school authorities attempting to suppress unpopular student opinions or those that they do not agree with.²⁰¹ In short, *Tinker One*, while arguably sufficient to regulate student speech in 1969, is no longer sufficient to regulate off-campus electronic student speech.

2. *Tinker One* Would Regulate Nearly All Modern Electronic Forms of Student Speech

Tinker One is overly broad because any student speech—originating on- or off-campus—can be easily made to satisfy its inquiry. The Seventh Circuit explained the relevant test as “whether school authorities ‘have reason to believe’ that the expression will be disruptive.”²⁰² Such a subjective standard gives rise to the question of what constitutes a “reason to believe.” When considering that some student speech that school administrators seek to regulate involves serious threats to the safety and well-being of other students, many school administrators are understandably cautious and prefer to apply *Tinker One* rather than risk the consequences of silence.

Application of this prong to off-campus electronic speech has thus far given rise to fact-sensitive holdings that reflect the subjective nature of the standard. For example, the Second Circuit upheld the punishment of a student for a post on a private blog that urged other students to protest the

criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus. *Id.* at 1340–41. It would seem that Judge Seals in *Sullivan* would find the current application of *Tinker* to off-campus electronic speech even more preposterous. Additionally, other courts have indirectly addressed off-campus student speech:

The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable.

Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987).

200. Even governments are unable to efficiently regulate the Internet. See John D. Sutter, *Could the U.S. Shut Down the Internet?*, CNN TECH (Jan. 3, 2011, 10:23 AM), http://www.cnn.com/2011/TECH/web/02/03/internet.shut.down/index.html?eref=rss_topstories (“Shutting down the entire internet would be pretty much impossible at this point.” (quoting Jim Cowie, co-founder of Renesys)).

201. School administrators could misuse *Tinker One* to exact revenge for an activity that they do not approve of, or administrators may misuse the test in good-faith attempts to regulate speech that they may find personally offensive, but is not offensive to others.

202. *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

school's decision to cancel a concert event at the school.²⁰³ The student's blog post, the court argued, "created a foreseeable risk of substantial disruption to the work and discipline of the school."²⁰⁴ However, the Supreme Court refused to find student speech that *actually* took place on the school campus, was plainly visible, and was controversial in nature to be a violation of this broad standard.²⁰⁵ Thus, there is a clear interpretive element to this standard, which only becomes more amorphous with the evolving nature of electronic speech.²⁰⁶

C. *Tinker Two: The Second Tinker Prong Best Ensures Student Safety While Protecting Students' First Amendment Rights*

Students and school administrators will benefit from a clear standard that is easy to apply to student speech of any form and made in any location. Students and school administrators need a standard that does not require them to either differentiate between the geographic location where the speech originated and the method of communication utilized by the student, or predict how or if the speech will affect the school at some undefined time in the future.²⁰⁷ Subjective standards are inefficient, difficult to apply, and contrary to judicial economy concerns as our courts continue to be flooded by student speech cases resulting in fact-sensitive holdings.²⁰⁸

203. *Doninger v. Niehoff*, 527 F.3d 41, 44 (2d Cir. 2008).

204. *Id.* at 53. In addition, the Second Circuit explained that the "off-campus character [of the student's speech] does not necessarily insulate the student from school discipline." *Id.* at 50.

205. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–14 (1969); see also *supra* Part II.A.

206. There is clearly some subjectivity in applying student speech precedent. See, e.g., *Wilson v. Hinsdale Elementary Sch. Dist.* 181, 810 N.E.2d 637, 646–47 (Ill. App. Ct. 2004) (upholding the suspension of a student for bringing a CD containing threatening lyrics onto his school campus and playing it using a school-owned computer). The *Wilson* case arguably does not even involve student speech. Rather, it involves speech by another that the student adopted as his own. *Id.* at 639–40.

207. See *Ellison*, *supra* note 85, at 833 ("Students will benefit from a clear test so that they can order their lives accordingly and be put on notice that certain less-protected forms of speech, though originating off campus, could make them subject to school discipline.").

208. See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001). The Ninth Circuit in *LaVine* "emergency expelled" a high-school student after he wrote a poem at his house entitled "Last Words." *Id.* at 983. The poem described a fictional character that kills himself after he perpetrates a school-shooting rampage. *Id.* The student submitted the poem to his English teacher, who had previously encouraged the submission of independent student work for feedback. *Id.* at 985–86. The teacher alerted the principal and the student was immediately expelled. *Id.* The Ninth Circuit held that the school did not need to prove that the student's poem constituted a true threat or that the school's safety was *actually* at risk. *Id.* at 989 n.5. True to the unpredictable spirit of *Tinker One*, the Ninth Circuit stated that, "At the time the school officials made their determination to emergency

1. Student Safety Is of Paramount Importance

In considering a uniform standard to apply, the emotional and physical well-being of all American students must be of paramount concern.²⁰⁹ It should be uncontroversial that preventing another incident like the Columbine High School tragedy must be an obvious consideration for school administrators when deciding whether to regulate student expression.²¹⁰ Additionally, recent attention has focused on the emotional well-being of students.²¹¹ Any standard to regulate student speech must also permit the regulation of speech detrimental to the emotional well-being of students, as this speech can be just as harmful as speech that precludes a physical attack on schools.²¹² Thus, a standard that ensures school administrators have the ability, and perhaps even the mandate, to investigate any student speech which purports to threaten the physical or emotional safety of the school or its students and staff is essential.

The Supreme Court addressed this paramount consideration, perhaps inadvertently, when it included the second prong in the *Tinker* standard.²¹³ *Tinker* Two allows the regulation of student speech that “collid[es] with the rights of others.”²¹⁴ The Court’s inclusion of this caveat in its rule may have

expel [the student], they had facts which might reasonably have led them to forecast a substantial disruption of or material interference with school activities.” *Id.* at 992.

The *LaVine* court recognized that the recent Columbine High School tragedy influenced its opinion. *Id.* at 983. “[This case] arises against a backdrop of tragic school shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they perceived was the student’s implied threat of violent harm to himself and others.” *Id.* The proposed *Tinker* Two test would be sufficient to evaluate the *LaVine* case, without the need to interpret how much disruption was caused, or may have potentially been caused at some undefined time in the future, by the poem. *See infra* notes 246–53 and accompanying text.

209. *See* U.S. DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR RESEARCHERS 4 (2009), available at http://www.cdc.gov/violenceprevention/pdf/Electronic_Aggression_Researcher_Brief-a.pdf (finding that “electronic aggression is a growing public health problem in need of additional research and prevention efforts” due in large part to the dramatic increase in Internet harassment).

210. *See supra* notes 160–63 and accompanying text.

211. *See supra* notes 165–67 and accompanying text.

212. Bullying has been linked to increased suicide rates. *See* Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CTR. 1 (2010), http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf (“[Y]outh who are bullied, or who bully others, are at an elevated risk for suicidal thoughts, attempts, and completed suicides.”). Scholars have even coined the term “cyberbullicide” to denote suicide that is directly or indirectly influenced by experiences with online aggression. *Id.*

213. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 513 (1969).

214. *Id.* at 513. The Court alternatively phrased this prong of its standard as whether the speech at issue involves an “invasion of the rights of others.” *Id.* Presumably, “others” includes both students and faculty or staff. *See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002) (finding that a school district may discipline a student for creating a website that contained derogatory and threatening statements directed toward a teacher and principal).

been inadvertent, in that the entire *Tinker* opinion discussed at length the possibility that the student speech in question may have caused a material and substantial disruption to the school environment (*Tinker One*),²¹⁵ but the Court never considered at any length whether the speech in *Tinker* “collid[ed] with the rights of others” (*Tinker Two*).²¹⁶ Perhaps the Court foresaw the possibility that some student speech could be so harmful toward the physical or emotional well-being of others that the standard must accept some regulation of that speech. Indeed, that possibility exists today and such harmful expression should be regulated under *Tinker Two*.

2. *Tinker Two* Adequately Regulates Speech that Causes Emotional Harm or Jeopardizes School Safety

“The primary function of a public school is to educate its students”²¹⁷ Schools must focus singularly on that goal and not on patrolling Internet forums or chat rooms for inflammatory speech. Schools must wisely use their sparse time and resources on improving education and safety within the schoolhouse gate.²¹⁸ Employing *Tinker One*, as is often the current practice,²¹⁹ requires schools to engage in a futile venture to gather and preserve significant evidence in anticipation of future litigation.²²⁰ No

215. See *supra* Part II.A.

216. See *Tinker*, 393 U.S. at 513.

217. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

218. Conversely, courts have noted that students can make a significant contribution to the marketplace of ideas, and the Seventh Circuit has emphasized:

[A] school’s countervailing interest in protecting its students from offensive speech by their classmates that would interfere with the learning process—though [the Seventh Circuit] added that because 18-year-olds can now vote, high-school students should not be “raised in an intellectual bubble,” . . . which would be the tendency of forbidding all discussion of public issues by such students during school hours.

Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 876 (7th Cir. 2011) (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)).

219. See Papandrea, *supra* note 41, at 1042 (“[V]irtually all the student speech cases applying *Tinker* have focused on its material-and-substantial-disruption prong . . .”).

220. Several articles give advice to school districts and administrators on how to best avoid litigation or increase the likelihood that courts will uphold the discipline. See Vander Broek et al., *supra* note 26, at 16. One commentary outlined six “general principles” that will help school districts and administrators. See *id.* (“First, a school district’s position is strongest when it can demonstrate that a student’s Internet posting or speech communicated what a reasonable person would view to be a true threat. . . . Second, to the extent that a school district can establish that a student’s Internet posting or speech was transmitted or brought to school or viewed at school, it should do so. . . . Third, school districts have great leeway in regulating the use of their computers and the Internet at school. . . . Fourth, the more outrageous or potentially dangerous the speech appears from an objective point of view, and the more actual or potential school disruption that can

teacher or school administrator should be required to compile evidence in anticipation of future litigation.²²¹ *Tinker* Two, used alone, allows schools to ensure the physical and emotional safety of students and forbids school administrators from becoming bogged down in endless missions for discovery.²²²

D. Application: The Proposed *Tinker* Two Test in Action

Under the proposed application of solely *Tinker* Two to resolve all student speech cases,²²³ courts and school administrators alike can find some clarity that the current mix of lower court holdings and outdated Supreme Court jurisprudence fail to offer.²²⁴ *Tinker* Two applies easily to both traditional on-campus student speech cases that are currently resolved fairly easily under *Tinker*,²²⁵ and the more complex off-campus student speech cases arising in the digital age.²²⁶ A uniform, clear, and easily applied standard for all forms of student speech will further the goal of judicial economy, relieve confusion among school administrators, and offer public school students a definite rule to follow.

1. Applying *Tinker* Two to Traditional On-Campus Student Speech

Traditional on-campus student speech cases—those involving student speech that both originates on campus and is not electronic—have been fairly easily examined under current Supreme Court jurisprudence.²²⁷

be demonstrated, the better the chances that the discipline will be upheld. . . . Fifth, students do not enjoy a right to participate in extracurricular activities. . . . Finally, the younger the student, the more discretion will be afforded a district.” (internal footnotes omitted)).

221. While preservation of evidence for anticipated litigation is entirely reasonable, the fact that teachers and school administrators must currently consider the high likelihood of litigation before acting to prevent potentially harmful student expression is excessively burdensome and distracts from the larger goal of protecting student safety and well-being.

222. Scholars have called on courts to reinvigorate *Tinker* Two. See, e.g., Martha McCarthy, *Student Expression That Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 ED. LAW REP. 1, 15 (2009) (“*Tinker*’s second prong deserves to have more punch, and hopefully the federal judiciary soon will see that it does.”). A very recent Fourth Circuit decision employed *Tinker* Two in its analysis. See *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011) (determining that *Tinker*’s second prong was met where a student created a website that claimed another student had herpes), *cert. denied*, 132 S. Ct. 1095 (Jan. 17, 2012).

223. See *supra* Part V.C.

224. See *supra* Parts II, IV; see also Kyle W. Brenton, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1206–07 (2008) (“Protecting student speech is a task for the courts, but constitutional jurisprudence provides only the vaguest outline for deciding when a particular student’s cyberspeech may constitutionally be regulated by the school.”).

225. See *infra* Part V.D.1.

226. See *infra* Part V.D.2.

227. See *supra* Part II.

However, courts retain the discretion to regulate student speech under either *Tinker* prong, a standard that permits school administrators a wide range of discretion.²²⁸ Under the proposed *Tinker* Two test, cases involving traditional on-campus student speech may be easily evaluated, and many, if not most, of the lower court holdings would remain the same.

The seminal Supreme Court case of *Tinker v. Des Moines Independent Community School District* demonstrates an early example of the traditional form of on-campus student speech.²²⁹ In *Tinker*, the speech at issue was the display of black armbands by several students meant to voice, in a purely symbolic manner, their opposition to the then-ongoing Vietnam War.²³⁰ While the Supreme Court utilized this case to create the two-pronged standard still employed today,²³¹ *Tinker* would have reached the same result using only *Tinker* Two.²³² Under *Tinker* Two, school administrators may regulate student speech that “collid[es] with the rights of others.”²³³ Speech that collides with the rights of others is itself a broad category, with the ability to include many forms of speech. While there is no clear Supreme Court guidance on what forms of electronic speech collide with other’s rights,²³⁴ speech that is independently tortious unquestionably qualifies.²³⁵

228. See *supra* note 41 and accompanying text.

229. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); see also *supra* Part II.A.

230. See *Tinker*, 393 U.S. at 504.

231. See *id.* at 513.

232. See *id.* at 514.

233. *Id.* at 513.

234. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“The precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress.” (citing *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991))).

235. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177–78 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007). The Ninth Circuit attempted to account for the relatively undefined second *Tinker* prong:

This court has explained that vulgar, lewd, obscene, indecent, and plainly offensive speech “by definition, may well ‘impinge[] upon the rights of other students,’” even if the speaker does not directly accost individual students with his remarks. . . . So too may other speech capable of causing psychological injury. The Tenth Circuit has held that the “display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone,” even though there was no indication that any student was physically accosted with the flag, aside from its general display.

Id. (internal citations omitted). It seems reasonable to conclude that speech which constitutes harassment or bullying, or which represents a threat to the emotional or physical safety of students or staff, represents a “collision” with the right of other students to be let alone and receive an education in a safe environment.

Thus, the speech at issue in *Tinker*—the symbolic wearing of black armbands—does not involve a collision with the rights of any student or implicate the safety of the school, and therefore cannot be restricted under the proposed *Tinker* Two test.²³⁶

Another recent traditional on-campus student speech case further demonstrates that the *Tinker* Two test, if applied alone, would result in a similar holding by the court. The Seventh Circuit, in *Zamecnik v. Indian Prairie School District No. 204*,²³⁷ affirmed the right of public high school students to wear t-shirts emblazoned with slogans opposing homosexuality.²³⁸ The t-shirts at issue were worn by several students in response to the “Day of Silence,” a day meant to call “critical attention to [the] harassment of homosexuals.”²³⁹ The t-shirts read “My Day of Silence, Straight Alliance” on the front, and “Be Happy, Not Gay” on the back.²⁴⁰ School administrators determined that the phrases violated the school’s policy against written or oral comments “that refer to race, ethnicity, religion, gender, sexual orientation, or disability,” and inked over the phrase in an effort to bring the shirts into compliance with the school policy.²⁴¹ While the court found for the students based on the two prongs of *Tinker*, it

236. One may argue that the black armbands at issue in *Tinker* constitute symbolic speech much like the presentation of the Confederate flag at issue in the Tenth Circuit’s *West v. Derby Unified School District No. 260*. 206 F.3d 1358, 1366 (10th Cir. 2000). The Tenth Circuit was at pains to differentiate the facts before them from *Tinker*’s facts, and determined that the evidence presented by the school district “reveal[ed] that based upon recent past events, Derby School District officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone.” *Id.* Among the evidence cited by the court was the fact that the school district experienced “a series of racial incidents or confrontations in 1995, some of which were related to the Confederate flag.” *Id.* (citing *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1223, 1232 (D. Kan. 1998)). Thus, the court found that because the school district’s racial harassment policy was enacted in response to a specific racial conflict occurring within the school district, the district’s regulation was reasonable and did not violate the suspended student’s First Amendment rights. *Id.* (“The history of racial tension in the district made administrators’ and parents’ concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable.” (citing *West*, 23 F. Supp. 2d at 1232)). Therefore, the foreseeable interference with the rights of other students caused by the possession of the Confederate flag in *West* cannot be compared with the innocuous black armbands at issue in *Tinker* because the black armbands in *Tinker*—unlike the Confederate flag—did not implicate any racial issues or put any student in fear for his or her safety. Although the Vietnam War was a controversial and hotly debated issue in 1969, there was no evidence that it implicated a specific student’s identity—for example, their race.

237. 636 F.3d 874 (7th Cir. 2011).

238. *Id.* at 874, 882.

239. *Id.* at 875. The school approved of the Day of Silence and many students and teachers participated in the event. *Id.* Participating students remained silent throughout the day unless called on in class, and some teachers participated by refraining from calling upon students during the Day of Silence. *Id.*

240. *Id.*

241. *Id.*

criticized the standard and appeared to question its speculative nature.²⁴² Under the proposed *Tinker* Two test, however, it is likely that the court would have come to the same finding where the expression at issue did not threaten violence or attempt to bully other students, and particularly where the school allowed opposing viewpoints to be actively asserted.²⁴³ Thus, under the proposed *Tinker* Two test, traditional on-campus student speech cases will likely result in holdings similar to those under the current *Tinker* rule.

2. Applying *Tinker* Two to Traditional Off-Campus Student Speech

Many student speech cases involve speech that originates off-campus but makes its way onto the physical school campus in some manner.²⁴⁴ Courts have reached differing holdings where the current *Tinker* standard caused confusion and left courts to conduct fact-sensitive inquiries.²⁴⁵ However, applying the proposed *Tinker* Two test to these cases again results in similar holdings with a much simpler analysis for both courts and school administrators alike.

242. See *id.* at 877 (“Not that *Tinker*’s ‘substantial disruption’ test has proved a model of clarity in its application. The cases have tended to rely on judicial intuition rather than on data, and the intuitions are sometimes out of date.”).

243. The Seventh Circuit determined that “a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality.” *Id.* at 876. One may argue that t-shirts such as those in *Zamecnik* do implicate the rights of others—particularly students who are homosexual because they did threaten the emotional well-being of homosexual students (because they would not feel accepted by their peers, etc.). Taken alone that argument may hold water; however, the fact that the school accepted (and perhaps even constructively sponsored) the Day of Silence makes it less likely that the opposing viewpoint may be permissibly repressed. See *id.* Therefore, it is likely that under the proposed *Tinker* Two test the holding in *Zamecnik* would be the same.

244. See, e.g., *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 981, 985 (11th Cir. 2007) (finding the ten-day suspension of a student for bringing a notebook to school wherein she had written a narrative describing a “dream” in which she brought a gun to school and shot her art teacher in front of other students to be reasonable in light of concerns over school violence); see also *id.* at 985 (citing Mark Bixler, *Cherokee School Acts on Threats*; R.M. Moore Elementary Officials Say a Student Wanted to “Settle a Score,” ATLANTA J.-CONST., May 30, 1998, at D1) (detailing the arrest of a student after he told a classmate outside of school that he intended to bring a gun to school the following day).

245. Compare *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (finding the expulsion of a student reasonable after he drafted a poem describing a fictional character perpetrating a school-shooting rampage and submitted it to his English teacher), with *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (finding a drawing depicting the student’s school under siege to be protected speech where the student did not have knowledge that his brother brought the drawing onto the school campus).

Applying the proposed *Tinker* Two test to *LaVine v. Blaine School District*²⁴⁶ and *Porter v. Ascension Parish School Board*²⁴⁷ results in a greatly simplified—although still difficult—analysis. In *LaVine*, the Ninth Circuit noted the importance of preventing school violence in the wake of the Columbine tragedy²⁴⁸ and found the emergency expulsion of a student appropriate where the student drafted and submitted to his English teacher a poem describing a fictional character perpetrating a school shooting.²⁴⁹ The Fifth Circuit in *Porter* determined that a drawing made two years earlier off-campus could not be regulated by school officials where the student who drew the picture was not even aware that it was brought onto campus.²⁵⁰

As school violence has put our “nation on edge,” school officials have been hesitant to let any speech that may potentially indicate a threat to the safety of students go unpunished.²⁵¹ Both *LaVine* and *Porter* involve speech that represents a potentially grave threat to the safety of the school.²⁵² But under the proposed *Tinker* Two test, school administrators in both cases would be justified in regulating the potentially violent student expression. While the speech at issue is sensitive, and arguably the speech in *LaVine* and *Porter* differ in some respects,²⁵³ schools must be sensitive to direct threats against the safety of students—and the proposed *Tinker* Two test permits them to do just that.

246. 257 F.3d 981.

247. 393 F.3d 608.

248. *LaVine*, 257 F.3d at 987 (“[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spate of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies. After Columbine, Thurston, Santee and other school shootings, questions have been asked about how teachers or administrators could have missed telltale ‘warning signs,’ why something was not done earlier and what should be done to prevent such tragedies from happening again.”).

249. *Id.* at 983.

250. *Porter*, 393 F.3d at 611, 620.

251. *See LaVine*, 257 F.3d at 987.

252. *Porter*, 393 F.3d at 611 (involving a student’s drawing of the school depicting it “under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons”); *LaVine*, 257 F.3d at 983 (involving a student’s poem entitled “Last Words” that described a fictional character who perpetrates a school-shooting rampage).

253. It may be argued that the speech at issue in *Porter* was less serious or might not be taken as seriously as the speech at issue in *LaVine*. The speech in *Porter* was a drawing that involved unlikely scenarios that would be particularly difficult for a student to carry out—for example, obtaining a gasoline tanker truck, missile launcher, and helicopter. *See Porter*, 393 F.3d at 611. Conversely, the speech at issue in *LaVine* presented a scenario that a student could more reasonably carry out—bringing a gun to school and perpetrating a school shooting. *See LaVine*, 257 F.3d at 983.

3. Applying *Tinker* Two to Electronic Off-Campus Student Speech

As previously detailed, electronic off-campus student speech presents new and difficult challenges for courts and school administrators to regulate.²⁵⁴ In the Internet age, electronic mobile devices make this challenge even more difficult.²⁵⁵ Particularly illustrative of the predicament facing the courts is the example of the recently resolved intra-circuit split within the Third Circuit.²⁵⁶ The proposed *Tinker* Two test, however, would allow courts and school administrators to regulate electronic student speech even when it originates off-campus.

While the Third Circuit in *Layshock* refused to uphold the punishment of a student for creating a parody MySpace profile that defamed the school principal,²⁵⁷ a different panel of the same court in *Blue Mountain* upheld the punishment of a student for creating a similar MySpace profile defaming the school principal.²⁵⁸ The facts in both cases were surprisingly similar; however, even more surprising were the entirely different holdings that came out of the same court.²⁵⁹

Under the proposed *Tinker* Two test, difficult cases like those that have perplexed the Third Circuit become clear and easily resolved. Rather than debating the facts of each case, involving unnecessary litigation, the panels of the Third Circuit could have easily dismissed both *Layshock* and *Blue Mountain* because neither student's actions rose to the level that would cause them to "collide" with the rights of others.²⁶⁰

254. See *supra* Part IV; see also J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1107–10 (C.D. Cal. 2010) (holding that despite the fact that a student's speech originated off-campus, the school was not precluded from regulating speech which eventually made its way onto campus).

255. See Pike, *supra* note 5, at 972 ("Student expression has never been a simple concern, and the information age is changing the landscape, blurring the black-letter law of past decades, and challenging administrators and policy-makers to contemplate the particulars of technology in tandem with applicable legal principles.").

256. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010), *aff'd in part, rev'd in part*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), *aff'd in part, rev'd in part*, 650 F.3d 205 (3d Cir. 2011) (en banc); see also *supra* Part IV.C.

257. *Layshock*, 593 F.3d at 263.

258. *Blue Mountain*, 593 F.3d at 308.

259. While the en banc review of these cases has since resolved the intra-circuit split, the discrepancy within the Third Circuit's holdings remains illustrative.

260. Conversely, the parody MySpace profiles in both *Layshock* and *Blue Mountain* arguably did "collide" with the rights of the school principal in each case. In both cases, the school principal was the subject of the parody profiles, which were often vulgar and defamatory. See *Blue Mountain*, 593 F.3d at 308; *Layshock*, 593 F.3d at 252–54. However, courts have established that there is no such thing as a "hurt feelings" exemption to the First Amendment. See Zamecnik v. Indian Prairie Sch.

Electronic student expression promises to continue to cross the so-called schoolhouse gate, as students possessing mobile electronic devices with expanding functionality can create, access, transmit, and receive an unlimited deluge of expressions about themselves and others.²⁶¹ Rather than unnecessarily involving the courts,²⁶² creating an inconsistent puzzle of precedent,²⁶³ the proposed *Tinker* Two test greatly simplifies the analysis, removes countless cases from our increasingly burdened court system, and avoids requiring school administrators to gather and preserve extensive evidence each time they punish student speech out of fear of future litigation.

VI. CONCLUSION: *TINKER* TWO PROPERLY BALANCES THE SAFETY AND SPEECH INTERESTS AT STAKE

As courts continue to promulgate inconsistent approaches toward the regulation of student speech in an ever-evolving technological climate, it is evident that a clearer standard of analysis is necessary. Continued reliance on both prongs of the forty-three year old *Tinker* decision and its progeny will continue to result in unpredictable holdings and likely further muddle the already unclear state of the law. School administrators across the nation remain in a state of confusion, unclear whether they may regulate

Dist. No. 204, 636 F.3d 874, 877 (7th Cir. 2011) (“[There is no established] ‘hurt feelings’ defense to a high school’s violation of the First Amendment rights of its students.”). Thus, a student’s First Amendment rights may not be violated simply because a school administrator or student has hurt feelings resulting from another’s expression of his or her non-violent and non-threatening thoughts or feelings.

261. See Pike, *supra* note 5, at 973 (“As students adopt email, Web sites, cell phones, and instant messaging software to facilitate personal expression, however, they are increasingly able to affect others at a distance, blurring the line between on- and off-campus speech.”).

262. At times the involvement of courts in student speech issues appears unnecessary or trivial. For example, the Seventh Circuit in *Zamecnik* found itself giving advice to high school students on the appropriate venue to wear controversial attire expressing an opinion. See *Zamecnik*, 636 F.3d at 878 (“[The student] could . . . have displayed [his message] on his graduation gown had he wanted to.”).

263. See Pike, *supra* note 5, at 986–87. By one scholar’s analysis, at least six tests have been adopted by courts perplexed with how to examine student speech cases in the Internet age, including: (1) unprotected speech may be proscribed on or off campus; (2) unprotected speech may be proscribed regardless of whether a disruption to the school environment occurs; (3) inappropriate speech that would be ordinarily protected off-campus may be proscribed only within the school context; (4) inappropriate speech that would be ordinarily protected may be proscribed because it qualifies as a per se disruption; (5) “core speech” may be proscribed on campus only; (6) “core speech” may be proscribed only where an actual or reasonably forecast disruption is evidenced. *Id.*

Additionally, it has been noted that the current *Tinker* standard “in all likelihood . . . boils down to societal norms regarding the nature of healthy, normal child development—which is an especially politic way of saying that ‘appropriateness’ is a deeply personal value judgment.” *Id.* at 987.

off-campus student speech.²⁶⁴ Without further Supreme Court guidance on this issue, school administrators remain stuck between attempting to ensure the safety and efficient operation of their schools and respecting the constitutional protections afforded to their students. Courts can respect the need to balance school safety and constitutional rights by applying only *Tinker Two*,²⁶⁵ all the while creating a significantly simplified and easily applied standard for all school administrators.²⁶⁶ As the proverbial “schoolhouse gate” first expounded by the Supreme Court in *Tinker* quickly fades away with the rise of technology, so too must the current outdated *Tinker* standard.

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264. See Vander Broek, et al., *supra* note 26, at 20 (“The ability of school boards and administrators to discipline students for off-campus conduct remains treacherous and highly fact-specific.”).

265. See *supra* note 41 and accompanying text.

266. See *supra* notes 207–22 and accompanying text.

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