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TWEAKING *TINKER*: REDEFINING AN OUTDATED STANDARD FOR THE INTERNET ERA

SHANNON M. RALEY*

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I. INTRODUCTION

After a high school party in Minnesota, several partygoers “posted” pictures from their night onto the popular social networking site Facebook, which made the pictures available for public viewing.¹ Officials from Eden Prairie High School discovered the pictures, many of which contained underage drinking, and suspended over 100 students based on the pictures’ contents.² This story starkly demonstrates the phenomenon that while many students are aware of the potential risks associated with posting information on social networking sites,³ the risks have done little to deter students from using these sites.⁴ Thus, public schools are increasingly required to evaluate the bounds of their authority in disciplining students for their activities on the Internet.

Despite this need for constant evaluation, the Supreme Court has provided little guidance to public schools on the issue of what student Internet speech may be regulated without infringing upon the students’ First Amendment rights. While the lack of Supreme Court guidance has undoubtedly caused confusion among public schools, a greater amount of uncertainty surrounding this issue exists in the lower courts. The Third Circuit’s decisions in *Layshock v. Hermitage School District*⁵ and *Snyder v. Blue Mountain School District*,⁶ handed down on the same day, poignantly illustrate this area’s unsettled nature. Both cases involve public school students who received extended suspensions⁷ after they created offensive MySpace pages of their respective principals.⁸ Both students sued their school districts, alleging that their suspensions violated their First Amendment right of free speech.⁹ Despite the nearly

¹ See Mary Lynn Smith & Courtney Blanchard, *Facebook Photos Land Eden Prairie Kids in Trouble*, STAR TRIB. (Minneapolis-St. Paul), Jan. 9, 2008, at 1B, available at 2008 WLNR 883534.

² *Id.*

³ One Eden Prairie student stated that “[i]t’s dumb to have these pictures up on the Internet,” because of the potential consequences they create. *Id.* Another stated that she does not “put bad stuff on [her] page,” because of the risks associated with them. *Id.* By posting pictures of illegal activities or comments containing offensive or harassing language on the Internet, students risk the possibility of suspensions, see, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), or even criminal charges, see Rob Quinn, *Teens Arrested Over Facebook Prank*, NEWSER (Jan. 14, 2011, 10:26 AM), <http://www.newser.com/story/109697/teens-arrested-over-facebook-prank.html>.

⁴ See FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Nov. 15, 2011) (estimating that Facebook has over 800 million active users).

⁵ *Layshock*, 593 F.3d 249.

⁶ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010).

⁷ *Layshock*, 593 F.3d at 254; *Snyder*, 593 F.3d at 293 (stating that both students received ten day out-of-school suspensions).

⁸ See *Layshock*, 593 F.3d at 252-53; *Snyder*, 593 F.3d at 291.

⁹ *Layshock*, 593 F.3d at 245-55; *Snyder*, 593 F.3d at 294-95. For background information on the First Amendment, see generally U.S. CONST. amend. I.

identical facts of each case, the Third Circuit reached opposite conclusions regarding the students' First Amendment rights.¹⁰

The conflicting results of these cases indicate that a clarification of current precedent is necessary to integrate Internet-originated speech. Under the current precedent established in *Tinker v. Des Moines Independent Community School District*,¹¹ a student's right of free speech may be regulated only if the speech 1) originates on school grounds and 2) would substantially disrupt school operations or interfere with the rights of others.¹² However, this standard cannot adequately encompass situations that arise in today's Internet-centered world because a great deal of Internet-originated speech does not occur "on-campus" and courts are unsure of what exactly constitutes a "substantial disruption" as required by *Tinker*.¹³

First, *Tinker* and its progeny¹⁴ involved actions by students that occurred directly on school grounds, such as silent protests in the classrooms or speeches given in the school's auditorium.¹⁵ Although courts routinely emphasize that student speech can only be regulated if it occurs "on-campus," such a requirement has become virtually meaningless considering that the nature of the Internet makes it both "nowhere and everywhere at the same time . . ."¹⁶ Given the Internet's imperceptible existence, *Tinker*'s "on-campus" requirement creates a confusing and illogical requisite.

Furthermore, because students may access the Internet from school computers, as well as their own computers and cell phones brought into the school, *Tinker* creates a strange disciplinary system allowing First Amendment protections only when Internet speech is said outside of school boundaries, despite the speech occurring over the same medium. Consider the following example. One student uses her cell phone while walking out of the school doors at the end of the school day to post a harassing comment about a teacher that is later discovered. At the same time, another student uses his cell phone inside the school, posts the same kind of comment, which is also later discovered. Under *Tinker*'s current understanding, the first student's comments are protected by the First Amendment, while the second

¹⁰ *Layshock*, 593 F.3d at 263 (holding that Layshock's suspension violated his right of free speech); *Snyder*, 593 F.3d at 303 (holding that Snyder's suspension did not violate her right of free speech).

¹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹² *Id.* at 513.

¹³ See *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (stating that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . .") (citation omitted); Benjamin T. Bradford, Comment, *Is It Really MySpace? Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era*, 3 J. MARSHALL L.J. 323, 331 (2010) (arguing that "when the tests outlined in [*Tinker* and its progeny] are extended to student speech occurring at places and times when the students are no longer under school supervision, the logic behind each of the tests begins to crack, if not completely crumble.").

¹⁴ See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). For an in-depth discussion of both *Morse* and *Fraser*, see *infra* Part II.B-D.

¹⁵ See, e.g., *Fraser*, 478 U.S. at 675; *Tinker*, 393 U.S. at 504.

¹⁶ See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1090 (2008).

student is subject to disciplinary action by the school.¹⁷ Recognizing this absurdity, courts themselves understand that the “on-campus” requirement is becoming increasingly meaningless: “[a]s 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 in years past.”¹⁸ Therefore, because the current *Tinker* standard does not adequately take into account speech that occurs on the Internet, a re-examination of this standard is necessary.

Second, courts are unsure of what exactly constitutes a “substantial disruption” under *Tinker*. In both *Snyder* and *Layshock*, the respective school districts argued that a substantial disruption occurred since students circulated copies of the parodied MySpace profiles and discussed the profiles’ contents during class time, requiring administrators and teachers to repeatedly ask students to refrain from discussing the profiles at school.¹⁹ While the *Snyder* court found this to be “substantially disruptive” under *Tinker*,²⁰ the *Layshock* court did not.²¹ It is clear from *Snyder* and *Layshock* that courts are confused about the intersection of student free speech precedent and the widespread use of the Internet. Thus, a clarification of this standard would not only inform students of their rights on the Internet, but would also guide public schools in determining the limits of their disciplinary reach.

This Note argues that the *Tinker* standard needs to be reevaluated to encompass Internet-related cases both by eliminating the “on-campus” requirement and by further defining what constitutes a “substantial disruption.” The “on-campus” requirement should be eliminated for the following reasons: 1) lower federal courts already disregard this condition for Internet-related cases; 2) it leads students to abuse their First Amendment rights; and 3) this requirement threatens the safety of teachers, students, and other school personnel. Additionally, *Tinker*’s “substantial disruption” prong would be better understood as a factors test. This ensures that schools utilize the same criteria in determining whether a “substantial disruption” has occurred, as well as eliminate the need for courts to define ambiguous terms.

Part II examines the evolution of Supreme Court student speech cases beginning with *Tinker* in 1969 until its most recent decision in 2007: *Morse v. Frederick*.²² Part III proceeds by arguing that *Tinker* would be more applicable to present-day student speech cases if its “on-campus” requirement was eliminated. Part IV further argues that a clarification of *Tinker*’s “substantial disruption” requirement is necessary both to avoid conflicting results on identical facts²³ and to ensure that courts use the same criteria to determine whether a “substantial disruption” had occurred. Implementing

¹⁷ See *Tinker*, 393 U.S. at 508-09.

¹⁸ *Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *7 n.5 (M.D. Pa. Sept. 11, 2008).

¹⁹ See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 293-94 (3d Cir. 2010).

²⁰ *Snyder*, 593 F.3d at 302.

²¹ See *Layshock*, 593 F.3d at 258-59 (acknowledging that the school district could not satisfy *Tinker*’s substantial disruption test).

²² *Morse v. Frederick*, 551 U.S. 393 (2007).

²³ See *Layshock*, 593 F.3d at 253; *Snyder*, 593 F.3d at 293-94.

these revisions would ensure that the *Tinker* standard is better adapted to Internet-related cases.

II. THE EVOLUTION OF THE *TINKER* STANDARD

This Part discusses the evolution of Supreme Court precedent in the area of student free speech rights. The general standard for student speech was first articulated in 1969, when the Court decided *Tinker v. Des Moines*. The Court has since decided three subsequent student speech cases and has offered a new rationale for speech regulation in each case.²⁴ In addition to the confusion caused by these four rationales, the Court neglected to expand on the specific situations in which each standard potentially applies. Thus, as a result of these four cases, lower courts are left to determine which standard, out of the four possible, is germane to a given fact pattern with little guidance from the Supreme Court. As such, this Part attempts to distinguish the four Supreme Court cases and determine the situations under which each standard applies. It will ultimately conclude that *Tinker* is the appropriate standard to use for Internet-related cases.

A. *The Beginning of Student Free Speech Regulation—Tinker v. Des Moines*

The United States Supreme Court had its first opportunity to define the limits of student free speech on public school premises in *Tinker v. Des Moines*. There, a group of high school students desired to voice their opposition to the Vietnam War by wearing black armbands to school.²⁵ Several days before the scheduled protest, the school adopted a policy that any student wearing an armband to school would either be asked to remove it or suspended.²⁶ Despite this policy, three students continued with the protest and wore the black armbands to school and, as a result, all three were suspended.²⁷ The students sued the school district, challenging the constitutionality of their suspensions.²⁸

The Court began its analysis by acknowledging that neither teachers nor students “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁹ However, students’ First Amendment rights must be determined by looking at the “special characteristics of the school environment.”³⁰ Thus, students, while they are on school premises, are not necessarily afforded the same First Amendment rights as adults.³¹

²⁴ See *infra* Part II.B-D.

²⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 506.

³⁰ *Id.* See also *id.* at 515 (Stewart, J., concurring) (stating that, “[a] State may . . . 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.”).

³¹ See *id.* at 506 (stating that the rights of students must be “applied in light of the special characteristics of the school environment . . .”).

The Court concluded that, despite the limited First Amendment rights given to students, public schools are not free to regulate any speech deemed to be unpleasant.³² Schools cannot punish students for a particular expression of opinion out of a “mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint.”³³ Thus, to uphold a student’s punishment, the school must show that the conduct would “materially disrupt[] classwork or involve[] substantial disorder or inva[de] . . . the rights of others”³⁴ Because the school did not present any evidence that the students’ protest either interrupted school activities or intruded upon the rights of others, the Court held that their suspensions violated their Constitutional rights.³⁵

B. Expanding Speech Restrictions—Bethel School District v. Fraser

Seventeen years after *Tinker*, the Court re-examined the bounds of student free speech in *Bethel School District v. Fraser*.³⁶ In *Fraser*, a high school student delivered a sexually explicit speech nominating one of his fellow classmates for student elective office during a school assembly.³⁷ Fraser delivered the speech despite prior warnings given to him by several teachers regarding the potential punishments of delivering the speech.³⁸ After characterizing Fraser’s speech as “indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly,” the school suspended Fraser for three days.³⁹ Fraser then sued the school district challenging the constitutionality of his suspension.⁴⁰

The Court began its analysis with an examination of public schools’ role in society.⁴¹ The objective of public education is to instill the “fundamental values necessary to the maintenance of a democratic political system” in its students.⁴² These fundamental values must teach students to balance an advocacy for unpopular and controversial viewpoints with the knowledge of the boundaries of socially appropriate behavior.⁴³ Based on these values, the *Fraser* Court, following *Tinker*’s guidance, acknowledged that “the constitutional rights of students in public school[s] are not automatically coextensive with the rights of adults in other settings.”⁴⁴ For

³² See *id.* at 509.

³³ *Id.*

³⁴ *Id.* at 513.

³⁵ *Id.* at 514.

³⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

³⁷ *Id.* at 677.

³⁸ *Id.* at 677-78.

³⁹ *Id.* at 678-79.

⁴⁰ *Id.* at 679.

⁴¹ *Id.* at 681.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 682.

this reason, “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate *properly rests with the school board.*”⁴⁵ This duty is exclusively given to the schools because it is through the conduct of teachers and older students that the remainder of the student body understands the appropriate form of civil disclosure and expression.⁴⁶

Against this backdrop, the Court held that a student’s right of free speech does not extend to “vulgar and lewd” speech; so the school district was within its authority to discipline Fraser.⁴⁷ This holding is an exception to *Tinker* because the school does not have to anticipate a disruption of class time or an interference with the rights of others.⁴⁸ Instead, the vulgar and offensive nature of the speech itself is sufficient to satisfy the *Fraser* standard.⁴⁹ As such, *Fraser* creates a two-pronged analytical framework. If the student speech is vulgar, then the school is free to discipline the student speaker, regardless of the speech’s disruptive nature. Conversely, if speech is not vulgar, *Tinker* remains the applicable authority.

C. *Further Expansion of Tinker—Hazelwood School District v. Kuhlmeier*

Two years after *Fraser*, the Supreme Court again addressed the contours of a student’s right to free speech in *Hazelwood School District v. Kuhlmeier*.⁵⁰ *Kuhlmeier* involved several students who wrote and edited the school newspaper.⁵¹ The newspaper printed more than 4,500 copies throughout the year and was distributed every three weeks to students, school personnel, and other members of the community.⁵²

The paper’s final edition included two controversial articles: one relating several students’ experience with teen pregnancy and another discussing the impact of divorce on one student and her family.⁵³ Before approving the edition, the principal concluded that, despite the authors’ best efforts, the students interviewed for the teen pregnancy article would not remain anonymous and that the article on divorce would not be a fair representation of both parents involved.⁵⁴ As a result, the principal determined that his only option was to eliminate the two controversial articles.⁵⁵ The

⁴⁵ *Id.* at 683 (emphasis added).

⁴⁶ *Id.*

⁴⁷ *Id.* at 685.

⁴⁸ See *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (stating that “*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute” because the Court did not conduct a “substantial disruption” analysis).

⁴⁹ See *Fraser*, 478 U.S. at 685.

⁵⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁵¹ *Id.* at 262.

⁵² *Id.*

⁵³ *Id.* at 263.

⁵⁴ *Id.*

⁵⁵ *Id.* at 264.

students saw this deletion as a violation of their First Amendment rights and sued the school district.⁵⁶

Similar to the previous cases, the *Kuhlmeier* Court began by recognizing that public schools are not akin to other traditional forums that are used “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁵⁷ Therefore, the rights afforded to students in public schools are not coextensive with the rights of adults in traditional circumstances.⁵⁸ Although the *Kuhlmeier* Court began its analysis in a similar manner as both *Tinker* and *Fraser*, it distinguished itself from both cases and ultimately created a new standard under which student speech may be regulated.

First, the Court stated that “the question . . . addressed in *Tinker* . . . is different from the question” addressed in *Kuhlmeier*, which determined “whether the First Amendment requires a school affirmatively to promote particular student speech.”⁵⁹ Accordingly, the *Kuhlmeier* Court concluded that “the standard articulated in *Tinker* for determining when a school may punish student expression *need not also be* the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”⁶⁰ Therefore, the *Tinker* standard was not applicable in *Kuhlmeier*.

Second, the *Kuhlmeier* Court stated that “school[s] must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics”⁶¹ This takes *Kuhlmeier* out of the realm of the lewd and vulgar speech standard articulated in *Fraser* and instead puts it in a new category of sensitive student speech. Thus, the standard articulated in *Kuhlmeier* allows a school to exercise “editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁶² Therefore, the students’ First Amendment rights were not violated when the principal deleted the two controversial articles.⁶³

D. The Final Clarification of Student Speech Restriction—*Morse v. Frederick*

The Supreme Court’s most recent examination of student speech rights came in 2007 when the Court decided *Morse v. Frederick*. *Morse* involved a high school student who, in an attempt to get on television at a school-sanctioned, school-sponsored event, unfurled a large banner that indiscreetly advocated illegal drug use.⁶⁴ The student was told to take down the banner and, upon his refusal, was

⁵⁶ *Id.*

⁵⁷ *Id.* at 267 (quoting *Hague v. CIO*, 307 U.S. 469, 515 (1939)).

⁵⁸ *Id.* at 266 (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) & *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁵⁹ *Id.* at 270-71.

⁶⁰ *Id.* at 272-73 (emphasis added).

⁶¹ *Id.* at 272.

⁶² *Id.* at 273.

⁶³ *Id.*

⁶⁴ *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

suspended for ten days.⁶⁵ Frederick sued the school district, alleging that his suspension violated his First Amendment right of free speech.⁶⁶

The *Morse* Court distinguished its facts from both *Tinker* and *Fraser*, ultimately concluding that neither standard was applicable.⁶⁷ Although *Tinker* warned that schools cannot punish students out of an “undifferentiated fear or apprehension of [a] disturbance’ or ‘a mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint,’” the type of speech involved in *Morse* was much more serious.⁶⁸ A public school’s concern for drug abuse prevention extends well beyond a mere desire to avoid and discomfort and unpleasantness of a student’s particular viewpoint,⁶⁹ thus removing this case from a *Tinker* analysis. Furthermore, although the school district urged the Court to adopt a broader reading of *Fraser* to include Frederick’s drug reference as “offensive” speech, such an expansion would allow the standard to encompass virtually all speech, as “much political and religious speech might be perceived as offensive to some.”⁷⁰

Avoiding the *Tinker*, *Fraser*, and *Kuhlmeier* standards, the *Morse* Court upheld Frederick’s suspension by reflecting on the dangerous intersection between schools and drugs.⁷¹ The Court noted that nearly half of American high school students have used an illicit drug upon their graduation and 25% of all high school students have been “offered, sold, or given an illegal drug on school property within the past year.”⁷² Furthermore, “Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use” and has provided schools with billions of dollars to support drug-prevention programs.⁷³ As such, the *Morse* Court determined that “[t]he First Amendment does not require schools to tolerate at school events student expression that contributes” to the dangers presented by drugs.⁷⁴ Thus, “a public school may prohibit speech advocating illegal drug use.”⁷⁵

While the *Morse* standard seems limited and exclusive to drug use alone, its analysis opens an avenue that could allow for its application in a variety of student free speech cases.⁷⁶ The *Morse* Court did not use an elemental approach, as the

⁶⁵ *Id.* at 396, 398.

⁶⁶ *Id.* at 399.

⁶⁷ *Id.* at 408-09.

⁶⁸ *Id.* at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)).

⁶⁹ *See Morse*, 551 U.S. at 408-09.

⁷⁰ *Id.* at 409.

⁷¹ *Id.* at 407-08.

⁷² *Id.* at 407 (citation omitted).

⁷³ *Id.* at 408.

⁷⁴ *Id.* at 410.

⁷⁵ *Id.* (Thomas, J., concurring).

⁷⁶ *But cf. id.* at 422 (Alito, J., concurring) (limiting *Morse*’s holding to student speech that reasonably advocates illegal drug use).

Tinker Court did,⁷⁷ but instead appealed to the governmental interest behind drug-abuse prevention to find that such speech cannot be tolerated in schools.⁷⁸ Thus, it is possible that other forms of student speech may be regulated under the *Morse* analysis based on the importance of a prevailing governmental interest. However, absent further clarification from the Supreme Court, prevailing governmental interests only serve as an exception to *Tinker*'s general standard.

The Supreme Court had an opportunity to address student Internet speech when it decided *Morse* in 2007. Instead, the *Morse* Court created a new rationale for regulating student speech without clarifying previous Supreme Court standards. Therefore, although lower courts continue to use *Tinker* as the default authority for Internet-related cases,⁷⁹ *Morse*'s silence on Internet speech has left both schools and courts with a muddled and confusing doctrine.⁸⁰ As such, lower courts are left to decipher the four student speech standards with minimal guidance and clarification from the Supreme Court. In light of this confusion, the Supreme Court needs to re-examine the *Tinker* standard and 1) eliminate the "on-campus" requirement to incorporate Internet speech and 2) further clarify what constitutes a "substantial disruption."

III. *TINKER*'S "ON-CAMPUS" REQUIREMENT SHOULD BE ELIMINATED

To better adapt *Tinker*'s standard for student speech restriction to the Internet era, its "on-campus" requirement should be eliminated. Central to this argument is an appreciation for the dependence students now have on the Internet.⁸¹ Because the Internet is another medium of communication for students, many conversations that would have once been private are now available for viewing by a large public audience. Furthermore, public schools are in the difficult position of encouraging student Internet use during structured class time on the one hand and discouraging personal Internet use during that time on the other hand.⁸² Using these competing

⁷⁷ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (establishing a 2-prong analysis in student speech cases).

⁷⁸ See *Morse*, 551 U.S. at 408 (stating that "the governmental interest in stopping student drug abuse," reflected in both congressional and school policies, "allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use.").

⁷⁹ See, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) ("[T]he standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*." (internal citations omitted)). Although these standards do not explicitly mention Internet-originated speech, courts have regularly applied the *Tinker* standard for such cases. See, e.g., *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 298 (3d Cir. 2010); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). While it can be argued that *Fraser*'s standard for lewd and vulgar speech is more appropriate for Internet speech, this argument is not addressed in this Note. Rather, this Note proceeds by using *Tinker* as the general standard for student speech cases because of its continued application.

⁸⁰ Benjamin F. Heidlage, Note, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 579 (2009).

⁸¹ See *infra* Part III.A.

⁸² See *infra* Part III.B.

interests as background, this Part will then argue for the elimination of *Tinker*'s "on-campus" requirement.

A. The Internet's Influence on Students

To understand why *Tinker*'s "on-campus" requirement should be eliminated, it is first necessary to appreciate the impact that the Internet has on the lives of most modern students. For students, the Internet is not a detached "virtual world" from which they can log on and off at-will; instead, it represents a means of communication that is an integral part of their lives.⁸³ Unlike many adults who approach their Internet communications as separate from the rest of their actions, "most youths, having grown up with such technology, have completely integrated the Internet into their everyday interactions."⁸⁴ As a result, "for children, there is no such dichotomy of online and off-line, or virtual and real—the digital is so much intertwined into their lives and psyche that the one is entirely enmeshed with the other."⁸⁵ Thus, "[t]here is no real separation between the way youths approach interactions through traditional methods of communication (including face-to-face) and those that occur through Internet technology."⁸⁶

The rise in popularity of social networking sites such as Facebook have contributed to this changing method of youth interaction. Although many adults see social networking sites as a means of communication with friends and family, students utilize these sites as replacements for "offline social hangouts."⁸⁷ "[T]eenagers [now] hang out on the Internet and their mobile phones just like 'they used to hang out on street corners before.'"⁸⁸ As a consequence, many conversations that would have typically been private between the involved individuals are now posted online to be viewed by virtually limitless amounts of people.⁸⁹

Consider the following example. Student complaints about teachers and faculty members are certainly not a new phenomenon in public schools.⁹⁰ However, the rise in popularity of the Internet has allowed a greater amount of people to see these once private communications, including parents, teachers, and school administrators.⁹¹ In

⁸³ See Heidlage, *supra* note 80, at 588 ("Youths do not merely approach the Internet as a realm that is separate and distinct from the rest of their lives.").

⁸⁴ *Id.*

⁸⁵ *Id.* at 588-89 (quoting ANGELA THOMAS, *YOUTH ONLINE: IDENTITY AND LITERACY IN THE DIGITAL AGE* 163 (2007)); see also *id.* at 580 ("Childrens' lives in online communities connect to and blend into their lives in offline communities: socially, emotionally, sometimes physically, and intellectually.").

⁸⁶ Heidlage, *supra* note 80, at 589.

⁸⁷ Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 *FLA. L. REV.* 1027, 1033-34 (2008).

⁸⁸ *Id.* at 1034 (internal quotation omitted).

⁸⁹ See *id.* at 1036-37; Heidlage, *supra* note 80, at 589 ("What once would have been a message passed from one person to another is now an Internet posting available to a worldwide audience.").

⁹⁰ Papandrea, *supra* note 87, at 1037.

⁹¹ *Id.*

Wisniewski v. Board of Education,⁹² an eighth grade student expressed his dissatisfaction with one of his teachers by creating an “icon”⁹³ of his teacher on an online instant messaging service.⁹⁴ Wisniewski’s icon “was a small drawing of a pistol firing a bullet at a person’s head, above which were dots representing splattered blood. Beneath the drawing appeared the words, ‘Kill Mr. VanderMolen.’”⁹⁵ Although Wisniewski saw this as merely a joke, the school took his icon seriously and suspended him for threatening a teacher.⁹⁶

As *Wisniewski* illustrates, student Internet speech typically amplifies what would ordinarily be said within the context of a face-to-face conversation. Likely, if Wisniewski had simply complained to his friend about his teacher outside of class, the school would have no justifiable cause to suspend him.⁹⁷ However, because he supplemented his complaints with a threatening icon, viewable for three weeks and seen by many of his classmates, it was eventually brought to the school’s attention and he was suspended.⁹⁸

Like Wisniewski, many middle- and high school students perceive little, if any, risk in making outrageous and threatening comments online because of the perceived anonymity and impunity that the Internet provides.⁹⁹ “Thus, [students] proceed in

⁹² *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

⁹³ The AOL instant messaging (IM) service

permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender’s name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two “buddies,” and each can copy the icon of the other and transmit it to any other “buddy” during an IM exchange.

Id. at 35-36.

⁹⁴ *Id.* at 35.

⁹⁵ *Id.* at 36.

⁹⁶ *Id.* at 36-37.

⁹⁷ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (acknowledging that the First Amendment gives students the right to “wear Tinker’s armband, but not Cohen’s jacket,” which stated “Fuck the Draft”); *Id.* at 688 (Brennan, J., concurring) (stating that, “[i]f [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”) (citation omitted).

⁹⁸ *Wisniewski*, 494 F.3d at 36.

⁹⁹ Jay Braiman, Note, *A New Case, An Old Problem, A Teacher’s Perspective*, 74 BROOK. L. REV. 439, 471 (2009). See, e.g., *Donovan v. Richie*, 68 F.3d 14, 15-16 (1st Cir. 1995) (students created a website entitled “The Shit List” which “zeroed in on some 140 named students, each name being followed by one or more lines of crude descriptions of character and/or behavior . . . [which] were not merely insulting as to appearance, but suggestive, often explicitly so, of sexual capacity, proclivity, and promiscuity.”); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781-82 (E.D. Mich. 2002) (student created a website entitled “Satan’s web page” which included “SATAN’S MISSION FOR YOU THIS WEEK: Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face.”); *J.S. ex rel. H.S. & I.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416 (Pa. Commw. Ct. 2000) (the student-

disseminating their thoughts to anyone and everyone with a connection to this seemingly limitless forum for intellectual and linguistic detritus.”¹⁰⁰ Since both courts and schools are unsure of how far a student’s right of free speech extends, students continue to push the boundaries and gain control of the classroom.¹⁰¹

B. The Difficulties Schools Face in Enforcing Limits on the Internet

The freedom and invincibility students often feel while communicating online certainly places public schools in a difficult position. On one hand, public schools encourage student Internet use by providing on-campus computer labs equipped with the Internet, requiring research to be done online, and by instructing students on how to use the Internet. By encouraging student Internet use, schools hope to ensure that students both have access to technology and an understanding of how to appropriately use it.¹⁰²

To further encourage students’ technological proficiency, schools across the country are changing the face of classroom note-taking by providing students with in-class computers and iPads, making traditional notebooks and pens obsolete.¹⁰³ Teachers and administrators believe that, through the widespread use of technology in classrooms, students will become more interested and engaged in the material.¹⁰⁴

However, by readily providing students with Internet access, schools risk the possibility that it will be used for the students’ own personal use during school hours, rather than just school-related material.¹⁰⁵ In *Beussink v. Woodland*,¹⁰⁶ students were able to access a classmate’s offensive homepage from computers in both the school’s computer lab and library.¹⁰⁷ Interestingly, based on the attention

created website depicted his teacher “with her head cut off and blood dripping from her neck,” and included a donation section to pay for a hitman for the teacher).

¹⁰⁰ Braiman, *supra* note 99, at 471. *See also id.* at 474 (stating that “[t]he Internet seems to have given children and adolescents, who lack the judgment and foresight to fully appreciate the consequences of their words and actions, a forum to say whatever they please, protected further from those consequences by the perceived, if illusory, safety and absence of risk provided by the Internet’s abstract distance and anonymity.”).

¹⁰¹ *See id.* at 472-74.

¹⁰² Antrenise Cole, *Grant Secures iPads for Attalla Schools*, GADSDEN TIMES (Gadsden, Ala.), Sept. 22, 2010, available at <http://www.gadsdentimes.com/article/20100922/NEWS/100929956/1016/NEWS?p=1&tc=pg> (stating that “[i]t’s our job to make sure students have access to . . . technology and know what they’re supposed to do with it.”).

¹⁰³ *See, e.g., id.*; Jill Russell, *iPads for All*, THE DAILY NEWS ONLINE (Longview, Wash.), Sept. 18, 2010, available at http://tdn.com/news/local/article_ecb836ee-c3ae-11df-83af-001cc4c03286.html.

¹⁰⁴ Cole, *supra* note 102.

¹⁰⁵ *See* Russell, *supra* note 103. Certainly students have access to the Internet through means other than school-provided computers, such as cell phones and personal computers. However, the technology dilemma for schools arises when Internet-accessible computers are directly provided to students from the school itself.

¹⁰⁶ *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

¹⁰⁷ *Id.* at 1178-79.

generated by the website, the school's computer teacher granted several students permission to access the website from the school's computers during class time.¹⁰⁸

While *Beussink* presents a unique situation in which a teacher actively promoted the use of personal Internet sites during school hours, teachers and administrators are often unaware that students are using the available technology for personal use.¹⁰⁹ For example, in *Layshock*, students used the school-provided computers available in their Spanish classroom and in other parts of the school to access the parody MySpace page.¹¹⁰ However, administrators only discovered that students were accessing MySpace from on-campus computers after an investigation in the weeks following the website's creation.¹¹¹ Even after the school learned of students' MySpace access during school hours, students remained able to access the website, despite the technology director's "best efforts" to prevent it.¹¹²

Thus, schools are faced with two competing interests: keeping students up-to-date and skilled in technological advancements on one hand and maintaining control and discipline in their classrooms on the other. Further complicating this issue are the uncertainties schools face regarding the bounds of their disciplinary authority over student Internet speech.¹¹³ Although public schools are required to "inculcat[e] in their students the] fundamental values necessary to the maintenance of a democratic political system,"¹¹⁴ the widespread use of technology is making this increasingly difficult.¹¹⁵

C. Arguments for the Elimination of Tinker's "On-Campus" Requirement

Schools' competing technological interests coupled with student Internet dependence indicate that *Tinker*'s "on-campus" requirement serves no functional purpose within the confines of today's Internet-dependent schools. As such, this requirement should be eliminated. There are three prominent reasons behind the conclusion. First, federal courts across the country have disregarded the "on-campus" requirement based on the nature of Internet speech.¹¹⁶ Second, students continue to push the boundaries of decency within the school environment by

¹⁰⁸ *Id.* at 1179.

¹⁰⁹ See, e.g., *Layshock ex rel. v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010) (stating that "[s]chool district administrators were unaware of Justin's in-school attempts to access MySpace until their investigation the following week.").

¹¹⁰ See *id.* (stating that "[o]n December 15, Justin used a computer in his Spanish classroom to access his MySpace profile . . . [and] Justin again attempted to access the profile from school on December 16 . . .").

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *supra* note 10.

¹¹⁴ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

¹¹⁵ See Braiman, *supra* note 99, at 459 n. 129 (describing a student's disregard of her teacher's requests to put her cell phone away during class time).

¹¹⁶ See discussion *infra* Part III.C.1. See also Papandrea, *supra* note 87, at 1090 (stating that the nature of the Internet makes it "generally nowhere and everywhere at the same time . . .").

harassing, degrading, humiliating, and slandering their teachers, administrators, and fellow classmates over the Internet.¹¹⁷ Based on this intensified student speech, the continued application of the “on-campus” requirement encourages students to abuse their First Amendment rights.¹¹⁸ Third, *Tinker’s* “on-campus” requirement should be eliminated because of the dangers posed by its continued use.¹¹⁹

1. Federal Courts Disregard the “On-Campus” Requirement for Internet-Related Cases

Federal courts have long understood *Tinker* as requiring non-protected speech to originate “on-campus”¹²⁰—thus anything that happens outside of the reasonable bounds of the school is protected under the First Amendment. However, the express language of the *Tinker* decision allows a school to punish student conduct that occurs either “in class or out of it,” so long as it substantially disrupts classwork.¹²¹ Thus, although *Tinker* is understood to require “on-campus” origination, its express language allows courts to disregard this requirement and schools to extend their disciplinary authority past the school boundaries.

Only seven years after *Tinker* was decided, lower federal courts began to relax the “on-campus” requirement. In *Fenton v. Stear*,¹²² a group of high school students were gathered at a public shopping center away from school on a Sunday afternoon.¹²³ The group noticed one of their teachers passing by and one student commented, loud enough for the teacher to hear, “he’s a prick.”¹²⁴ The student who made the comment was suspended for three days.¹²⁵ Although the speech occurred off-campus and outside of regular school hours, the court upheld the suspension holding that “[i]t is our opinion that when a high school student refers to a high school teacher in a public place on a Sunday by a lewd and obscene name in such a loud voice that the teacher and others hear the insult it may be deemed a matter for discipline in the discretion of school authorities.”¹²⁶

Although this case was not decided under the *Tinker* standard, its holding shows the beginning of a rift between *Tinker* and lower court decisions that is especially

¹¹⁷ See *supra* note 99.

¹¹⁸ See discussion *infra* Part III.C.2.

¹¹⁹ See discussion *infra* Part III.C.3.

¹²⁰ See, e.g., *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (stating that “[i]n school, however, [students’] First Amendment rights [are] circumscribed in light of the special characteristics of the school environment.”) (internal quotations omitted); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (allowing student speech restrictions if the speech occurs “in the cafeteria, or on the playing field, or on the campus during the authorized hours.”) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969)).

¹²¹ *Tinker*, 393 U.S. at 513.

¹²² *Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976).

¹²³ *Id.* at 769.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 772.

significant for Internet-related cases.¹²⁷ The *Fenton* court reasoned that the protections afforded under the First Amendment do not extend to insulting or fighting words which “incite an immediate breach of the peace.”¹²⁸ Additionally, “[t]o countenance such student conduct even in a public place without imposing sanctions could lead to devastating consequences in the school.”¹²⁹ Recently, several courts presented with Internet-centered cases have recognized the danger feared in *Fenton* and, as a result, have relaxed *Tinker*’s “on-campus” requirement.

In *J.S. v. Bethlehem Area School District*,¹³⁰ an eighth grade student made a personal website entitled “Teacher Sux” which included insulting and degrading comments about this teacher as well as a solicitation of \$20 from every visitor to “help pay for the hitman.”¹³¹ The student was subsequently suspended after the targeted teacher, as well as the school community, discovered the website.¹³² Relying on previous federal decisions, the *Bethlehem* court had little trouble concluding that “courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process.”¹³³

Continuing the trend set in *Bethlehem*, the *Wisniewski* court gave little weight to the website’s off-campus creation.¹³⁴ While *Wisniewski* argued that his website’s off-campus origination barred him from punishment, the court instead determined that its place of origin “does not necessarily insulate him from school discipline.”¹³⁵

¹²⁷ Following the *Fenton* decision, several non-Internet related cases continued the break from *Tinker*’s “on-campus” requirement. In *Donovan v. Ritchie*, 68 F.3d 14, 15-16 (1st Cir. 1995), a group of students created “The Shit List” which “zeroed in on some 140 named students, each name being followed by one or more lines of crude descriptions of character and/or behavior.” While the list was neither made nor distributed on school premises, copies were placed in the school’s garbage can and called to school officials’ attention. *Id.* at 16. The court concluded that the off-campus conduct led to the distribution of the list on school premises, therefore the students’ suspensions were upheld. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 419 (Pa. Commw. Ct. 2000) (discussing the *Donovan* decision).

¹²⁸ *Fenton*, 423 F. Supp. at 771.

¹²⁹ *Id.* at 772.

¹³⁰ *Bethlehem*, 757 A.2d 412.

¹³¹ *Id.* at 416. Directed at a particular teacher, the website stated, “Fuck you Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch” and included a “diagram of Mrs. Fulmer with her head cut off and blood dripping from her neck.” *Id.*

¹³² *Id.* at 417. The district court found that the effect the website had on the school community “was comparable to the effect . . . [of] the death of a student or staff member because there was a feeling of helplessness and a plummeting morale.” *Id.*

¹³³ *Id.* at 421.

¹³⁴ Relying in part on the *Bethlehem* decision, the court in *Wisniewski* similarly stated that “[w]e have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school.” *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007) (citations omitted).

¹³⁵ *Id.* See also *id.* at 39 n.3 (stating that since *Morse*, the Supreme Court has not determined the circumstances under which a school may discipline students for off-campus activities).

Thus, relying on previous decisions, the *Wisniewski* court concluded that if off-campus conduct creates a foreseeable risk of substantial disruption, the punishment will be upheld.¹³⁶

Although some courts are more reserved about expanding *Tinker*'s authority to off-campus speech,¹³⁷ a substantial number of courts have little trouble extending both *Tinker* and the school's authority, so long as a substantial threat of disruption exists.¹³⁸ These decisions indicate a growing recognition by courts that *Tinker*'s "on-campus" requirement is unworkable in an Internet-reliant society.¹³⁹ Furthermore, heavy reliance on the on- / off-campus distinction overlooks the thrust of *Tinker*, which is not as concerned with the origin of the speech as it is with the disruption it causes within the school.¹⁴⁰ For these reasons, the *Tinker* standard would be better adapted to Internet-related cases if its "on-campus" requirement was eliminated.

2. Retention of the "On-Campus" Requirement Leads to Abuse of Students' First Amendment Rights

Dissenting from the *Tinker* majority, Justice Black warned that "[t]urned loose with lawsuits for damages and injunctions against their teachers . . . it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools . . ."¹⁴¹ It is easy to see how Justice Black's fears

¹³⁶ *Id.* at 39.

¹³⁷ See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. 2010); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002). It should be noted that much confusion surrounds the application of the "on-campus requirement." For example, some courts implicitly determine that the "on-campus" requirement must be satisfied when the speech originates. See *Layshock*, 593 F.3d at 259. Therefore, if the speech does not originate on school grounds, the "on-campus" requirement has not been satisfied, regardless of the speech eventual entrance "on-campus." However, in *Thomas ex rel. Tiedeman v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1045-46 (2d Cir. 1979), a group of students were suspended for creating and distributing a satirical newspaper. The Second Circuit deemed their punishments unconstitutional because the newspaper neither originated nor was distributed on school premises. *Id.* at 1050. Unlike *Layshock*, the *Thomas* decision states that *Tinker*'s "on-campus" requirement can be satisfied either if 1) the speech originates on school grounds, or 2) if the speech eventually crosses onto school boundaries. Therefore, as these cases indicate, it is unclear whether the speech needs to simply originate off-campus to be protected or whether it needs to be seen or heard off-campus, as well.

¹³⁸ See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 298 (3d Cir. 2010); *Wisniewski*, 494 F.3d at 39; *Bethlehem*, 757 A.2d at 421.

¹³⁹ See Matthew I. Schiffhauer, Note, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN'S J. LEGAL COMMENT. 731, 756-58 (2010).

¹⁴⁰ See Schiffhauer, *supra* note 139, at 757; Stephanie Klupinski, Note, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Era*, 71 OHIO ST. L.J. 611, 643-44 (2010); see also *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 768 (9th Cir. 2006) (stating that "[t]he *Tinker* rule is a 'flexible one,' and in applying it, 'we look to the totality of the relevant facts,' including not only the plaintiffs' actions, but 'all of the circumstances confronting the school officials' at the time.") (citations omitted).

¹⁴¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 525 (1969) (Black, J., dissenting).

have become a reality in present-day public schools. With minimal computer knowledge, students can create humiliating profiles of their principals,¹⁴² threaten the lives of their teachers and fellow classmates,¹⁴³ and use sexually graphic language to describe virtually any member of the school community with whom they have had contact.¹⁴⁴ Moreover, all of this can be accomplished while hiding behind the First Amendment right of free speech. Because some courts continue to protect this degrading, humiliating, and threatening speech under the First Amendment, students are experiencing unprecedented authority in the classroom, believing that anything they say on the Internet is protected.¹⁴⁵ To restore both the educational mission of public schools as well as the safety felt by teachers and students, it is necessary to eliminate *Tinker*'s "on-campus" requirement.

Central to *Fraser* was the Court's recognition that "public education must prepare pupils for citizenship in the Republic" by "inculcat[ing] fundamental values necessary to the maintenance of a democratic political system."¹⁴⁶ These fundamental values must include tolerance of opposing viewpoints, as well as a respect for the sensibilities of others.¹⁴⁷ To instill these values in its students, public schools are required to "[balance] unpopular and controversial views . . . against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."¹⁴⁸

While the role of public schools has not changed since *Fraser*, a school's ability to ensure that its students are furnished with these fundamental values has become infinitely more difficult with the rise of the Internet. Central to this difficulty is a school's ability to discipline its students. As Justice Black remarked, "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."¹⁴⁹ However,

schoolchildren . . . [who lack] the capacity to appreciate the obligations, risks, and consequences that [attach to the right of free speech], become empowered to defy school authorities, say and do whatever they please

¹⁴² See, e.g., *Layshock*, 593 F.3d at 252-53, 254; *Snyder*, 593 F.3d at 291-92, 295.

¹⁴³ See, e.g., *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35-37 (2d Cir. 2007); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781-83 (E.D. Mich. 2002); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416-17 (Pa. Commw. Ct. 2000); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177-80 (E.D. Mo. 1998).

¹⁴⁴ See, e.g., *Donovan v. Ritchie*, 68 F.3d 14, 15-16 (1st Cir. 1995).

¹⁴⁵ See Braiman, *supra* note 99, at 472-74 (claiming that students are presently using the First Amendment as a "sword rather than as a shield.>").

¹⁴⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (internal quotations omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting).

while they are in school, and hale teachers and school officials into court when they do not get their way.¹⁵⁰

Again, it is not difficult to see that Justice Black's fears have become a reality in many present-day public schools. In retaliation for being disciplined, students no longer simply complain to friends about the action taken against them or about the disciplining teacher or principal. Instead, they charge to the perceived safety and anonymity of the Internet¹⁵¹ and accuse the disciplinarian of pedophilia,¹⁵² illegal drug use,¹⁵³ and discuss the disciplinarian's sexual history.¹⁵⁴ While perhaps such accusations are not new with the rise of the Internet, the extent to which others can access them has certainly increased. These accusations not only undermine the integrity and authority of the school, but they also seriously call into question the reputation of the singled-out teacher or principal.¹⁵⁵

While proponents of the "on-campus" requirement argue that the disciplinary authority for Internet actions should rest solely with the students' parents, this solution cannot realistically inform students of the severity of their actions. Despite parental discipline, students do not appreciate the consequences and implications of their actions on the Internet. In *Snyder*, despite the student's extensive punishment from her parents, she proceeded to sue her school, alleging violations of her right of free speech.¹⁵⁶ Thus, despite parental punishment, Snyder did not believe that she was at fault for the hurtful and offensive allegations she brought against her principal. Instead, she believed that she was entitled to say whatever she pleased about her principal and that the school had violated this constitutionally-protected right.

Furthermore, delegating disciplinary authority solely to parents undermines the vital ability of a school to punish students for conduct that is not in line with the school's mission. "Realistically . . . children could not be educated if school officials supervising pre-college students were without power to punish one who" disrupted the educational mission of the school.¹⁵⁷ As many student speech cases

¹⁵⁰ Braiman, *supra* note 99, at 458 (Black, J., dissenting) (citing *Tinker*, 393 U.S. at 524-26). See also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 294 (3d Cir. 2010) (attributing the rise in lawsuits against schools for violations of student First Amendment rights to "a new culture of students rallying against the administration.").

¹⁵¹ See Braiman, *supra* note 99, at 471 (stating that, "[f]or many students, the Internet provides anonymity and, they believe, impunity.").

¹⁵² See *Snyder*, 593 F.3d at 291.

¹⁵³ See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 252 (3d Cir. 2010).

¹⁵⁴ See *Snyder*, 593 F.3d at 291; *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416 (Pa. Commw. Ct. 2000).

¹⁵⁵ See, e.g., *Layshock*, 593 F.3d at 253 (stating that, after the creation of the "degrading", 'demeaning', 'demoralizing', and 'shocking' website, the principal was "concerned about his reputation.").

¹⁵⁶ See *Snyder*, 593 F.3d at 293, 294-95.

¹⁵⁷ *Thomas ex rel. Tiedeman v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1049 (2d Cir. 1979).

indicate, the creation of parody Internet sites have a direct impact on the educational mission of the school by disrupting class time, undermining the authority of school administrators, greatly infringing upon the teachers' sense of safety and well-being, and causing rumors to spread about particular teachers and principals.¹⁵⁸ Removing any disciplinary authority from the school simply because the Internet writings did not occur "on-campus" would drastically undermine the school's authority. Consequently, to paraphrase Justice Black, students would then be empowered to believe that they may say what they please, where they please, and when they please.¹⁵⁹

Critics of eliminating the "on-campus" requirement further argue that, if schools could extend their disciplinary authority onto the Internet, then virtually no student expression would be out of the school's reach.¹⁶⁰ However, eliminating the "on-campus" requirement still ensures that, under *Tinker*, the Internet speech creates a substantial disruption or an interference with the rights of others to fall outside the protections of the First Amendment.¹⁶¹ This certainly does not include all Internet speech that directly relates to the students' school, teachers, principals, or fellow students,¹⁶² but only speech that is deemed substantially disruptive by the school. Thus, the school's disciplinary authority takes effect only once the Internet speech threatens to substantially disrupt either school activities or the rights of others.¹⁶³

This ensures that school administrators do not take a "knee-jerk" overreaction to student expression¹⁶⁴ out of a "mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint."¹⁶⁵ On the

¹⁵⁸ See, e.g., *Layshock*, 593 F.3d at 252; *Snyder*, 593 F.3d at 294; *Bethlehem*, 757 A.2d at 417.

¹⁵⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 522 (1969) (Black, J., dissenting).

¹⁶⁰ See *Layshock*, 593 F.3d at 260 (stating that "[i]t 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."); Schiffhauer, *supra* note 139, at 760-61 (arguing that punishing students for Internet speech is too invasive and has the potential to do more harm to the school community than the Internet speech itself); Papandrea, *supra* note 87, at 1091-92 (arguing that the elimination of the "on-campus" requirement would "grant schools virtually unbridled discretion to restrict juvenile speech generally.").

¹⁶¹ In *Snyder*, the majority "disagree[d] with our dissenting colleague's assertion that under our standard a school district could punish two students 'for using a vulgar remark to speak about their teacher at a private party. . . .' Our opinion, reached by applying *Tinker*, only allows school discipline when there is a significant risk of substantial disruption at the school. [Therefore,] there is no risk that a vulgar comment made outside the school environment will result in school discipline absent a significant risk of a substantial disruption at the school." 593 F.3d at 301 n.8.

¹⁶² See Papandrea, *supra* note 87, at 1091-92 (fearing that, because most student expression centers around their school, virtually any student expression would come to the school's attention and, thus, be under its disciplinary control).

¹⁶³ *Tinker*, 393 U.S. at 513.

¹⁶⁴ See Schiffhauer, *supra* note 139, at 761.

¹⁶⁵ *Tinker*, 393 U.S. at 509.

contrary, it allows schools to assess the “special characteristics of the school environment” and determine whether punishment is warranted for the disruption caused by the Internet speech.¹⁶⁶

Abuse of the First Amendment right of free speech by students may not be a new phenomenon, but its effects are certainly farther-reaching and more disruptive with the rise of the Internet. Students’ beliefs that they are entitled to say virtually whatever they want on the Internet undermines the educational mission of the school, disrupts school activities and class time, harasses teachers and students, and contributes to their growing misconception that they control the schools.¹⁶⁷ Retention of *Tinker*’s “on-campus” requirement reinforces these misconceptions in students and allows them to hide behind the First Amendment with the belief that the school has violated their right to say whatever they please. Therefore, *Tinker*’s “on-campus” requirement should be eliminated to ensure that students do not abuse their First Amendment rights, thus allowing public schools to once again instill in its students the fundamental values necessary for entrance into society.¹⁶⁸

3. Retention of *Tinker*’s “On-Campus” Requirement Threatens the Safety of Teachers, Students, and Other School Personnel

The incidents of cyber violence and cyberbullying have risen with alarming rates over the past decade.¹⁶⁹ These “[v]iolent incidents in schools . . . deprive students of their constitutionally protected property right to an education because they divert students’ attention from their studies [and] create[] an atmosphere of fear and apprehension while diminishing the school’s educational mission.”¹⁷⁰ Although courts certainly do not condone threats of violence, they implicitly allow such conduct to occur by prohibiting discipline simply because the threat originates “off-campus.”

In *Mahaffey v. Aldrich*,¹⁷¹ a student created a website entitled “Satan’s web page” which included a weekly mission for other students.¹⁷² One week, “Satan’s” mission instructed the website’s viewers to “[s]tab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face.”¹⁷³ The student then advised viewers that “[k]illing people is wrong don’t do [i]t unless Im [sic] there to watch.”¹⁷⁴ Despite the

¹⁶⁶ *Id.* at 506.

¹⁶⁷ *Id.* at 525 (Black, J., dissenting).

¹⁶⁸ *See* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

¹⁶⁹ *See generally* Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CTR., http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf (last visited Nov. 15, 2011).

¹⁷⁰ Michael C. Jacobson, Note, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to Control the Increasingly Violent and Disorderly Scholastic Environment*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 909, 936 (2006).

¹⁷¹ *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

¹⁷² *Id.* at 781-82.

¹⁷³ *Id.* at 782.

¹⁷⁴ *Id.*

seriousness and dangerous nature of the website, the district court believed that the website was created within the student's First Amendment rights.¹⁷⁵ Utilizing a dangerous line of reasoning, the court downplayed the threats written on the website and instead saw it as a simply a joke that was created for laughs.¹⁷⁶ Furthermore, the court gave great weight to the website's disclaimer, telling viewers, "NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?"¹⁷⁷ Based on these two factors, the court determined that a reasonable person would interpret the website as a joke which did not actually intend for anyone to be harmed or killed.¹⁷⁸

Perhaps even more disturbing is the court's utter disregard of previous acts of violence based on Internet writings. Included on "Satan's web page" was an introduction stating, "[t]his site has no purpose. It is here to say what is cool, and what sucks. For example, Music is cool. School sucks. If you are reading this you probably know me and Think Im [sic] evil, sick and twisted."¹⁷⁹ It went on to "list[] 'people I wish would die,' 'people that are cool,' 'movies that rock,' 'music I hate,' and 'music that is cool.'"¹⁸⁰ Eerily similar to this website were the writings created by Eric Harris and Dylan Klebold, the students responsible for the Columbine Massacre. Harris' and Klebold's writings, like Mahaffey's website, stated, "You know what I hate? Star Wars fans: get a friggin life, you boring geeks. You know what I hate? People who mispronounce words . . . You know what I hate? People who drive slow in the fast lane, God these people do not know how to drive. You know what I hate? The WB network!!!!"¹⁸¹

Critics of eliminating the "on-campus" requirement argue that societal changes have caused students to express themselves in a violent and crude manner and courts, who cannot appreciate such changes, overreact to "nonsense or 'sick humor.'"¹⁸² However, this can hardly be deemed a legitimate reason for retaining *Tinker's* "on-campus" requirement. Although it is admittedly difficult for schools to predict whether a student's Internet threats have the potential to be carried out, schools cannot wait until a threat is actually carried out to consider disciplinary action to protect the safety of the school community.¹⁸³ Adhering to the *Mahaffey* line of reasoning would ensure that the school could take no disciplinary action could until after a particular threat is carried out.

¹⁷⁵ *Id.* at 786.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 781-82.

¹⁸⁰ *Id.* at 782.

¹⁸¹ Jacobson, *supra* note 170, at 935 (citation omitted).

¹⁸² Schiffhauer, *supra* note 139, at 759.

¹⁸³ See Rob Quinn, *3 Teens on Facebook Hit List Killed*, NEWSER (Aug. 25, 2010, 1:43 AM), <http://www.newser.com/story/98904/3-teens-on-facebook-hit-list-killed.html>. Under facts strikingly similar to many cases mentioned throughout this Note, a hit list was posted on Facebook, naming 100 men and women who were to be killed if they did not evacuate town. *Id.* Police "initially thought [the site] was a joke[;]" however three of the named individuals were shot and killed. *Id.*

Furthermore, threatening Internet speech is undoubtedly seen by many of the student's classmates, thus disturbing the aura of safety within the confines of the school community. Although courts disregard threatening websites as jokes that could not possibly be taken seriously,¹⁸⁴ the individuals against whom the threats are made certainly do not interpret the websites as students simply looking for laughs.¹⁸⁵ If schools are to continue protecting the safety and well-being of all school personnel, *Tinker's* "on-campus" requirement cannot be sustained.

"The original idea of schools . . . was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders."¹⁸⁶ Although this idea has not changed since *Tinker* was handed down in 1969, retention of its "on-campus" requirement allows students to out-smart their elders by writing harassing, degrading, humiliating, and threatening messages on the Internet under the perceived protection of the First Amendment. Federal courts across the country are recognizing the counter-intuition of this requirement and allow school disciplinary action for things said online.¹⁸⁷ "Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding."¹⁸⁸ However, when the tried and true no longer serve a useful purpose in the law, the only beneficial solution is change, which, in this case, is the elimination of *Tinker's* "on-campus" requirement.

IV. *TINKER'S* SUBSTANTIAL DISRUPTION TEST SHOULD BE BETTER DEFINED

In addition to eliminating the "on-campus" requirement, the Court should provide clarity to *Tinker's* "substantial disruption" prong by creating a factors test. The *Tinker* standard allows a public school to punish its students so long as the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"¹⁸⁹ Although this standard has been applied to countless cases since its 1969 inception,¹⁹⁰ no court has given "substantial disruption" a precise definition. While most courts uniformly agree that *Tinker* grants deference to the school's finding of a substantial disruption,¹⁹¹ courts are unsure of what exactly

¹⁸⁴ See, e.g., *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007); *Mahaffey*, 236 F. Supp. 2d at 786; *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 421 (Pa. Commw. Ct. 2000).

¹⁸⁵ See *Wisniewski*, 494 F.3d at 36 (stating that the threatened teacher asked to be removed from the student's English class, out of both fear and embarrassment); *Bethlehem*, 757 A.2d at 416-17 (stating that the threatened teacher received a medical sabbatical leave of absence for the school year and could not mingle with crowds out of fear that someone was intending to kill her).

¹⁸⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 522 (1969) (Black, J., dissenting).

¹⁸⁷ See discussion *supra* Part III.C.1.

¹⁸⁸ *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

¹⁸⁹ *Id.* at 513.

¹⁹⁰ See, e.g., sources cited *supra* note 137.

¹⁹¹ See *Tinker*, 393 U.S. at 509 (stating that the "school . . . 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 accompan[ies] an unpopular viewpoint.") (emphasis added);

constitutes a “substantial disruption.” Therefore, to create a more understandable and unified standard, courts should adopt a factors test to determine if a “substantial disruption” has occurred.

Although countless court opinions have utilized the *Tinker* analysis, no court has given an exact definition to a “substantial disruption.” It is precisely this absence that accounted for the conflicting opinions in *Snyder* and *Layshock*. In both cases, students circulated copies of the parodied MySpace profiles and spoke about the profiles’ contents during class time, requiring administrators and teachers to repeatedly ask students to refrain from discussing the profiles at school.¹⁹² The *Snyder* court was satisfied that such disruptions were “substantial” enough under *Tinker*¹⁹³ while the *Layshock* court was not.¹⁹⁴ Based on the conflicting results of these almost identical cases, it is clear that a more defined standard is required.

Although there is no precise definition of a “substantial disruption,” the court in *Saxe v. State College Area School District*¹⁹⁵ stated that, “[t]he primary function of a public school is to educate its students; [therefore] conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.”¹⁹⁶ However, this circular definition gives courts little assistance in determining if a student’s First Amendment rights have been violated. Furthermore, this seems contrary to what the *Tinker* Court itself implied—that a “substantial disruption” must have a physical interference in the school.¹⁹⁷

Under Justice Fortas’ reasoning in *Tinker*, a “substantial disruption” occurs when: 1) the student’s speech interferes with, or is likely to interfere with, the school’s direct teaching activities; 2) the communication from the teacher to the students or from the students back to the teacher is in a structured setting; and 3) there is violence or a threat of violence.¹⁹⁸ However, this definition provides little more guidance than the attempted definition set out in *Saxe*. For example, when is a

Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 299 (3d Cir. 2010) (stating that, “a school may meet its burden of showing a substantial disruption through its well-founded belief that future disruption will occur.” (citing *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008))); *Thomas ex rel. Tiedeman v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 n.13 (2d Cir. 1979) (dismissing an argument that courts, rather than schools, should adopt student-speech regulations because of the “oft-articulated deference to the discretion of school officials.”) (citations omitted).

¹⁹² See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010); *Snyder*, 593 F.3d at 293-94.

¹⁹³ See *Snyder*, 593 F.3d at 303.

¹⁹⁴ See *Layshock*, 593 F.3d at 263.

¹⁹⁵ *Saxe ex rel. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

¹⁹⁶ *Id.* at 217.

¹⁹⁷ See Abby Marie Mollen, Comment, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1522 (2008) (arguing that “Justice Black’s statement in dissent that the armbands “did divert students’ minds from their regular lessons” might suggest that the *Tinker* Court did not consider nonphysical interference to be sufficient.”).

¹⁹⁸ See Mark Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN’S L. REV. 365, 367-68 (1995).

teacher involved in “direct teaching activities?” The *Snyder* court implicitly determined that breaking up several minutes worth of conversation during unstructured free time constituted a direct teaching activity.¹⁹⁹ However, this same activity was not considered a direct teaching activity in *Layshock*.²⁰⁰

Furthermore, how serious must the threat of violence be to warrant a disruption? In *Bethlehem*, the court determined that the solicitation of money from other students to hire a hit man was a serious threat that constituted a “substantial disruption.”²⁰¹ However, in *Mahaffey*, an arguably more dangerous threat of violence was not serious enough to be considered a “substantial disruption.”²⁰² It is clear from these decisions that the little guidance provided by *Tinker* has left courts unsure of what exactly constitutes a “substantial disruption.” Therefore, further clarification is necessary.

To allow for both the flexibility and subjectiveness required in a public school setting, the best and most effective way to evaluate a “substantial disruption” is through a factors test. Under a factors test, courts do not need a precise definition of “direct teaching activities” or the “educational mission” of the school. Instead, courts can evaluate the school’s forecast of a substantial disruption through a specified list of elements. Significant factors should include: 1) the amount of time disrupted in the classrooms;²⁰³ 2) the extent to which the Internet speech was directed at a particular member of the school community, including other students, teachers, or administrators; 3) the subject matter of the speech, including its level of vulgarity and obscenity;²⁰⁴ 4) the physical, emotional, professional, and personal consequences experienced by the target of the Internet speech; 5) any relevant reaction to the speech outside of the school community, including parental concerns or the necessity of police involvement; 6) the severity of any threat made against a particular member of the school community; and 7) the extent to which a reasonable

¹⁹⁹ See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 294, 303 (3d Cir. 2010).

²⁰⁰ See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 253, 263 (3d Cir. 2010).

²⁰¹ See *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416, 422 (Pa. Commw. Ct. 2000).

²⁰² See *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781-82, 786 (E.D. Mich. 2002).

²⁰³ This non-exhaustive list can include time spent by teachers quieting students from talking about the disputed Internet speech during either structured or unstructured class time, conversations between teachers and students about the disputed Internet speech inside the classroom, and time spent accessing the disputed Internet speech through school-provided computers or the students’ own personal computers and cell phones.

²⁰⁴ Although schools cannot punish a student *solely* out of a “discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint,” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969), a student’s level of obscenity or vulgarity should be a relevant factor in determining whether the speech is protected, see *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986). It should be noted that the level of obscenity and vulgarity could remove a particular student Internet speech from a *Tinker* analysis and place it instead under *Fraser*’s authority. However, the exact amount of vulgarity necessary to warrant a *Fraser* analysis can best be determined by the courts.

person would dismiss the Internet speech as a mere joke. Although this list assumes equal weight to all factors, both schools and courts can afford more weight to certain elements if the circumstances indicate that such imbalance is necessary.

Opponents of this revised approach can argue that a factors test creates just as much, if not more, uncertainty than the current standard because it “fails to provide clear, workable guidance for future cases.”²⁰⁵ However, the strength of this argument is limited by two beneficial aspects of factors tests. First, although the proposed factors test will require courts to define more terms than the previous “substantial disruption” test, it does not follow that this will create more confusion in both the courts and schools. Rather, it will free courts from the burden of determining what exactly constitutes a “substantial disruption” and allow them to look at a list of factors relevant to determining whether a “substantial disruption” has occurred. Given the confusion that courts endure in determining the existence of a “substantial disruption,”²⁰⁶ a factors test will be a beneficial guide, rather than a cause of greater confusion.

Second, factors tests provide courts with enough flexibility to craft their rulings to particularized fact patterns. The “special characteristics of the school environment,” as recognized by Justice Fortas, indicate that courts cannot effectively apply a single, broad standard to all schools.²⁰⁷ Rather, courts must utilize a standard that allows for both the flexibility necessary in a particular school environment and consistency required for the faithful application of the law. The most effective way to craft such a standard is through a factors test.

Because courts have not received sufficient guidance on what constitutes a “substantial disruption” from either *Tinker* or *Saxe*, further clarification is necessary. To avoid contradictory results, the “substantial disruption” prong would be better understood and utilized as a factors test. Factor tests ensure that courts: 1) are not left to decipher the meaning of ambiguous words on their own and thus reach contradictory conclusions²⁰⁸ and 2) utilize the same criteria to determine whether the school was justified in punishing the disputed Internet speech. Therefore, *Tinker*’s “substantial disruption” prong should look at a list of relevant factors, rather than one culminating disruption within the school.

V. CONCLUSION

As Justice Black opined, “[c]hange has been said to be truly the law of life”²⁰⁹ Therefore, when confronted with an unworkable doctrine, courts must recognize the doctrine’s limitations and redefine the standard to fit the changing times. The current *Tinker* standard for student free speech has created significant confusion among lower courts, which has allowed some courts to place their

²⁰⁵ See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269-72 (2009) (Roberts, C.J., dissenting) (creating a list of 40 questions raised by the majority’s newly-created factors test).

²⁰⁶ See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010).

²⁰⁷ *Tinker*, 393 U.S. at 506.

²⁰⁸ See *Layshock*, 593 F.3d at 263; *Snyder*, 593 F.3d at 303; see also Yudof, *supra* note 198, at 367-70 (indicating that Justices Fortas and Black—both of whom decided the *Tinker* case—had differing opinions about the “mission of the school.”).

²⁰⁹ *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

imprimatur on threatening and other dangerous speech.²¹⁰ Based on this failing, the Court should redefine *Tinker* to make it both more applicable to the Internet era and more supportive of schools' educational missions. This redefinition should include the following two prongs: 1) elimination of *Tinker*'s "on-campus" requirement and 2) clarification of the "substantial disruption" element as a factors test.

Presently, *Tinker* requires unprotected student speech to occur within the reasonable boundaries of the school yard.²¹¹ However, the nature of the Internet does not allow it to be confined to space and time since the Internet is "generally nowhere and everywhere at the same time . . ." ²¹² Due to this new technological reality, allowing Internet speech to remain protected simply because it is not written at school seems futile. Indeed, in light of this new reality, lower federal courts have begun to break from *Tinker*'s "on-campus" requirement.²¹³ Furthermore, continued use of *Tinker*'s "on-campus" element encourages students to believe that anything they say and do on the Internet is protected. This belief has increased as courts continue to protect the violent and offensive student Internet discourse.²¹⁴ Therefore, to restore both the educational mission of public schools and the aura of safety surrounding those schools, *Tinker*'s "on-campus" requirement should be eliminated.

Tinker also requires non-protected student speech to have a "substantial disruption" of class time.²¹⁵ However, "substantial disruption" has never been given a precise definition. Therefore, lower courts are left to determine for themselves whether a disruption is substantial enough under *Tinker*. It is precisely this lack of clarity that accounted for the conflicting results found in *Layshock* and *Snyder*. Therefore, to ensure that lower courts utilize the same criteria in student speech cases, *Tinker*'s "substantial disruption" prong would be better understood as a factors test.

Redefining *Tinker* would restore uniformity in lower court decisions by avoiding conflicting results on identical facts,²¹⁶ as well as inform public schools of their true disciplinary reach. Implementing these two revisions would ensure that courts adjust *Tinker* to the modern Internet era and thus, bring life back into an otherwise confusing and muddled doctrine.²¹⁷

²¹⁰ See, e.g., sources cited *supra* note 99.

²¹¹ See *Tinker*, 393 U.S. at 512-13.

²¹² Papandrea, *supra* note 87, at 1090.

²¹³ See sources cited *supra* note 137.

²¹⁴ See sources cited *supra* note 99.

²¹⁵ See *Tinker*, 393 U.S. at 513.

²¹⁶ See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 252, 263 (3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 291-94, 303 (3d Cir. 2010).

²¹⁷ See Heidlage, *supra* note 80, at 579.