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Constitutional Law—First Amendment—Social Media Rams the Tinker Schoolhouse Gate: A New Approach for Online Student Speech

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CONSTITUTIONAL LAW—FIRST AMENDMENT—SOCIAL MEDIA RAMS THE *TINKER* SCHOOLHOUSE GATE: A NEW APPROACH FOR ONLINE STUDENT SPEECH

I. INTRODUCTION

Rapid advances in computer technology and the Internet have contributed to vast transformations in the way Americans work, learn, and communicate. Technologies now allow students to talk with astronauts in space,[1] interact with children from other parts of the world,[2] and even defy geographic boundaries to raise awareness and funds for the needy.[3] While the Internet provides the classroom with the capability to make enormous strides, it has also become a burden that administrators and teachers must treat with much caution and some skepticism.

Social commentator Jon Stewart once noted that "[t]he Internet is just a world passing around notes in a classroom,"[4] and sometimes, whether we like it or not, school administrators must stop the note passing. Before the advent of the Internet, the Supreme Court of the United States held in *Tinker v. Des Moines Independent Community School District*,[5] that students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[6] But student internet speech defies the boundaries originally conceived by the Court, and, as a result, *Tinker*'s schoolhouse gate[7] is now largely metaphorical. Nevertheless, the reality of intrusive and offensive internet speech must be promptly reckoned with by school administrators to maintain order within the classroom. Unfortunately, courts have failed to adequately create or endorse a comprehensive assessment that not

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1. *E.g.*, Elaine M. Marconi, *Communication from Space Inspires Young Minds*, NASA (Jul. 30, 2008), http://www.nasa.gov/mission_pages/shuttle/behindscenes/ariss.html.

2. *E.g.*, Rodolfo Roman, *Technology links Miami Classroom with Kids in China*, RODOLFOROMAN.COM (May 25, 2011), http://rodolforoman.com/technology-links-miami-classroom-with-kids-in-china/.

3. *E.g.*, Beth Sussman, *Students Use the Internet to Help Darfur*, USA TODAY (June 13, 2007, 8:21 AM), http://www.usatoday.com/news/education/2007-06-12-darfurstudents_N.htm.

4. Josh Monza, *5 Reasons Technology in the Classroom Engages Students*, SECUREDGE NETWORK (Dec. 20, 2010, 7:44 AM), http://www.securedgenetworks.com/secure-edge-networks-blog/bid/51752/5-Reasons-Technology-in-the-Classroom-Engages-Students.

5. 393 U.S. 503 (1969).

6. *Id.* at 506.

7. *Id.*

only caters exclusively to various forms of online student speech but also maintains a flexible nature that can stand the test of time.[8]

Past student-speech cases set the initial stage for formulating a test that adequately balances the right of student expression and the need for administrative control.[9] A thorough understanding of how circuits have thus far approached the matter provides insight as to what interests are at stake and illustrates why both students and administrators are rightly concerned about the future legal implications of online student speech.[10] Using prior precedent's current application, pitfalls, and ongoing conflicts as a foundation, this note advocates for a two-prong test that has the ability to break the current cycle of case-by-case consideration, which will eventually cripple the system and leave administrators and students with more questions than answers.[11] While others have philosophized on the possible ramifications of sanctioning online student speech,[12] or advocated for tests[13] that continue to evaluate this new medium solely under the past classifications of *Tinker*, *Morse v. Frederick*,[14] *Hazelwood School District v. Kuhlmeier*,[15] and *Bethel*

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8. *See infra* Part III (discussing the inadequacy of current remedies applied by various courts).

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See, e.g.*, Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 178–80 (2010) (arguing that *Fraser*'s standard should not apply to online student speech as it would only treat the consequences of such speech as opposed to the causes); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 659 (2011) (noting that the distinction between harassment and dissent should be the causal factor in determining whether students should be punished for their off-campus speech and supporting state anti-harassment and anti-cyber-bullying laws to combat the problem but failing to propose a test that courts, administrators, and students alike could use in evaluating speech prior to its dissemination).

13. Such tests do little to help students and administrators alike decide, prior to litigation, whether their actions are reasonable, thus inadequately prevent unnecessary court intervention in matters. *See* 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, 340 (2010) (proposing that courts evaluate three factors prior to determining whether *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* are even triggered); *see also* Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for An Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 156–57 (2007) (proposing that internet speech, absent intentional or reckless distribution by the student on campus, be considered off-campus speech, and thus unreachable by school administrators, then advocating the application of the *Tinker* standard once distribution is proved). Furthermore, evaluation methods that tie administrators' hands with a pure *Tinker* standard will be short-lived due to the increasing availability and ability of technology.

14. 551 U.S. 393, 397 (2007).

15. 484 U.S. 260, 273 (1988).

School District No. 403 v. Fraser,[16] this two-prong test fills the unique void that the Internet has created in the legal doctrine of student-speech and expression cases. The proposed test maintains the foundations of early student-speech cases, while also extending protections to reach the various natures and subsequent problems associated with online student speech.

II. AN ADEQUATE FOUNDATION: *TINKER*, *FRASER*, *KUHLMEIER*, AND *MORSE*

While the Supreme Court of the United States has yet to address what abilities, if any, public school administrators have to regulate online student speech, the founding student speech cases provide some guidance as to what considerations the Court may consider when formulating a test. Additionally, these four pivotal cases lay the foundation for a test that would specifically address the rampant issue of online student speech that crosses onto school grounds and interferes with the mission of the school.[17]

A. *Tinker*'s Substantial Disruption Test

In *Tinker*, a group of high school students planned to wear black armbands to school in protest of the Vietnam War.[18] School administrators, upon learning of the plan to wear the armbands, adopted a policy that would result in punishment for students that refused to remove them.[19] Ultimately, three students followed through with the plan and were suspended for refusing to comply with the policy.[20] In perhaps one of the most quoted lines in First Amendment jurisprudence, the Supreme Court noted that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[21] Ultimately, the Court found that the students were allowed to wear the armbands to school in protest against the Vietnam conflict, as political speech is considered the highest form of protected speech,[22] but only so long as it did not cause substantial disruption within the school.[23]

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16. 478 U.S. 675, 682 (1986).

17. These four cases followed the Supreme Court's holding in *West Virginia State Board of Education v. Barnette*, which first recognized student speech rights by holding that a school could not force students to participate in the pledge of allegiance. 319 U.S. 624, 642 (1943).

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

19. *Id.* at 504.

20. *Id.*

21. *Id.* at 506.

22. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 422 (1992) ("Core political speech occupies the highest, most protected position. . .").

23. *Id.* at 510–11. This holding resulted in what courts and commentators have often referred to as the "substantial disruption test." *Id*.

In crafting the original student-speech test, the Court relied on the Fifth Circuit's holding in the case *Burnside v. Byars*.[24] In *Burnside*, the Fifth Circuit held that the banning of "Freedom Buttons" worn by students was arbitrary and unreasonable because the buttons did not materially and substantially interfere with the requirements of appropriate discipline for the successful operation of the school.[25] Notably, in holding that school officials could not forbid the students in *Tinker* from wearing armbands, the Court emphasized that the speech at issue was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners."[26] Additionally, *Tinker* placed an emphasis on the schoolhouse gate, which demonstrates the Court's deference to speech that affects the school environment.[27]

B. *Fraser*'s Lewd and Vulgar Requirement

After *Tinker*, it was clear that "pure" or "symbolic" on-campus speech would not be actionable by school officials, so long as it did not substantially disrupt the school's operations.[28] Not long thereafter, however, the Court held that the constitutional rights of students in a public school are not automatically coextensive with the rights of adults in other settings.[29] The Court's holding in *Bethel School District No. 403 v. Fraser* recognized that the freedom to advocate controversial views must be balanced by the societal interest of teaching students appropriate behavior.[30] In *Fraser*, school administrators punished a student for including an "elaborate, graphic, and explicit sexual metaphor" in a student election speech held on campus.[31] Opining that a public high school was no place for a sexually explicit message, the Court found it perfectly appropriate for the school to disassociate[32]

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24. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
25. *Burnside*, 363 F.2d at 749.
26. *Tinker*, 393 U.S. at 508.
27. *Id.* at 511. The Court found that

> [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, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Id. at 512–13. The Court further noted that speech that crossed those boundaries however, was "not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513.
28. *Id.* at 517.
29. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
30. *Id.* at 681.
31. *Id.* at 678.
32. Originally, the student was told he would be suspended for three days and his name would be removed from the list of candidates eligible to speak at the school commencement

itself in order to demonstrate that vulgar speech and lewd conduct are wholly inconsistent with the fundamental values of public school education.[33] Factually, *Fraser* is distinguishable from *Tinker* in that the student speech at issue was not political speech but rather vulgar and lewd speech.[34] *Fraser* specifically determined that student speech that was plainly offensive, lewd, or indecent had no place in schools and, therefore, could be categorically limited.[35]

C. *Kuhlmeier* and *Morse* Have Continued a Trend of Granting More Regulatory Control to School Officials in Special Circumstances

After deciding *Tinker* and *Fraser*, the Court continued a trend of placing restrictions on student speech when it allowed school officials to exercise prior restraint of student expression as long as such restraint was reasonably related to legitimate pedagogical concerns of the school.[36] In *Hazelwood School District v. Kuhlmeier*, a principal censored articles in the school newspaper that contained, among other topics, information about three high-school students' experiences with pregnancy.[37] The principal believed that, even though the pregnancy article used false names, the identity of the young women could be deduced, and furthermore, the article itself contained sexual references that were inappropriate for younger students.[38] The Court held that the principal's actions were reasonable and did not violate student speech rights.[39]

The trend of favoring necessary restrictions on student speech continued in *Morse v. Frederick* when the Court extended administrative control of student speech to an off-campus function.[40] In *Morse*, the Court held that school administrators were justified in confiscating a student sign displaying the words, "BONG HiTS 4 JESUS" at an off-campus, school-related function because not doing so could send the wrong message to other students.[41] The school officials in *Morse* believed that the speech advocated for illegal drug use and, therefore, was contrary to "the school's educational mission to educate students about the dangers of illegal drugs and to discourage their

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ceremony. *Id.* Ultimately however, the student only served two days of the suspension. *Id.* at 679.

33. *Id.* at 685–86.
34. *Id.* at 685.
35. *Fraser*, 478 U.S. at 686.
36. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
37. *Id.*
38. *Id.* at 263.
39. *Id.*
40. Morse v. Frederick, 551 U.S. 393, 397 (2007).
41. *Id.*

use."[42] *Morse* reveals that the Court recognizes that administrators have a need to maintain an element of control in certain off-campus circumstances, which consequently justifies punishment of those students.[43]

D. Lessons from *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*

While *Tinker* set the initial physical boundary for actionable student speech, *Fraser* established that administrators can limit students' First Amendment rights when that boundary is crossed. *Kuhlmeier* expressed the Court's legitimate concern for maintaining a harmonious school environment while *Morse* demonstrated that administrative power extends to student speech that occurs off-campus. Perhaps this extension touches on the social desire or responsibility that society thrusts upon public schools to, in some fashion, mold today's children into productive citizens of tomorrow.[44]

The sum of these cases supports the conclusion that school officials have the authority to limit some student speech.[45] None of these cases, however, take into consideration the special concerns involved with internet speech, or what abilities school administrators may have to regulate this speech in order to maintain an environment that fosters their educational purpose.

III. THE INTERNET'S SPECIAL CONSIDERATIONS

It may be true that in its original context, the physical bounds of the school created the ultimate barrier between on- and off-campus speech.[46] For better or for worse, however, the schoolhouse gate is largely a metaphorical representation of the school in its entirety, including its educational mission, and this language should be strictly construed.

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42. *Id.* at 399. The Court noted the distinction between this message and protected political speech advocating a change in drug laws. *Id.* The Superintendent noted that the student "was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity." *Id.*

43. *Id.* at 397.

44. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (discussing society's desire for schools to teach children socially acceptable behavior).

45. This power currently only extends to on-campus speech that is substantially disruptive or vulgar and lewd. Additionally, off-campus speech can be limited when it relates to a school function and is in conflict with a school's pedagogical message. *See supra* notes 32–34 and accompanying text.

46. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

A. The Harmonious Educational Environment

Schools, as instruments of the state,[47] may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.[48] While it is important to recognize student speech rights, it is also necessary for public schools to have the administrative power necessary to maintain a harmonious educational environment.[49]

The United States Supreme Court has taken notice of the conflicting nature of both student-speech rights and the school's duty to be a principle instrument in awakening the child to cultural values, preparing him for later professional training, and helping him to adjust normally to his environment.[50] In order to accomplish these missions, schools strive to keep classrooms focused and keep students' minds on schoolwork instead of gossip.[51] Therefore, when student speech crosses onto school grounds, administrators dutifully take steps to ensure that the speech does not materially and substantially disrupt the school environment.[52]

B. A Pervasive Problem with Inadequate Remedies

Following the Supreme Court's holding in *Tinker*, many courts have been asked to address whether speech that originated off-campus but, through some means, crossed onto schoolhouse grounds was at all actionable by school administrators. For instance, the First Circuit held that a student's suspension was proper when a "Shit List," though created off-campus, found its way onto campus.[53] Conversely, the Fifth Circuit held that

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47. It should be noted that this note focuses on the rights of students in public school environments. Private schools have a greater ability to set limits, restraints, and regulations on their students, including speech rights. *See* Vanessa Ann Countryman, *School Choice Programs Do Not Render Participant Private Schools "State Actors"*, 2004 U. CHI. LEGAL F. 525, 528 (2004) (stating that "Private schools are private actors: they may act as they choose, and the Fourteenth Amendment will offer no protection to those affected by a private organization's actions.").

48. *Fraser*, 478 U.S. at 683.

49. *Id.*

50. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

51. *See generally School Mission Statements*, MISSIONSTATEMENTS.COM, http://www.missionstatements.com/school_mission_statements.html (last visited Feb. 26, 2012). This website provides a variety of sample school mission statements from universities, prep schools, and public schools. The statements generally indicate that the focus of the school should be on education and preparing the student's mind for the world. *See id.*

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

53. Donovan v. Ritchie, 68 F.3d 14, 15–16 (1st Cir. 1995). The list in question had 120 names with "one or more lines of crude descriptions of character and/or behavior" *Id.* at 16. The court also noted that the descriptions for the juniors and seniors on the list contained

school officials could not punish a student for a violent sketch, created off-campus two years prior, that was inadvertently brought to campus by another student.[54] This decision marked the second time the Fifth Circuit was confronted with student speech originating off-campus. In a prior decision, *Shanley v. Northeast Independent School District*,[55] the Fifth Circuit ruled that an underground student newspaper, which was produced and distributed off-campus, did not merit administrative intrusions.[56] In a similar off-campus student-newspaper case however, the Seventh Circuit reached a different conclusion.[57] In *Boucher v. School Board of School District of Greenfield*,[58] the Seventh Circuit vacated a preliminary injunction that had been granted in favor of a student who, using a newspaper that had been created off-campus, advocated hacking the school computer systems.[59] The court emphasized that the unique nature of what was being advocated threatened to interfere with the day-to-day mission and business of the school.[60]

Similarly, the Ninth Circuit agreed that school administration could suspend a student for writing a poem that depicted school violence, even though the poem was written off-campus, because it was subsequently shown to a teacher.[61] The court reasoned that the school had a duty to prevent any potential violence on campus and that this duty outweighed any of the student's First Amendment rights that were possibly infringed.[62] Arkansas's own federal circuit has also addressed off-campus speech that creeps pasts *Tinker*'s gate.[63] In *Doe v. Pulaski County Special School District*,[64] the Eighth Circuit held that a student could be disciplined for a letter threatening rape and murder, even though composed off-campus, because the letter was nonetheless eventually brought to campus by another student.[65] While these cases all address off-campus student speech that was subsequently brought

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"epithets that were not merely insulting as to appearance, but suggestive, often explicitly so, of sexual capacity, proclivity, and promiscuity." *Id.*

54. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619–21 (5th Cir. 2004). Even though the court held that the student was protected by the First Amendment, the court nevertheless determined that the school administrator had qualified immunity against the claim. *Id.* at 621.

55. 462 F.2d 960 (5th Cir. 1972).

56. *Id.* at 965–71.

57. Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 826 (7th Cir. 1998).

58. *Id.*

59. *Id.* at 822, 826.

60. *Id.* at 827–28.

61. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 991–92 (9th Cir. 2001).

62. *Id.* at 989.

63. *See* Doe v. Pulaski Co. Special Sch. Dist., 306 F.3d 616, 624–25 (8th Cir. 2002).

64. *Id.*

65. *Id.*

onto campus, none conclusively advocates for a test to confront such issues in the future.

As the Internet becomes more widely used by students, it becomes a tool that students use to express themselves.[66] In the only student-internet-speech case to reach a state supreme court, *J.S. ex rel. H.S. v. Bethlehem Area School District*,[67] the court found that the creation of webpages off-campus, which "contained derogatory, profane, offensive and threatening statements directed toward one of the student's teachers and his principal,"[68] constituted on-campus speech.[69] The Pennsylvania Supreme Court held that when speech is aimed at a specific school or its personnel and is brought onto the school campus or accessed at school by its originator, the speech should be considered on-campus speech.[70] The reasoning in *Bethlehem* is sound because it notes the inevitability that student internet speech that targets a school and is then intentionally distributed to its students will create disruption on-campus.[71]

While some district courts have also dealt with the issue of what types of off-campus speech can be regulated by school administrators, there is no clear favored standard, test, or viewpoint.[72] In fact, only the Fourth and Second circuit courts have conclusively addressed the specific issue of whether online student speech can be analyzed under the traditional on-campus framework.[73] In *Wisniewski v. Board of Education of Weedsport Central School District*,[74] the Second Circuit concluded that the mere nature of online speech did not necessarily insulate a student from school discipline.[75] Indeed, the Second Circuit has been the frontrunner in analyzing online speech as on-campus speech. As early as 1979, the court noted that it could

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66. Kristen Purcell, *Trends in Teen Communication and Social Media Use,* PEW INTERNET & AMERICAN LIFE PROJECT (Feb. 9, 2011), *available at* http://www.pewInternet.org/Presentations/2011/Feb/PIP-Girl-Scout-Webinar.aspx (last accessed Aug. 7, 2013).

67. 807 A.2d 847 (2002).

68. *Id.* at 850.

69. *Id.* at 865.

70. *Id.*

71. *See id.* at 688.

72. *E.g.*, Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (finding that a non-explicit Facebook page was not on-campus speech because it was never accessed on-campus or brought to campus by other students); Fenton v. Stear, 423 F. Supp. 767, 771 (W.D. Penn. 1976) (holding that an off-campus insult from student to administrator constituted fighting words, and therefore, the student could be punished); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090–91 (W.D. Wash. 2000) (granting an injunction because content of speech did not contain violent tendencies and because speech was deemed to be off-campus).

73. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 36 (2d Cir. 2007).

74. *Id.*

75. *Id.*

"envision a case in which a group of students incite substantial disruption within the school from some remote locale," and the court did not foreclose on the idea that this speech would be punishable.[76]

Subsequently, in *Wisniewski*, the court held that the transmission of an IM icon,[77] depicting a pistol firing a bullet at a person's head with blood smears and a teacher's name, were disruptive at school in accordance with *Tinker*.[78] It later reiterated this rule in *Doninger v. Niehoff.*[79] In *Doninger*, a student used her blog to call school administrators "douchebags" and encouraged her fellow students to contact the school to "piss-off" an administrator.[80] The student was approached by school officials and asked to apologize to the administrator in writing, show a copy of the post to her mother, and withdraw her candidacy for senior class secretary.[81] The Second Circuit noted that if the student had distributed a handbill with the identical content on school grounds—as opposed to electronically posting it to her blog—the case would fall squarely within the Supreme Court's precedent.[82] Despite not being physically distributed on school grounds, the court held that the speech created a foreseeable risk of substantial disruption within the school environment, and therefore the school was justified in disciplining her.[83]

Initially, the Third Circuit issued conflicting opinions on the issue of online student speech that disrupted the campus environment.[84] Coincidentally, both cases involved students who used off-campus computers to create MySpace[85] profile pages that insulted the schools' principals.[86] In *J.S. ex rel. Snyder v. Blue Mountain School District,* a student used MySpace to create, on a home computer, a profile that "contained crude content and vul-

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76. *See* Thomas v. Bd. of Educ. Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979).

77. An IM icon is a small image used to represent yourself when you participate in online conversations through AOL® Messaging Services.

78. *Wisniewski*, 494 F.3d at 38–39 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

79. 527 F.3d 41, 48 (2d Cir. 2008).

80. *Id.* at 49.

81. *Id.* at 46.

82. *Id.* at 49 (construing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682–83 (1986)).

83. *Id.* at 50–51 (citing *Wisniewski*, 494 F.3d at 40).

84. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010), *vacated & en banc reh'g granted*, 2010 U.S. App. LEXIS 7342 (3d Cir. 2010), *aff'd in part & rev'd in part*, 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 263 (3d Cir. 2010), *vacated & en banc reh'g granted*, 2010 U.S. App. LEXIS 7362 (3d Cir. 2010), *aff'd in part*, 650 F.3d 205 (3d Cir. 2011) (en banc).

85. MySpace is a social networking site that allows users to create individual profiles. MYSPACE, www.myspace.com (*last visited* April 18, 2013).

86. *Snyder*, 650 F.3d at 920; *Layshock*, 650 F.3d at 207–08.

gar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."[87] In *Layshock ex rel. Layshock v. Hermitage School District*, the student used his grandmother's computer to create a MySpace profile that portrayed the middle school principal as admitting to illegal drug use and sexual promiscuity.[88] Additionally, the schools claimed the content of the profiles caused problems for teachers on campus. In *Layshock,* after learning that the profile was being accessed on campus, the administration restricted student access to computers.[89] In *Snyder*, two teachers had to quiet their classes because students were talking about the profile, and a guidance counselor had to proctor a test so another administrator could sit in on the meetings between the principal and the student creator.[90] Ultimately, both students were disciplined by school officials for their actions.[91]

After rehearing these cases due to their conflicting nature, the Third Circuit ruled that schools officials were not entitled to act upon the student speech in *Layshock* because it found that the speech "did not disturb the school environment and was not related to any school sponsored event."[92] While the Third Circuit did not believe *Tinker* was applicable in these cases, it did not foreclose upon the idea that off-campus, online speech by students may be capable of causing substantial disruption, meriting administrative action.[93] Yet, with the continuing and expanding use of the Internet by students, both in and out of the classroom, it is nearly assured that school administrators and students alike will continually be forced to confront this issue as campus life is increasingly impacted by online speech.

IV. A MODERN TEST FOR A MODERN AGE

"In 1969, when the Supreme Court held that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' there could not have been any serious doubt as to the whereabouts of that gate—or the whereabouts of a given student in relation to it."[94] In the modern world however, "students adopt email, Web sites, cell phones, and instant messaging software to facilitate personal expression," and "they are

87. *Snyder*, 650 F.3d at 920.
88. *Layshock*, 650 F.3d at 207–08.
89. *Id.* at 209.
90. *Snyder*, 650 F.3d at 922–23.
91. *Id.* at 922; *Layshock*, 650 F.3d at 210.
92. *Layshock*, 650 F.3d at 207.
93. *See Snyder*, 650 F.3d at 931–32.
94. Kenneth R. Pike, Comment, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 972 (2008) (*citing* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

increasingly able to affect others at a distance, blurring the line between on- and off-campus speech."[95] When compared to other forms of electronic media, "the Internet has expanded at an exponential rate, integrating various modes of traditional communication, including radio and television, into a vast interactive network."[96] Teens are currently the heaviest Internet users, and teen cell phone use is also on the rise.[97] These statistics suggest that because students are on-campus for a significant portion of the day, they likely have access to online student speech during school hours through school computers or personal internet-capable devices such as cell phones.

And while internet usage increases, thereby increasing the chances of clashes between school administrators and students, there is still not a single test currently endorsed by a majority of courts for when online student speech may be restricted. The substantial-disruption test in *Tinker* produces undesirable results for both administrators and students.[98] This test favors punishment for students when their speech, through varying circumstances, happens to cause interference in the classroom.[99] Yet, the test does not impose punishment for the exact same conduct when circumstances simply do not bring the speech within the school environment.[100] This means that students, when engaging in internet speech, do not have any method to accurately determine whether or not they can be punished for their actions because some factors, such as if other students print the material and bring it to campus, are outside of the speaker's control. Additionally, the lewd and vulgar examination in *Fraser* is inadequate as it would prohibit a lewd act on one side of the schoolhouse gate and expressly allow it on the other, even if the speech flowed directly to the same impressionable students.[101] This type of irrelevant line drawing does not promote good citizenship; instead, it merely encourages students to funnel their lewd and vulgar speech to the schoolhouse through an off-campus medium in order to avoid the consequences of their actions.

It is possible, however, to formulate a test using various Supreme Court standards and notable internet-speech-case decisions such as those previously mentioned.[102] Students and administrators alike will benefit from a clearly drawn student-internet-speech test that balances the administrators' duty to facilitate a harmonious learning environment, which instructs youth as to the

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95. *Id.* at 972–73.
96. James Slevin, THE INTERNET AND SOCIETY 1 (2000).
97. Purcell, *supra* note 66.
98. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
99. *See id.*
100. *See id.*
101. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
102. *See supra* Part III.

"essential lessons of civil [and] mature conduct," with students' First Amendment Free Speech rights.[103]

A. Off-Campus Student Speech: A Proposed Two-Prong Test

A test based conjunctively on foreseeability and a student's objective intent will allow student speech with social value to be completely protected, but it will also allow school administrators to regulate any lewd, threatening, or otherwise un-valuable speech, thus ensuring a healthy educational environment for all youths.[104] Additionally, such a simple test would allow students to evaluate their speech prior to its dissemination and to appreciate the consequences of any action they chose to take. In order to gain an understanding of its full applicability, this test is demonstrated using the factual scenarios of the Eighth Circuit's *Doe*, a case involving off-campus speech that did not take place online,[105] and the Second Circuit's *Doninger*, a case directly dealing with off-campus, online student speech.[106]

1. *First Prong: Foreseeability*

The first step in deciding whether administrators can regulate online student speech should be to determine if it is foreseeable (1) that the speech will reach school grounds and (2) that the speech is likely to cause substantial disruptions on school grounds. Under the first prong of this proposed test, both elements should be foreseeable in order for a finder of fact to proceed to the second prong.

The holding of the Pennsylvania Supreme Court in *Bethlehem* provides guidance as to the first element of the foreseeability prong.[107] *Bethlehem* held that speech should be considered on-campus when it is aimed at a specific school or its personnel and is brought onto the school campus or accessed at school.[108] Therefore, when determining whether the first element of the foreseeability prong has been met—that is, whether or not the speech was likely to reach campus—courts, administrators and students alike should first look to the content and subject matter of the speech. [109] If the subject matter involves the school, a school official, a teacher, or another

103. *Fraser*, 478 U.S. at 683.

104. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (noting that "lewd, obscene, profane, libelous, and insulting or 'fighting'" words speech are not an "essential part of any exposition of ideas," and they have only slight social value that can be outweighed by "social interest in order and morality").

105. Doe v. Pulaski Co. Spec. Sch. Dist., 306 F.3d 616 (8th Cir. 2002).

106. Doninger v. Niehoff, 527 F.3d 41, 53 (2d Cir. 2008).

107. J.S. *ex rel*. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (2002).

108. *Id.*

109. *Id.*

student,[110] then it is foreseeable that the speech was likely to cross *Tinker*'s now-metaphorical schoolhouse gate and enter the realm of on-campus speech. This a careful line to walk, so as to not discourage all speech regarding the school. There would be a difference, for example, if a student's online speech merely concerned an upcoming school dance or pep rally, as opposed to a problem with a specific teacher or with a specific school policy. For the former, a court could reasonably find that the speech concerned a topic, a school dance or pep rally, many students are likely to discuss off-campus. Therefore, it would not be foreseeable for students to fear the speech will specifically reach campus. In the latter example, speech concerning a specific problem with a teacher or school policy, should be viewed as likely to reach campus, because confrontations with teachers and faculty are aimed specifically at the school or its officials.

Examining *Doe* under this element of the first prong, a court would likely determine that it was unforeseeable that the speech would ever reach campus. In *Doe,* the letter, which threatened a classmate, was written by the student, at his home, nearly a year prior to being brought onto campus.[111] The letter was shared with only a single friend who took the letter from the student author's home and subsequently brought it to campus without the student author's knowledge.[112] Even though another student was the subject of the violent and graphic letter, a court could reasonably conclude that the subject matter was limited to a single classmate, it was shared with a single classmate, and the student himself did not take any affirmative steps to bring the letter, either physically or through electronic transmission to school. Therefore, a court would find it was unlikely to reach the school grounds.[113] Under the proposed test, further examination of *Doe* would be unwarranted, and a court could conclude its analysis and hold that any remedial actions enforced by school administrators were unnecessary.

An examination of this prong using the facts of *Doninger* yields a different result. In *Doninger*, the student shared her message initially via email with a "large number" of email addresses.[114] Additionally, the student posted her message to her blog with the admitted intention of encouraging students who did not receive the initial email message to read it and respond.[115]

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110. In the future, this test could even expand to help school officials and courts decide when online student speech has constituted cyber-bullying. To do so, the test would simply need to be applied to the student as opposed to the school. For example, the first prong of the test would then become: Is it foreseeable that the speech will (1) reach the targeted student and (2) whether that speech is likely to cause harm to that student.

111. Doe v. Pulaski Co. Spec. Sch. Dist., 306 F.3d 616, 619 (8th Cir. 2002).

112. *Id.*

113. *See id.* at 616.

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

115. *Id.* at 45.

Moreover, the subject matter of the speech in *Doninger* directly concerned school officials, whom she called "douchebags," and the student actively encouraged her fellow students to contact the school to "piss-off" a certain administrator.[116] Due to the subject matter of this speech and the fact that it was actively shared and disseminated throughout the student body, a court analyzing the speech under the first element of the foreseeability prong should reasonably conclude that the speech would reach school grounds. If indeed the court found that the first element was satisfied, it should then proceed to the second element of the foreseeability test.

The second element of the foreseeability test, inspired by *Tinker*, is whether the speech was likely to cause significant problems or disruptions to the learning environment once it reached campus.[117] Naturally, this requires school administrators and even the court in instances such as preliminary injunctions, to speculate as to what speech will be disruptive. Nevertheless, schools and courts should seek to find concrete support for the inference that the speech ultimately will or will not cause substantial disruptions. Keeping in mind that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[118] courts can adequately predict whether school administrators will have to reroute resources, redirect students, or reinstruct teachers in response to the online student speech at issue.

If the speech is purely political, as in *Tinker*, then schools should absorb any reasonable disturbances in order to promote the national reverence for political speech.[119] Notably however, true student political speech should not include, as defined by *Fraser*, content that is lewd and vulgar.[120] Because student rights are not automatically coextensive with the rights of adults in other settings, the nature of the speech needs to be appropriate for an educational environment.[121] The Court's jurisprudential weaving, therefore, gives a high school student in the classroom the right to wear *Tinker*'s armband, but not *Cohen*'s jacket. [122]

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116. *Id.* at 44–45.

117. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

118. *Id.* at 508.

119. *See id.* at 514. Although the Court found no disturbances in *Tinker*, the scenario could reasonably be likened to a student wearing a "Pro-Life" or "Pro-Choice" shirt to school. While the shirt might inevitably cause some disturbances, such as student complaints, *Tinker* essentially requires the school to permit these disturbances so long as they are not substantial. *See id.* at 510.

120. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

121. *See id.* at 682.

122. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring). Justice Newman's reference to Cohen's jacket is from the case of *Cohen v. California*, where the speech involved a black leather jacket emblazoned with the phrase, "Fuck the Draft." 403 U.S. 15, 16 (1971).

Further examination of *Doninger* demonstrates how a court could determine whether the nature of the speech is appropriate for an educational environment. On first glance, the speech in *Doninger* might appear to be purely political—a student merely encouraging her fellow classmates to contact administration to voice concerns and frustrations.[123] However, as it was noted in *Fraser*, "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[124] Therefore, because the student in *Doninger* made the decision to include offensive terms in her call to arms, as well as to actively encourage students to directly engage a *single* administrator[125] with whom the student was in disagreement, a court could reasonably conclude that the nature of the student speech was not purely political and, instead, when viewed in the special context of the school environment, was plainly offensive.[126]

This element of the foreseeability prong will, of course, require an intense and somewhat subjective examination of the facts of any particular case. There are markers, however, that will assist courts and administrators alike in evaluating the nature of off-campus student speech. If a court deems that the student speech is free of such things as true threats,[127] fighting words,[128] and lewd or vulgar content,[129] then it can reasonably infer that any subsequent disruptions were unforeseeable by the student prior to engaging in the speech.

Furthermore, while this test will prevent some unnecessary litigation, other situations will ultimately lead to litigation; therefore, courts should also be encouraged to look to what type of reaction the school administrators were forced to take in responding to the speech. A school's limited response might indicate that the nature of the speech was not foreseeably capable of causing substantial disruption, while a response requiring substan-

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123. Doninger v. Niehoff, 527 F.3d 41, 44–47 (2d Cir. 2008).

124. *Fraser*, 478 U.S. at 681.

125. Students also had the capability to post comments on the blog post, some of which specifically attacked the administrator with whom the student was having the disagreement. *Doninger*, 527 F.3d at 45. One commenter and fellow student referred to the administrator as a "dirty whore." *Id.*

126. *See id.* at 44–47.

127. The Court has stated that "[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 360 (2003).

128. Fighting words have been classified by the Court as words that "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

129. *Fraser*, 478 U.S. at 685–86.

tial reallocation of teachers' or administrators' time might indicate that it was foreseeable that the nature of the speech would substantially disrupt campus life. Returning to *Doninger*, the school administrators were forced to respond to an increased number of phone calls and additionally "were forced to miss or [arrive] late to several school-related activities" as a result of handling the disruption.[130]

In sum, once it is determined that the content or subject matter of the speech is school-based, and thus likely to enter the bounds of the school, then it should be determined whether the speech's context contains the types of speech society would like schools to discourage children from using.[131] Additionally, if the case does find its way to a courtroom, judges should look to see whether the speech stopped class time, interfered with the goals and missions of the school, or forced a reallocation of resources and staff. If so, then a court could reason that a disruption took place.

2. *Second Prong: Objective Intent*

After finding that it is foreseeable that a student's internet speech will reach campus and cause substantial disruption, a court should then look to whether there was an objective intent for the speech to incite students, faculty, or administrators. An objective test is important in this instance because it is likely that students who face expulsion, suspension or other punishments for their speech would, if given the opportunity, use lack of intent as a get-out-of-jail-free card. Still, without some indication of the speaker's intent, it would be possible for schools to override a student's rights far too easily.

While *Tinker* emphasized the location of the speech and speaker, in the internet age, location of the speech includes the medium used by the speaker.[132] Therefore, in order to adequately determine whether the student had an objective intent to cause disruption, a court should turn to the medium the student chooses to disperse his message. If the online speech occurs in a public forum, such as social networking sites, or a private form that is actively shared with fellow students, such as an email with instructions to forward it to other students, then a court should hold that the student possessed the requisite objective intent to cause disruptions on school grounds. If, on the other hand, a student merely posts to a personal online blog that she does not actively promote or encourage her fellow students to read, or sends a single e-mail message to a close friend, then a court could conclude that the

130. *Doninger*, 527 F.3d at 46.
131. *See supra* text accompanying note 45.
132. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

student did not intend for the speech, regardless of its nature, to reach campus and become disruptive.

A continued examination of *Doninger* demonstrates that the student likely possessed the requisite intent to cause substantial disruptions. The student chose two mediums through which to disseminate her message—mass email and a publicly accessible blog with commenting enabled.[133] These mediums demonstrate that the student desired the speech to be heard by as many of her classmates as possible because the mediums actively sought to include or enlist fellow students.[134] As a result, a court could easily infer an intent to disrupt. In contrast, if Doninger had chosen instead to email or message her complaint to only a few close friends through Facebook,[135] but not necessarily encourage them to spread the message along, a court could find it reasonable that she was merely expressing her frustrations through the Internet, much like as if she had been passing a note to a friend in a school hallway.

This two-prong, content-context-medium-focused test, will guide courts, school administrators, and students in determining what off-campus student speech can be regulated by evaluating four important factors of the speech. This test conclusively addresses the following: (1) to whom the speech is relayed; (2) the content of the speech; (3) the nature of the speech; and (4) how the speaker chooses to disperse his or her message. In order for online student speech to be actionable by school administrators, both prongs of this test must be met, and therefore, all speech with regard to the same factors. Additionally, the school should have the burden of demonstrating that the student speech in question was both foreseeably capable of disrupting campus life, and that the student's choice of medium indicates that he had the objective intent to do so.

B. Additional and Future Applications

While this test addresses student online speech that targets administrators, as previously illustrated, it is also flexible in nature and can adapt to

133. *Doninger*, 527 F.3d at 44–47.

134. *Id.*

135. Courts will have to use a reasonableness test to essentially "draw the line" in some situations. If a student, for example, emailed three friends a court might find the student did not possess the requisite intent. In contrast, a student who emailed five close friends might be found to have possessed the objective intent of disrupting campus. The Objective Intent Prong should be view conjunctively with both elements of the Foreseeability Prong. Therefore, a message with highly inflammatory content, such as a teacher's perceived sexuality, may not be as tolerated by a court. Likewise, if the context of the speech is perhaps vaguely lewd or vulgar, such as comments on a teacher's breasts, a court might tolerate the message being privately shared online with a few more friends than in other circumstances.

address any type of off-campus speech, via the Internet or otherwise, which ultimately could have implications for on-campus life.

1. *The Proposed Test Is Also Applicable for Variations of Off-Campus Student Speech*

In addition to online speech, this test can also be applied to other forms of off-campus student speech, such as the letter in *Doe*.[136] Additionally, the test is versatile enough to provide guidance for less traditional or technological forms of student speech. The test would, for example, allow students to picket their schools off campus in order to show disapproval of some administrative decision or policy because of the pure political nature of that speech.[137] For the same reason, student protests, walk outs, or marches would also be protected under this proposed test.[138] Yet, this test would allow school administrators to take action when students use off-campus speech to target, or bully, other students.[139] As the Internet increasingly provides students with more outlets to bully their fellow classmates, "administrators are becoming increasingly alarmed" and schools must take steps to "preserve an appropriate pedagogical environment."[140] Thus, this two-prong test would allow administrators to do so, as the content and the nature of this kind of speech would likely indicate that it is foreseeable that the speech would reach campus and cause substantial disruptions and that the student possessed the objective intent to cause disruption on-campus.[141]

2. *Inevitable Advances in the Internet and Technology*

Because technology changes so rapidly, it is necessary for any test to have the ability to mold to these inevitable changes. Any test adopted by the United States Supreme Court should have broad applicability in order to stand this test of time. The proposed two-prong test meets these requirements.

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136. *See* Doe v. Pulaski Co. Special Sch. Dist., 306 F.3d 616, 624–25 (8th Cir. 2002).

137. *See, e.g.*, Michael Miller, *Students Picket Outside H.B. High: Leaders of Daylong Protest Say School Puts Too Much Stress on Grades, Too Little on Creativity. 'I Refuse to be a Sheep,' One Sign Reads,* HUNTINGTON BEACH INDEP. (Nov. 9, 2011), http://articles.hbindependent.com/2011-11-09/entertainment/tn-hbi-1110-protest-20111107_1_students-picket-protest-monday-morning-grades/2.

138. *See, e.g.*, Chris Welch, *Lee High School Students March in Protest of Huntsville Superintendent's Proposal to Change School Name,* THE HUNTSVILLE TIMES (Nov. 3, 2011, 8:20 AM), http://blog.al.com/breaking/2011/11/lee_high_school_students_prote.html.

139. *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 576–77 (4th Cir. 2011).

140. *Id.* at 577.

141. *See supra* Part IV.A.1–2.

While the Third Circuit's cases, *Snyder* and *Layshock*, both involved MySpace pages created by students, this test would just as easily apply to Facebook pages or groups.[142] New types of online interaction are always gaining or fading in popularity, and this test would be capable of adapting in response.[143]

Even though Facebook maintains high popularity, Twitter, created in 2006, is gaining rapid popularity and has even contributed to important world events such as the Arab Spring.[144] It is possible, therefore, to conceive that a court will soon be asked to determine whether a student can be punished for a "tweet," a YouTube video, or some other new medium of online expression that has yet to gain traction or even be invented. Because this proposed two-prong test evaluates four factors, both broadly and concisely, it will continue to adapt to upcoming changes in technologies.

C. Possibility of Supreme Court Intervention

The Supreme Court of the United States has already refused to review *Doninger* out of the Second Circuit.[145] Most recently, it has refused to hear *Snyder* and *Kowalski v. Berkeley County Schools*,[146] cases involving online bullying from the Third and Fourth Circuits, respectively, as well.[147] The sheer number of these cases infiltrating the lower courts should encourage the Supreme Court of the United States to accept certiorari in a case soon and to set a clear standard that lower courts can use to address the substantial and continuing concerns of off-campus and online student speech.

D. Dangers of Not Adopting a Broad, Yet Specific, Internet Speech Test for Student Speech Cases

If, or when, the Supreme Court takes up one of the many student speech case writs, it will have three options before it. First, the Court could choose to analyze the single case on its individual merits and essentially decide that all student internet speech cases should be analyzed on a case-

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142. *See* J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011); Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011).

143. MySpace formerly held the highest number of users, but that honor now belongs to Facebook. *See* Michael Arrington, *Facebook Now Nearly Twice The Size of MySpace Worldwide*, TECHCRUNCH (Jan. 22, 2009), http://techcrunch.com/2009/01/22/facebook-now-nearly-twice-the-size-of-myspace-worldwide/.

144. Carol Haung, *Facebook and Twitter Key to Arab Spring Uprisings: Report,* THE NAT'L (June 6, 2011), http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report.

145. Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), *cert. denied*, 132 S. Ct. 499 (2011).

146. 652 F.3d 565 (4th Cir. 2011).

147. *Id.*; J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

by-case basis. This would be unwise as it would leave the current circuit split unaddressed. Moreover, it would not provide guidance as to how courts should handle these cases in the future or to what extent administrators can regulate speech without fear of lawsuit.

Second, the Court could choose to analyze student internet speech under the old standards of *Tinker*, *Fraser*, *Kuhlmeier*, *Morse*, or some combination of the four. While this option is certainly preferable to the previous one, it still leaves much to be desired. Even if *Tinker*'s substantially disruptive standard works in one case, there is no guarantee that it will work in a majority of others. As technology continues to expand and becomes more widely used in the classroom, the odds that more internet speech cases will not fit squarely within the bounds of *Tinker* or *Fraser* become too great. This option, much like the first, still leaves school administrators and students without viable options for evaluating student internet speech at its source, and it fails to potentially eliminate unnecessary intervention by the judicial system.

Third, the Court has the option of adopting a specific student internet speech test. This is the only option before the Court that would not only adequately work for whichever case is granted certiorari, but would also provide a potentially long-lasting remedy that multiple courts, administrators, and students could use in evaluating this type of speech. While many tests exist, and undoubtedly more will surface in the interim, the two-prong, content-context-medium focused approach this note proposes would provide a stable yet flexible measure by which administrators, students, and courts would substantially benefit.

Administrators would have an opportunity to more easily assess speech before deciding whether it merits punishment. More importantly, administrators would be able to take a sigh of relief, as a clear and applicable standard would assuage fears that every detention hall or suspension will lead to lawsuits. Therefore, it is possible that administrators will be less likely to advocate for limiting internet interactions and capabilities for students and teachers.[148]

Students will benefit from the adoption of this test in two ways. First, they will be given guidance as to how to self-monitor their own behavior. While it is true that parents are responsible for the rearing of their children, it is also true that much goes unnoticed, especially when children have smart-phones, laptops, and access to the internet on tablets. Therefore, a

148. *See* Ryan Lytle, *Student-Teacher Social Media Restrictions Get Mixed Reactions*, US NEWS AND WORLD REPORT (Aug. 10, 2011), http://education.usnews.rankingsandreviews.com/education/high-schools/articles/2011/08/10/student-teacher-social-media-restrictions-get-mixed-reactions; Jennifer Preston, *Rules to Stop Pupil and Teacher From Getting Too Social Online,* N.Y. TIMES (Dec. 17, 2011), http://www.nytimes.com/2011/12/18/business/media/rules-to-limit-how-teachers-and-students-interact-online.html?_r=4.

clear standard would allow students to address the possible consequences of their speech prior to its dissemination and, hopefully, would encourage speech that is productive, political, beneficial, or responsible to society. Second, students will benefit if administrators can relax and loosen the reins on Internet usage. If administrators are less worried about lawsuits because they can clearly cut out improper speech with prompt attention and discipline, then students are likely to benefit by increased access to the Internet while on-campus and less stringent standards regarding their interaction with faculty while off-campus.

Finally, courts will benefit by having a test that will stand the test of time. Whether the case before it deals with a tweet, a viral video, a blog comment,[149] a Facebook group,[150]or another aspect of technology not yet conceivable, a court will have a clearly defined, yet flexible, standard by which to evaluate the speech. This type of security saves judicial resources and time and allows for cases to move as swiftly as possible through the justice system.

V. CONCLUSION

The proposed two-prong student internet speech test would provide a better and more predictable framework for students, administrators, and courts to use. As the Internet and social media networks continue to expand, and as more and more schools begin and continue to use technology both inside and outside of the classroom, it becomes even more important for both students and administrators to have clearly defined parameters of students' First Amendment speech rights.

Because schools play an essential role in molding young American minds, they are tasked with the difficult, and often conflicting, duties of empowering student voices while also moderating student conduct. This task, while daunting, can be achieved if courts opt to use the proposed two-prong test on a consistent basis to evaluate off-campus student speech. This test will continue to encourage the types of rights recognized by the Supreme Court in *Tinker*, while also encouraging students to voice their First

149. *See generally* D.C. v. R.R., 182 Cal. App. 4th 1190 (2010) (addressing a student suit against a fellow student alleging statutory violations under California's hate crime laws and common law claims for defamation and intentional infliction of emotional distress following comments posted to a student's blog that threatened the student's life, and included profanity laced insults regarding the student's perceived sexuality).

150. *See, e.g.*, Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860 (8th Cir. 2011). In this case, a student brought suit against his high school alleging that he was a victim of sexual harassment as prohibited by Title IX. *See id.* at 862. A portion of the student's allegations stemmed from a student-created Facebook page called, "Every One [sic] That Hates Billy Wolfe," which contained a photo-shopped image of the student's face on a figure wearing a green fairy costume with the word "HOMOSEXUAL" written on it. *Id.*

Amendment rights in a way that is both productive and civil. Even though the Constitution affords protection outside *Tinker*'s gate to hateful and morally reprehensible speech, such as that used by the members of Westboro Baptist Church in protesting military funerals, it is a safe bet that no public school in America seeks to actively promote such vile and patently offensive conduct among its future graduates.[151]

A clear test should promote and encourage a student's First Amendment rights while also instilling within them a healthy distaste for the type of lewd and offensive conduct first prohibited in schools by *Fraser*.[152] This two-prong test will enable America's public schools to effectively deal with the increasing number of these cases while also maintaining the respect of students everywhere.

*S. Kate Fletcher**

151. *See* Snyder v. Phelps, 131 S.Ct. 1207 (2011).

152. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

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