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Symposium: Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing

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Symposium: Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing

Abstract

This article examines the erosion of the strength of the Supreme Court's 1969 opinion in *Tinker v. Des Moines Independent Community School District*. Indicators of decline range from Justice Thomas' stunning call in *Morse v. Frederick* for overruling *Tinker* to recent lower-court opinions using *Tinker* to censor off-campus expression posted on the Internet. The article explores possible reasons for the decline and abuse of *Tinker* and it makes suggestions for its reinvigoration. Part I highlights and analyzes other indicators of the erosion, decline, and abuse of *Tinker*. Part II then explores some possible reasons and explanations for the midlife crisis it faces. Finally, Part III concludes that *Tinker* is still viable today, especially in cases that approximately mirror its facts, and that it has been used in some relatively recent cases to safeguard student expression. In other words, *Tinker* can weather this midlife crisis if judges and school administrators take it seriously.

Keywords

Tinker, *Morse v. Frederick*, First Amendment, Censorship, Off-Campus speech

TINKER'S MIDLIFE CRISIS: TATTERED AND TRANSGRESSED BUT STILL STANDING

CLAY CALVERT*

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INTRODUCTION

French psychiatrist and psychoanalyst Bernard Golse recently wrote that the term midlife crisis “corresponds to a change, a transition, or an existential turning point”¹ that “takes place somewhere between the ages of thirty-five and fifty.”² Others, however, contend that the

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1. Bernard Golse, *Midlife Crisis*, in 2 INTERNATIONAL DICTIONARY OF PSYCHOANALYSIS 1055, 1055 (Alain De Mijolla ed., 2005).

2. *Id.*

notion of a midlife crisis is merely a myth that “has continually failed to receive empirical support.”³

A myth? Try telling that to the forty-year-old opinion of *Tinker v. Des Moines Independent Community School District*.⁴ The United States Supreme Court seminally declared in *Tinker* that students in public schools possess a First Amendment⁵ right of free expression⁶ that can only be abridged when actual facts⁷ exist that might reasonably lead “school authorities to forecast substantial disruption of or material interference with school activities”⁸ or when the speech “materially disrupts class work or involves substantial disorder or invasion of the rights of others.”⁹ *Tinker*, at middle age,¹⁰ is in the midst of a very real, very serious jurisprudential crisis and it may be at an “existential turning point,”¹¹ waning in importance in the annals of First Amendment law.

How would you feel if someone was calling for your death? That is precisely what Justice Clarence Thomas did two years ago in *Morse v. Frederick*,¹² when he wrote that he would “dispense with *Tinker* altogether, and given the opportunity, I would do so.”¹³ Employing a heavy dose of originalism¹⁴ in his *Morse* concurrence¹⁵ and

3. E.g., Jutta Heckhausen, *Midlife Crisis*, in 3 *ENCYCLOPEDIA OF AGING* 933, 933 (David J. Ekerdt ed., 2002). Heckhausen adds that “[i]n spite of the evidence contradicting it, the notion of a midlife crisis has survived as a public myth about development during the fourth and fifth decades of life.” *Id.* at 934.

4. 393 U.S. 503 (1969).

5. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

6. See *Tinker*, 393 U.S. at 506 (writing that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

7. *Id.* at 508. The Court wrote that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.*

8. *Id.* at 514.

9. *Id.* at 513.

10. See Ravenna Helson & Christopher J. Soto, *Up and Down in Middle Age: Monotonic and Nonmonotonic Changes in Roles, Status, and Personality*, 89 J. PERSONALITY & SOC. PSYCHOL. 194, 194 (2005) (describing middle age as “roughly between ages 35 and 65”).

11. Golse, *supra* note 1, at 1055.

12. 127 S. Ct. 2618 (2007).

13. *Id.* at 2636 (Thomas, J., concurring).

14. Originalism can be defined as “the view that the Constitution should be construed to fit with the original public meaning of the document.” Cass R. Sunstein, *Minimalism Versus Perfectionism in Constitutional Theory: Second-Order Perfectionism*, 75 *FORDHAM L. REV.* 2867, 2867 (2007).

emphasizing the notion of *in loco parentis*,¹⁶ Thomas reasoned that “*Tinker* utterly ignored the history of public education”¹⁷ and that “*Tinker* has undermined the traditional authority of teachers to maintain order in public schools.”¹⁸ Thomas thus concluded that “[a]s originally understood, the Constitution does not afford students a right to free speech in public schools.”¹⁹

“[I]n *Morse*, Justice Thomas articulated a Dickensian view of the world, especially in the public school setting, with virtually no room for student rights.”²⁰ If *Tinker* was, as constitutional law scholar Erwin Chemerinsky wrote in 2004, “the high watermark of the Supreme Court protecting the constitutional rights of students,”²¹ then it is not too much of a stretch to deem Justice Thomas’s concurrence as the low watermark, at least to date, for *Tinker*’s continued viability.

Although *Tinker* survived Justice Thomas’s withering wrath, it now faces a new problem: being overshadowed by the high court’s opinion in *Morse* and, in the process, being relegated for use only in those cases that mirror or closely parallel its facts. In particular, and as I recently argued elsewhere, lower courts post-*Morse* are side-stepping *Tinker*’s traditional and rigorous substantial-and-material disruption standard and substituting, in its place, the Supreme Court’s ruling in *Morse* to automatically squelch student speech that allegedly threatens violence.²² This seems truly bizarre for two

15. See Kenneth W. Starr, *Our Libertarian Court: Bong Hits and the Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 5 (2008) (writing that “Justice Thomas based his concurrence on his view of the original purpose and protection of the Constitution”).

16. See *Morse*, 127 S. Ct. at 2631–34 (providing Thomas’s discussion of the *in loco parentis* doctrine) (Thomas, J., concurring). Thomas ultimately concluded that “*Tinker*’s reasoning conflicted with the traditional understanding of the judiciary’s role in relation to public schooling, a role limited by *in loco parentis*.” *Id.* at 2634.

17. *Id.* at 2636.

18. *Id.*

19. *Id.* at 2634.

20. Stephen Kanter, *Bong Hits 4 Jesus as a Cautionary Tale of Two Cities*, 12 LEWIS & CLARK L. REV. 61, 99 (2008). A Dickensian view of the world captures the paradoxes inherent in the modern era of human rights. To summarize, “[w]e have seen the best of human rights protections inscribed on the books, but some of the worst human rights violations inflicted on the ground.” John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707, 707–08 (2001).

21. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124 (2004).

22. See Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far To Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 4 (2008) (arguing that the United States Court of Appeals for the Fifth Circuit’s November 2007 decision in *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007), “allows school administrators to sidestep, avoid, and otherwise dodge the application of the *Tinker* standard when the student speech threatens mass violence”).

reasons. First, *Morse* has nothing, at least factually, to do with violent expression but, instead, relates to a banner reading “BONG HiTS FOR JESUS”²³ that, according to Chief Justice John Roberts’s majority opinion, “advocated the use of illegal drugs.”²⁴ Second, the *Morse* holding has no relation to violent expression and is, in fact, very narrow;²⁵ the majority concluded only “that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”²⁶

But just six months after the Supreme Court’s ruling in *Morse*, the United States Court of Appeals for the Fifth Circuit, in *Ponce v. Socorro Independent School District*,²⁷ applied *Morse* to a case involving a student-written notebook entry that described “a Columbine-style attack on a school.”²⁸ In determining whether the speech, which the student claimed was “a work of fiction,”²⁹ was protected by the First Amendment, the court chose to ignore the rule from *Tinker*. It reasoned that “*Tinker* will not always allow school officials to respond to threats of violence appropriately”³⁰ and that, instead, “harm of a mass school shooting is . . . so devastating and so particular to schools that [a] *Morse* analysis is appropriate.”³¹ Intimating that *Tinker*’s substantial-and-material disruption test was either too difficult or too time consuming for school administrators to apply to such cases, the Fifth Circuit wrote that “[s]chool administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance.”³² The Fifth Circuit is not alone in suggesting that *Morse* can be used in place of *Tinker* to squelch violent-themed speech.³³

23. *Morse*, 127 S. Ct. at 2622–23 (describing the underlying facts of the case).

24. *Id.* at 2625.

25. See Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 357 (2007) (“By its plain language, *Morse*’s holding is narrow in that it expressly applies only to student speech promoting illegal drug use.”).

26. *Morse*, 127 S. Ct. at 2622.

27. 508 F.3d 765 (5th Cir. 2007).

28. *Id.* at 766; see *infra* note 163 (describing one of the deadliest school shootings in United States history).

29. *Ponce*, 508 F.3d at 766.

30. *Id.* at 770.

31. *Id.* at 771 n.2.

32. *Id.* at 772.

33. For instance, the United States Court of Appeals for the Eleventh Circuit, in upholding a high school’s decision to suspend a student for a violent-themed notebook entry, wrote:

Recently, in *Morse*, the Supreme Court broadly held that “[t]he special characteristics of the school environment and the governmental interest in

The problem is this: As courts expand the scope and power of *Morse*, they contract and reduce the force of *Tinker*. The rationale reflected here for treating speech that advocates illegal drug use, such as the banner in *Morse*, as the equivalent of student expression that features violent content was succinctly summarized in September 2008 by U.S. District Judge James Knoll Gardner, who wrote:

Schools at all levels have been affected either directly or indirectly by the violent events that have occurred at places like Columbine, Virginia Tech, Northern Illinois, Nickel Mines and Red Lion. *The impact of violence in schools is so great that it now has equal importance as the issue of illegal drug use in schools.*³⁴

Taken together, Justice Thomas's concurrence in *Morse* and the Fifth Circuit's decision in *Ponce* amount to a "one-two punch" against *Tinker*. Justice Thomas calls for it to be overruled and then the Fifth Circuit, with *Tinker* still standing, opts to ignore it. Sadly, Justice Thomas is not the only prominent jurist in recent years to denigrate the free expression rights of high school students. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, writing in April 2008, opined that "high-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students."³⁵ That is a far cry from the lofty, speech-inspiring rhetoric³⁶ in *Tinker* that: "state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students;"³⁷ and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."³⁸

It is also ironic that Judge Posner would seem to belittle what *Tinker* stands for and, in the words of fellow Seventh Circuit Judge Ilana

stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." That same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.

Boim v. Fulton County Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007) (citation omitted).

34. Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 616–17 (E.D. Pa. 2008) (emphasis added) (footnotes omitted).

35. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 674–75 (7th Cir. 2008).

36. See Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 120 (2003) (describing how, in *Tinker*, the "majority opinion authored by Justice Abe Fortas has become famous for its stirring language" (emphasis added) (footnote omitted)).

37. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

38. *Id.*

Diamond Rovner, write an opinion that “repeatedly denigrates”³⁹ what she calls “the value of the speech and speech rights of high school students.”⁴⁰ The irony arises because Judge Posner, just seven years earlier, in *American Amusement Machine Ass’n v. Kendrick*,⁴¹ cited *Tinker* favorably to support his simple, no-nonsense assertion that “[c]hildren have First Amendment rights.”⁴² In *Kendrick*, Judge Posner and the Seventh Circuit enjoined the enforcement of an Indianapolis, Indiana law that limited minors’ access in arcades to video games that depict violence.⁴³

All of this is not good news, of course, for the viability of *Tinker*, especially as a bulwark⁴⁴ against the censorial proclivities of school officials and, in turn, the judicial deference granted to their decisions in a post-Columbine world.⁴⁵ Part I of this article highlights and analyzes other indicators of the erosion, decline, and abuse of *Tinker*. Part II then explores some possible reasons and explanations for the midlife crisis it faces. Finally, Part III concludes that *Tinker* is still viable today, especially in cases that approximately mirror its facts, and that it has been used in some relatively recent cases to safeguard student expression. In other words, *Tinker* can weather this midlife crisis if judges and school administrators take it seriously.

39. *Nuxoll*, 523 F.3d at 677 (Rovner, J., concurring).

40. *Id.*

41. 244 F.3d 572 (7th Cir. 2001).

42. *Id.* at 576 (citing *Tinker* and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), to support this proposition).

43. *Id.* at 580.

44. See James M. Henderson, Sr., *The Public Forum Doctrine in Schools*, 69 ST. JOHN’S L. REV. 529, 531 (1995) (writing, from his position as Senior Counsel in the Washington, D.C., office of the American Center for Law and Justice, that “*Tinker* has remained a *bulwark* in our legal representation of our student clientele” (emphasis added)).

45. As the United States District Court for the Southern District of New York recently wrote, in the context of upholding the suspension of a fifth-grade student for turning in an assignment in which he wrote about blowing up his school, “[t]he threat of serious school violence—including mass shootings perpetrated by students—is an unfortunate fact of life in twenty-first-century America.” *Cuff v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008). The court then observed:

It is against this backdrop that courts across the country have considered First Amendment challenges to discipline imposed on students for speech that school officials viewed as threatening. *The overwhelming response has been deference on the part of courts to the judgment of educators as to whether a perceived threat should be taken seriously and met with discipline in order to ensure the safety of the school community.*

Id. (emphasis added).

I. INDICATORS OF *TINKER*'S DECLINE AND ABUSE

This Part initially examines the trio of Supreme Court decisions subsequent to *Tinker* affecting students' First Amendment right of expression, with each case chipping away at *Tinker*'s foundation of constitutional protection for student speech. It then analyzes how *Tinker* is today being abused by lower courts to punish students for speech that the Supreme Court at the time of *Tinker* could never have imagined—postings on the World Wide Web. Next, it illustrates how *Tinker* has been stretched by at least one court to shield students from emotional injuries caused by offensive expression—a radically different use than the facts of *Tinker* would suggest is appropriate.

A. *Three Strikes and You're Out? Almost.*

The most obvious indicator of *Tinker*'s decline is that, in each of the three subsequent Supreme Court decisions involving student expression rights, the Court chose: (1) not to apply *Tinker*; (2) to carve out fact-specific exceptions to *Tinker*; and (3) to rule in favor of school officials and against students.⁴⁶

In 1986, the Supreme Court in *Bethel School District No. 403 v. Fraser*⁴⁷ gave school authorities power to regulate sexually offensive expression, reasoning that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”⁴⁸ It held:

The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.⁴⁹

As Stanford Law School Professor Kathleen Sullivan recently summed up *Fraser*, the Court “denied First Amendment protection to a student who made sexual remarks in a mandatory school assembly, holding that such speech may be restricted as pedagogically inappropriate and contrary to the school's educational mission.”⁵⁰

Two years after *Fraser*, the Supreme Court held in *Hazelwood School District v. Kuhlmeier*⁵¹ that “educators do not offend the First

46. See *Morse v. Frederick*, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

47. 478 U.S. 675 (1986).

48. *Id.* at 683.

49. *Id.* at 685.

50. Kathleen M. Sullivan, *Free Speech*, 35 PEPP. L. REV. 533, 538 (2008).

51. 484 U.S. 260 (1988).

Amendment by exercising 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.”⁵² The Court avoided applying *Tinker* in *Kuhlmeier*, which dealt with the censorship of two articles in a public high school newspaper produced as part of a journalism class, reasoning “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.”⁵³ As Professor Douglas Laycock succinctly observed, *Kuhlmeier* stands for the maxim that the *Tinker* “rule does not apply if the speech is school-sponsored.”⁵⁴ Two former executive directors of the Student Press Law Center put it more bluntly when they wrote that, in *Kuhlmeier* “the Supreme Court has, without sufficient justification, disemboweled the [*Tinker*] disruption standard for school-sponsored publications.”⁵⁵ They called *Kuhlmeier* “unquestionably a serious step backward.”⁵⁶

Both *Fraser* and *Kuhlmeier* thus can be viewed as chipping away at *Tinker*. The Supreme Court in *Fraser* and *Kuhlmeier* qualified when *Tinker* should apply and “clarified that schools did not in every situation need to justify regulation of student speech on the basis that the speech would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”⁵⁷

After a nineteen-year hiatus post-*Kuhlmeier* from deciding student expression cases, the Supreme Court in 2007 handed down its third-straight defeat for student speech in *Morse v. Frederick*.⁵⁸ Even setting aside Justice Thomas’s concurring opinion mentioned earlier,⁵⁹ the Court’s opinion in *Morse* undermines *Tinker*. As Erwin Chemerinsky recently observed:

52. *Id.* at 273.

53. *Id.* at 272–73.

54. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 112 (2008).

55. J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 724 (1988).

56. *Id.* at 732.

57. *Barr v. Lafon*, 538 F.3d 554, 563 (6th Cir. 2008) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

58. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

59. See *supra* notes 12–19 and accompanying text (discussing Justice Thomas’s argument to overturn *Tinker*, as set forth in his concurring opinion in *Morse*).

In *Bethel*, the Court at least argued that Fraser's speech disrupted school activities, but in *Morse v. Frederick*, the Court made no effort to do so. Although the Court did not overrule *Tinker*, it clearly abandoned the idea that speech can be punished only if it is actually disruptive of school activities.⁶⁰

In summary, the trio of Supreme Court student-speech cases subsequent to *Tinker* have all whittled away at *Tinker*'s free-expression triumph,⁶¹ "greatly alter[ing] the holding set forth by the Warren Court."⁶² *Tinker*, in essence, has become the back-up rule for student speech cases: It is applied only if the facts before a court fall outside the framework of sexually lewd and offensive expression (*Bethel*), school-sponsored expression (*Kuhlmeier*), or expression that advocates illegal drug use (*Morse*).⁶³ After chalking up a victory for student speech rights in *Tinker*, the Supreme Court has now ruled against students in three consecutive cases from 1986 through 2007.

B. Abusing *Tinker* in Cyberspace

When the Supreme Court is not carving out exceptions to *Tinker*, some lower courts are now using—misusing, really—*Tinker* in a situation and scenario that the Court in 1969 could hardly have imagined. In particular, they are incorrectly applying it to censor off-campus student expression that is posted on the World Wide Web.⁶⁴

For instance, in July 2007, the United States Court of Appeals for the Second Circuit in *Wisniewski v. Board of Education of Weedsport*

60. Erwin Chemerinsky, *How Will Morse v. Frederick be Applied?*, 12 LEWIS & CLARK L. REV. 17, 20 (2008).

61. Cf. Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 840 (2008) (writing that "[c]ommentators generally hailed *Tinker*, and deplored what they saw as a narrowing of it by *Fraser* and *Kuhlmeier*" (footnote omitted)).

62. Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995).

63. As the United States Court of Appeals for the Sixth Circuit recently wrote, vulgar and obscene speech is governed by *Fraser*, school-sponsored speech is governed by *Kuhlmeier*, and "all other speech is governed by *Tinker*." Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007). Similarly, the United States Court of Appeals for the Second Circuit, in a ruling handed down prior to the Supreme Court's decision in *Morse v. Frederick*, wrote that "for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under [*Kuhlmeier*], the rule of *Tinker* applies." Guiles v. Marineau, 461 F.3d 320, 325 (2d Cir. 2006).

64. See Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 730–33 (2007) (noting that "most lower courts have applied the Supreme Court's *Tinker* standard to off-campus speech," and that, although the Supreme Court has not ruled on whether public schools possess the power to punish students' off-campus speech posted in cyberspace, "lower courts have reached the consensus that *Tinker*'s substantial disruption standard governs such speech").

*Central School District*⁶⁵ applied *Tinker*'s substantial-and-material disruption standard to affirm the suspension of a student "for sharing with friends via the Internet a small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed."⁶⁶ Even though the instant-messaging icon in question was created by student Aaron Wisniewski "on his parents' home computer,"⁶⁷ the Second Circuit reasoned that "off-campus conduct can create a foreseeable risk of substantial disruption within a school"⁶⁸ and that *Tinker* is "the appropriate First Amendment standard"⁶⁹ to apply when evaluating "school officials' authority to discipline a student's expression reasonably understood as urging violent conduct."⁷⁰ The Second Circuit concluded that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."⁷¹

In May 2008, the Second Circuit once again applied *Tinker* to uphold the punishment of a high school student, this time for an off-campus blog posting, in *Doninger v. Niehoff*.⁷² The court concluded that the student Avery Doninger's posting, which referred to school administrators as the "douchebags in central office"⁷³ and urged classmates to write or call one administrator "to piss her off more,"⁷⁴ "created a foreseeable risk of substantial disruption to the work and discipline of the school and that Doninger has thus failed to show clearly that Avery's First Amendment rights were violated when she was disqualified from running for Senior Class Secretary."⁷⁵

Several years before the Second Circuit's rulings in *Wisniewski* and *Doninger*, the Supreme Court of Pennsylvania in *J.S. ex rel. H.S. v. Bethlehem Area School District*⁷⁶ applied *Tinker* to affirm a school's punishment of a student, J.S., who created, while off campus and at home, a website that "contained derogatory, profane, offensive and threatening statements directed toward one of the student's teachers and his principal."⁷⁷ In doing so, the Court observed that the "few

65. 494 F.3d 34 (2d Cir. 2007).

66. *Id.* at 35.

67. *Id.*

68. *Id.* at 39.

69. *Id.* at 38.

70. *Id.*

71. *Id.* at 40.

72. 527 F.3d 41 (2d Cir. 2008).

73. *Id.* at 45.

74. *Id.*

75. *Id.* at 53.

76. 807 A.2d 847 (Pa. 2002).

77. *Id.* at 850.

courts that have considered Internet communication have focused upon *Tinker* in their analysis.”⁷⁸ Applying *Tinker*, the Pennsylvania Supreme Court held that:

[W]e are satisfied that the School District has demonstrated that J.S.’s web site created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of *Tinker*. Thus . . . we find that the School District’s disciplinary action taken against J.S. did not violate his First Amendment right to freedom of speech.⁷⁹

Tinker is being abused in cases such as *Wisniewski*, *Doninger*, and *J.S.* because it was never designed to be applied to off-campus speech scenarios. First, *Tinker* dealt with speech that took place on campus—the wearing of black armbands while on school property to protest the war in Vietnam.⁸⁰ *Tinker* was “the first case explicitly to recognize a student’s right to freedom of expression *on campus*.”⁸¹

Second, the Supreme Court in *Tinker* only considered, in its explicit reasoning, on-campus scenarios and on-campus locations during school hours when adopting its substantial-and-material disruption test.⁸² As Justice Abe Fortas wrote:

A student’s rights, therefore, 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 interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others.⁸³

Justice Fortas was careful to note that school officials did possess authority over students, but he described this in the context of on-campus control, writing that “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control *conduct in the schools*.”⁸⁴ And

78. *Id.* at 866.

79. *Id.* at 869.

80. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (noting the students in the case “determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season”).

81. Paul J. Beard II & Robert Luther III, *A Superintendent’s Guide to Student Free Speech in California Public Schools*, 12 U.C. DAVIS J. JUV. L. & POL’Y 381, 387 (2008) (emphasis added).

82. *Tinker*, 393 U.S. at 512–13.

83. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (emphasis added).

84. *Id.* at 507 (emphasis added).

seemingly, by definition, the creation and posting of a website by a student at home, on his or her own computer, is not in-school conduct. Moreover, Justice Fortas also made it clear that the *Tinker* Court was measuring and defining the scope of First Amendment speech rights for students “in light of the *special characteristics of the school environment*.”⁸⁵ The Court was not evaluating those rights outside of that environment, such as on a student’s home computer.

An early analysis of Internet-posted student expression cases contended that the “clear inference”⁸⁶ to be drawn from *Tinker*, *Fraser*, and *Kuhlmeier*—none of which involved off-campus-created speech—is that the Supreme Court “is assuming the school’s authority over the speech of its students ends as the student leaves the schoolhouse.”⁸⁷

Several more points must be made as to why *Tinker* should not be applied to censor off-campus student expression. First, individuals (teachers, principals, or students) who are defamed by the off-campus, Internet postings of students *already* have sufficient remedies at their disposal in the form of civil libel suits that can be filed against those who post defamatory information.⁸⁸ It is tantamount to judicial overkill for courts to allow not only defamation suits but also in-school punishment for such off-campus expression. Courts should not allow schools to exert a second form of punishment (suspension or expulsion, for instance) when a libel suit will suffice to make whole the individuals who are harmed.

Second, extending *Tinker* to off-campus speech intrudes on the realm of parental rights. Schools must not be allowed to usurp control from parents over the off-campus speech and off-campus behavior of their children simply because such speech or behavior relates to or is somehow about other students or administrators.

85. *Id.* at 506 (emphasis added).

86. Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 142 (2000).

87. *Id.*

88. For instance, a public school principal from Pennsylvania named Eric W. Trosch filed a defamation lawsuit against four former students who he claimed posted defamatory statements about him on the Internet via fake MySpace profiles. See Joe Pinchot, *Principal Sues 4 Ex-students Over Profiles on Myspace*, HERALD, Apr. 4, 2007, http://www.sharon-herald.com/local/local_story_094195802.html. In addition to such out-of-school efforts at redress, Trosch also punished one of those same students, Justin Layshock, at school for Layshock’s fake profile of Trosch, leading to a federal lawsuit in *Layshock v. Hermitage School District*, 496 F. Supp. 2d 587 (W.D. Pa. 2007). Similarly, Principal Cyd Duffin of Colony High School in Alaska filed a lawsuit for defamation and invasion of privacy in 2009 based upon a fake MySpace profile of her. Zaz Hollander, *Abusive MySpace Page Draws Principal’s Lawsuit*, ANCHORAGE DAILY NEWS, Apr. 7, 2009, <http://www.adn.com/news/alaska/matsu/story/748805.html>. Although Duffin sued not only MySpace, but also the unknown creator of the website, who may or may not be a student. *Id.*

When students are off campus and not engaged in school events like field trips, they are no longer students but are, instead, minors under parental control and supervision.⁸⁹

This point was made clear in an appellate brief, co-written by attorneys from the American Civil Liberties Union of Pennsylvania, and filed in 2008 on behalf of Justin Layshock in his appeal of the United States District Court for the Western District of Pennsylvania's decision in *Layshock v. Hermitage School District*,⁹⁰ another case involving in-school punishment for Internet-posted expression:

Although the Supreme Court has never squarely decided where school authority stops—and parental authority begins—inherent in the Supreme Court's . . . student-speech cases is the elemental proposition that, when exiting the schoolhouse gates, students regain whatever rights they shed upon entry. The rationales that justify curtailing students' rights in school disappear when students return to the community and to the control of their parents.⁹¹

Third, *Tinker* dealt with both a mode of expression (clothing) and a target of expression (a government policy on the war in Vietnam) that are radically unlike the scenarios now playing out in cyberspace with student speech. In particular, the speech involved in cases such as *Wisniewski*, *Doninger*, and *J.S.* does not target government policies of war-time importance, but rather is directed at specific individuals (teachers, principals, or classmates) and meant to cause them injury. These simply are very different factual scenarios from *Tinker*.

C. *Abusing Tinker To Provide Students with Emotional Tranquility*

Perhaps one of the more memorable lines from the Supreme Court's opinion in *Tinker* was its statement that school officials, in order to justify speech regulation, must show "*something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.*"⁹²

Despite this admonition, and other language in *Tinker* buttressing the notion that student speech cannot be squelched because it

89. Cf. *Frederick v. Morse*, 127 S. Ct. 2618, 2631 (2007) (Thomas, J., concurring) (noting that rationale for schools' ability to discipline students is based in the principle of in loco parentis, or in other words, based on the power of schools to act as a parent to children while the student is in school).

90. 496 F. Supp. 2d 587 (W.D. Pa. 2007).

91. Second-Step Brief of Appellee and Cross-Appellants at 15, *Layshock v. Hermitage Sch. Dist.*, Nos. 07-4465 & 07-4555 (3d Cir. May 22, 2008), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-05-22-Layshocks%20Appellate%20Brief.pdf>.

92. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (emphasis added).

offends,⁹³ the United States Court of Appeals for the Ninth Circuit held in 2006 that *Tinker* allowed school officials at Poway High School to prohibit the wearing of a t-shirt with the anti-gay message, "HOMOSEXUALITY IS SHAMEFUL."⁹⁴ The issue in *Harper v. Poway Unified School District*, as framed narrowly by the two-judge majority,⁹⁵ was "whether schools may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students and that may cause them significant injury."⁹⁶ The Ninth Circuit concluded that such regulation is permissible.⁹⁷

The majority deemed that exposure to the anti-gay messages on the t-shirts worn by student Tyler Chase Harper⁹⁸ would constitute "a destructive and humiliating experience"⁹⁹ for gay students because the messages "injure students with respect to their core characteristics."¹⁰⁰ The majority then found that because "the record demonstrates that Harper's speech intruded upon the rights of other students, the School's restriction is permissible under *Tinker*."¹⁰¹

What makes the Ninth Circuit's opinion quite a stretch from *Tinker* is that the majority focused on what it called "the application of the 'rights of others' prong of *Tinker*""¹⁰² rather than on *Tinker*'s other

93. The Supreme Court in *Tinker* also wrote that "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.* at 508.

94. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171, 1182 (9th Cir. 2006) (holding "that the School's restriction of Harper's right to carry messages on his T-shirt was permissible under *Tinker*"), *vacated*, 549 U.S. 1262, 1262 (2007).

95. The majority opinion in *Harper* was authored by Judge Stephen Reinhardt and joined by Judge Sidney R. Thomas, while Judge Alex Kozinski, the current chief judge of the Ninth Circuit, dissented. 445 F.3d at 1170, 1192.

96. *Id.* at 1182.

97. *Id.*

98. Judge Reinhardt wrote:

On April 21, 2004, the date of the 2004 "Day of Silence," appellant Tyler Chase Harper wore a T-shirt to school on which "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," was handwritten on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" was handwritten on the back. There is no evidence in the record that any school staff saw Harper's T-shirt on that day.

The next day, April 22, 2004, Harper wore the same T-shirt to school, except that the front of the shirt read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," while the back retained the same message as before, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"

Id. at 1171.

99. *Id.* at 1182.

100. *Id.* at 1186.

101. *Id.* at 1185.

102. *Id.* at 1184.

language regarding whether the speech would cause a “substantial disruption of or material interference with school activities.”¹⁰³ The rights-of-others language to which the majority in *Harper* referred occurs in several places in *Tinker*, the most prominent of which is where the Supreme Court explained that student speech that constitutes an “*invasion of the rights of others* is, of course, not immunized by the constitutional guarantee of freedom of speech.”¹⁰⁴

Ultimately, the majority in *Harper* found that the rights of gay students were impermissibly violated because “[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”¹⁰⁵ Although the Supreme Court later vacated the Ninth Circuit decision with instructions to dismiss the appeal as moot,¹⁰⁶ the case was still alive in February 2008, when a motion for reconsideration on behalf of Kelsie K. Harper, Tyler Chase Harper’s younger sister and a then-current student at Poway High School, was heard and denied by Judge John A. Houston of the United States District Court for the Southern District of California.¹⁰⁷ Judge Houston noted that “[t]he Supreme Court cases cannot be read to have abandoned *Tinker*’s ‘rights of others to be left alone’ prong under the guise of religion and free speech protections afforded by the First Amendment.”¹⁰⁸ The decision was, once again, appealed to the Ninth Circuit.¹⁰⁹

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

104. *Id.* at 513. The Court reasoned:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with *the rights of other students* to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or *the rights of other students*.

Id. at 508 (emphasis added).

105. *Harper*, 445 F.3d at 1178.

106. *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007). In April 2007, the Ninth Circuit dismissed the appeal, pursuant to the Supreme Court’s instructions. *Harper v. Poway Unified Sch. Dist.*, 485 F.3d 1052, 1053 (9th Cir. 2007).

107. *Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072, 1095 (S.D. Cal. 2008).

108. *Id.* at 1101. Judge Houston ultimately concluded that “the district properly restricted Harper’s negative speech for the *legitimate pedagogical concern* of promoting tolerance and respect for differences among students.” *Id.* (emphasis added). This is a very peculiar rationale because it borrows its key terms from the Supreme Court’s ruling in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), in which the Court considered the censorship of a school newspaper that was part of the high school curriculum and held that “educators do not offend the First Amendment by exercising 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*.” *Id.* at 273. The problem is that *Kuhlmeier* involved

The Ninth Circuit's 2006 ruling is, indeed, an odd application of *Tinker*. As put by one commentator, "[t]he vast majority of cases applying *Tinker* have focused on the 'substantial disruption' standard, whereas the *Harper v. Poway* panel opinion seized on the oft-ignored *Tinker* language of 'invasion of the rights of others.' Lower courts need guidance on the application of this part of *Tinker*."¹¹⁰

Other commentary bluntly points out the peculiarity and idiosyncratic nature of the *Harper* ruling and its interpretation of *Tinker*—specifically noting that "the Ninth Circuit's opinion made history; it was the first reported opinion to restrict student speech by relying on *Tinker*'s rights-of-others exception."¹¹¹ Indeed, at least one federal appellate court, in recently defining the *Tinker* test, failed to even mention the rights-of-others exception.¹¹² More importantly, in *Morse v. Frederick*,¹¹³ Chief Justice John Roberts omitted mention of the rights-of-others exception when he wrote that "*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"¹¹⁴

The Ninth Circuit's broad reading of *Tinker* that permitted a school to stop the wearing of t-shirts with anti-gay messages in the name of

consideration of "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. The t-shirts at issue in *Harper*, however, were in no way sponsored by the school or part of its curriculum, so borrowing a justification from *Kuhlmeier* to suppress the speech at issue in *Harper* stretches *Kuhlmeier* beyond its narrow scope. If *Tinker* is suffering from a midlife crisis, as this article contends, then perhaps *Kuhlmeier* may be suffering from what singer John Mayer called a "quarter-life crisis." See John Moore, *Positive Messages Are at Hand in "Q,"* DENVER POST, Sept. 12, 2008, at D-15 (describing "the self-absorption of John Mayer's 'quarter-life crisis' generation"); Thomas Walter, *No Frills Works for Mayer*, WASH. TIMES, Aug. 18, 2003, at B5 (noting the "quarter-life crisis" that John Mayer sings about in his song "Why Georgia").

109. Press Release, Alliance Def. Fund, Poway Free Speech Case Again Before 9th Circuit (Mar. 31, 2008), available at <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=4443>.

110. David L. Hudson, Jr., *Tinkering with Tinker Standards?*, FIRSTAMENDMENTCENTER.ORG, Aug. 9, 2006, <http://www.firstamendmentcenter.org/analysis.aspx?id=17253>.

111. Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 366–67 (2007).

112. For instance, the United States Court of Appeals for the Second Circuit in 2006 observed, in the context of a student t-shirt case, that "*Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only because it is *substantially disruptive*." *Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006). The Second Circuit added that, under *Tinker*, "[s]chools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school." *Id.* at 325.

113. 127 S. Ct. 2618 (2007).

114. *Id.* at 2626 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

preventing emotional injury also conflicts with other rulings on the subject. For instance, in the 2005 case *Nixon v. Northern Local School District Board of Education*,¹¹⁵ Judge George C. Smith of the United States District Court for the Southern District of Ohio issued a permanent injunction against a school district that tried to stop student James Nixon from wearing a t-shirt bearing an anti-gay statement.¹¹⁶ Judge Smith did not consider the rights-of-others language from *Tinker*, but instead focused on the well-accepted disruption prong and enjoined Nixon's school from regulating his expression absent a demonstration "that the shirt is substantially disrupting or interfering with the school's activities or that an imminent and substantial disruption is likely to occur"¹¹⁷ and found that, absent such actual or imminent substantial disruption or interference, Nixon "shall be entitled to wear his T-shirt to school without any repercussions" from school officials.¹¹⁸ The key is that this language is devoid of any mention of the rights-of-others language from *Tinker*.

Supreme Court Justice Samuel Alito wrote, while serving on the United States Court of Appeals for the Third Circuit and declaring unconstitutional a school district policy that prohibited anti-gay messages, that "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."¹¹⁹ In doing so, he openly questioned the rights-of-others prong of *Tinker*, noting that its language and subsequent interpretation was ambiguous.¹²⁰ He opined that in order to satisfy this *Tinker* prong, "it is certainly not enough that the speech is merely offensive to some listener."¹²¹

In summary, the Ninth Circuit abused and misused *Tinker* in such a way in *Harper* as to allow for viewpoint-based discrimination¹²² against

115. 383 F. Supp. 2d 965 (S.D. Ohio 2005).

116. *Id.* at 966. The t-shirt, which was black with white lettering, included the statement "Homosexuality is a sin!" on the back side. *Id.* at 967.

117. *Id.* at 975.

118. *Id.*

119. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (observing that at least one court has limited *Tinker* to tortious speech such as libel and slander).

120. *Id.* at 217 (citing *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991)).

121. *Id.*

122. The general rule against viewpoint-based discrimination is indicative of "a fundamental First Amendment principle—that government may not proscribe speech or expressive conduct because it disapproves of the ideas expressed." *Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 444 (W.D. Tex. 2001). Conversely, "it is a central tenet of the First Amendment that the

speech (pro-gay t-shirts would be permissible under the reasoning in *Harper* but not anti-gay messages), all in the name of preventing the alleged emotional harm that supposedly would befall gay students who read the t-shirts. This is particularly ironic since anti-gay speech is what might be called core political speech,¹²³ especially in California where *Harper* took place, given recent controversies there involving ballot propositions¹²⁴ and judicial rulings¹²⁵ regarding same-sex marriage. The speech in *Tinker*, of course, also was core political speech conveyed on an article of clothing.¹²⁶ If the Supreme Court's 1988 ruling in *Hazelwood School District v. Kuhlmeier*,¹²⁷ which gives school officials wide latitude to squelch student expression in school-sponsored publications and when the speech is part of the curriculum,¹²⁸ does not allow for viewpoint-based discrimination, as some lower courts have ruled,¹²⁹ then it is ironic that a more pro-

government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

123. See generally *Virginia v. Black*, 538 U.S. 343, 365 (2003) (noting that, under some circumstances, cross burning may mean that a "person is engaged in core political speech"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–48 (1995) (using the phrase "core political speech" and discussing it in terms of public issues that affect elections).

124. For instance, Californians in 2008 voted on Proposition 8, which would amend the state constitution to define marriage as between a man and a woman. Jessica Garrison, *Prop. 8 Leads in New Poll, Opponents Say*, L.A. TIMES, Oct. 8, 2008, at B3. The measure was so controversial that campaigns for and against it raised almost \$60 million, making it the most costly measure in the country of the year. Dan Morain & Jessica Garrison, *Prop. 8 Foes, Fans Amass \$60 Million*, L.A. TIMES, Oct. 25, 2008, at B1. The measure, ultimately, was passed by California voters on November 4, 2008, but lawsuits were filed shortly thereafter asking that it be overturned. Maura Dolan & Tami Abdollah, *Gay Rights Supporters File 3 Lawsuits Against Prop. 8*, L.A. TIMES, Nov. 6, 2008, at A23.

125. In 2008, the California Supreme Court considered whether failing to officially recognize same-sex marriages violated the state constitution. *In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008). A majority of the California Supreme Court reasoned that "the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes." *Id.* at 451. It concluded that it was unconstitutional for California statutory law to limit marriage to a union "between a man and a woman." *Id.* at 453.

126. See *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (writing that the speech in *Tinker* substantially implicated the First Amendment, as the students were engaging in political "concerns at the heart of the First Amendment. The students sought to engage in political speech . . .").

127. 484 U.S. 260 (1988).

128. The Court held that "educators do not offend the First Amendment by exercising 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." *Id.* at 273.

129. See *Banon v. Sch. Dist. Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004) (determining that "*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint"); *Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003) (observing that "even under *Hazelwood*, a . . .

student speech decision like *Tinker* would embrace such discrimination.

With these indicators of *Tinker*'s midlife crisis in mind, the next Part of this Article turns to a brief examination of some of the likely reasons for the opinion's decline.

II. POSSIBLE REASONS FOR *TINKER*'S MIDLIFE CRISIS

There probably is no single variable or causal force that has precipitated the midlife crisis of *Tinker*; it would be far too reductionist to believe that was the situation. It thus is initially helpful to examine the situational context in which the *Tinker* opinion was spawned, and then to analyze how times have changed and events have transpired subsequent to it, leading up to today's "millennial" generation and the election of Barack Obama to the presidency.

Tinker was decided in 1969 and to a large extent, can be viewed as a product of the antiwar, free-speech movement of the 1960s.¹³⁰ As Professor Stanley Ingber wrote as part of a symposium examining students' rights twenty-five years after *Tinker*:

It was a time remembered more for political and cultural conflict, urban chaos, civil rights battles, free speech movements on university campuses, and, perhaps most of all, the national divide over the Vietnam War. The 1960s was an era during which the value of order—of deference to authority—was challenged profoundly, to the great chagrin of those who view order as an imperative in a civilized society. This era of turmoil is the context in which one must understand the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*.¹³¹

Viewed in this light, a pro-student speech ruling made sense. As Professor Ingber put it, "in an age when claims of liberty were embraced increasingly while those heralding authority were deemed suspect, one would have been most surprised had the Court ruled that students were totally devoid of First Amendment protections."¹³²

school's restrictions on speech reasonably related to legitimate pedagogical concerns *must still be viewpoint-neutral*") (emphasis added). *But see* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 926–27 (10th Cir. 2002) (concluding that there is no requirement of viewpoint neutrality, while acknowledging that courts are split over the issue).

130. *E.g.*, Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1465 (1998) (recognizing that during the 1960s the United States was "an era of civil rights activism, antiwar protests, the welfare rights movement and an emerging view of law as an instrument of progressive social change").

131. Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 421 (1995).

132. *Id.* at 421–22.

Of course, for Justice Hugo Black, who dissented in *Tinker*, the turmoil was precisely the reason to deny students' protection, as he observed that "groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins."¹³³ He predicted a parade of horrors arising from *Tinker*:

Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders.¹³⁴

It is not surprising, of course, that Justice Thomas seized upon this exact language from Justice Black's bitter dissent when he called in *Morse v. Frederick* for the demise of *Tinker*, agreeing that *Tinker* had indeed significantly undermined the authority of teachers at public schools.¹³⁵ Justice Black's dissent thus laid the groundwork for at least part of *Tinker*'s midlife crisis.

Evolving times also have precipitated trouble for *Tinker*. Since *Tinker*, courts have increasingly perceived public schools as responsible for instilling community values in their students, perhaps at the cost of suppressing individual rights.¹³⁶ The problems for student speech have been even further compounded by two major factors: 1) a climate of fear of mass-scale violence in public schools that has led some administrators to squelch any expression that portends violence and that, in turn, militates in favor of judicial deference to school-imposed censorship;¹³⁷ and 2) widespread use of

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

134. *Id.* at 524–25. Black included examples of such dire-circumstances hyperbole, such as children under eighteen being allowed to vote and hold positions on the board of education. *Id.* at 518.

135. *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Thomas, J., concurring) (citation omitted).

136. See Yudof, *supra* note 62, at 366 ("Today, children in public schools are viewed less as the bearers of individual rights and more as the repositories of community responsibilities.").

137. As the author of this article and a colleague wrote back in 2003:

Quite simply, the events at Columbine gave high school administrators all the reasons—legitimate or illegitimate—they needed to trounce the First Amendment rights of public school students in the name of preventing violence. The first wave of censorship cases that swelled up in the year immediately following Columbine is now well documented. But the fear of Columbine-like violence that gave rise to that wave has not subsided in the years since.

Clay Calvert & Robert D. Richards, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1091 (2003).

the Internet by students to post material that openly mocks and pokes fun at classmates, teachers, and administrators in a public forum available to people all around the world—a vastly open forum that school administrators now wish to close and control.¹³⁸

These two variables have become important forces in leading to censorship, in my opinion. In particular, no principal wants to err on the side of free speech and fail to punish a student who writes violent stories and, as it later turns out, goes on to commit violent acts at school. Sacrificing a little free speech for potentially saving lives is a “no brainer” from a principal’s perspective. The principal, in turn, is cut substantial judicial slack when he or she forecasts, under *Tinker*, a substantial disruption when evaluating a student writing to determine its potential to cause harm.¹³⁹ However, such an encroachment on individual rights is not without its critics. As Colorado attorney Edward T. Ramey wrote in 2000:

The great threat of convulsions like Columbine is that they make it seductively easy to be innocently dishonest. We become at least temporarily more tolerant of those who, frequently with the best of intentions, would impose (rather than truthfully seek to teach and inculcate) a viewpoint or lifestyle and stifle a competing one.¹⁴⁰

In terms of the Internet, I suspect there is some trepidation that school officials encounter in providing students with speech rights on new technologies (the Internet) and through new means (texting and instant-messaging, for instance) with which those officials lack familiarity and understanding. The power of new communications technologies is partly what is so scary for some school administrators and teachers, I believe.

A generational shift of teachers (as old teachers retire and new teachers are hired) in the near future, of course, may bode well for freedom of speech, with younger teachers and administrators, who grew up with and were weaned on the Internet, assuming pedagogical positions of power in public schools. They may be less likely to be afraid of those technologies and more likely to understand, for better or worse, that some abuse of those technologies by students is inevitable.¹⁴¹

138. See *supra* notes 64–87 and accompanying text (describing cases in which courts have applied *Tinker* in order to punish off-campus-created speech that is posted on the Internet).

139. See *supra* note 45 and accompanying text (discussing the deference granted by courts to school officials).

140. Edward T. Ramey, *Student Expression: The Legacy of Tinker in the Wake of Columbine*, 77 DENV. U. L. REV. 699, 710 (2000).

141. The United States Supreme Court made a similar statement when considering abuse of press freedom in the seminal prior restraint case of *Near v.*

The *Tinker* test itself has multiple flaws that harm its effectiveness and, concomitantly, has lead to its misuse and abuse.¹⁴² As aptly recognized by Professor Mark Yudof, current president of the University of California:

When I was a law professor, I used to ask my students the following questions: What counts as a disruption? How much disruption will outweigh the assertion of the right? How are these interests balanced? Is this rule, with its emphasis on identifying disruption in schools, a rule at all, or is it just an invitation to judges to assert their personal ideologies and persuasions?¹⁴³

Some of these same problems were, in fact, mentioned by Judge Richard Posner in his convoluted 2008 opinion in *Nuxoll v. Indian Prairie School District*,¹⁴⁴ which allowed a student to wear a t-shirt conveying the message “Be Happy, Not Gay.”¹⁴⁵ Judge Posner openly queried “what is ‘substantial disruption’? Must it amount to ‘disorder or disturbance’? Must class work be disrupted and if so how severely?”¹⁴⁶ Indeed one federal appellate court recently stretched the meaning of substantial disruption to apply not only to interference with educational processes, teaching and learning *inside* the classroom, but also to an interruption in the day-to-day work of school administrators that in no way impacted or affected the day-to-day pedagogical processes of the school in its classrooms.¹⁴⁷

It would be useful, of course, for the Supreme Court to clarify what it meant by substantial disruption, but one fears that any revisiting of

Minnesota, 283 U.S. 697 (1931). The Court, in declaring unconstitutional the prior restraint imposed upon Jay Near’s *Saturday Press*, quoted James Madison for the proposition that:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.

Id. at 718 (quoting *Report on the Virginia Resolutions*, MADISON’S WORKS, vol. IV, at 544) (emphasis added).

142. See Yudof, *supra* note 62, at 367 (“*Tinker*’s application treacherous, difficult, and unpredictable.”).

143. *Id.*

144. 523 F.3d 668 (7th Cir. 2008). Judge Ilana Kara Diamond Rovner, who concurred with Posner on the outcome of *Nuxoll*, wrote a concurring opinion in which she proclaimed that “we are bound by the rule of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), a case that the majority portrays in such a *convoluted fashion* that the discussion folds in on itself like a Möbius strip.” *Id.* at 676 (Rover, J., concurring) (emphasis added).

145. *Id.* at 676.

146. *Id.* at 674.

147. See *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (upholding the punishment of student who urged other students to email and write administrators to complain about their actions).

this issue would simply give Justice Thomas another opportunity to influence his colleagues to overrule, or at the very least, to dilute, *Tinker*. There is no guarantee, in other words, that the Court would buttress the meaning of substantial disruption in a manner that is more protective of student expression rights.

There is some irony, of course, in the current efforts to crack down on the student expression of a generation known as the “millennials,” many of whom are perceived to feel an extremely strong sense of entitlement.¹⁴⁸ As author Ron Alsop writes:

Millennials are truly “trophy kids,” the pride and joy of their parents. The millennials were lavishly praised and often received trophies when they excelled, and sometimes when they didn’t, to avoid damaging their self-esteem. They and their parents have placed a high premium on success, filling resumes with not only academic accolades but also sports and other extracurricular activities.¹⁴⁹

It thus must be particularly galling to the members of this generation that they are not entitled to all of the perks and promises of freedom of expression in schools that were portended by *Tinker*. The millennials were born in the late 1970s and early 1980s,¹⁵⁰ which means that in their lifetimes, the U.S. Supreme Court has never once ruled in favor of student expression rights.

One must wonder here, however, whether this same generation, which spoke up powerfully and flexed its political muscle in the November 2008 presidential election,¹⁵¹ will tolerate the post-*Tinker* ways of censorship or will seek, as their (by-and-large) candidate of choice put it, “change.”¹⁵² If it really is true that Barack Obama’s victory over John McCain reflects “the founding fathers’ clear vision of the ideal makeup of a democracy: an inclusive electorate, political

148. Ron Alsop, *The ‘Trophy Kids’ Go to Work*, WALL ST. J., Oct. 21, 2008, at D1.

149. *Id.*

150. Ian Shapira, *For This Generation, Vocations of Service*, WASH. POST, Oct. 14, 2008, at B1.

151. *The New York Times*, for instance, observed that Barack Obama’s triumph at the polls on November 4, 2008,

was greatly helped by his young allies. More 18- to 29-year-olds went to the polls this year than in any election since 1972—between 21.6 million and 23.9 million, up from about 19.4 million in 2004, according to preliminary estimates from the Center for Information and Research of Civic Learning and Engagement. And 66 percent voted for Mr. Obama, according to exit polls by Edison/Mitofsky.

Damien Cave, *Generation O Gets Its Hopes Up*, N.Y. TIMES, Nov. 9, 2008, § ST, at 1.

152. For instance, during his victory speech, Barack Obama proclaimed that “change has come to America.” Tom Shales, *After a Night of Illusions, Television Records Reality*, WASH. POST, Nov. 5, 2008, at C1.

participation and political power sharing”¹⁵³ and that “Obama had a powerful impact on youth activism,”¹⁵⁴ this may be a generation that will recognize the importance of both youth and freedom of expression in a democratic society. Once its members begin to assume positions of political power, including judgeships, a shift toward protecting student expression rights may occur. Importantly, Obama courted many of these young voters on new technologies like the Internet and text messaging¹⁵⁵ that school administrators now are quick to censor in cases like *Wisniewski* and *Doninger*.¹⁵⁶

III. CONCLUSION

Although *Tinker* may not be looking fabulous at forty, none of the above is intended to suggest that *Tinker* is dead today—it still is alive and kicking in cases that approximate its facts. For instance, a federal judge in 2003 used *Tinker* to protect the ability of a high school student in Dearborn, Michigan to wear to school a shirt featuring a picture of President George W. Bush and captioned with the words “International Terrorist.”¹⁵⁷ As with *Tinker*, the case involved political speech that related to a controversial war—the student wore the t-shirt to protest President Bush’s foreign policies and the imminent war in Iraq¹⁵⁸—and that was conveyed silently on clothing.

Similarly, in 2006 the United States Court of Appeals for the Second Circuit applied *Tinker* to protect the right of a middle-school student to wear a t-shirt to school that mocked, through a combination of words and images, President George W. Bush “as a chicken-hawk president and accuses him of being a former alcohol and cocaine abuser.”¹⁵⁹ Ruling in favor of the student, the Second Circuit observed that the parties agreed that the t-shirt did not create any kind of disruption in the school, let alone a substantial disruption under *Tinker*.¹⁶⁰

153. Orlando Patterson, *An Eternal Revolution*, N.Y. TIMES, Nov. 7, 2008, at A35.

154. *Id.*

155. See Shailagh Murray & Juliet Eilperin, *Tempo, Rhetoric Heat Up On Trail*, WASH. POST, Nov. 2, 2008, at A1 (noting how Obama’s campaign used “new rounds of text messages”); Jose Antonio Vargas, *Thumbs Up to Voting: Tech Tools Reach Youth*, WASH. POST, Nov. 1, 2008, at C01 (describing Obama’s use of new technologies to reach young voters, including online mechanisms and cell phones).

156. See *supra* notes 65–75 and accompanying text (describing *Wisniewski* and *Doninger*).

157. *Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847 (E.D. Mich. 2007).

158. *Id.* at 849.

159. *Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 3054 (2007).

160. *Id.* at 330.

In order for *Tinker* to survive its midlife crisis and to be restored to its original grand promise as an important barrier against school-imposed censorship, several things must happen.

First, judges must not give excessive deference to school administrators each and every time those administrators claim that speech, be it political or offensive or violent or some combination of all three, will cause a substantial or material disruption of the educational atmosphere. On this point, lower courts must remind themselves of the language in *Tinker* that emphasizes an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁶¹ The Court also made it clear that there must be actual “*evidence* that [censorship] is *necessary* to avoid material and substantial interference with schoolwork or discipline.”¹⁶²

It is important to remember here that the year 2009 not only marks the fortieth anniversary of *Tinker*, but also the tenth anniversary of the tragedy at Columbine High School.¹⁶³ I fear that the legacy of the latter, decade-old tragedy will ultimately trump the celebration of the ruby anniversary¹⁶⁴ of *Tinker*.

The second thing that must occur for *Tinker* to be reinvigorated, if not resuscitated, is that the rights-of-others prong of *Tinker*, which was moribund until the Ninth Circuit’s decision in *Harper*, must be abandoned. *Harper* illustrates the speculative nature of its application and the danger that it could lead to viewpoint-based discrimination against political expression.

Finally, and most importantly (beyond, of course, not letting the view that Justice Thomas expressed in *Morse* prevail at the level of the nation’s highest court), the Supreme Court cannot continue to carve out exceptions to *Tinker*, as it has done now in *Fraser*, *Kuhlmeier*, and *Morse*. If it continues to go down this path, the exceptions will eventually swallow up the *Tinker* rule.

161. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

162. *Id.* at 511 (emphasis added).

163. See generally Tom Kenworthy, *Police: Attack Planned in Detail; 15 Dead, 28 Hurt in Rampage*, WASH. POST, Apr. 22, 1999, at A01 (describing the killings at Columbine High School in April 1999).

164. See Bob Ford, *Forty Years? For Faithful, Flyers Are Their Religion*, PHILA. INQUIRER, Oct. 8, 2006, at D1 (writing about “the 40th anniversary, the ruby anniversary, according to the books”).