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The Omnipotent School Administrator: Seeking to Curb Restriction of Off-Campus Student Speech in the Wake of *C.R. v. Eugene School District 4J*

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Note*

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I. INTRODUCTION

The First Amendment of the Constitution grants broad protection of free speech and expression for citizens of the United States.[1] This right, when exercised by a citizen, is subject only to a handful of articulated limitations based on the content of the speech.[2] However, this quintessential right is altered and subject to greater limitation when the speech at issue has not been delivered by an individual acting in his or her capacity as a citizen, but as a student.[3] The altered First Amendment standard for student speech seeks to provide school administrators[4] and teachers with the means to maintain control of

1. *See* U.S. CONST. amend. I.

2. *See* Matthew Broderick, *Supreme Court Avoids Crushing the First Amendment: Why the Decision in* United States v. Stevens *Was Important for the Preservation of First Amendment Rights*, 88 DENV. U. L. REV. 577 (2011) (listing the categories of speech that are not protected by the First Amendment).

3. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'") (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)); *see also* Scott Dranoff, Tinker-*ing with Speech Categories: Solving the Off-Campus Student Speech Problem with a Categorical Approach and a Comprehensive Framework*, 55 WM. & MARY L. REV. 649, 655–57 (2013) (noting the Supreme Court's willingness, in certain circumstances, to permit regulation of student speech based on the content of said speech).

4. *See Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

the school environment.[5] Schools exercise said control through the regulation of student speech that would be protected by the First Amendment in other contexts.[6] While students clearly do not enjoy the same First Amendment protections as typical citizens,[7] the issue is rife with uncertainty and has prompted significant debate in the legal community.

The debate and conflict surrounding this issue arises from speech that takes place outside of the physical territory of the school (off-campus speech).[8] What is the limit of this minimized First Amendment protection? When do students take off their student hats and don their citizen hats, entitling them to the full protection of the First Amendment? These questions have proven vexing for both legal scholars and federal judges. Federal appellate courts have attempted to craft standards for determining under what circumstances school officials have the authority to discipline students for speech that originates off-campus.[9] This Note aims to articulate a workable threshold test for determining whether an individual's off-campus speech falls under the regulatory umbrella of school officials and the diminished protection of the First Amendment.

Part I draws attention to the distinction between First Amendment protection afforded to the average citizen and the lessened protection afforded to citizens acting in their capacity as students. Additionally, Part I acknowledges the difficulty in assessing whether an individual is acting as a citizen or a student. Part II examines the four occasions in which the Supreme Court has addressed the First Amendment in the context of student speech. The federal circuit courts have struggled to define the limits of these precedents when presented with speech that takes place outside of the physical territory of the school grounds. As a result of this struggle, the circuit courts have developed tests for deciding whether a school may regulate off-campus speech. Part II explains the two most prominent standards—the reasonably foreseeable test and the nexus test. Part II concludes by articulating

5. *See* Daniel Marcus-Toll, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3399 (2014).

6. *Id.* ("Indeed, school officials may prohibit many forms of student expression that would otherwise generally be protected by the First Amendment.").

7. *See Kuhlmeier*, 484 U.S. at 266. *But see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (acknowledging the fact that students do not forfeit all of their constitutional rights by virtue of being at school).

8. *See* Jon G. Crawford, *When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to* Tinker's *Reach?*, 45 URB. LAW. 235, 236 (2013) ("The absence of a definitive Supreme Court ruling clarifying the authority of school leaders to impose disciplinary consequences for student off-campus internet speech that permeates the metaphorical gate is creating a vexing challenge for both school leaders and lower courts.").

9. *See, e.g.*, Marcus-Toll, *supra* note 5, at 3420–29.

the Ninth Circuit's approach to off-campus student speech and exploring how this approach is applied in *C.R. v. Eugene School District 4J*.[10]

Part III addresses the initial question of whether the Supreme Court's student speech jurisprudence should apply to off-campus speech in certain circumstances. This examination of the Court's precedent will yield the conclusion that the circuit courts were correct in authorizing regulation of off-campus speech; however, their application of this regulation is flawed. The Ninth Circuit is correct that not all off-campus speech is untouchable, but its practice of applying the reasonably foreseeable test and nexus test is ineffective and led to the wrong outcome in *C.R. v. Eugene School District 4J*.[11] Part III addresses the shortcomings of the Ninth Circuit's approach and proposes a threshold test for determining when off-campus speech may be regulated by school administrators. This test aims to address the weaknesses of other proposed standards and provide greater speech protection for students than what is provided by the reasonably foreseeable and nexus tests.

II. BACKGROUND

A. The Supreme Court's Student Speech Jurisprudence

"[T]he constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[12] This assertion is well-accepted in the legal community; however, the circumstances that give rise to this diminished standard of constitutional protection remain the subject of significant debate.[13] The Supreme Court has only addressed the application of the First Amendment to student speech on four occasions.[14] All four cases involved speech that was deemed on-campus; thus, the Court has never explicitly determined whether, and to what extent, its precedents govern off-campus student speech.[15]

The first examination of a school's authority to restrict a student's right to free speech and expression came in *Tinker v. Des Moines Inde-*

10. 835 F.3d 1142 (9th Cir. 2016).
11. *Id.*
12. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
13. *See, e.g.*, Crawford, *supra* note 8 (acknowledging the uncertainty surrounding the scope of the Supreme Court's student speech precedents).
14. *See, e.g.*, Marcus-Toll, *supra* note 5, at 3406–14 (discussing the holdings and facts relating to the four Supreme Court student speech cases).
15. Mary R. Loung, 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, 98 (2017) ("However, the Supreme Court has yet to address how its precedents apply to off-campus speech.").

pendent Community School District.[16] The Court's holding provided a framework for determining whether limitation of student speech is appropriate[17] while recognizing students necessarily retain constitutional protections at school: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] When courts rule on the constitutionality of a school's regulation of student speech, they do so with an eye to *Tinker*.[19] This pivotal case articulated a discernable standard for assessing whether administrators may police the speech of students.[20] At the same time, the case recognized students do not forfeit all their constitutional protections merely by virtue of being at school.[21] *Tinker*'s decision and its scope are fundamental to understanding the complex issue of off-campus speech.

The petitioner students in *Tinker* were members of a group that opposed the Vietnam War. In an effort to publicize their opposition to the war, the students wore black armbands through the holiday season.[22] Principals at the petitioners' high school were made aware of this plan and implemented a policy to address it.[23] Students were asked to remove these armbands and if they did not comply, they were suspended until they returned without the armband.[24] The petitioners were suspended as a result of this policy and brought suit against school officials.[25]

When ruling on this case, the Supreme Court's opinion recognized the need to defer to school officials in order for schools to maintain authority over their students.[26] However, this interest must be reconciled and balanced with students' prerogative to exercise their rights under the First Amendment.[27] The Court attempted to strike that balance, holding "conduct by the student . . . [which] materially disrupts classwork or involves substantial disorder or invasion of the rights of

16. 393 U.S. 503 (1969).
17. *But see* Marcus-Toll, *supra* note 5 (explaining that *Tinker* applies to issues of school speech unless one of the three categorical exceptions apply).
18. *Tinker*, 393 U.S. at 506.
19. *See, e.g.*, C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015); S.J.W. *ex rel*. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).
20. *C.R.*, 835 F.3d at 1152 (citing Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (2013) (quoting *Tinker*, 393 U.S. at 508, 514)).
21. *Tinker*, 393 U.S. at 506.
22. *Id.* at 504.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 507.
27. *Id.* ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.").

others is, of course, not immunized by the constitutional guarantee of freedom of speech."[28] The Court analyzed the students' expression under this standard and found insufficient facts to support a finding of material disruption or a substantial invasion of the rights of others.[29]

Tinker's test can be summarized as follows: schools may police student speech if it is reasonably likely to cause a substantial disruption of school activities or interfere with the rights of other students.[30] The bar for substantial disruption is high. Speech that simply makes the audience uncomfortable will not be suppressed under this standard.[31] Additionally, school officials must base their disciplinary action on more than fear of a resulting disruption.[32] While the disruption need not actually take place, restriction on student speech will only be sustained if the school officials were reasonable in their belief that the disruption would occur.[33]

Following *Tinker*, the Court ruled on three subsequent student speech cases, and these decisions introduced categorical rules providing school administrators with the authority to regulate student expression based on the content of their speech.[34] In *Bethel School District No. 403 v. Fraser*, the Court heard a case involving the discipline of a student based on a speech he gave during a school assembly.[35] The speech involved graphic and explicitly sexual metaphors, as well as obscene gestures, which resulted in the student's suspension from school.[36] The Court examined the school's imposed discipline to determine whether the student's First Amendment rights had been

28. *Id.* at 513.
29. *Id.* at 505 (finding the wearing of armbands to school by the petitioners to be "entirely divorced from actually or potentially disruptive conduct").
30. *See* Crawford, *supra* note 8, at 238–39 (clarifying that the *Tinker* holding established two independent bases upon which school limitation of student speech can be justified—the material disruption basis and the rights of others basis).
31. *Tinker*, 393 U.S. at 509 ("[I]t must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").
32. *Id.* at 508 ("But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").
33. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 397 (5th Cir. 2015) (finding that the *Tinker* test can be satisfied if "the record contains facts 'which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'") (quoting *Tinker*, 393 U.S. at 514) (emphasizing a school's ability to discipline a student when a substantial disruption occurs as a result of speech or when such a disruption could have been reasonably forecast); *see also* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1152 (9th Cir. 2016) (affirming the interpretation of *Tinker's* substantial disruption language to only require schools to *forecast* said disruption).
34. *See, e.g.*, Loung, *supra* note 15 (listing the categories of speech articulated by the Court which justify a school's regulation of student speech); Marcus-Toll, *supra* note 5, at 3409–14.
35. 478 U.S. 675 (1986).
36. *Id.* at 677–78.

violated and concluded no such violation had taken place.[37] The environment in which the speech was disseminated was crucial to the Court's analysis: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[38] The lewd and inappropriate nature of the student's speech rendered the discipline appropriate. In so holding, the Court established a categorical rule permitting schools to impose sanctions upon students for offensively lewd and indecent speech.[39]

The next categorical rule promulgated by the Court was the product of the *Hazelwood School District v. Kuhlmeier* decision, which addressed school-sponsored speech.[40] The dispute in this case revolved around a high school newspaper and the school's censorship of its content.[41] An examination of the school's suppressions and censorship of certain articles resulted in the Court holding the school's actions permissible: "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[42] The Court reasoned that when a school lends its name to a student publication, it has an interest in demanding certain standards be met if it is to be published.[43] Thus, the *Kuhlmeier* decision established a categorical grant of authority for schools to regulate school-sponsored speech.

The most recent Supreme Court decision addressing the issue of student speech was rendered in *Morse v. Frederick*.[44] Again, the Court's decision announced a categorical rule authorizing content-based restriction of student speech.[45] The controversy in *Morse* developed when a student displayed a banner advocating illegal drug use

37. *Id.* at 676.
38. *Id.* at 685.
39. *Id.* at 685–86 ("Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.").
40. 484 U.S. 260 (1988); Marcus-Toll, *supra* note 5, at 3412 (drawing attention to *Kuhlmeier* establishing a new test for "school-sponsored expressive activities").
41. *Kuhlmeier*, 484 U.S. at 260.
42. *Id.* at 273.
43. *Id.* at 271–72 ("A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and may refuse to disseminate student speech that does not meet those standards.").
44. 551 U.S. 393 (2007); *see also* Marcus-Toll, *supra* note 5, at 3413 (noting that the *Morse* decision is the most recent Supreme Court decision involving student speech).
45. *See, e.g.*, Watt Lesley Black Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting* Tinker *in the Digital Age*, 59 ST. LOUIS U. L.J. 531 (2015) ("In . . . *Morse v. Frederick*, the Court carved out [an] exception[ ] that allow[s]

during a school sponsored-event.[46] While the speech at issue took place across the street from the school, the Court rejected the student's argument that his banner could not be labeled school speech.[47] The Court addressed several factors supporting its finding that his banner was in fact school speech rendering him subject to the diminished protections of the First Amendment:

> The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district's student conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school.[48]

Upon finding the banner amounted to student speech, the Court concluded the school officials did not violate the First Amendment rights of the student when they confiscated the banner advocating drug use.[49] In so holding, the Court produced a categorical rule authorizing the regulation of student speech promoting illegal drug use.[50]

The three preceding Supreme Court cases are instances in which the Court declined to apply *Tinker* to student speech, instead opting to create categorical rules to apply to certain categories of speech. If student speech does not fall within one of the three enumerated categories—lewd and indecent speech, school-sponsored speech, or speech advocating the use of illegal drugs—*Tinker* is applied to determine whether restriction of the speech is appropriate.[51]

While *Tinker* appears to delineate a clear model for school officials to follow when confronted with student speech issues, the Court did not articulate a clear limit for the application of this test.[52] The operation of the test outside the strict confines of the school campus is am-

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school administrators to discipline students for speech . . . that advocates the use of illegal drugs.").

46. *Morse*, 551 U.S. at 393.
47. *Id.* at 393–94. This finding is particularly relevant to the scope of the Supreme Court's student speech jurisprudence. This holding is addressed in greater detail in Part III of this Note during its discussion of the Supreme Court's intention that its precedents extend beyond the physical territory of the school.
48. *Id.*
49. *Id.* at 397.
50. *Id.* ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."); *see generally* Marcus-Toll, *supra* note 5, at 3413 (describing the case's holding as allowing school officials to police student speech that they regard as encouraging illegal drug use).
51. *See* Black, *supra* note 45; *see also* Marcus-Toll, *supra* note 5, at 3410–11 (emphasizing that the three most recent Supreme Court student speech decisions represented *exceptions* to the standard established by *Tinker*, permitting school officials to restrict student speech purely based on the content of said speech).
52. *See, e.g.*, Loung, *supra* note 15 ("[T]he Supreme Court has yet to address how its precedents apply to off-campus speech.").

biguous. Legal scholars and federal appellate courts appear to generally support *Tinker's* application to certain off-campus speech.[53] However, there is a general consensus that some additional threshold test is necessary for school officials to satisfy in order to apply *Tinker*.[54] The federal appellate courts are currently struggling to define a threshold test outlining the limits of *Tinker*'s application.[55] These efforts have produced several tests, utilized by different circuits, articulating various means for assessing the propriety of speech restriction; yet, these tests provide no meaningful hurdle for school officials seeking to restrict student speech originating off-campus.[56]

B. Circuits Struggle to Define the Limits of *Tinker*

As case law in this area continues to develop, two tests for analyzing the reach of *Tinker* have emerged.[57] One of these tests is referred to as the reasonably foreseeable test. This standard has been articulated and implemented by the Eighth Circuit[58] and the Second Circuit.[59] Another attempt to define the scope of *Tinker* yielded the nexus test, which has been applied to off-campus speech issues by the Fourth Circuit.[60] These two threshold tests are the result of federal courts recognizing the need to adapt to the evolution of school speech while preserving students' First Amendment protection.[61]

1. The Eighth Circuit's Approach: Reasonable Foreseeability the Speech Will Reach the School

The Eighth Circuit examined a school's ability to regulate student speech originating off-campus in *S.J.W. ex rel. Wilson v. Lee's Summit*

53. *See id.* (noting the absence of Supreme Court direction necessitated the lower federal courts to develop standards for assessing whether schools could regulate off-campus speech); *see also* Marcus-Toll, *supra* note 5, at 3416 (explaining the need to apply *Tinker* off-campus as deriving in part from the rise of the internet and changes in technology).

54. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011). *But see* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (recognizing *Tinker* applies off-campus but declining to adopt any of the threshold tests from other circuits: "[B]ecause such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits.").

55. *See, e.g.*, Marcus-Toll, *supra* note 5, at 3420–29.

56. *See* discussion *infra* section III.B.

57. *See generally* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013).

58. *See Wilson*, 696 F.3d at 771.

59. *See Doninger*, 642 F.3d 334.

60. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011).

61. *See, e.g.*, Marcus-Toll, *supra* note 5, at 3400 (listing modern issues that have contributed to the application of *Tinker* off-campus).

R-7 School District.[62] This case involved the creation of a website by students that was, according to the student creators, intended to "discuss, satirize, and 'vent' about events" at school.[63] However, the racist and degrading content of the website was eventually brought to the attention of school officials.[64]

The Eighth Circuit addressed whether *Tinker* may apply to off-campus speech, holding it applicable when the student's speech was reasonably foreseeable[65] to reach the school community and cause a substantial disruption.[66] This holding expressed a threshold inquiry to be conducted when speech occurs off-campus: is the speech reasonably foreseeable to reach campus? The *Tinker* analysis is only conducted if this question is answered in the affirmative.[67] With these considerations in mind, the Eight Circuit applied the reasonably foreseeable test to the contested speech in *Wilson*.

When applying the reasonably foreseeable test to Wilson's website, the Eighth Circuit held the content could reasonably be expected to make its way to the school and impact the learning environment.[68] The creators of the website claimed they had only told a handful of friends about the site, and they used a Dutch domain site so users in the United States could not find the website with a Google search.[69] However, the court noted the site was not password-protected.[70] Additionally, the Eighth Circuit echoed the sentiment of the District Court that the posts were directed at the school.[71] Based on these findings, the reasonably foreseeable test had been satisfied and application of *Tinker* was appropriate.

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62. *See* 696 F.3d at 771.

63. *Id.* at 773.

64. *Id.* (explaining that the subject matter of the site included racist posts as well as sexually explicit comments, which mentioned female students by name).

65. In implementing the reasonably foreseeable standard, the Eighth Circuit relied on a decision from the Second Circuit expressing a similar justification for regulating off-campus speech that could be expected to reach campus. *Id.* at 777 ("[A] student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' *at least when it was similarly foreseeable that the off-campus expression might also reach campus*." (quoting Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) (emphasis added))).

66. *Id.* at 776–77. The "reasonably foreseeable" language from this holding represents the additional threshold test school officials must satisfy to reach the speech and the subsequent "substantial disruption" language represents the application of the *Tinker* test.

67. *Id.* at 778.

68. *Id.*

69. *Id.* at 773.

70. *Id.*

71. The Eighth Circuit did not articulate specific factors to support their finding that the posts were directed at the school. *Id.* at 778.

2. The Fourth Circuit's Approach: The Nexus Test

When confronted with off-campus student speech, the Fourth Circuit developed a standard unique to those of its sister courts.[72] The determinative consideration for the Fourth Circuit was the nexus between the speech and the school's pedagogical interests: "[W]here such speech has a *sufficient nexus* with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."[73] In *Kowalski v. Berkeley County Schools*, the Fourth Circuit developed this standard authorizing school officials to restrict off-campus student speech in response to a student-created MySpace page dedicated to ridiculing another student.[74] Derogatory comments and demeaning photographs directed at the classmate were posted to the page.[75] School administrators responded to this incident by suspending the creator of the page, Kowalski, from school and placing her on a social suspension.[76]

In analyzing the legality of the action taken by the school administrators, the court recognized the school's legitimate interest in "maintaining order in the school and protecting the well-being and educational rights of its students."[77] The court identified facts supporting a finding of a connection between the speech and the school's interest: Kowalski was aware the dialogue generated by the MySpace page would take place among the students of the high school, the impact of the speech would be felt at school, and the vast majority of the page's members were students.[78] In light of these facts, the court held a sufficient nexus existed between the speech and the school.[79] Having satisfied the nexus test, the speech was within the reach of school officials.[80] The Fourth Circuit determined the application of *Tinker* to Kowalski's off-campus speech was appropriate.[81]

72. *See* Marcus-Toll, *supra* note 5, at 3425 ("Unlike the Second Circuit's reliance on foreseeability or the Third Circuit's emphasis on intent, the Fourth Circuit grounded its inquiry in the school's broad educational mission and duty to its students."). *But see* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011) (examining the foreseeability of the speech reaching campus as well as whether there was a sufficient nexus).

73. *Kowalski*, 652 F.3d at 577 (emphasis added).

74. *Id.* at 567–68.

75. *Id.*

76. *Id.* at 569.

77. *Id.* at 571.

78. *Id.* at 573.

79. *Id.*

80. *Id.* at 573–74 (holding the nexus between the student's speech and the high school's pedagogical interest was sufficiently strong to warrant restriction of the speech).

81. *Id.*

C. The Ninth Circuit Tackles Off-Campus Student Speech: *C.R. v. Eugene School District 4J*

The approach of the Ninth Circuit in *C.R. v. Eugene School District 4J* was consistent with recent Ninth Circuit precedent in its extension of *Tinker* to off-campus speech[82] and application of both the reasonably foreseeable test and the nexus test introduced by its sister circuits.[83] While the Ninth Circuit discussed and applied these two tests to the student speech, its discussion did not endorse or adopt one test over the other.[84]

1. Facts

The dispute in *C.R. v. Eugene School District 4J* stemmed from an off-campus incident involving the sexual harassment of two students.[85] C.R. and a group of boys made sexually suggestive comments regarding oral sex to a younger male and female student.[86] An instructional aide for the school district happened upon the group of students while these events were unfolding and asked the two younger students if they felt comfortable.[87] The male student said yes, and the female said no.[88] The female proceeded to tell the aide what had transpired.[89] On the following Monday, the instructional aide called the school and spoke with the vice principal about what had taken place.[90] After an informal investigation, the school disciplined the boys involved in the incident. C.R. received a two-day suspension.[91]

The speech at issue occurred approximately five minutes after school had been let out for the day, a few hundred feet from the school's property line at a public park.[92] It is important to note, this park bordered the school's athletic field, and members of the school faculty referred to the park and the athletic fields collectively as "the

82. *See* 835 F.3d 1142 (9th Cir. 2016) (applying *Tinker* to off-campus speech that took place in person); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013) (holding application of *Tinker* appropriate to a student's MySpace messages); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 983–86 (9th Cir. 2001) (expelling a student based on the content of a poem he wrote off-campus and subsequently showed to a teacher).

83. *C.R.*, 835 F.3d at 1149. *But see LaVine*, 257 F.3d at 990–92 (applying *Tinker* to the off-campus speech given its "potential for substantial disruption").

84. *See C.R.*, 835 F.3d at 1150 ("We follow *Wynar* in applying both the nexus and reasonable foreseeability tests to C.R.'s speech.").

85. *Id.* at 1145.

86. *Id.* at 1146.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1146–47.

92. *Id.* at 1145.

back field."[93] C.R. claimed the school had no authority to suspend him given the incident took place off-campus and on public property.[94]

2. The Court's Justification for Applying Tinker *to C.R.'s Speech*

In reviewing the school's decision to suspend C.R., the Ninth Circuit considered the threshold question of whether the school had the authority to discipline C.R. for said speech in the first place.[95] The court ultimately determined the speech fell within the scope of *Tinker*, thus rendering it subject to potential restriction by the school.[96] In reaching this conclusion, the court relied on *Wynar v. Douglas County School District* which upheld the expulsion of a student for sending messages over MySpace threatening to commit a school shooting.[97] The *Wynar* court identified both the reasonably foreseeable standard from the Eighth Circuit as well as the nexus test from the Fourth Circuit; however, the court declined to endorse one test over the other, instead opting to run the speech through both standards.[98] The *C.R.* court followed the model established in *Wynar* by applying both the reasonably foreseeable and nexus tests to the contested speech.[99]

When applying the nexus test, the court emphasized all of the parties involved were students.[100] Additionally, while the location was technically off school property, the incident occurred only a few hundred feet from campus on property that was frequented by students as they came to and from school.[101] The property line between the school and the public park was ambiguous, and the students may not have

93. *Id.* at 1146 (noting the ambiguity of the property line: "[T]here is no visible boundary to indicate where school property ends and the park begins.").

94. *Id.*

95. *Id.* at 1148 (explaining the outcome of this case would involve a two-step inquiry: first, whether the school could regulate the speech, and second, whether the discipline imposed "complied with the First Amendment's requirements").

96. *Id.* at 1152 (holding the school district had the authority to discipline the off-campus speech).

97. *Id.* at 1149 (listing the two tests identified by the *Wynar* court: the nexus test and the reasonably foreseeable test); *see also* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013) (identifying threshold tests used by its sister circuits but declining to endorse one test over the other).

98. *Wynar*, 728 F.3d at 1069; *see also C.R.*, 835 F.3d at 1149 ("*Wynar* declined to choose between these tests, holding that both were satisfied in the case of a threatened school shooting.").

99. *C.R.*, 835 F.3d at 1150.

100. *Id.* ("[A]ll of the individuals involved were students, a fact that typically counsels in favor of finding that a student's speech was susceptible to school discipline.").

101. *Id.* The mere fact that the speech occurred off-campus could not be used to bar application of *Tinker*; on the contrary, the close physical proximity of the location of the speech and the school grounds was used to justify a finding of a sufficient nexus. *See id.*

realized they were no longer on school property.[102] Furthermore, the students had been let out of school shortly before the incident.[103] The court theorized that had it not been for the students walking home from school, the harassment would not have taken place.[104]

The court then analyzed C.R.'s speech under the reasonably foreseeable standard.[105] Administrators had to recognize the possibility that the harassment would persist in the school hallways, and the targets of the harassment would be distracted from their studies as a result.[106] The court held the speech to be reasonably foreseeable to reach campus:

> Because the harassment in this case was so closely connected to campus—on the students' walk home, a few hundred feet from the school, immediately after school let out—administrators could reasonably expect that the effects of the speech would extend to the students' in-school experience.[107]

The court held both the nexus test and the reasonably foreseeable test permitted school officials to regulate C.R.'s off-campus speech.[108] This holding is of particular significance due to the face-to-face nature of the speech. Application of *Tinker* off-campus is overwhelmingly conducted in the context of student cyber-speech.[109]

The Supreme Court's student speech jurisprudence has definitively held students are not afforded the full protection of the First Amendment. *Tinker*'s framework is applied to determine whether a school may regulate or limit student expression. This doctrine is well-settled.

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102. *Id.* at 1150–51 ("There is no visual marker (*i.e.*, a fence or other boundary) to indicate where school property ends and the city park begins . . . .").
103. *Id.* at 1151.
104. *Id.* ("The school's schedule thus brought the students together on the bike path. Had all of the students not been released from school at the same time and walked home along the same path, the older students would not have had the same opportunity to sexually harass the younger students.").
105. *Id.*
106. This reasonably foreseeable standard was conducted from the perspective of the school administrators. The court reasoned school administrators could have foreseen the speech reaching the school and causing a distraction thereon. *See id.*
107. *Id.*
108. *See id.* at 1152 ("For all of the foregoing reasons, we conclude that the School District had the authority to discipline C.R. for his off-campus . . . speech."). After determining the reasonably foreseeable and nexus tests had been satisfied, the court went on to apply the *Tinker* test to determine whether the discipline conformed to the Supreme Court's precedent. *Id.* at 1152–53.
109. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (applying *Tinker* to the content of a rap posted on a student's Facebook page); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013) (applying *Tinker* to a student's MySpace messages referencing a school shooting); S.J.W. *ex rel*. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012) (applying *Tinker* to students' blog posts on a website they created); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011) (applying *Tinker* to content from a student's MySpace page); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011) (applying *Tinker* to a student's post on her publicly accessible blog).

What remains unclear is the reach of a school's regulatory arm when student expression does not occur within the confines of the schoolhouse. Federal appellate courts have struggled with this question, and these struggles have yielded imperfect threshold tests that must be satisfied prior to *Tinker*'s application. The Ninth Circuit's approach, like those of its sister circuits, is flawed.

III. ANALYSIS

A. *Tinker* Should Be Applied Off-Campus Under Certain Circumstances

Application of the *Tinker* analysis need not be limited to the physical confines of school property. Under certain circumstances, the ability for schools to regulate otherwise protected student speech should extend off-campus.[110] The Court's holding in *Morse v. Frederick* supports this assertion.[111] In *Morse*, the speech at issue did not occur on school grounds, yet the Court deemed the school's discipline appropriate.[112] "[T]he *Morse* Court found its student-speech jurisprudence applicable because Frederick was standing among fellow students, during normal school hours, at an event sanctioned and monitored by school officials."[113] By conducting this analysis and examining these circumstantial factors, the Court illustrated the complexity of the issue—complexity that cannot be resolved through a mere geographical inquiry. The context of the speech, not just its physical origin, was significant. In permitting regulation of speech that occurred outside of the schoolhouse, the Court provided conclusive evidence that it never intended to sever the applicability of its precedents as soon as a student took a step off school grounds.[114]

110. *But see* Susan S. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School's Disciplinary Arm Reach Speech Made in a Student's Bedroom?*, 48 WILLAMETTE L. REV. 195, 222 (2011) ("Speech that takes place outside the school environment . . . should be beyond the school's disciplinary reach, but if a disruption results on campus, that disruption itself can be suppressed and those involved can properly be disciplined.").

111. 551 U.S. 393, 400–01 (2007) (rejecting the student's argument that his speech was outside the purview of the school's authority merely because he was not physically on school grounds).

112. *Id.*

113. Marcus-Toll, *supra* note 5, at 3414.

114. *Morse*, 551 U.S. at 400–01. It is important to note that when the Court examined the circumstances surrounding the speech, it concluded the student could not totally claim the speech was off-campus. *Id.* It held the speech was on-campus and subject to restriction. *Id.* This is an important distinction to note because the Court was not explicitly stating its precedent is applicable off-campus. *See id.* Notwithstanding its failure to expressly hold its precedents applied off-campus, this holding is evidence of the Court's unwillingness to bar school officials from restricting all speech that takes place beyond the school's property lines.

The language in the *Morse* decision demonstrates the legality of *Tinker's* application off-campus under certain conditions. However, this conclusion serves to further confuse the issue of student speech by muddying the limits of a school's regulatory authority. *Morse* is evidence that the scope of *Tinker* is not easily defined.

B. Criticisms of the Ninth Circuit's Approach to Off-Campus Speech

The Ninth Circuit's standard for assessing a school's ability to regulate off-campus speech is flawed.[115] A school's interest in restricting speech is necessarily more attenuated when the speech is off-campus.[116] The goal and purpose of any threshold test is to provide greater protection for students speaking off-campus as opposed to on-campus.[117] These tests are to serve as an additional obstacle for school administrators because the speech is further removed from the classroom.[118] The Ninth Circuit's approach fails to achieve this goal.

While the Ninth Circuit has not expressly adopted the reasonably foreseeable or nexus tests,[119] their recent precedent applies both tests to contested speech.[120] Both tests have their own unique shortcomings. Essentially, the court fails to provide the necessary additional protection for students speaking outside of school.[121] Standing alone, neither test furthers the purpose of providing an additional barrier to school officials seeking to restrict speech.

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115. *See generally* Loung, *supra* note 15 (discussing the Ninth Circuit's approach to off-campus speech in *C.R.*).

116. Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) ("There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate.").

117. *See, e.g.*, Marcus-Toll, *supra* note 5, at 3433 ("The courts' perceived need for a threshold test . . . indicates their continued rejection of plenary school regulatory authority.").

118. *See* Elizabeth A. Shaver, *Denying Certiorari in* Bell v. Itawamba County School Board, 82 BROOK. L. REV. 1539, 1595 (2017) ("Some scholars . . . believe that a 'two-tiered' inquiry under which school officials must first determine the reasonable foreseeability that a student's speech would reach school is a 'more conservative approach' that provides greater protection to students' First Amendment rights, essentially because there is a threshold inquiry before *Tinker*'s substantial disruption standard is applied.").

119. *Id.* at 1569–70.

120. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (following its *Wynar* precedent in applying both standards to the speech at issue).

121. *See supra* notes 117–18 and accompanying text.

1. The Nexus Test Is Unclear and the Factors for Reviewing Courts to Consider Have Not Been Adequately Articulated

The greatest flaw of the nexus test is the lack of clarity and direction provided by the Fourth Circuit. The *Kowalski* court failed to flesh out exactly what factors should be considered when determining whether a sufficient nexus exists.[122] The court concluded: "[W]e are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."[123] The basis for this conclusion and the factors that guided the court in reaching this conclusion are not entirely clear from the opinion.[124]

The lack of clarity from the *Kowalski* opinion poses significant problems. By failing to delineate specific factors, the Ninth Circuit has left reviewing courts and school officials without guidance or a framework to reference when applying the standard.[125] Going forward, the proper way to implement the nexus test is something of a mystery. Consequently, not only does this uncertainty have the potential to yield inconsistent results, it could also lead to overly broad application of the test,[126] subjecting more students to speech restriction.[127] An overbroad application would defeat the purpose of these threshold tests: to provide greater protection to students speaking off-campus.

2. The Reasonably Foreseeable Test Provides No Additional Protection for Off-Campus Speech

As noted above, the purpose of a threshold test should be to revoke a school's ability to apply *Tinker* to off-campus speech under some circumstances. The school's interest in controlling the school environment is necessarily more attenuated when the speech occurs off-

122. *See* Marcus-Toll, *supra* note 5, at 3431; *see generally* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011).
123. *Kowalski*, 652 F.3d at 573.
124. Marcus-Toll, *supra* note 5, at 3431 ("Moreover, the *Kowalski* court left unresolved the methodology for determining when or whether the nexus between off-campus student speech and a school's pedagogical interests is 'sufficiently strong.'"); *see Kowalski*, 652 F.3d at 573 (considering additionally the reasonable foreseeability of the speech reaching school property, thus raising uncertainty as to whether the court's decision was based primarily on the nexus or the foreseeability factor).
125. *See* Bendlin, *supra* note 110, at 221 ("The problem with vague standards is that neither school officials nor students know exactly what the rules are.").
126. Marcus-Toll, *supra* note 5, at 3431.
127. *See* Shaver, *supra* note 118, at 1595 ("[S]uch a standard easily can be 'stretched too far' and thus 'risk[s] ensnaring any off-campus expression that happened to discuss school-related matters." (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011))).

campus.[128] In the context of this policy rationale, the Eighth Circuit's reasonably foreseeable standard is problematic because it is substantively hollow, particularly when considering the Ninth Circuit's application. The Ninth Circuit conducts the reasonably foreseeable analysis from the perspective of the school official, not the student.[129] This approach does little to act as an additional barrier between administrators and students.[130] The standard simply extends *Tinker* to off-campus speech without any qualification. In practice, application of this test is not a sufficient restraint on school officials and administrators.

When the reasonably foreseeable threshold analysis is conducted from the perspective of school officials,[131] the subsequent *Tinker* analysis adds little to the inquiry.[132] *Tinker* provides authority to regulate and restrict student speech if the speech could be *reasonably forecast* to cause a substantial disruption in the classroom.[133] The requisite standard for forecasting such a disruption is a high bar.[134] If an administrator could reasonably forecast speech to cause a disruption, the speech would almost certainly have been reasonably foreseeable to reach the school.[135] How could speech ever be anticipated to cause a disruption at school if it could not be anticipated to reach the school in the first place? Logically, school officials could not foresee a substantial disruption if they could not anticipate the speech reaching school.

128. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct *in the schools*." (emphasis added)); Marcus-Toll, *supra* note 5, at 3399.

129. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1151 (9th Cir. 2016). The Ninth Circuit assesses the foreseeability of the speech as it relates to the school officials. *Id*. ("*Administrators* could also reasonably expect students to discuss the harassment in school." (emphasis added)).

130. *See* Shaver, *supra* note 118, at 1596 ("Because almost all electronic speech could be deemed as 'reasonably foreseeable' to come to the attention of school officials, the reasonable foreseeability standard seems to provide very little protection to students.").

131. *See C.R.*, 835 F.3d at 1151.

132. Courts applying the reasonably foreseeable standard appear to merge the threshold question with the *Tinker* analysis instead of addressing two independent questions with two distinct levels of analysis. This approach can cause confusion by muddying the distinction between the foreseeability of the speech reaching school (threshold test) and the foreseeability of the speech causing a substantial disruption or interfering with the rights of other students (*Tinker* test). *See* Doninger v. Niehoff, 642 F.3d 334, 349 (2d Cir. 2011) ("[I]t was reasonably foreseeable that Doninger's post would reach school property and have disruptive consequences there.").

133. *See, e.g.*, *Tinker*, 393 U.S. at 514.

134. *Id.* at 508 (noting a school official's mere fear of a resulting disruption is not enough to warrant suppression of student expression).

135. *See* Shaver, *supra* note 118, at 1596 (discussing the unlikelihood that digital expression would ever survive the reasonable foreseeability examination).

Accordingly, speech subject to *Tinker* would rarely be deemed protected by way of its off-campus origin through application of the reasonably foreseeable standard. The Ninth Circuit's application of the reasonably foreseeable threshold test does not supplement the already high *Tinker* reasonable forecast standard. In other words, the threshold test would rarely withdraw a school's ability to regulate speech that takes place off-campus.[136]

The Ninth Circuit's application of the reasonably foreseeable test merely rephrases the language of the *Tinker* analysis. It is hard to imagine a situation in which off-campus speech would be subject to regulation under *Tinker* but fail the reasonably foreseeable threshold test. The test is toothless in its ability to reign in school regulatory authority and does not add any substantive speech protection to that already existing under *Tinker*.[137]

3. Policy Implications from the C.R. Decision

Threshold tests found in federal appellate cases were developed in response to cyber speech and the need to address a school's ability to regulate speech in the digital age.[138] Alternatively, the Ninth Circuit's decision applied this framework in a context that was not originally anticipated when the threshold tests were developed. The *C.R.* court uses the test to justify restriction of student speech that took place face-to-face.[139] This decision is concerning, in part, because it represents an extension of power for school administrators.[140]

C.R.'s holding opened the door for administrators to discipline in-person conversations between students off-campus, while failing to articulate a limit: "[T]he Ninth Circuit declined to hold whether its decision of allowing schools to regulate off-campus public speech would

136. *Id.* ("By providing such a low threshold for the imposition of school discipline, the reasonable foreseeability test unduly constricts students' ability to engage in free speech about an important and predominant aspect of their lives: school.").

137. *See* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 251 (2009) ("[A]n approach . . . that relies solely on whether it is reasonably foreseeable that the speech in question will come to the attention of school authorities gives schools sweeping off-campus jurisdictional power.").

138. *See generally* Black, *supra* note 45; James M. Patrick, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855 (2010).

139. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) ("We have not yet considered whether a school may discipline a student for off-campus sexual harassment. Nor are there any directly analogous decisions from any other circuit. Rather, the vast majority of the law in this area concerns school officials' authority to discipline students for internet speech.").

140. *See* Loung, *supra* note 15, at 107 (asserting the Ninth Circuit's decision in *C.R.* increased the "scope of a school's ability to regulate off-campus speech").

extend to public places in general."[141] The *C.R.* decision appears to expand the regulatory capacity of schools by creating an omnipresent authority to loom over students. The implications of such perpetual oversight should not be underestimated, and scholars have warned of the potential adverse impact of such sweeping school authority: "Consequently, this approach entails a considerable risk of chilling protected speech."[142] Regulating expression in this context represents a more significant infringement on First Amendment rights than cases restricting cyber speech. Accordingly, greater protection should be afforded to students communicating in this context. It is with these concerns in mind that this Note strives to create a meaningful and effective threshold.

C. Proposed Threshold Test: The Availment Standard

The availment test proposed by this Note addresses the shortcomings of the existing circuit tests[143] with an eye toward providing enhanced protection for off-campus speech. This test will direct reviewing courts to conduct a two-step inquiry: (1) Was it reasonably foreseeable, from the *student's* perspective, that the speech would reach the school? (2) Is the speech sufficiently related to the school? It may be helpful to think of the availment test as a product of the concepts of personal jurisdiction[144] tailored to fit the context of student speech. The foreseeability question parallels the purposeful availment analysis in personal jurisdiction,[145] and the relatedness prong serves the same purpose in the school speech context as the personal jurisdiction context.[146] The foreseeability analysis differs from the Ninth Cir-

141. *Id.* at 105.

142. Marcus-Toll, *supra* note 5, at 3430. This comment was made in the context of criticizing the Second Circuit's reasonably foreseeable standard. *Id.* Marcus-Toll is concerned with the Second Circuit's failure to limit application of the test to those circumstances involving off-campus digital speech. *Id.*

143. *See supra* section III.B.

144. *See generally* Kyle W. Brenton, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority Over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206 (2008) (discussing the role personal jurisdiction factors can play in the analysis of whether off-campus speech may be regulated by school officials).

145. Some scholars have framed the question of a school's regulatory authority through an examination of purposeful availment. *See generally id.* However, this question is typically addressed in the context of cyberspeech and the particular factors considered by scholars vary. *Cf. id*. at 1234–35 (discussing two potential bases for purposeful availment: (1) students accessing off-campus websites while at school; and (2) "off-campus cyberspeech that intentionally causes harm within the school environment").

146. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109 (1987) ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957))).

cuit's approach by conducting the assessment from the perspective of the student speaker, as opposed to the school administrator. The second step of the test, the relatedness prong, modifies the Fourth Circuit's nexus considerations by delineating specific factors to be weighed when assessing the content of the speech and its connection to the school. Only after an affirmative finding of foreseeability and relatedness is application of *Tinker* appropriate.

The first prong of this test asks whether it was reasonably foreseeable, from the student's perspective, that his or her speech would reach the school. This analysis requires an objective rather than subjective standard. Courts are to look to what a reasonable student would anticipate, not what the individual student in each case anticipated. If a reasonable student knew or should have known his or her speech would reach school, the foreseeability prong is satisfied.[147] Again, it is important to acknowledge this test looks at foreseeability from the eyes of the student rather than the administrator. While the Ninth Circuit explicitly conducted the analysis from the perspective of the administrator,[148] other circuits using this standard are not clear as to whether it is the student or administrator's foreseeability at issue.[149] When the analysis is conducted from the perspective of the administrator, the threshold test fails to act as a screening mechanism[150] and simply extends *Tinker* off campus in nearly every conceivable circumstance.[151]

In addressing the question of foreseeability, the medium from which the speech originates is the most important factor to be considered.[152] Student speech taking place off campus and in person should not be subject to the diminished First Amendment protection afforded under *Tinker*. Speech that is not published, but takes place in person, cannot be anticipated to reach the school to the same extent as pub-

147. This standard is distinct from the state of mind standard articulated by James Patrick. *See generally* Patrick, *supra* note 138, at 888 ("An objective analysis should ask whether . . . the student *intended to guarantee* his speech reached the school. If the answer is yes, the speech is deemed on-campus speech subject to the Supreme Court's existing student speech jurisprudence." (emphasis added)).

148. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1151 (9th Cir. 2016) ("*[A]dministrators* could reasonably expect the harassment's effects to spill over into the school environment." (emphasis added)).

149. *See* S.J.W. *ex rel*. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).

150. *See* Marcus-Toll, *supra* note 5, at 3430 (referring to the Second Circuit's application of the reasonably foreseeable test in *Doninger*: "[T]he *Doninger* test seems overly broad. . . . [T]he *Doninger* test fails to create a meaningful threshold.").

151. *See* discussion *supra* subsection III.B.2.

152. *See* Patrick, *supra* note 138, at 881 ("In order to determine a student's intent, another scholar has suggested looking at the type of technology used to communicate the message.").

lished speech.[153] Conversely, the permanent nature of published cyber speech significantly undermines a student's privacy expectations and makes it far more likely a reasonable student would anticipate the speech reaching the school. Publication creates a presumption of foreseeability, but this presumption may be rebutted. Reviewing courts should consider the manner of publication and the size of the audience when assessing foreseeability. If the speech is published but only made available to a single individual or small group, a finding of foreseeability is less likely. However, if the speaker targets a broader audience and the content of the speech is widely disseminated, this will tend to negate his or her expectation of privacy and cut toward a finding of foreseeability. After a finding of foreseeability, a court will consider the relatedness prong.[154]

This relatedness prong modifies the considerations articulated by the Fourth Circuit.[155] The Fourth Circuit's analysis of the connection between the pedagogical interest of the school and the speech need not come into play. These considerations are more appropriately addressed during the substantial disruption and interference with the rights of others analysis of *Tinker*;[156]—they need not be examined as part of a threshold test. Instead, regulation of student speech will be proper if the speech is sufficiently related to the school or school activities.[157] Does the content of the speech involve other students, conduct taking place during school hours, or conduct taking place during a school event? These are important questions for a court analyzing the relatedness of the speech and the school.

1. The Availment Test Is a Stronger Legal Standard than Other Proposed Threshold Tests

The availment test prioritizes protecting student speech in a variety of contexts over concerns of judicial efficiency. As such, this proposed standard will provide greater protection for students speaking off-campus than other proposed threshold tests. By replacing the

153. Off-campus speech is considered private in a way on-campus speech is not; however, when this speech is published, these considerations change. *See id.* at 856 ("Although the student's speech occurred in a private setting off campus, the internet speech is transferrable and could end up reaching the school.").

154. However, restriction of the speech will be sustained absent a finding of foreseeability if the speech at issue threatens an act of violence at the school. *See* discussion *infra* subsection III.C.2.iii.

155. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (explaining the nexus between the speech and the school's pedagogical interests).

156. *See* Crawford, *supra* note 8, at 238–39.

157. *See* Brenton, *supra* note 144, at 1234 ("A court analyzing a school's claim of authority over student cyberspeech should first determine whether or not that speech has sufficient minimum contacts with the school environment.").

Ninth Circuit's hollow standard of administrator foreseeability[158] with a reasonable student standard, this test provides a hurdle for school officials to overcome. The importance of publication for a finding of foreseeability should render this hurdle nearly impossible to surmount when the speech takes place face–to-face. Instead of the ambiguous and unclear nexus standard[159] posited by the Fourth Circuit,[160] the availment test articulates factors for a court to consider when determining whether the speech is related to the school or school activities. Additionally, this test eliminates the redundancy of the Fourth Circuit's pedagogical interest inquiry, which is more appropriately conducted during application of *Tinker*.[161] This two-prong test operates to provide greater protection for students speaking off-campus while recognizing the need to restrict student speech in certain circumstances.[162] The following hypothetical scenarios will demonstrate the balance established by this test.

2. Applying the Availment Test

a. Cyber Bullying

One common source of off-campus speech litigation is cyber bullying.[163] This speech typically involves publication of speech sent either directly to the bullied student or more broadly in a manner enabling many students to view the speech.[164] The permanent nature of speech published online cuts towards a finding of foreseeability. However, while publication is a critical consideration in the analysis, it is not dispositive. The presumption of foreseeability can be rebutted through an examination of the target audience. If a student sent disparaging messages directly to one other student, this would weigh against a finding of foreseeability. Reasonable students would be less likely to anticipate this kind of communication coming to the attention of the school. On the other hand, bullying that reaches a broader audience intended to expose the victim to ridicule from a vast group, like the

158. *See, e.g.*, C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016).
159. *See* discussion *supra* subsection III.B.1.
160. *Kowalski*, 652 F.3d 565 (4th Cir. 2011).
161. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (permitting regulation of speech that causes a substantial disruption of school activities).
162. The use of a multi-factor test is preferable to many of the one-size-fits-all threshold tests. Analyzing multiple variables creates a more sophisticated analysis by taking the context surrounding the speech into account. *See* Calvert, *supra* note 137, at 251 (noting the benefits of a threshold test that utilizes multiple factors while acknowledging that no two student speech cases are identical).
163. *See, e.g.*, Black, *supra* note 45, at 531 ("Students are using technology to threaten, bully, and harass . . . .").
164. *See* Crawford, *supra* note 8, at 235 (noting the internet is increasingly a primary source of communication between students).

Myspace posts at issue in Kowalski,[165] would satisfy the foreseeability prong. Reasonable students understand the more the speech is circulated, the more likely it is to reach the school.

After a finding of foreseeability, the analysis turns toward the relation between the speech and school. This inquiry will hinge completely on content. The fact that a *student* is the subject of the speech is not, by itself, enough to satisfy the relatedness prong. If a student was bullied based on an incident that took place at the local mall the previous weekend, the speech would not be sufficiently related to the school. However, when the speech involves the school, a school function, or an incident relating to or taking place at school, a different outcome will follow. For example, if a student was bullied for his performance in a school play, the speech would satisfy the relatedness test.

In the context of cyber speech, the outcome under the availment test will largely turn on the intended audience and the content of the speech.

b. Political Speech

One of the most widely recognized norms of First Amendment jurisprudence is the substantial protection afforded to political speech.[166] This category of speech evinces the importance of a threshold test to limit the reach of *Tinker*. Employment of the availment test serves to prevent *Tinker's* application in situations that would have the effect of regulating and restricting political speech.

Imagine a student goes to a rally for a controversial political candidate who advocates for strict deportation policies. The student records the rally and posts it on his Twitter page. As a result, many immigrant students become furious with his posting and are uncomfortable around him. Under simple application of *Tinker*, this speech would likely be subject to restriction because a school official could reasonably forecast a substantial disruption as a result of the student's post. However, application of the availment test would withdraw the school's ability to restrict the speech pursuant to *Tinker*.

In this situation, the foreseeability prong of the test would be satisfied. Not only was the speech published, but it was directed toward

165. The student speaker in *Kowalski v. Berkeley County Schools* created a group discussion page on Myspace and used the page to "orchestrate a targeted attack on a classmate." 652 F.3d 565, 567 (4th Cir. 2011).

166. Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . .").

many viewers via Twitter.[167] However, the speech clearly fails the second prong of the test as it is in no way related to the school, school activity, or specific student conduct. The fact that a reasonable student could have foreseen the content of the speech reaching the school does not control the outcome. When there is a lack of relatedness between the speech and the school, restriction of speech is impermissible notwithstanding the foreseeability of the speech reaching the school. The availment test would prevent regulation of political speech, a category of speech courts are loath to restrict.[168]

c. Threats of School Violence

Suppose a student writes a post via social media indicating his intention to commit an act of violence at school. This information eventually makes its way to school administrators, and the student is suspended. The fact that the speech was published yields a fairly straight-forward outcome. The publication creates a presumption that a reasonable student would anticipate this speech coming to the attention of the school. The content of the speech is clearly related to the school. Threatening school violence or a school shooting is directly related to the school and school community because the violence is to take place on school grounds, during the school day, and the victims are to be students. The relation between the speech and the school could not be stronger.

The more difficult question is what the outcome should be if the threat was conveyed from one student to another in a face-to-face interaction. Generally, the availment test does not permit restriction of speech that occurs off school property that was not published, but threats of school violence warrant a narrow exception to the general rule.[169] Typically, a reasonable student would not have reason to believe their off-campus conversations would reach their school. However, when a student indicates a desire to harm others, it is reasonable to expect this message will be relayed to the intended target of their violence. Reasonable students would recognize the foreseeability of such speech reaching school. The inquiry under the relatedness prong is the exact same regardless of whether the speech is published or communicated in person. In both instances, application of *Tinker* would be appropriate.

167. *See* Marcus-Toll, *supra* note 5, at 3430–31 (pointing out the possibility that the reasonably foreseeable test would not afford protection to a student's political speech).

168. *See Buckley*, 424 U.S. at 14.

169. See Dranoff, *supra* note 3, at 667–71, for a discussion of the need to protect students from threats of school violence.

d. Application to C.R.

If the Ninth Circuit had applied the availment test to the facts of the *C.R.* case,[170] the school would not have been able to regulate the student speech. In fact, the speech at issue fails both substantive prongs that make up this test's framework.

Reasonable students in the speaker's shoes could not foresee the contested speech reaching school administrators. The speech took place in person. As noted above, speech in this context is significantly different than speech published online, which tends to be permanent. It was only by chance the content of the speech reached school. Had the school aide not happened to be passing the group of students during the exchange,[171] nothing suggests the speech would have ever come to the attention of school officials. The student had no way of knowing the aide would overhear his comments; therefore, a reasonable student could not anticipate the speech making its way to the ear of a school administrator.

An examination of the relation between the speech and the school also supports the conclusion that the speech should not be subject to restriction or discipline. The fact that the comments were made to a fellow student is not enough to sustain a finding of relatedness. The comments had no connection to the school, a school activity, or any conduct taking place at the school.[172] The lack of a relation to the school renders the comments outside the authority of school officials when said comments were made off-campus.

Application of the availment test renders the speech of the student in *C.R.* beyond the regulatory grasp of school officials.[173]

3. Potential Criticisms of the Availment Test

This test may be subject to criticism in that its complexity could prove difficult to apply for school administrators without legal education.[174] However, threshold tests are not actually being applied by school administrators when they decide to suspend a student for off-campus speech. In practice, school officials must act decisively when handling matters of student discipline. It is only after the disciplinary

170. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016).
171. *Id.* at 1146–47.
172. *See id.* at 1146.
173. There is no evidence that a reasonable student in C.R.'s position would anticipate his speech being subject to school authority. Additionally, the content of the speech fails the relatedness inquiry. *See id.*
174. Dranoff, *supra* note 3, at 664 ("It is extremely difficult for anyone without legal training to apply, however, and thus provides little guidance for the untrained students, parents, teachers, and administrators whom it would affect."); *see also* Brenton, *supra* note 144, at 1242 ("[T]his framework . . . does little to aid school administrators or students in making ex ante decisions about real-world policy.").

decision has been made that the threshold test will be applied by judges. Therefore, concerns about the complexity of the standard and a school official's capacity to apply it are misguided.

Another potential criticism is that in most circumstances, this test will necessitate a fact intensive inquiry when determining whether schools can reach the off-campus speech. Some jurists may prefer a bright line framework to promote predictability and ease of application. However, a one-size-fits-all approach to free speech issues has its own dangers. Technology is ever changing, and legal scholars cannot anticipate all circumstances surrounding future off-campus student speech; therefore, a proposed threshold test must have a degree of flexibility. Additionally, ease of application should not be a driving factor in determining the proper legal standard for the scope of *Tinker*. The priority and purpose of a threshold test should be to stretch the protections of the First Amendment to as many students as possible,[175] not to promote judicial efficiency. The development of a sound legal standard, which affords students as much protection under the First Amendment as possible, should be prioritized above the simplicity of the test's application.

IV. CONCLUSION

The Supreme Court has recognized that student rights may be curbed in a public-school setting.[176] As a result, students are subject to diminished First Amendment protection when they are speaking on-campus.[177] What is less clear is exactly when this weakened protection applies to student speech that takes place off-campus.[178] This lack of clarity prompted the development of threshold tests to determine whether school officials have the authority to restrict student speech occurring off-campus.[179] The purpose of such a test is to serve as an additional obstacle for school administrators to overcome if restriction of student speech is to be sustained.[180] The Ninth Circuit's application of the reasonably foreseeable test and the nexus test[181]

175. While it is well settled that schools have a unique and substantial interest in protecting the school environment, this interest is not boundless. *See supra* note 114 and accompanying text.
176. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").
177. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).
178. *See, e.g.*, Crawford, *supra* note 8, at 236.
179. *See generally* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016); S.J.W. *ex rel*. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).
180. *See supra* section III.B.
181. *C.R.*, 835 F.3d at 1150–52.

does not provide greater protection to students speaking off-campus as opposed to on-campus and is thus an ineffective threshold test.

The availment test posited by this Note safeguards students' First Amendment rights to a greater extent than other threshold tests by making it difficult for school administrators to apply *Tinker* off-campus. This end is achieved by incorporating the purposeful availment concept of personal jurisdiction with pre-existing approaches to off-campus speech.[182] For speech to be within the scope of a school's regulatory authority, this test requires an affirmative finding of purposeful availment[183] and a sufficient relationship between the content of the speech and the school. Additionally, the test provides a restricting mechanism that prohibits regulation of speech that would offend traditional First Amendment norms.

While students are subject to a lessened First Amendment protection, this protection is not abrogated entirely.[184] Replacing the reasonably foreseeable standard with purposeful availment and replacing the nexus test with a relatedness inquiry more precisely achieves the balance referred to in *Tinker*.[185] When applied, the availment test stretches the protections of the First Amendment to more students than any other standard. While the test grants broad student speech protection, it also provides courts with a framework for assuring school officials may properly exercise control over the school environment.

182. *See* discussion *supra* section III.C.

183. *But see* discussion *supra* subsection III.C.2.iii (acknowledging an exception to this general rule when the speech at issue involves a threat of school violence).

184. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

185. *Id.* at 507 (noting the need to reconcile a student's ability to exercise his or her First Amendment rights with the school's interest in maintaining comprehensive authority within the school environment).