Tinkering with Student Speech: Balancing the Protection of Students' First Amendment Rights with a School's Duty to Protect

"[T]he vast majority of the law in this area concerns school officials' authority to discipline students for internet speech. In this case, nothing was put into writing, and the students' speech was never shared online; the offending comments were made in person, just as school was letting out, a few hundred feet from the school's property line."[1]

I. INTRODUCTION

For decades, courts have grappled with both determining which precedent to apply in cases concerning protection of students' speech at school, and how to apply such precedent.[2] The Supreme Court has provided guidance through opinions that established certain categories of speech that schools have the authority to regulate, and by establishing how far those regulations may reach.[3] Nevertheless, before the Supreme Court could solidify an approach to determine a school's authority to police on-campus student speech, digital communication gave rise to cyberbullying and presented the more pressing concern—determining a school's authority to combat off-campus student speech.[4] The

1. C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016).

2. *See* Sam Winston, Comment, *From Bullying to Pure Political Speech: Updating the Supreme Court's Student Speech Jurisprudence with a Substantial Harm Rule*, 58 LOY. L. REV. 415, 431 (2012) (stating Supreme Court cases leaving student speech jurisprudence open to wide interpretation). The varying circumstances in which off-campus student speech may take place, as well as the broad array of categories such speech could fall into, limit courts' ability to craft a "global standard." *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (stating reluctance in crafting "one-size fits all approach").

3. *See* Morse v. Frederick, 551 U.S. 393, 409-10 (2007) (allowing regulation of speech about illegal drugs); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274-75 (1988) (permitting regulation of school-sponsored speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (authorizing regulation of lewd, vulgar, indecent, or plainly offensive student speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (allowing regulation of speech causing material disruption of classwork or invading others' rights).

4. *See* Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299, 320 (2014) (identifying national problem of bullying and lack of systematic approach); Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect*, 62 MERCER L. REV. 407, 447-48 (2011) (exemplifying importance of school officials addressing cyberbullying); Lisa Smith-Butler, *Walking the Regulatory Tightrope: Balancing Bullies' Free Speech Rights Against the Rights of Victims to Be Let Alone When Regulating Off Campus K-12 Student Cyber-Speech*, 37 NOVA L. REV. 243, 249 (2013) (addressing issue of student bullying and rivalry moving from playground to internet). Rather than occurring predominantly on-campus, bullying now occurs on a seemingly unsupervised virtual location because students have gained access

influx of issues regarding cyber communications via text messaging and social media currently dominates student speech jurisprudence, leaving one area of law unscathed and uncertain: off-campus, in-person speech.[5]

In one of the most impactful cases concerning students' rights to free speech, *Tinker v. Des Moines Independent Community School District*,[6] the Court stated that although students do not "shed their constitutional rights to freedom of speech" when they enter school, their rights are not absolute and may be reasonably regulated.[7] In later cases, the Court expanded school authority over different categories of student speech, including lewd speech, school-sponsored speech, speech concerning illegal drugs, and speech disruptive to the classroom.[8] Nevertheless, the Court's decisions created little guidance for lower courts to follow unless the student's speech fit perfectly into one of the specified categories.[9] Likewise, lower courts have also inconsistently imposed threshold tests to *Tinker*'s application, broadening its scope to encompass off-campus student speech, both cyber and in-person communications.[10]

to a variety of electronic platforms. *See Wynar*, 728 F.3d at 1065 (discussing student threats communicated over instant message); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 567 (4th Cir. 2011) (analyzing student creating degrading MySpace page about another student). Although states have enacted anti-bullying statutes to address the increasing rate of bullying between classmates, these statutes offer minimal guidance for schools to promote students' safety without also infringing students' free speech rights. *See* Francisco M. Negrón, Jr., *Maddening Choices: The Tension Between Bullying and the First Amendment in Public Schools*, 11 FIRST AMEND. L. REV. 364, 365 (2013) (addressing lack of decisions offering method to balance safe learning environment with students' constitutional rights); *Laws, Policies & Regulations*, STOPBULLYING.GOV, https://www.stopbullying.gov/laws/index.html [https://perma.cc/25XL-WUVD] (listing states' anti-bullying laws and policies).

5. *See C.R.*, 835 F.3d at 1150 (discussing lack of precedent concerning off-campus, in-person speech); *see also* Mary R. Loung, Case Summary, C.R. *ex rel* Rainville v. Eugene School District 4J*: Slowly Expanding a School's Ability to Reach Off-Campus Speech*, 47 GOLDEN GATE U. L. REV. 97, 105 (2017) (stating Ninth Circuit noted most recent cases involve internet speech).

6. 393 U.S. 503 (1969).

7. *See id.* at 506, 514; Benjamin A. Holden, Tinker *Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 233, 250 (2018) (designating *Tinker* most impactful student speech case).

8. *See Morse*, 551 U.S. at 410 (regulating speech about illegal drugs); *Hazelwood*, 484 U.S. at 274 (censoring school-sponsored speech); *Fraser*, 478 U.S. at 685 (permitting regulation of "offensively lewd and indecent speech"). Most of the confusion in this area of law emanates from courts neither directly following nor invalidating *Tinker*, and instead establishing different categories of speech schools may regulate. *See* Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 368-69 (2007) (discussing courts' general application of *Tinker*).

9. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (noting circumstance-specific application of standards); *see also* Loung, *supra* note 5, at 105 (identifying Ninth Circuit limited decision in *C.R.* to specific facts presented). The Court perpetuates the confusion surrounding student-speech regulations because it finds a fact specific justification for a school to regulate student speech, even though the student speech does not fit the *Tinker* standard, effectively categorizing certain speech that schools are authorized to regulate. *See* Morse v. Frederick, 551 U.S. 393, 409 (2007) (allowing regulation of student speech to maintain government interest of preventing illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (permitting regulation to prevent school appearance of promoting inappropriate student speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (authorizing regulation to protect school's basic educational mission).

10. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068-69 (9th Cir. 2013) (declining to choose between tests). *Compare* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir.

Fast forward another decade, the Ninth Circuit in *C.R. ex rel. Rainville v. Eugene School District 4J*[11] encountered the lack of established law governing a school's authority for disciplining off-campus, in-person speech, as well as which test to apply when determining the constitutionality of the school's regulation.[12] The court noted that its sister circuits are currently split on which test is appropriate—either the nexus test or the reasonable foreseeability test—but declined to strictly adhere to one test over the other.[13] Ultimately, the Ninth Circuit applied both tests to determine the regulation's appropriateness, and then applied the *Tinker* standard to determine its constitutionality.[14] Still, although this decision provides a "path on what steps a school must take for its actions to survive First Amendment scrutiny," it leaves questions open as to whether courts need to apply both tests, or just one.[15]

This Note addresses the varying interpretations of law and inconsistencies in balancing a school's authority to regulate off-campus student speech with students' constitutional rights to free speech.[16] Specifically, it examines the circuit split on the appropriate threshold tests to apply when determining whether schools have the authority to discipline students for off-campus, in-person speech.[17]

Section II.A begins with an overview of *Tinker* and the two-pronged test employed in deciding when a school can restrict on-campus speech.[18] Next, it compares the Supreme Court cases decided after *Tinker*, discussing the holding of each in relation to *Tinker*, and the uncertainty that ensues.[19]

2012) (applying "reasonably foreseeable" test), *with* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (applying "nexus" test).

11. 835 F.3d 1142 (9th Cir. 2016).

12. *See id.* at 1150 (noting lack of analogous decisions from other circuits).

13. *See id.* at 1150-52 (following *Wynar* in applying both nexus and reasonable foreseeability tests). In *Wynar*, the Ninth Circuit chose not to apply any one particular test and instead, distinguished the student's speech because of the seriousness of the student mentioning weapons, guns, and ammunition in his online speech. *See Wynar*, 728 F.3d at 1069 (noting difference between speech threatening school shooting and speech involving parody of principal); *see also* Kevin Nathaniel Troy Fowler, Note, Tinker *Tortured: The Scope of Student Off-Campus Viral Speech Rights in the Federal Circuits*, 104 KY. L.J. 719, 729-30 (2015) (comparing speech in *Wynar* and *LaVine v. Blaine School District*).

14. *See C.R.*, 835 F.3d at 1151 (holding school disciplinary action appropriate under both nexus and reasonable foreseeability test). Once the court in *C.R.* determined the school was able to reach the student's speech, it then held the school's action complied with *Tinker* because of a student's right "to be secure and to be let alone." *See id.* at 1150, 1152 (detailing court's approach and analysis).

15. *See* Loung, *supra* note 5, at 106 (predicting interpretation of decision by other courts). The path outlined in *C.R.* follows: Courts should use both the nexus test and reasonable foreseeability test to determine whether a school may regulate a student's off-campus speech, and then use *Tinker*'s "material disruption or invasion of rights" test to determine whether school regulation is constitutionally permissible. *See id.*; *see also C.R.*, 835 F.3d at 1150 (explaining standard for schools' action to survive First Amendment scrutiny).

16. *See infra* Parts II-III (detailing and analyzing inconsistent interpretations and difficulty in applying law).

17. *See infra* Section II.B (examining circuit split).

18. *See infra* Section II.A.1 (introducing initial Supreme Court decision allowing school regulation of student speech).

19. *See infra* Sections II.A.2-4 (comparing Supreme Court's decision in *Tinker* to subsequent cases).

Section II.B then focuses on the ability of schools to regulate and discipline off-campus speech, and the difficulty in applying precedent to justify this regulation and discipline.[20] This part of the Note predominantly discusses cyberspeech, compares each side of the circuit split regarding threshold tests utilized, and outlines the key factors governing each court's decision.[21] It then leads into this Note's main topic—off-campus speech that takes place in-person—and discusses the Ninth Circuit's encounter with this issue and the lack of law concerning it.[22]

Section III.A compares the merits of each circuit's approach to off-campus student speech jurisprudence, and ultimately assesses the validity of circuit courts developing different standards.[23] Further, it identifies the contrasting issues regarding on-campus and off-campus speech that make application of the same threshold tests misguided.[24] Section III.B then criticizes the specific threshold tests courts utilize when analyzing off-campus student speech, suggests a more stringent approach, and discusses the predicted consequences of the lower courts' decisions.[25] Finally, this Note concludes by stressing the need for clarity in this area of jurisprudence and suggests a direction to follow in dealing with off-campus, in-person speech.[26]

II. HISTORY

A. Supreme Court Cases Governing School Regulation of On-Campus Student Speech

1. Constitutionality of Public Schools' Regulation of Student Speech Under the Tinker Standard

The Supreme Court's most notable encounter with students' First Amendment rights in public schools occurred when students were suspended for wearing black armbands at school to protest the Vietnam War.[27] In determining whether

20. *See infra* Section II.B (explaining difficulty in applying approach to on-campus speech to off-campus speech).

21. *See infra* Section II.B (introducing circuit split and each circuit's rationale surrounding its decision).

22. *See infra* Section II.B; *see also* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (analyzing Ninth Circuit decision to apply both tests).

23. *See infra* Section III.A (comparing rationales behind each circuit decision).

24. *See infra* Section III.A (scrutinizing analogous treatment of on-campus and off-campus student speech).

25. *See infra* Section III.B.

26. *See infra* Part IV (summarizing Note's key points and ideas).

27. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (detailing students' plan to protest Vietnam War); *see also* U.S. CONST. amend. I (protecting freedom of speech); John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying* Tinker *in the Internet Age*, 39 PEPP. L. REV. 939, 945 (2012) (noting Supreme Court first dealt with student speech in public schools in *Tinker*); Aleaha Jones, Article, *Schools, Speech, and Smartphones: Online Speech and the Evolution of the* Tinker *Standard*, 15 DUKE L. & TECH. REV. 155, 156 (2017) (explaining lack of clarity regarding student First Amendment rights on campus before *Tinker*); Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School*

the students' suspension violated their free speech rights, the Court specified that the issue "lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[28] Although students maintain their constitutional rights at school, their rights are not absolute and are subject to reasonable regulation "in carefully restricted circumstances."[29]

More specifically, the Court held that a public school may limit students' constitutional rights to free speech and expression if such speech or expression could substantially disrupt or interfere with school activities.[30] In doing so, the Supreme Court generated the original "substantial disruption" standard used to determine whether a school's speech regulation is constitutional.[31] Although this

Regulation of Off-Campus Digital Student Speech, 82 FORDHAM L. REV. 3395, 3405-06 (2014) (stating importance of *Tinker* in establishing students' protected constitutional right to free speech on campus).

28. *Tinker*, 393 U.S. at 507. After the school became aware of the students' plan to protest, but before the date that the students' intended to wear the armbands, the school adopted a policy where students would be asked to remove any armbands and would be suspended if they refused. *See id.* at 504. In deciding that the school policy violated the students' First Amendment right to free speech, the Supreme Court pointed out that the school did not forbid other forms of political speech, and to justify such a prohibition, the school had to show that prohibition was motivated by "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509; *see* Fowler, *supra* note 13, at 723 (noting implementation of "higher threshold" to determine constitutionally permissible limitations of student speech). A significant consideration for courts determining the appropriateness of a school's disciplinary action is whether the school engaged in viewpoint discrimination that is prohibited under *Tinker*. *See Tinker*, 393 U.S. at 509 (forbidding prohibition of student expression due to particular unpopular viewpoint); *see also* John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 585-86 (2009) (noting *Tinker* applies to content-based regulations not subject to specific exceptions of category). The initial distinction lies in whether the regulation of speech is content-based or content-neutral, with viewpoint discrimination being considered the most problematic form of content-based regulation. *See* Taylor, *supra*, at 580-81 (analyzing distinction and issues pertaining to content-based restrictions). Accordingly, courts subject content-based restrictions to higher scrutiny because such restrictions are based on the message conveyed, whereas content-neutral restrictions are typically based on the circumstances under which the speech was made. *See id.* (distinguishing content-based and content-neutral restrictions on speech); *Limitations on Expression*, LAWSHELF EDUC. MEDIA, https://lawshelf.com/coursewareentry/limitations-on-expression [https://perma.cc/H2HF-V5A2] (defining content-neutral regulations).

29. *See Tinker*, 393 U.S. at 513 (recognizing First Amendment allows reasonable regulation "in carefully restricted circumstances"). Although *Tinker* asserts that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it also establishes constitutionally permissible circumstances in which schools may regulate speech on campus. *See id.* at 505-06 (allowing regulation of speech "materially and substantially interfering" with classwork); *see also* Smith-Butler, *supra* note 4, at 255-56 (restating lack of absolute constitutional protection and analysis for permissible discipline).

30. *See Tinker*, 393 U.S. at 513; Smith-Butler, *supra* note 4, at 255 (noting non-disruptive nature of student's action). The Court additionally held schools may regulate student speech that "inva[des] the rights of others." *See Tinker*, 393 U.S. at 513. However, courts typically focus on *Tinker*'s "substantial disruption" prong and rarely invoke the "rights of others" prong to justify regulating student speech. *See* Dickler, *supra* note 8, at 363-64 (stating lower courts tend to focus on "substantial disruption" language); *see also* Winston, *supra* note 2, at 441 (identifying lack of case law on rights of others standard).

31. *See Tinker*, 393 U.S. at 505 (presenting *Tinker*'s "substantial disruption" standard); *see also* Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972) (concluding school ordinance unconstitutional under *Tinker*); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 567 (4th Cir. 2011) (holding student's online post met substantial disruption test); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 964, 969-70 (5th Cir. 1972) (discussing whether students' underground paper caused substantial disruption); Dickler, *supra* note 8, at 363 (noting reliance on *Tinker* substantial disruption language). In *Tinker*, the Court seemingly formed the substantial disruption

standard encompasses the notion of protecting students' right of expression, scholars have criticized *Tinker* for having a "broad reach."[32]

Nonetheless, the Court created exceptions to the *Tinker* standard, further broadening its reach, and narrowing students' First Amendment protection on campus.[33] The Court distinguished student speech in these later cases based on the content, mode, and forum of the speech.[34] Therefore, schools could regulate student speech in additional situations, regardless of whether the action substantially disrupted school activities.[35]

2. The Fraser *Exception for Lewd, Vulgar, Indecent, and Offensive Speech*

Over a decade after *Tinker*, in *Bethel School District No. 403 v. Fraser*,[36] the Court determined that a school did not violate a student's First Amendment right when it suspended the student for giving a speech that contained sexual

standard using two Fifth Circuit cases that involved school regulations forbidding students from wearing freedom buttons. *See Tinker*, 393 U.S. at 505 n.1 (comparing Fifth Circuit decisions); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (enjoining school authorities from enforcing regulation forbidding students to wear buttons). *But see* Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966) (allowing school regulation because students wearing buttons harassed other students not wearing buttons). The students in *Blackwell v. Issaquena County Board of Education* were forbidden from wearing the freedom buttons because they were harassing students who did not wear the buttons, while the students in *Burnside v. Byars* passively wore the buttons without any such harassment, leading the Court to extend them First Amendment protection. *See* Taylor, *supra* note 28, at 587-88 (describing formation of *Tinker*'s substantial disruption rule). *Compare Blackwell*, 363 F.2d at 753 (denying students First Amendment protection because they harassed and accosted other students not wearing buttons), *with Burnside*, 363 F.2d at 749 (awarding students First Amendment protection because they silently wore freedom buttons).

32. *See* Jon G. Crawford, *When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to* Tinker*'s Reach?*, 45 URB. LAW. 235, 239 (2013) (noting language in *Tinker* opinion suggests expanded reach); Marc J. Herman, Note, *"Super Schools"—A New Generation of Narcissism and Unlawful Attempts to Police Students' Off-Campus Speech*, 32 QUINNIPIAC L. REV. 389, 397-98 (2014) (analogizing *Tinker*'s substantial disruption test to intermediate scrutiny).

33. *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (creating exception for speech involving illegal drugs); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (establishing school-sponsored speech exception); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (permitting regulation of lewd, vulgar, indecent, or plainly offensive student speech). Although the Supreme Court's primary concern in *Tinker* was to protect students' free-speech rights at school, the Court stated that the extension of such rights must be "applied in light of the special characteristics of the school environment," ultimately leaving the opinion open for later interpretation. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see* Crawford, *supra* note 32, at 239-41 (highlighting effect of Court's language in *Tinker* opinion).

34. *See* Fowler, *supra* note 13, at 724-26 (comparing student speech content and mode in Supreme Court decisions). With respect to content, in two cases following *Tinker*, the Court held that a school validly regulated sexually explicit speech, as well as speech promoting illegal drug use. *See Morse*, 551 U.S. at 410 (addressing speech promoting illegal drug use); *Fraser*, 478 U.S. at 685 (regarding sexually explicit speech). Whereas, in a different case, the Court relied on the vehicle of the speech as opposed to the speech's content in holding a school validly censored student speech because the school newspaper contained the speech. *See Hazelwood*, 484 U.S. at 274.

35. *See Morse*, 551 U.S. at 405 (noting trend of deviation from *Tinker* substantial disruption standard); *Hazelwood*, 484 U.S. at 272-73 (stating *Tinker* not necessary standard for school sponsored speech); *Fraser*, 478 U.S. at 685 (distinguishing Supreme Court decision here from *Tinker*); *see also infra* Sections II.A.2-4, II.B (illustrating different standards allowing school regulation of student speech).

36. 478 U.S. 675 (1986).

metaphors at a school assembly.[37] In doing so, the Court distinguished *Fraser* from *Tinke*r and indicated that the test outlined in *Tinker* was not applicable because of the differing content of the student speech in each case.[38] Instead, the Court's decision to uphold the student's suspension was rooted in the school's responsibility of instilling its students with the "habits and manners of civility" necessary to be productive citizens.[39]

By distinguishing the speech in *Fraser* from the political speech in *Tinker*, the Court effectively granted schools more deference to regulate student speech.[40] Following this decision, public schools had the authority to regulate lewd, vulgar, indecent, and offensive speech without showing that this speech would cause substantial disruption to school activities.[41] Instead, the Court granted school authorities significant power to regulate any student speech detrimental to the "school's basic educational mission."[42] Consequentially, schools then had two

37. *See id.* at 685. At a school assembly on campus, Matthew Fraser spoke in front of 600 students and made sexual metaphors, entertaining some students and disturbing others. *See id.* at 677-78. The school administration suspended Fraser and disqualified him from speaking at commencement. *See id.* at 678.

38. *See id.* at 685, 679-08 (noting school maintains right to prohibit vulgar and lewd speech and laying opinion's foundation); Herman, *supra* note 32, at 398-400 (highlighting Court's reliance on content and location of speech versus *Tinker* test); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 630-31 (2002) (listing three distinctions between *Tinker* and *Fraser*).

39. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (discussing role of American public school system); *see also* Crawford, *supra* note 32, at 239-40 (outlining basis of Supreme Court's decision); Herman, *supra* note 32, at 399-400 (noting Court's concern with school's important role of educator). In reaching its decision, the Court weighed Fraser's First Amendment interests in his speech against the school's interest in carrying on its basic educational mission. *See* Miller, *supra* note 38, at 631 (detailing Court's balancing test). Further, the Court importantly noted that although this type of speech may qualify as protected in circumstances involving adults, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *See Fraser*, 478 U.S. at 682; *see also* Miller, *supra* note 38, at 631 (noting less constitutional protection to lewd and indecent student speech).

40. *See* Miller, *supra* note 38, at 636 (explaining *Fraser* in terms of taking away student First Amendment rights); *see also* Marcus-Toll, *supra* note 27, at 3411 (comparing holding in *Tinker* to holding in *Fraser*). By focusing on the school's obligation to teach students acceptable societal behavior, *Fraser* recognized that a "school's educational mission extended beyond the boundaries of the campus" and did not specify that to discipline, the speech must have taken place on school campus. *See* Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 722 (2012). *But see* Marcus-Toll, *supra* note 27, at 3411 (recognizing understanding *Fraser* applies to on-campus speech only due to school's significant power to discipline). Some have deemed *Fraser* "the beginning of the end for students' free expression rights," and as taking away the free speech protection *Tinker* afforded students years before by focusing on the school's reasons for regulating speech, as opposed to reasons for protecting student speech. *See* Miller, *supra* note 38, at 636 (suggesting *Fraser* took away *Tinker*'s protection of student free speech rights in school); Scott Andrew Felder, Note, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 439 (2000) (highlighting *Fraser*'s negative impact on students' rights).

41. *See Fraser*, 478 U.S. at 685 (holding school acted within constitutionally permissible authority in suspending student for offensive speech); *see also* Crawford, *supra* note 32, at 240 (noting Court reached decision without substantial disruption analysis). In establishing the first exception to *Tinker*, the Court reasoned that permitting vulgar and lewd speech in schools would undermine the school's "basic educational mission." *See Fraser*, 478 U.S. at 685; *see also* Crawford, *supra* note 32, at 240 (exemplifying school's responsibility of preparing students for society).

42. *See Fraser*, 478 U.S. at 685; Miller, *supra* note 38, at 633 (noting focus shift of student expression jurisprudence from students' rights to schools' needs).

ways in which they could justify regulation or discipline of student speech at school.[43]

It followed that judicial precedent regarding a school's authority to regulate student speech at school became extremely convoluted.[44] Specifically, confusion arose when courts were faced with student speech containing neither "sexual content" nor a "political 'message,'" but discipline or regulation seemed appropriate for reasons including maintaining the school's educational responsibilities.[45] This led to courts deciding to create further exceptions based on the specific speech involved.[46]

3. The Hazelwood *Exception for School Sponsored Speech*

Following *Fraser*, the Supreme Court established another exception to *Tinker*, creating a third category of student speech school authorities could regulate.[47] In *Hazelwood School District v. Kuhlmeier*,[48] a school's principal removed two student articles from the school newspaper because one article dealt with teen pregnancy, and the other dealt with divorce.[49] The school rationalized that issues such as sexual activity were inappropriate for a school newspaper and some of the younger readers.[50]

43. *See Fraser*, 478 U.S. at 685-86 (allowing regulation of lewd, vulgar, indecent, and offensive speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (allowing regulation of substantially disruptive speech).

44. *See* Fowler, *supra* note 13, at 724 (noting departure from *Tinker* due to content of speech involved). In criticizing the appeals court, the *Frazer* Court distinguished the "political 'message'" speech in *Tinker*, from *Fraser*'s "sexual content" speech. *See Fraser*, 478 U.S. at 680.

45. *See Fraser*, 478 U.S. at 685-86 (articulating Supreme Court's rationale in regulating Fraser's speech); Fowler, *supra* note 13, at 724-27 (detailing deviation from *Tinker* due to confusion created by varying exceptions).

46. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (permitting school regulation of school-sponsored speech); *see also* Crawford, *supra* note 32, at 240 (noting *Fraser*'s extended deference applicable to only "narrow category of in-school student speech"); *infra* Sections II.A.3-4, II.B (discussing additional exceptions and categories of student speech). The Third Circuit Court of Appeals confronted the different categories of speech by noting that schools could regulate such speech if it substantially disrupted school activities, even if it fell outside the specified categories of political or sexually-charged speech. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213-14 (3rd Cir. 2001) (summarizing interplay of different Supreme Court decisions).

47. *See Hazelwood*, 484 U.S. at 274 (concluding school officials acted reasonably in removing two articles from student paper); *see also* Frank D. LoMonte, *"The Key Word Is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 311 (2013) (noting interpretation of *Hazelwood* exception to *Tinker*).

48. 484 U.S. 260 (1988).

49. *See id.* at 263.

50. *See id.* (noting school's concern with discussing sexual activity in newspaper). The school was also concerned that, although the article used fake names, people could identify the pregnant students from the text of the article, and the parents referred to in the divorce article should have been given the opportunity to respond to the comments before publication. *See id.* at 263. The principal would have allowed the two articles to run in the paper if necessary changes were made, but the principal believed allowing for changes would eliminate the paper's ability to get published prior to the end of the school year. *See id.* at 263-64.

Although the *Hazelwood* Court recognized *Tinker*'s controlling nature, it ultimately distinguished *Hazelwood* due to the differing issues presented.[51] The issue in this case did not concern the school merely tolerating particular student speech; rather, the issue was whether the school needed to affirmatively promote particular student speech.[52] Thus, instead of applying previous standards of review, the Court established a new set of circumstances where school officials may censor "school-sponsored expressive activities" when shown the students actions are "reasonably related to legitimate pedagogical concerns."[53]

After *Hazelwood*, these three Supreme Court cases involving student speech and school regulation were commonly referred to as the "*Tinker* Trilogy."[54] Nevertheless, the *Tinker* Trilogy provides more confusion than guidance for courts and school officials due to each case referencing specific types of student speech.[55] Consequently, no consistent mode of analysis exists for cases involving the varying types of student speech that may surface.[56]

51. *See id.* at 270-71 (distinguishing speech in *Hazelwood* from *Tinker*).

52. *See* Dickler, *supra* note 8, at 367-68 (noting question of whether schools must permit student expression which may portray school endorsement); *see also* LoMonte, *supra* note 47, at 316-17 (expressing importance of distinction between tolerating and promoting student speech to avoid overruling *Tinker*). In distinguishing the student speech, the Court reasoned that individuals could perceive school-sponsored speech as part of the school curriculum:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns 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. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Hazelwood, 484 U.S. at 270-71.

53. *See Hazelwood*, 484 U.S. at 273 (stating Court's standard for analyzing school-sponsored speech). In explaining what would qualify as a pedagogical purpose, the Court referenced certain objectives, including the role of a school in preparing students for later life tasks and in accounting for students' emotional maturity in deciding whether exposure to sensitive topics is appropriate. *See* LoMonte, *supra* note 47, at 317-18 (listing four primary justifications for school censorship). Nonetheless, the Court's references did not specifically define a "pedagogical interest," creating ambiguity, wide interpretation, and unnecessary restriction. *See* Fowler, *supra* note 13, at 738-39 (categorizing Court's "pedagogical interests" standard of review with "least protective" terminology).

54. *See, e.g.*, Dickler, *supra* note 8, at 356 (referring to so-called *Tinker* Trilogy); Miller, *supra* note 38, at 628-33 (detailing *Tinker* Trilogy cases); Kellie Nelson, Case Note, *Constitutional Law—The Supreme Court Takes a Fractured Stance on What Students Can Say About Drugs;* Morse v. Frederick, *127 S. Ct. 2618 (2007)*, 8 WYO. L. REV. 291, 292 (2008) (referencing *Tinker* Trilogy with respect to key points).

55. *See* Winston, *supra* note 2, at 431 (noting Supreme Court leaving student speech jurisprudence open to wide interpretation); *see also* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (recognizing difficulty in creating "one-size fits all approach").

56. *See* Dickler, *supra* note 8, at 356 (stating *Tinker* Trilogy "focus of much scholarship, but little consensus").

4. Establishing the Morse *Quartet with Speech Concerning Illegal Drug Use*

In light of the *Tinker* Trilogy's lingering confusion, courts greatly anticipated the Supreme Court's *Morse v. Frederick*[57] decision, hoping that it would clarify balancing schools' regulation of student speech and the students' First Amendment protection.[58] Although *Morse* did not establish one synthesized approach for analyzing whether schools have the authority to regulate student speech, the Court did clarify particular uncertainties left open by preceding decisions.[59] The first point the Court addressed was whether its decisions in *Fraser* and *Hazelwood* effectively overruled *Tinker*.[60] The *Morse* decision affirmed that *Tinker* remained good law and the two subsequent decisions in *Fraser* and *Hazelwood* instead created two separate exceptions.[61] The next point then detailed the interrelationship between the three *Tinker* Trilogy decisions.[62] The Court's analysis bolstered the understanding that the *Tinker* Trilogy created three separate categories of speech with different standards of review.[63]

Although *Morse* affirmed the previous Supreme Court holdings, the Court held that the school's suspension of the student was necessary and appropriate even though the student's speech did not fall into one of the three established

57. 551 U.S. 393 (2007).

58. *See* Dickler, *supra* note 8, at 368-70 (highlighting uncertainty following *Tinker* Trilogy and clarification provided by *Morse*). Not only did individuals and courts hope for clarification on the scope of *Tinker*, *Fraser*, and *Hazelwood*, they also hoped for some clarification on how the three cases are interrelated. *See id.* at 356-57.

59. *See Morse*, 551 U.S. at 405-06 (acknowledging *Hazelwood* confirms both *Tinker* and *Fraser*). In relation to First Amendment protection for student speech, eight of the nine Justices agree with the following:

> (1) students retain significant First Amendment protection when they are in school; (2) students' First Amendment rights are limited, however, by the school context; (3) school officials must be permitted substantial discretion to maintain discipline, even when that may consequentially, although not intentionally, restricts student speech; (4) at the same time, political student speech is strongly protected by the First Amendment from viewpoint discrimination; and (5) finally, *Tinker*'s "substantial disruption" test remains applicable to any student speech that may not be permissibly regulated under one of the exceptions established to *Tinker* created by *Fraser*, *Hazelwood*, and *Morse*.

Dickler, *supra* note 8, at 380 (summarizing key points established by Supreme Court's student speech jurisprudence).

60. *See Morse*, 551 U.S. at 422 (Thomas, J., concurring) (stating *Morse* neither overrules nor explains when *Tinker* applies); *see also* Dickler, *supra* note 8, at 380 (noting five points of agreement provide answers to uncertainties *Tinker* Trilogy created).

61. *See Morse*, 551 U.S. at 417-18 (Thomas, J., concurring); Dickler, *supra* note 8, at 380-81.

62. *See* Dickler, *supra* note 8, at 380-81 (noting subsequent cases created exceptions to *Tinker* without overruling).

63. *See id.* at 381 (answering questions left open by *Tinker*). The Court followed the same approach in designating types of student speech that may be regulated by schools as it did when it first established classes of speech unprotected by the First Amendment in general. *See* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942) (listing categories of speech not afforded First Amendment protection), *superseded by statute*, ALA. CODE § 13A-1-8 (2019). Examples of these categories of unprotected speech include the lewd and obscene, the profane, defamation, and fighting words. *See id.* at 572. Further, subsequent Supreme Court decisions outline particular standards of review for each category of speech. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (stating standard of review for commercial speech); Brandenburg v. Ohio, 395 U.S. 444, 446-47 (1969) (describing modern incitement test).

categories.[64] Specifically, in *Morse*, a student at a school-sponsored event unveiled a fourteen-foot banner that said "BONG HiTS 4 JESUS" and refused to take it down when the principal demanded.[65] The Court validated the school's suspension of the student and held that school authorities may take steps to protect those in their care from speech that encourages illegal drug use.[66] Thus, a fourth category of student speech rounded out the four instances where school officials may regulate on-campus student speech.[67]

Although the rationales in *Morse*, *Fraser*, *Hazelwood*, and *Tinker* varied, each focused on the school's important educational purpose.[68] Because student off-campus speech occurs outside of school, when school officials are not responsible for students, the pedagogical concerns allowing regulation of on-campus speech are not persuasive in justifying school involvement in student speech that never actually occurred on campus.[69]

B. School Regulation of Off-Campus Speech

The Supreme Court has established a framework for dealing with constitutional issues regarding student speech on campus.[70] Nonetheless, no

64. *See* Morse v. Frederick, 551 U.S. 393, 403-07 (2007) (distinguishing *Morse* from *Tinker* Trilogy). The Court distinguished *Morse* from *Tinker* because the banner Frederick unveiled stating "BONG HiTS 4 JESUS" did not constitute political speech; the Court distinguished *Morse* from *Hazelwood* because no reasonable person would think the school promoted the banner. *See* Nelson, *supra* note 54, at 303-04, 306 (applying *Tinker* Trilogy to case at hand). Although, at first glance, the banner's language could fall under *Fraser* as "vulgar," the Court distinguished the speech because the Court engaged in a sense of content-based discrimination in *Fraser*, not present in *Morse*. *See* Dickler, *supra* note 8, at 382 (distinguishing *Fraser* speech from *Morse* banner); *see also supra* note 28 (detailing meaning of "content-based" discrimination).

65. *See Morse*, 551 U.S. at 397-98.

66. *See id.* at 396-97 (discussing Court's holding). In its *Morse* holding, the Supreme Court focused on the special circumstances of a school environment, as well as the important governmental interest in discouraging students from using drugs. *See id.* at 408.

67. *See id.* at 409-10 (establishing fourth category of speech allowing for regulation); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (categorizing school-sponsored speech following *Fraser* and *Tinker*); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (authorizing regulation of lewd student speech establishing second category); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (identifying first category of student speech school authorities may regulate); *see also* Dickler, *supra* note 8, at 383 (identifying Supreme Court's baseline assumption pertaining to *Morse* Quartet cases).

68. *See Morse*, 551 U.S. at 409-10 (emphasizing importance of schools discouraging illegal drug use); *Hazelwood*, 484 U.S. at 273 (stating school control over student speech must reasonably relate to legitimate pedagogical concerns); *Fraser*, 478 U.S. at 685-86 (holding allowance of vulgar and lewd speech would undermine school's basic educational mission); *Tinker*, 393 U.S. at 513 (justifying school regulation of student speech substantially disrupting school activities).

69. *See* Crawford, *supra* note 32, at 249 (identifying courts' struggle dealing with student off-campus cyberspeech).

70. *See* Dickler, *supra* note 8, at 383 (describing Supreme Court's presumed approach when deciding which precedent to apply to student speech cases); *see also supra* Sections II.A.1-4 (discussing Supreme Court's approach to dealing with regulation of on-campus student speech). In sum, the theme of Supreme Court precedent on student speech issues establishes that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *See Fraser*, 478 U.S. at 682;

such framework exists when it comes to student speech that takes place off campus.[71] Therefore, courts inconsistently apply the Supreme Court's *Morse* Quartet analysis when dealing with school officials regulating off-campus speech because no other Supreme Court guidance or applicable framework exists.[72]

Circuit courts have relied on variations of *Tinker*'s substantial disruption standard when determining whether a school had authority to regulate off-campus communications between students that took place either virtually or face-to-face.[73] Specifically, many of these courts encounter issues of student speech or expression created off campus but later brought on campus.[74] The most prominent off-campus student speech is cyberspeech between classmates, or posted on some form of social media.[75] In determining whether a school regulation violates students' First Amendment rights with no Supreme Court guidance, circuit courts have developed different tests trying to weigh students' constitutional rights and the necessity of school regulation.[76]

One circuit court approach used by courts that have determined *Tinker* does apply to off-campus speech involves imposing threshold tests—before applying *Tinker*—to determine whether the school could even permissibly regulate the

Tinker, 393 U.S. at 506; *see also* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1067 (9th Cir. 2013) (summarizing key points from *Morse* Quartet).

71. *See* Crawford, *supra* note 32, at 249 (identifying growing issue involving student off-campus cyberspeech and lack of judicial guidance); M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH. J.L. TECH. & ARTS 135, 142 (2014) (emphasizing importance of changing jurisprudence along with technology); *see also supra* note 9 and accompanying text (addressing lack of precedent to apply to off-campus student speech regulation).

72. *See, e.g.*, S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (applying *Tinker* to student-created website); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 572-73 (4th Cir. 2011) (applying *Tinker* to MySpace postings); Doninger v. Niehoff, 642 F.3d 334, 347-48 (2d Cir. 2011) (applying *Tinker* to blog post).

73. *See Wynar*, 728 F. 3d at 1069 (detailing varying Circuits' applications of *Tinker*).

74. *See* Fowler, *supra* note 13, at 728 (noting variations of *Tinker* application); Lindsay J. Gower, Note, Blue Mountain School District v. J.S *ex rel.* Snyder*: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709, 723 (2013) (recognizing difficulty establishing line between on-campus and off-campus speech). Courts have grappled with issues regarding speech created off-campus but brought on-campus by the speaker, or brought on-campus by another student. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 208-10 (3d Cir. 2011) (en banc) (analyzing student creation of MySpace page about Principal and students accessing page from school computers); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004) (regarding student bringing violent drawing which older brother created two years earlier to school); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 990-92 (9th Cir. 2001) (analyzing *Tinker* with regard to poem written at home then brought to school); *see also* Allison E. Hayes, Note, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 256-62 (2010) (analyzing lower courts' attempts at creating standard for student speech originating online).

75. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (stating vast majority of student speech jurisprudence involves internet speech); *see, e.g.*, *Wynar*, 728 F.3d at 1065 (analyzing student threating use of weapons on fellow classmate over instant message); *Kowalski*, 652 F.3d at 567 (considering case regarding student creating degrading MySpace page about another student); *Doninger*, 642 F.3d at 339-42 (discussing students hacking emailing regarding popular school event).

76. *See* Fowler, *supra* note 13, at 728-39 (summarizing different standards used by various circuits).

student's speech.[77] For example, in determining whether schools may regulate student off-campus speech, the Eighth Circuit has utilized a "reasonably foreseeable" test that asks whether it was reasonably foreseeable that the off-campus speech would reach the school.[78] On the other hand, the Fourth Circuit utilized a "nexus test" that asks whether the speech is tied closely enough to the school to allow for regulation.[79] If these threshold tests permit the school to regulate the students' speech, the court then applies *Tinker* to determine whether the school's regulation is constitutional.[80]

77. *See S.J.W.*, 696 F.3d at 777 (applying "reasonably foreseeable" threshold test); *Kowalski*, 652 F.3d at 573 (applying "nexus" threshold test).

78. *See* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 776-77 (8th Cir. 2012) (detailing and reaffirming reasonably foreseeable threshold test); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir. 2011) (establishing reasonably foreseeable test). The court in *S.J.W.* stated the lack of concern for the speech's location was because the posts were directed at the high school. *See S.J.W.*, 696 F.3d at 776-77. Thus, additional courts interpret the reasonably foreseeably test in a way that focuses on whether "it was reasonably foreseeable . . . that the [speech] would come to the attention of school authorities," or whether the student purposely designed the speech to make it to campus. *See* Gower, *supra* note 74, at 724 (describing foreseeability standard); *see also* Doninger v. Niehoff, 642 F.3d 334, 348 (2d Cir. 2011) (concluding student's blog entry designed to reach school); Wisniewski *ex rel.* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007) (noting violent icon involving teacher foreseeable to reach campus).

79. *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (detailing nexus threshold test); *see also* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 981, 1069-70 (9th Cir. 2013) (describing different circuit courts approaches with threshold tests). In *Kowalski*, the court noted that although the student was not at school when she operated her computer and formed the "S.A.S.H." group, *Tinker* still applied given the conduct would foreseeably reach the school via the Internet because most of the group members and targets of the harassment were students of the particular high school. *See Kowalski*, 652 F.3d at 574; *see also* Jessica K. Boyd, Note, *Moving the Bully From the Schoolyard to Cyberspace: How Much Protection Is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215, 1227 (2013) (noting student's abilities of bringing website to campus through Internet). Notably, scholars have criticized the two tests, stating that no difference exists between the analysis courts employ when applying either the nexus or reasonably foreseeable test. Alex Teixeira, Comment, *Constructing a Consensus Approach for Analyzing Students' Out-of-School Speech*, 8 WAKE FOREST J. L. & POL'Y 523, 532 (2018) (analogizing nexus and reasonably foreseeable tests). Specifically, comparing the fact that both tests "call for a court to ask whether the speaker could have expected [the] speech to reach the schoolhouse gate." *See id.* Nonetheless, other circuit courts have taken a different approach by skipping the threshold tests and finding the nature of the off-campus speech alone warrants discipline. *See Wynar*, 728 F.3d at 1069 (stating alarming nature of student's speech prompted disciplinary action); *LaVine*, 257 F.3d at 983 (stressing importance of balancing knowledge of school shootings against students' First Amendment rights). For example, the Ninth Circuit in *Wynar* did not follow the threshold test approach established by other circuits, and instead determined a student's off-campus posts clearly met both prongs under *Tinker* due to the threatening nature of the posts and the fact such posts were directed at the school. *See Wynar*, 728 F.3d at 1070-71 (establishing specter of school shooting clearly qualifies under either prong); *see also* Fowler, *supra* note 13, at 730 (noting closeness of Ninth Circuit's holding to *Tinker* while adding threat of violence qualifier). Notably, the Third and Fifth Circuits have not definitively recognized whether *Tinker* applies to off-campus speech. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926, 930 (3rd Cir. 2011) (en banc) (assuming *Tinker* applies without definitively stating it does); *Porter*, 393 F.3d at 615-16 n.22 (noting difficulty of addressing student speech made off-campus but later brought on-campus).

80. *See C.R.*, 835 F.3d at 1150 (explaining standard for school's action to survive First Amendment scrutiny); Loung, *supra* note 5, at 103-04 (detailing Ninth Circuit's application of both threshold tests then *Tinker*); *see also Wynar*, 728 F.3d at 1069 (declining to choose between two threshold tests).

Understandably, circuit courts still grapple with whether to apply the nexus test or reasonably foreseeable test, or if it is necessary to apply both tests.[81] The countless circumstances in which off-campus speech occurs makes crafting a "one-size-fits-all" approach to these issues an impossible task.[82] The differing approaches to analyzing these cases has led to inconsistent application of lower court precedent, further prolonging the convoluted nature of student off-campus speech regulation.[83]

In the midst of these uncertainties, the Ninth Circuit encountered a situation that is neither directly related to on-campus speech nor cyberspeech: student speech involving offensive comments made in person, a few hundred feet from the school.[84] In *C.R*, a school suspended a student for harassing another student on their way home from school, with the harassment taking place on a bike path near the school's athletic fields.[85] In analyzing the validity of the school's decision to suspend the student, the court noted the circuit split regarding which threshold test to apply, but ultimately offered no clarification.[86]

The Ninth Circuit applied both the nexus and the reasonable foreseeability threshold tests, holding the school satisfied both.[87] In analyzing the suspension's constitutionality, the court held for the school, citing to *Tinker*'s "rights of

81. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (noting circuit spilt between threshold test application); *see also* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (declining to adopt or reject any approach used by other circuits); *Wynar*, 728 F.3d at 1069 (stating inability to create "one-size fits all" approach). The Fifth Circuit caused further confusion by rejecting to apply any circuit tests and instead holding a school may regulate student off-campus speech because "[a]rguably, a student's threatening, harassing, and intimidating a teacher inherently portends a substantial disruption, making feasible a *per se* rule in that regard." *Bell*, 799 F.3d at 396-97; *see* Margaret Malloy, Note, Bell v. Itawamba County School Board*: Testing the Limits of First Amendment Protection of Off-Campus Student Speech*, 2016 WIS. L. REV. 1251, 1264 (outlining controversial points made by Fifth Circuit in *Bell*).

82. *See C.R.*, 835 F.3d at 1150 (emphasizing circumstance-specific application of standards); Loung, *supra* note 5, at 105 (identifying court's decision in *C.R.* limited to specific facts presented); *see also* Gower, *supra* note 74, at 728 (emphasizing need for clarification of application of precedent to off-campus speech). The Fifth Circuit highlighted that regardless of which test a court applies, all courts ultimately engage in a "circumstance-specific" approach to determine whether school authorities may regulate student off-campus speech. *See C.R.*, 835 F.3d at 1150.

83. *See C.R.*, 835 F.3d at 1150 (noting circuit spilt with application of threshold tests); *Bell*, 799 F.3d at 396 (declining to take stance on any approach used by other circuits); *Wynar*, 728 F.3d at 1069 (recognizing difficulty to create one common approach).

84. *See C.R.*, 835 F.3d at 1150 (detailing issue addressed by Ninth Circuit). *See generally* Loung, *supra* note 5 (analyzing Ninth Circuit method of analysis in *C.R.*).

85. *C.R.*, 835 F.3d at 1146.

86. *See id.* at 1148-50 (choosing to follow *Wynar* instead of choosing between nexus and reasonable foreseeability test).

87. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150-52 (9th Cir. 2016); *see also* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (exhibiting Ninth Circuit precedent followed in *C.R.*). The court held that the student harassment met the nexus test due to the close ties to the school. *See C.R.*, 835 F.3d at 1150. Specifying that the path the event took place on shared boundaries with the school, and it happened minutes after school let out. *See id.* at 1150-52. Further, the court held that the school could reasonably foresee the effects of the harassment to make it to the school environment because it happened in such close proximity to school. *See id.* at 1151.

others" prong.[88] Although this offered one way to address the permissibility of a school's regulation of student in-person, off-campus speech, the Ninth Circuit stressed:

> Our decision is necessarily restricted to the unique facts presented by this case: The speech at issue occurred exclusively between students, in close temporal and physical proximity to the school, on property that is not obviously demarcated from the campus itself. A school may act to ensure students are able to leave the school safely without implicating the rights of students to speak freely in the broader community.[89]

By stressing that this decision only applies to the specific facts present, the Ninth Circuit followed the Supreme Court in establishing an approach applicable only to situations where the facts mirror the precedent.[90] Courts are still uncertain whether schools must first meet a threshold test to ensure they have adequate authority to regulate or discipline the off-campus speech before analyzing whether such regulation is constitutional.[91] Further, no single court has established that when utilizing a threshold test, whether both threshold tests must be met, or if meeting one is adequate for school involvement.[92]

III. ANALYSIS

The inconsistent application of the Supreme Court standards have left circuit courts drowning in varying precedent with limited guidance on which precedent to apply when dealing with school disciplinary action for student speech.[93] The

88. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (stating schools may constitutionally regulate speech invading rights of others); *C.R.*, 835 F.3d at 1153 (finding students harassment interfered with victim's ability to feel safe and secure).

89. *C.R.*, 835 F.3d at 1152.

90. *See id.* at 1150 (emphasizing fact-specific application of standards); Dickler, *supra* note 8, at 383 (suggesting Court applies *Morse*, *Fraser*, or *Hazelwood* when speech within exception and *Tinker* if not). The Supreme Court in *Morse*, *Fraser*, and *Hazelwood* left subsequent courts with three categories of speech to reference when determining whether a school may constitutionally regulate a student's speech on-campus, and the *Tinker* standard as a fall back for when on-campus student speech falls outside of one of the three categories. *See* Gower, *supra* note 74, at 717 (stating Third Circuit's approach of when to utilize Supreme Court's precedent).

91. *See C.R.*, 835 F.3d at 1149-50 (encountering circuit spilt regarding threshold tests); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (declining to adopt any circuit court's approach); *see also Wynar*, 728 F.3d at 1069-70 (9th Cir. 2013) (describing varying circuit court threshold test applications).

92. *See C.R.*, 835 F.3d at 1151 (concluding school involvement appropriate under both nexus and reasonable foreseeability test); *Wynar*, 728 F.3d at 1068-70 (declining to choose between threshold tests and justifying involvement on alternative basis); S.J.W. *ex rel*. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (applying only reasonably foreseeable test); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (applying only nexus test).

93. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068 (9th Cir. 2013) (addressing different variations of *Tinker* substantial disruption standard); Crawford, *supra* note 32, at 239 (highlighting language in *Tinker* leaves opinion open for later interpretation); *see also* Morse v. Frederick, 551 U.S. 393, 410 (2007) (establishing speech about illegal drug use exception); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274

struggle lies in balancing students' constitutional rights with schools' pedagogical concerns, leading courts to continuously create new standards to fit the specific circumstances for the case at hand.[94] This typically occurred because the existing facts did not warrant regulation under the *Tinker* standard, but the Supreme Court held that regulation was justified due to the content or means of the student's speech.[95] Logically, designating the additional categories of speech in *Fraser*, *Hazelwood*, and *Morse*, warranting school regulation based on content and vehicle of communication makes sense because of a school's educational duty to students while under its supervision.[96] This reasoning, however, fails to offer guidance to schools trying to police off-campus communications because of the difficulty in rationalizing school governance to maintain educational responsibilities when something does not occur on school property.[97]

A. Attempt to Validate Regulation of Student Off-Campus Speech Under Inapplicable Standards

Regardless of whether student speech occurred on or off campus, school officials encounter the parallel issue of remaining within the Constitution's parameters when disciplining—and essentially limiting—student speech.[98] Yet,

(1988) (allowing schools to regulate school-sponsored speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (creating lewd speech exception to *Tinker* standard); C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149-50 (9th Cir. 2016) (detailing different circuit court approaches when dealing with disciplining off-campus speech); *S.J.W.*, 696 F.3d at 777 (utilizing reasonably foreseeable test); *Kowalski*, 652 F.3d at 573 (employing nexus threshold test).

94. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (stating difficulty in balancing student's rights and maintaining necessary learning environment since *Tinker*); Dickler, *supra* note 8, at 356, 368 (noting need for clarification after *Tinker* Trilogy); *see also Fraser*, 478 U.S. at 685 (deciding school's responsibility to maintain education warranted regulation of speech regardless of meeting *Tinker* test); Miller, *supra* note 38, at 633 (commenting on emphasis of school's needs over rights of students); *supra* note 39 and accompanying text (describing factual rationale behind *Fraser* holding).

95. *See Hazelwood*, 484 U.S. at 274 (justifying regulation due to school-sponsored newspaper mode of speech); *Fraser*, 478 U.S. at 685 (allowing regulation due to speech's content containing sexual references). Ultimately, if a student's expression on campus falls into the category described in *Fraser*, *Hazelwood*, or *Morse*, or meets the *Tinker* substantial disruption or rights of others standard, a school may regulate such speech. *See* Miller, *supra* note 38, at 653-54 (stating *Tinker* applies when student speech falls outside established categories).

96. *See Morse*, 551 U.S. at 408 (relying on special circumstances of school); *Fraser*, 478 U.S. at 681 (emphasizing role of public school system); Herman, *supra* note 32, at 399 (noting Court's concern with role of educator in *Fraser*); *see also supra* note 39 and accompanying text (detailing Supreme Court's *Fraser* rationale emphasizing importance of school's educational mission).

97. *See Kowalski*, 652 F.3d at 573 (noting limit of school interest in well-being of students when speech originates off campus); *see also* McKeown, *supra* note 71, at 142 (stressing necessary jurisprudential change consistent with technology). This idea correlates to the creation of threshold tests that determine whether schools have a sufficient basis for jurisdiction over a student's speech. *See supra* note 79 and accompanying text (explaining threshold tests circuits use when determining whether school officials may appropriately regulate off-campus speech).

98. *See Morse*, 551 U.S. at 403-07 (discussing whether principal validly restricted student's speech); *Hazelwood*, 484 U.S. at 270-71 (balancing students' First Amendment rights with school's responsibility to promote specific types of student speech); *Fraser*, 478 U.S. at 682-86 (analyzing necessary limits on students'

it becomes difficult for schools to justify regulating a student based solely on the content of their speech when it occurrs off campus.[99] Accordingly, before addressing issues concerning the constitutionality of school discipline, schools must first establish authority to become involved in regulating the off-campus speech at all.[100] Because the Supreme Court has yet to address school regulation of off-campus speech, lower federal courts have crafted their own inconsistently-applied tests.[101]

The nexus test and the reasonable foreseeability test seemingly provide a logical way to determine whether a student's speech connects enough to the school to justify the involvement of school officials.[102] Some courts choose to apply both tests, while others choose to apply one or the other without specifying situations best suited for each.[103] Moreover, although courts created these tests with respect to students' cyber communication, they have also been used in situations where communications occurred off campus but in person.[104]

For example, the court in *C.R.* applied both tests and concluded that the facts satisfied the standard for each, allowing school regulation of the student's speech that took place across the street from school, rather than on campus.[105] The Ninth Circuit determined the communications had sufficient nexus to the school because they occurred immediately after school hours, extremely close to school

First Amendment rights at school); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (stating First Amendment applies in light of special circumstances of schools); *see also supra* Sections II.A.1-4 (detailing Supreme Court history dealing with constitutionality of school regulation).

99. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (noting lack of analogous decisions to apply). Presumably, a school's interest in ensuring the educational mission and students' well-being only extends so far after they leave school. *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (suggesting limit of school's involvement in speech originating off campus).

100. *See C.R.*, 835 F.3d at 1150 (summarizing path taken by Ninth Circuit); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (establishing reasonably foreseeable threshold to determine appropriateness of school intervention in off-campus speech); *Kowalski*, 652 F.3d at 573 (detailing nexus threshold test to determine appropriateness of school intervention in off-campus speech).

101. *See C.R.*, 835 F.3d at 1149-50 (addressing circuit split concerning which test to apply); Loung, *supra* note 5, at 103 (stating lower courts left to create their own tests); *supra* note 79 (detailing threshold tests created by lower courts); *see also supra* note 81 and accompanying test (discussing confusion resulting from threshold tests).

102. *See supra* notes 77-80 and accompanying text (explaining mechanics and rationale behind two tests).

103. *See C.R.*, 835 F.3d at 1151 (following *Wynar* and applying both threshold tests); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (applying both tests due to reluctance in crafting "one-size fits all approach"); *S.J.W.*, 696 F.3d at 777 (applying reasonably foreseeable threshold test); *Kowalski*, 652 F.3d at 573 (applying nexus threshold test). In *C.R.*, the Ninth Circuit established that the facts satisfied both the reasonably foreseeable test and sufficient nexus test, while the court in *Wynar* neglected to choose between the tests and instead focused on the seriousness of the student's conduct in meeting *Tinker*. *See Wynar*, 728 F.3d at 1069 (explaining Ninth Circuit reasoning for circumstances in *Wynar*); *see also supra* note 87 (detailing how facts in *C.R.* met both nexus and reasonably foreseeability threshold tests).

104. *See C.R.*, 835 F.3d at 1150 (emphasizing most prominent off-campus speech jurisprudence involves cyberspeech); Loung, *supra* note 5, at 103 (detailing application of law to in-person, off-campus speech).

105. *See* C.R. *ex rel* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150-52 (9th Cir. 2016) (explaining Ninth Circuit decision); *see also* Teixeira, *supra* note 79, at 532 (emphasizing similar analysis between two tests); *supra* notes 87-88 (detailing factual disposition and reasoning in *C.R*).

grounds, and on a path students frequently used for getting to and from school.[106] Additionally, the Ninth Circuit determined that it was reasonably foreseeable that results of the harassment would eventually reach the school because the communications were between students who both attended that school.[107] Nevertheless, it remains unclear what would result if the facts of the case satisfied one test but not the other.[108]

Whether one or both tests need to be satisfied is unclear, allowing courts to hand pick the test which reaches the desired result, and ignore the test which does not.[109] Additionally, where speech occurred between students off campus, one could argue that it is reasonably foreseeable the speech will reach the school, or that there is a nexus between the speech and the school, simply because the students attend the same school.[110] Courts try to limit this broad interpretation by stressing a "circumstance specific" decision, stating that the approach taken is adequate only because of the specific proximity, time, location, and context of the speech involved.[111] If courts continue to use this approach, these decisions present a future of endless unworkable precedent.[112]

Nonetheless, although the tests outlined by the circuit courts create a threshold that schools need to pass to justify involvement in student off-campus speech, schools must still respect the students' First Amendment rights.[113] Thus, with respect to the Ninth Circuit, once the court determined both threshold tests were met, the court then went through the *Tinker* analysis to ensure the school's discipline was constitutional.[114] Courts have repeatedly tested and reaffirmed *Tinker*'s "substantial disruption" standard and "rights of others" tests.[115] The

106. *See C.R.*, 835 F.3d at 1150-51 (declaring facts met nexus test).

107. *See id*. at 1151 (determining facts met reasonably foreseeable test).

108. *See* Loung, *supra* note 5, at 106 (stating uncertainty regarding permissibility of using one threshold test); *see also C.R.*, 835 F.3d at 1150 (noting circuit split regarding threshold tests).

109. *See* Fowler, *supra* note 13, at 738-39 (examining how courts reach different conclusions based on which test they apply).

110. *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 574 (4th Cir. 2011) (justifying foreseeability given Musselman High School students made up group and targets of harassment); *see also* Loung, *supra* note 5, at 107 (recognizing scope of school's ability to regulate off-campus speech expanded by fraction).

111. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1152 (9th Cir. 2016) (restricting decision to unique facts presented); Loung, *supra* note 5, at 106-07 (emphasizing courts engage in circumstance-specific inquiries in regulation of student speech); *supra* Sections II.A.2-4 (explaining narrow and specific categories of speech); *see also supra* note 28 (analyzing distinction between content-based and content-neutral viewpoint discrimination).

112. *Cf.* Marcus-Toll, *supra* note 27, at 3419 (recognizing unwise and untenable nature of rigid adherence to past approaches).

113. *See id.* at 3421-22 (commenting on Court's *Tinker* application after establishing reasonably foreseeable threshold). Once a court determines that a school's regulation satisfies one of the threshold tests, it then applies one of the *Tinker* prongs to analyze whether the regulation violates a student's First Amendment rights. *See C.R.*, 835 F.3d at 1150 (explaining standard used to maintain student's constitutional rights).

114. *See C.R.*, 835 F.3d at 1152-53 (determining *C.R.* meets rights of others standard under *Tinker*).

115. *See* Morse v. Frederick, 551 U.S. 393, 403-07 (2007) (affirming *Tinker*, *Fraser*, and *Hazelwood*); *see also, e.g.*, S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773, 777 (8th Cir. 2012) (applying *Tinker* to student website); *Kowalski*, 652 F.3d at 573-74 (utilizing *Tinker* for decision involving MySpace

necessary adjustment to prevent boundless regulation of student off-campus speech involves a higher court to clarify when and where to utilize each specific test.[116]

Living in a digital age where most school-aged children carry smartphones, courts utilizing the reasonable foreseeability threshold test avail because virtual communications, postings, and alike "physically" make it to campus everyday through students' phone use at school.[117] This logic is inapplicable to in-person speech because once spoken, no such cyber network exists to preserve communications for later reference.[118] Extending these current tests to in-person speech between students could expand school authority to regulate off-campus speech much farther than is intended and appropriate.[119] With school being the central connection amongst students, the reasonably foreseeable standard is overly broad because any interaction, regardless of how far away from school, will eventually manifest on campus and authorize school discipline.[120] Further, if courts continue to emphasize specific facts in a single case to rationalize school regulation, there will be an abundance of unworkable precedent for future cases and a growing number of justifications that a school may use to regulate student speech.[121]

B. Adjusting Existing Standards to Guide Lower Federal Courts in Regulating Student Off-Campus Speech

For every exception that the Court has made to permit regulation of student speech, it has slightly diminished students' First Amendment rights.[122] Many

postings); Doninger v. Niehoff, 642 F.3d 334, 347 (2d Cir. 2011) (using *Tinker* in blog post case); *supra* notes 60-61 and accompanying text (explaining *Tinker* remains good law with subsequent decisions creating exceptions).

116. *See* Loung, *supra* note 5, at 106 (reiterating remaining uncertainty regarding threshold tests); *supra* note 79 and accompanying text (detailing varying approaches circuit courts utilized with and without threshold tests).

117. *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 574 (4th Cir. 2011) (highlighting foreseeability due to students' access to computers, smartphones, and electronic devices while at school); Boyd, *supra* note 79, at 1227 (articulating how students bring cyberspeech on campus through Internet access via smartphones).

118. *See supra* Section II.B (detailing difficulty in applying standards used for on-campus speech to off-campus speech); *cf.* Marcus-Toll, *supra* note 27, at 3419 (asserting digital speech creates record).

119. *See* Loung, *supra* note 5, at 107 (suggesting decisions may increase limits of student constitutional protection by fractions); *see also* Marcus-Toll, *supra* note 27, at 3419 (stating technology causing schools increased interest in regulating off-campus speech).

120. *See Kowalski*, 652 F.3d at 574 (justifying foreseeability given students attend same high school); *see also* Loung, *supra* note 5, at 107 (acknowledging school's ability to regulate off-campus speech expanded).

121. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1152 (9th Cir. 2016) (limiting decision to specific facts presented); Loung, *supra* note 5, at 106-07 (noting courts engage in circumstance-specific inquiries for regulation of student-speech cases); *supra* Sections II.A.2-4 (detailing facts required for specific categories of speech).

122. *See* Miller *supra* note 38, at 636 (explaining *Fraser*, which takes away students' *Tinker* protection); Felder, *supra* note 40, at 439 (emphasizing *Fraser*'s negative impact on students' rights); *see also* Morse v. Frederick, 551 U.S. 393, 410 (2007) (permitting restricting student speech about illegal drugs); Hazelwood Sch.

courts have stressed the extremely fact-specific nature of this area of law.[123] But without a more universal approach, courts continuously develop new standards leading to more decisions justifying school involvement and extending schools' authority to regulate student speech.[124] Ultimately, to maintain an appropriate balance between a school's pedagogical purpose and a student's constitutional rights, courts and schools need to treat on-campus speech, cyberspeech, and off-campus, in-person speech differently.[125]

The *Morse* Quartet appropriately governs on-campus student speech for the four respective categories, specifically speech disruptive to the classroom, school-sponsored speech, lewd speech, and speech concerning illegal drug use.[126] Further, the abundance of varying situations cyberspeech could present warrants the two threshold tests—nexus and reasonably foreseeable—used by lower federal courts.[127] Though it is unclear which test a court needs to apply, both tests ultimately establish a connection between the communications and the school that reasonably validates involvement and discipline.[128] Finally, however, the creation of a higher threshold test is vital to validate school involvement with in-person student communication that occurs away from school.[129] By allowing schools to discipline this type of speech, courts

Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (creating exception for school-sponsored speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (establishing exception for lewd, indecent, or offensive student speech).

123. *See C.R.*, 835 F.3d at 1152 (limiting decision to specific facts presented); Loung, *supra* note 5, at 106-07 (highlighting court engagement in circumstance-specific inquiries); Marcus-Toll, *supra* note 27, at 3418 (noting development of fact-dependent standards); *supra* Sections II.A.2-4 (detailing categories of speech allowing regulation and specific facts necessary to qualify under each).

124. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (explaining inability to craft "one-size fits all" approach); Loung, *supra* note 5, at 107 (concluding Ninth Circuit decision expanded school's ability to regulate off-campus speech).

125. *Compare* S.J.W. *ex rel*. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (applying *Tinker* after holding student speech reasonably foreseeable to reach school community), *and* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573-74 (4th Cir. 2011) (utilizing two-layer approach of meeting nexus threshold test then applying *Tinker*), *with Morse*, 551 U.S. at 403-06 (analyzing only constitutionality of school regulation of on-campus speech), *Hazelwood*, 484 U.S. at 270-73 (reviewing solely whether school action constitutional), *and Fraser*, 478 U.S. at 682-85 (establishing only constitutionality of lewd student speech restriction).

126. *See Morse*, 551 U.S. at 410 (addressing regulation of illegal drug speech); *Hazelwood*, 484 U.S. at 274-75 (introducing appropriate regulation of school-sponsored speech); *Fraser*, 478 U.S. at 685 (governing regulation of lewd student speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (permitting restricting materially disruptive student speech or speech invading rights of others); *supra* Sections II.A.1-4 (articulating decisions of each *Morse* Quartet case); *see also Wynar*, 728 F.3d at 1067 (summarizing points from *Morse* Quartet); Dickler, *supra* note 8, at 380-81 (noting establishment of *Morse* Quartet).

127. *See supra* note 74 (listing various circumstances under which off-campus speech ended up on campus); *see also supra* note 79 (detailing threshold tests). *But see Wynar*, 728 F.3d at 1069 (stating impossibility of creating one universal standard).

128. *See supra* note 79 and accompanying text (explaining Eight Circuit and Fourth Circuit approach to handling off-campus student speech); *see also* C.R. *ex rel* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150-52 (9th Cir. 2016) (encountering uncertainty of which test to apply).

129. *See* Fowler, *supra* note 13, at 722, 745 (suggesting use of higher threshold when analyzing off-campus speech).

effectively permits schools to discipline students for speech that never passed, or intended to pass, through the schoolhouse gates.[130]

Accordingly, a type of protective qualifier, such as intent, is necessary to ensure that students' constitutional rights stay intact when schools regulate students' in-person speech.[131] For example, in applying *Tinker*, the Third Circuit considered a student's intent to have her cyberspeech reach the school as evidence of whether the school could reasonably foresee a substantial disruption.[132] By requiring some showing of intent, a school would lack the authority to constitutionally regulate speech that the speaker never anticipated making onto campus, and that never actually made it onto campus.[133]

Although adding an intent aspect to the *Tinker* constitutionality analysis provides another layer of protection for students' speech, it does little for speech that takes place in-person because the issue lies in the threshold test stage before performing a constitutionality analysis.[134] The issue concerns how courts should determine whether the school passes the threshold to permissibly get involved at all.[135] By making it more difficult for schools to meet a jurisdictional threshold test because of a more stringent and narrowly-tailored approach, courts will limit the opportunity for schools to become involved with in-person, off-campus speech that never reaches the school or that is never directed at the school.[136] This approach prevents a school's ability to become involved in all aspects of student communications and thus provides greater protection for students' constitutional rights at school.[137]

Still, although an intent-driven approach suggests a method in ensuring the justification of schools' regulating off-campus, in-person speech, it poses an issue comparable to the one courts currently face when determining whether or

130. *See id.* at 732 (suggesting necessary safeguard for speech inadvertently reaching campus); *see also Kowalski*, 652 F.3d at 574 (stating ability of cyberspeech getting to campus via smartphones and other electronic devices); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004) (analyzing situation where student brought drawing older brother created to school); Boyd, *supra* note 79, at 1227 (recognizing students bring cyberspeech on campus through internet).

131. *See* Fowler, *supra* note 13, at 732 (asserting increased protectiveness of "intent-driven" test).

132. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 929-31 (3d Cir. 2011) (en banc) (emphasizing student limiting access to MySpace page by making private). By making the MySpace private, the court inferred that the student did not intend for the MySpace page to reach campus, and thus the school had no authority to regulate the student's speech. *See id.*

133. *See* Fowler, *supra* note 13, at 732, 745 (addressing protection against speech unintentionally reaching campus).

134. *See supra* note 28 and accompanying text (discussing constitutional issue regarding on-campus speech regulation).

135. *See supra* note 79 and accompanying text (detailing threshold tests courts use in determining validity of school involvement).

136. *See* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (stating lack of concern regarding location due to speech directed at school); *see also* Doninger v. Niehoff, 642 F.3d 334, 346 (2d Cir. 2011) (noting school involvement appropriate due to student's blog entry designed to reach school).

137. *See* Fowler, *supra* note 13, at 736 (asserting intent-driven test more protective than other tests).

not to utilize threshold tests, and if so which test.[138] The inherent difficulty in proving a student's subjective intent supports the idea that this approach should and will follow the fact-specific analysis exhibited throughout this area of law.[139] Specifically, factors such as the student's intended audience and context of speech could provide evidence of a student's desired outcome from what they communicate.[140] If the circumstances surrounding a student's speech establish a sufficient intent finding to justify a school's involvement, a *Tinker* analysis then ensures a student's First Amendment rights are not infringed upon.[141] But, this again leaves courts in the same position as before, struggling when the facts of a specific case do not fit into one of the circuit court's decisions.[142] This area of law—involving student speech that occurs off-campus but in-person—requires guidance not just because schools may inevitably find a way to regulate this type of speech, but because the pattern of continuously developing fact-specific decisions to allow school regulation will slowly chip away at students' free speech rights at school.[143]

IV. CONCLUSION

As discussed above, courts lack any guidance on how to frame an appropriate approach in handling student speech that takes place off campus but in person. This uncertainty stems from the lack of Supreme Court precedent regarding regulation of off-campus student speech and courts' inability to rely on rationales that allow for on-campus speech regulation. Cases permitting regulation of on-campus speech represent the notion that school officials should have flexibility in restricting student First Amendment rights at school to ensure the school's educational mission remains intact. Because off-campus speech cannot directly

138. *See* Boyd, *supra* note 79, at 1236 (noting resulting questions regarding satisfaction of intent requirement when using intent-driven test).

139. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (emphasizing fact-specific application of standards); Loung, *supra* note 5, at 106-07 (highlighting circumstance-specific inquiries).

140. *See* Fowler, *supra* note 13, at 732 (listing factors Third Circuit examined in determining intent). To determine whether the speaker intended for the speech to reach the school, the Third Circuit considered the steps the speaker took to confine the audience, whether the mode of communication the speaker chose was knowingly inaccessible on school campus, and whether the speaker focused the speech at a specific association with the school. *See id*.

141. *See C.R.*, 835 F.3d at 1150 (performing *Tinker* analysis after determining satisfaction of both threshold tests); *S.J.W.*, 696 F.3d at 777 (applying *Tinker* after determining speech reasonably foreseeable to reach school); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573-74 (4th Cir. 2011) (using *Tinker* constitutionality standard after speech met nexus threshold test).

142. *See C.R.*, 835 F.3d at 1152 (limiting opinion to circumstance presented); Loung, *supra* note 5, at 105 (identifying Ninth Circuit limited decision in *C.R.*); *see also supra* note 9 and accompanying text (discussing Court's perpetuating confusion with creating multiple standards).

143. *See* Crawford, *supra* note 32, at 239 (suggesting opportunity for expanded reach based on language in *Tinker*); Fowler, *supra* note 13, at 738-39 (recognizing courts reach different conclusions based on which test they apply); Loung, *supra* note 5, at 107 (acknowledging schools' expanded ability to regulate off-campus student speech).

disrupt the school's educational mission, lower courts created threshold tests to handle student cyberspeech to certify that school involvement is appropriate. Similarly, off-campus, in-person speech lacks this connection to a school's educational mission, and with the absence of decisions concerning this in-person speech, courts unfittingly treat in-person speech analogous to off-campus cyberspeech.

The circumstances pertaining to in-person, off-campus speech warrant the establishment of an even higher threshold test to ensure speech that can never physically or virtually make it to campus does not become subject to school regulation. An approach similar to the Third Circuit's intent-based approach, which focused on factors such as the speaker's context and audience, introduces a way to balance the authority of school officials to maintain a productive learning environment, while also more stringently protecting students' First Amendment rights. Although this approach more narrowly tailors the standards to allow school involvement, it too is undeveloped. Clearer guidance is necessary before the pool of precedent justifying school involvement gets so infinite that students truly do shed their constitutional right to freedom of speech at the schoolhouse gate.

Lindsay Foley