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Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech

Katherine A. Ferry

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Comment

Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech

*Katherine A. Ferry**

*The Internet and social media have a profound impact on society as a whole, but especially on teenagers. As technology continues to evolve, and more people gain access to social media, online speech will only serve to enhance the ways in which students engage and communicate. Inevitably, problems continue to arise; specifically, how much schools curtail students' First Amendment rights to maintain a productive educational environment. The Supreme Court articulated that students have First Amendment rights in the schoolhouse in *Tinker v. Des Moines Independent Community School District*, but the Court has not faced the issue of whether speech occurring off-campus is afforded the same protection. The federal appellate courts have applied *Tinker* and its progeny to off-campus speech, but distorted the framework, leading to inconsistent First Amendment protection. However, the Supreme Court recently held social media garners First Amendment protection in *Packingham v. North Carolina*.*

This Comment explores the Supreme Court's holdings on student speech and social media, and ultimately argues for school districts to implement their own policies regarding off-campus speech until the Supreme Court provides guidance. It will first explore the seminal Supreme Court cases on school speech and the federal appellate courts' split. Then, it examines the Supreme Court's holdings regarding the Internet and social media. Next, it will analyze the multiple tests applied by the federal appellate courts and critique individual school social media policies. It concludes by recommending a model framework for schools to use while drafting individual social media policies.

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INTRODUCTION

The Internet is one of the most important channels for the exchange of views, revolutionizing the means for citizens to communicate, debate, and engage with one another.¹ The Internet drives the stock market, shapes elections, and enhances education in the United States.² While the Internet is widely used and available to all age groups, teenagers report using the Internet the most, facilitated by the convenience and efficiency of smartphones.³ The majority of the time teenagers spend on the Internet is on social networking websites; Facebook in particular, but 71 percent of teenagers use more than one social networking site.⁴ As such, social media has a profound impact on the secondary school setting.⁵

1. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (describing the Internet as the most important place for the exercise of speech); Julie Seaman & David Sloan Wilson, *#FREESPEECH*, 48 ARIZ. ST. L.J. 1013, 1014 (2016) (stating “[t]he magnitude of this recent change in the pace, content, culture . . . of communication [on the Internet] is unprecedented in human history”).

2. DARREN LILLEKER & NIGEL JACKSON, *POLITICAL CAMPAIGNING, ELECTIONS AND THE INTERNET: COMPARING THE US, UK, FRANCE, AND GERMANY* 14–18 (Routledge 2011) (highlighting the role the Internet plays in elections). *See also* Robert J. Shiller, *How Stories Drive the Stock Market*, N.Y. TIMES (Jan. 22, 2016), <https://www.nytimes.com/2016/01/24/upshot/how-stories-drive-the-stock-market.html> (discussing the stock market fluctuations due to breaking news).

3. Amanda Lehnhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>; *Social Media Fact Sheet*, PEW RESEARCH CENTER (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> (comparing social media use by age group and providing statistics on teenagers’ social media use that indicate 92 percent of teens report going online daily compared with only 73 percent of adults). *See also* Christina Nguyen, *Monitoring Your Teenagers’ Online Activity: Why Consent or Disclosure Should Be Required*, 15 SEATTLE J. SOC. JUST. 261, 267–70 (2016) (discussing how access to the Internet has increased among teenagers in recent years).

4. Lehnhart, *supra* note 3; *Social Media Fact Sheet*, *supra* note 3.

5. *See* Alana Nunez-Garcia, *How Much Does Social Media Affect High School Students?*, L.A. TIMES HIGH SCHOOL INSIDER (June 17, 2016), <http://highschool.latimes.com/saint-joseph-high-school/how-much-does-social-media-affect-high-school-students/> (explaining research conducted on high school students’ opinions of the interplay between social media and education). *See PBS NewsHour: Schools are Watching Students’ Social Media, Raising Questions About Free Speech*,

The First Amendment provides a constitutional protection for speech, but its interplay with social media remains undefined. This is especially problematic considering the impact of social media on society.⁶ However, the Supreme Court recently provided clarity in *Packingham v. North Carolina*, in which it extended First Amendment protection to social media.⁷ *Packingham* presented the question of when social media use can be restricted, striking down a North Carolina statute that prohibited sex offenders from accessing social networking sites.⁸ Most importantly, Justice Kennedy, writing for the majority, equated the Internet to a public park, and reasoned that because cyberspace is the most important place for the exchange of views, blanket restrictions on social media cannot stand.⁹ Certainly this protection extends to adults, but how does the holding in *Packingham* extend to students in the school setting?¹⁰

Legal issues concerning students' free speech rights have been around for decades.¹¹ The Supreme Court's pronouncement of a student's right to speak freely in school dates back to 1969 when, in *Tinker v. Des Moines*, the Court affirmed students' constitutional right to free speech while on school grounds.¹² Subsequent Supreme Court decisions have

PUBLIC BROADCASTING SERVICE (June 20, 2017) (interviewing high school students about their relationship with social media).

6. U.S. CONST. amend. I; Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* (Saul Levmore & Martha C. Nussbaum eds., Harvard Univ. Press 2010) (discussing First Amendment questions stemming from Internet usage).

7. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

8. *Id.*; see N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2017) (stating "it is unlawful for a sex offender who is registered . . . to access a commercial social networking Web site").

9. *Packingham*, 137 S. Ct. at 1737 (describing the Internet as "the modern public square"). For more information on the impermissible blanket restriction on speech in *Packingham*, see *infra* Part II.B.

10. See *infra* Part III.B (comparing school social media policies to the reasoning in *Packingham* and concluding that the holding in *Packingham* should extend to students).

11. Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 617-26 (2010) (analyzing the history of student speech rights, beginning with *Tinker* and ending with district court cases in 2010). See generally Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 529-34 (2000) (discussing the history of *Tinker v. Des Moines Independent Community School District* and subsequent Supreme Court cases relating to student speech).

12. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). In *Tinker*, the Court fashioned the "substantial and material disruption" test to analyze school speech. See *infra* Part I.A (discussing the substantial and material disruption standard). For one perspective on what constitutes a substantial and material disruption, see Mitchell J. Waldman, *What oral statement of student is sufficiently disruptive so as to fall beyond protection of first amendment*, 76 A.L.R. FED. 599 § 1 (1986) (discussing cases in which courts found a substantial and material disruption present); see also Nancy Willard, *Student Online Off-Campus Speech: Assessing "Substantial Disruption"*, 22 ALB. L.J. SCI. & TECH. 611, 620 (2012) (analyzing what constitutes a "substantial

further clarified the restrictions and protections on student speech, but the matter has not been before the high court since 2007.¹³ However, all of these issues and subsequent restrictions on speech were enacted to regulate speech occurring *inside* the schoolhouse, leaving the protection of speech made outside school grounds open to debate.¹⁴ Additionally complicating the matter, the Supreme Court has been silent on the issue.¹⁵

While most juveniles’ Internet and social media usage occurs outside of school, it can and often does end up impacting the school community.¹⁶ As such, there has recently been a trend of school discipline stemming from student conduct on social media.¹⁷ For example, the senior class president at Heights High School, Wesley Teague, was suspended for the remainder of the school year after comparing the school’s football team to a notoriously bad college football team on Twitter.¹⁸ School officials claimed Teague intended to cause a

disruption”).

13. See generally *Morse v. Frederick*, 551 U.S. 393 (2007) (barring student speech that advocates illegal activity). See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (allowing schools to discipline school-sponsored speech); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (allowing school administrators authority to discipline lewd speech).

14. See Alison Hofheimer, *Saved by the Bell? Is Online, Off-Campus Student Speech Protected by the First Amendment?*, 40 FLA. ST. U. L. REV. 971, 984 (2013) (discussing whether schools can punish off-campus speech and to what end). See generally Caitlin May, “*Internet-Savvy Students*” and *Bewildered Educators: Student Internet Speech is Creating New Legal Issues for the Educational Community*, 58 CATH. U. L. REV. 1105 (2009) (discussing the implications of reaching into students’ homes to punish off-campus speech).

15. Carolyn Schurr Levin, *Legal Analysis: How far can schools go in limiting student speech online?*, STUDENT PRESS LAW CENTER (June 6, 2016, 10:49 AM), <http://www.splc.org/article/2016/06/legal-analysis-student-speech> (stating that “[b]ecause the United States Supreme Court has yet to weigh in on the First Amendment implications of off campus student speech on social media and elsewhere on the internet, a definitive rule is hard, if not impossible, to enunciate”). See Elizabeth A. Shaver, *Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students’ First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1573 (2016) (discussing the problem posed by the Court of not addressing off-campus speech).

16. Abhishek Karadkar, *The Impact of Social Media on Student Life*, TECHNICIAN (Sept. 13, 2015), http://www.technicianonline.com/opinion/article_d1142b70-5a92-11e5-86b4-cb7c98a6e45f.html. See *The Internet, Free Speech, and Schools*, NATIONAL ASS’N OF INDEP. SCHS. (2013), <https://www.nais.org/magazine/independent-school/winter-2013/the-internet,-free-speech,-and-schools/> (providing background on the effects of social media on students and schools).

17. For a synopsis of examples of student suspensions relating to conduct on social media, see Benjamin Herold, *10 Social Media Controversies That Landed Students in Trouble This School Year*, EDUCATION WEEK (July 6, 2017), <https://www.edweek.org/ew/articles/2017/06/29/10-social-media-controversies-that-landed-students-in-trouble.html>.

18. *Watch What You Tweet: Schools, Censorship, and Social Media*, NATIONAL COALITION AGAINST CENSORSHIP, <http://ncaac.org/watch-what-you-tweet-schools-censorship-and-social-media> [hereinafter *Watch What You Tweet*]; Rebecca Klein, *Wesley Teague, Kansas Student, Suspended After Tweeting About His High School Sports Program*, HUFFINGTON POST (May 9, 2013, 8:27 PM), <https://www.huffingtonpost.com/2013/05/09/wesley-teague-suspended-twitter->

disturbance and forbid him from giving the commencement speech at graduation.¹⁹ In 2012, a high school student created an anti-bullying video to raise awareness of the harmful effects of bullying.²⁰ Once school officials caught wind, she was subsequently suspended because her speech posed a disruption in school.²¹ Moreover, students can be suspended for simply ‘liking’ or ‘retweeting’ another person’s content.²²

When these cases make it to court, there is little guidance as to how they should be interpreted and what precedent, if any, should apply to the off-campus speech.²³ In the absence of clear guidance from the Supreme Court, the federal appellate courts have developed several of their own tests to determine if a school has the authority to regulate off-campus speech.²⁴ Because of this inconsistency, there is currently an unequal application of the First Amendment to students’ rights, which results in students’ geographical location having a large impact on whether their speech will be protected.²⁵ To avoid this, school districts should fashion policies that promote safety while still protecting the constitutional rights of students in the Internet age.²⁶ *Packingham*, while not related to student

tweet-sports_n_3248326.html.

19. *Watch What You Tweet*, *supra* note 18.

20. *Id.*; *Long Island Girl Suspended Over Anti-Bullying YouTube Video*, CBS NEW YORK (May 22, 2012, 7:29 PM), <http://newyork.cbslocal.com/2012/05/22/1-i-girl-suspended-over-anti-bullying-youtube-video/>.

21. *Watch What You Tweet*, *supra* note 18; Kery Murakami, *Jessica Barba back to school after suspension*, NEWSDAY (May 24, 2012, 10:17 PM), <https://www.newsday.com/long-island/suffolk/jessica-barba-back-to-school-after-suspension-1.3737937>.

22. *Watch What You Tweet*, *supra* note 18; Rebecca Klein, *20 High Schoolers Suspended for Retweeting Gossip*, HUFFINGTON POST (Mar. 18, 2014, 9:55 AM), https://www.huffingtonpost.com/2014/03/18/mckay-high-school-retweets_n_4981878.html.

23. Hofheimer, *supra* note 14, at 987. 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, 3423 (2014) (discussing the circuit courts’ conflicting ideas of what precedent governs off-campus student speech cases).

24. See John T. Ceglia, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 941 (2013) (stating *Tinker* is the federal courts of appeals’ preferred mode of analysis); Marcus-Toll, *supra* note 23, at 3423 (discussing the circuit courts’ use of *Tinker* to analyze regulation of off-campus student speech); Rory Allen Weeks, *The First Amendment, Public School Student, and the Need for Clear Limits on School Officials’ Authority Over Off-Campus Student Speech*, 46 GA. L. REV. 1157, 1182 (2012) (discussing the issues resulting from the federal appellate courts’ circuit split).

25. See Samantha M. Levin, *School Districts As Weathermen: The School’s Ability To Reasonably Forecast Substantial Disruption to the School Environment From Students’ Online Speech*, 38 FORDHAM URB. L.J. 859, 861 (2011) (arguing that *Tinker* thresholds result in an impermissible inconsistency for students’ First Amendment rights); see also *infra*, Part III.A (analyzing the impact the different threshold tests have on students’ First Amendment rights).

26. See Benjamin L. Ellison, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 842 (2010) (suggesting that a student’s intent for speech to reach campus should be included as a factor in assisting schools in determining whether to discipline a student for off-campus speech that disrupts the school environment). See *infra* Part

speech, provides important insight as to how schools can create social media policies that are constitutional while still maintaining order and safety in the schoolhouse.²⁷

In Part I, this Comment will provide the background of the Supreme Court student speech cases, the individual tests the Court incorporated to address these issues, and the approaches federal appellate courts have undertaken as a result.²⁸ Part II will then discuss the Supreme Court’s rulings concerning social media, specifically the reasoning set forth in *Reno v. ACLU* and *Packingham*, in which the Court held the Internet and social media are protected forms of speech.²⁹ Next, Part III will analyze the implications resulting from the differing threshold tests and individual school social media policies, as well as the “chilling effect” of this inconsistency.³⁰ Lastly, Part IV will propose a framework for schools to follow when crafting social media policies that adheres to both Supreme Court precedent and the federal appellate courts’ approaches.³¹

I. BACKGROUND

This Part begins by discussing the Supreme Court’s holding and reasoning in the seminal case on student speech rights, *Tinker v. Des Moines Independent Community School District*.³² It then examines subsequent Supreme Court cases that limited students’ speech rights in schools.³³ This Part then explains the “true threat” doctrine, which can be used to restrict certain types of student speech.³⁴ Next, this Part analyzes the federal appellate courts’ approaches to examining the regulation of off-campus student speech.³⁵ Finally, it presents examples of off-campus

IV (providing a model threshold test for schools to implement while drafting policies pertaining to social media).

27. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–38 (2017) (holding social media is protected speech). *See infra* Part III (discussing how *Packingham* can apply to student speech).

28. *See infra* Part I (providing background on the seminal Supreme Court cases on student speech, the tests employed by the Court, and the federal appellate courts’ circuit split).

29. *See infra* Part II (discussing the Supreme Court cases pertaining to the Internet and content-based and content-neutral regulations).

30. *See infra* Part III (analyzing the inconsistent application of students’ First Amendment rights due to the conflicting threshold tests undertaken by the federal appellate courts, critiquing school social media policies, and examining the chilling effect from these inconsistencies).

31. *See infra* Part IV (proposing a model policy for schools to implement using elements articulated by the Supreme Court cases as well as the federal appellate courts).

32. *See infra* Part I.A (discussing the reasoning and tests set forth in *Tinker*).

33. *See infra* Part I.B (examining student speech cases subsequent to *Tinker—Fraser*, *Kuhlmeier*, and *Morse*—and discussing the tests and reasoning employed by the Supreme Court in each case).

34. *See infra* Part I.C (analyzing the history and meaning of the “true threat” doctrine as applied to student speech).

35. *See infra* Part I.D (discussing cases pertaining to off-campus student speech and tests for

social media use policies enacted by various school districts.³⁶

A. *Tinker Revolutionizes Students' Speech Rights*

The Supreme Court addressed the issue of student speech in 1969 in *Tinker v. Des Moines Independent Community School District*.³⁷ *Tinker* is among the most important cases involving students' constitutional rights, and the first to announce that students enjoy First Amendment protection while in school.³⁸ In December 1965, a group of students in Des Moines, Iowa, agreed they would wear black armbands to school as a public showing of their support for a truce in the Vietnam War.³⁹ When the school principals learned of the plan, they created a policy that stated any student wearing an armband would be asked to remove it, and refusal to do so would result in suspension.⁴⁰ The students refused to remove the armbands and were subsequently suspended. In response, the students sued the school district for a violation of their First Amendment rights.⁴¹ The District Court for the Southern District of Iowa, Central Division, dismissed the complaint and the students appealed.⁴² The Court of

each federal court of appeals).

36. See *infra* Part I.E (discussing the school districts' policies regarding off-campus social media usage).

37. 393 U.S. 503, 514 (1969). Justice Abe Fortas delivered the opinion for a 7-2 majority, with concurring opinions by Justice Stewart and Justice White, and dissenting opinions by Justice Black and Justice Harlan. See generally JOHN W. JOHNSON, *THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S* (Univ. Press of Kansas 1997) (discussing the historical background during the time period *Tinker* was litigated).

38. Richard Gyory, *The Constitutional Rights of Public School Pupils*, 40 *FORDHAM L. REV.* 201, 204 (1971) (stating “*Tinker* was the first unambiguous assertion by the Supreme Court of the constitutional rights of school children”). See generally Jill H. Krafte, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 *DEPAUL L. REV.* 387 (1979) (discussing the impact the holding in *Tinker* had on public school students in 1969).

39. *Tinker*, 393 U.S. at 504.

40. *Id.*; Brief for Petitioners at 8, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (No. 21), 1968 WL 112602, at *3–4:

At this meeting, a policy prohibiting the wearing of arm bands in school was adopted by the principals, who decided that a student wearing an arm band to school would be asked to remove it, and that if the student refused he would be suspended but allowed to return without the arm band.

41. *Tinker*, 393 U.S. at 504.

42. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966). Chief Judge Stephenson delivered the opinion, holding that school officials must be given wide discretion to discipline students when there is a substantial interference to the rest of the school. The court provided substantial discussion on the effects of the Vietnam War, noting that the conflict “had become vehement in many localities.” *Tinker*, 258 F. Supp. at 973. See Jon G. Crawford, *When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to Tinker's Reach?*, 45 *URB. LAW.* 235, 238 n.22 (2013) (“The court also acknowledged the contentious nature of the debate had been demonstrated during the school board’s hearing on the students’ suspensions. These facts were part of the calculus involved in the district court’s conclusion school officials had acted reasonably” when they prohibited wearing of arm bands).

Appeals for the Eighth Circuit considered the case *en banc* and affirmed without opinion.⁴³

Supreme Court Justice Fortas, writing for the majority, famously declared that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁴ The Court found that because the students’ armbands did not cause any disorder in the school and the armbands represented a political opinion, the school could not curtail the students’ First Amendment rights.⁴⁵ However, the Court made clear that students’ free speech rights are not absolute while present on school grounds.⁴⁶ Under *Tinker*, a school may restrict student speech when it materially and substantially disrupts the school environment or invades the rights of others.⁴⁷ Importantly, the Court articulated that a school could regulate student speech in anticipation of a material and substantial disruption.⁴⁸ But, mere apprehension of a disturbance or undifferentiated fear is not enough to justify discipline.⁴⁹ Following *Tinker*, subsequent Supreme Court decisions created limits that further narrowed the scope of students’ rights.⁵⁰

43. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988, 988 (8th Cir. 1967). The Eighth Circuit was evenly divided. The case was argued before the Supreme Court on November 12, 1968, and the decision was delivered on February 24, 1969. Advocating for the plaintiffs, Dan Johnston declared during oral argument: “It’s important that the idea of freedom of dissent and inquiry and expression be maintained in the schools.” Oral Argument at 16:40, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (No. 21), <https://www.oyez.org/cases/1968/21>.

44. *Tinker*, 393 U.S. at 506.

45. *Id.* at 507–08.

46. *Id.* at 513 (holding student speech rights are important, but when student speech substantially interferes with the school it is “not immunized by the constitutional guarantee of freedom of speech”).

47. *Id.* See Bonnie Kellman, *Tinkering with Tinker: Protecting the First Amendment in Public Schools*, 85 NOTRE DAME L. REV. 367, 376–84 (2009) (discussing the reasoning in *Tinker* and dissecting the material and substantial disruption test).

48. [O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

Tinker, 393 U.S. at 509.

49. *Id.* at 508. See Chemerinsky, *supra* note 11, at 533 (“Mere fear of disruption is not enough. The burden is on the school to prove the need for restricting student speech and the standard is a stringent one: there must be enough proof that the speech would ‘materially and substantially’ disrupt the school.”).

50. See Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions – for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1423 (2011) (discussing the limiting trend of student speech rights from *Tinker* to *Morse*); see also *infra* Part I.B (discussing the limits placed on protection of student speech subsequent to *Tinker*).

B. Fraser, Kuhlmeier, and Morse Set Additional Limits on Student Speech

In *Bethel School District v. Fraser*, the Supreme Court ruled that schools could prohibit speech that was considered vulgar, lewd, or plainly offensive because such speech was inconsistent with the fundamental values of public school education.⁵¹ In *Fraser*, a high school student delivered a vulgar speech during an assembly in which approximately 600 students were present.⁵² The Court distinguished this speech from the speech in *Tinker*, holding that the penalties imposed in this case were unrelated to any political viewpoint.⁵³ Chief Justice Burger, writing for the majority, emphasized language from Justice Black's dissent in *Tinker*, which rejected the notion that the Constitution compels school authorities to surrender control of the school to the students.⁵⁴ While the Court affirmed the student's punishment, Justice Brennan, in a concurring opinion, explained that if the student had delivered the same speech outside the school, he could not be penalized just because government officials considered his language to be inappropriate.⁵⁵ This set forth the idea that schools do not have the authority to punish speech occurring off-campus; however, some courts in subsequent years have not adhered to this viewpoint and instead upheld punishments for off-campus speech that officials found inappropriate.⁵⁶

Following *Fraser*, in 1988, the Court addressed whether a school could censor or prohibit student newspaper articles discussing controversial topics in *Hazelwood School District v. Kuhlmeier*.⁵⁷ The Court held that

51. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

52. *Id.* at 677. The assembly was part of a "school-sponsored educational program in self-government" in which Fraser referred to his favored candidate in terms of an "elaborate, graphic and explicit sexual metaphor." *Id.* at 677-78. Fraser gave the following speech:

I know a man who is firm – he's firm in his pants, he's firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the very end – even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

53. *Id.* at 685.

54. *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

55. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring). See *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that a California criminal statute which prohibited disturbance of the peace by offensive conduct was inconsistent with the First and Fourteenth amendments, even if the public display or speech involved was immoral and offensive).

56. See *infra* Part I.D (discussing cases when schools have limited speech occurring outside the schoolhouse gate).

57. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988). The articles that were

the First Amendment does not require a school to relinquish control over content in a school-sponsored publication, so long as the school’s actions are “reasonably related to legitimate pedagogical concerns.”⁵⁸ The Court granted school officials the authority to censor speech when it could be reasonably inferred from the circumstances that parents and members of the public would consider the speech a product of the school itself.⁵⁹ As the Court put another limit on the *Tinker* test, Justice Brennan’s dissent argued the majority’s holding created a classification of school censorship allowing heightened scrutiny for one category of speech but not another.⁶⁰ Emphasizing the lack of consistency in student speech jurisprudence, the dissent advocated for *Tinker* to be applied across the board to preserve the sanctity of good precedent, while foreshadowing the lack of consistency that would plague future student speech cases.⁶¹

The Court remained silent on student speech until 2007, when it decided *Morse v. Frederick*.⁶² *Morse* presented the question of whether schools could punish a student for speech promoting illegal drug use at an off-campus, school-sponsored activity.⁶³ In *Morse*, a high school in Alaska suspended a student for waving a banner reading “Bong Hits 4

censored dealt with three students’ experiences with pregnancy and the impact of divorce on students at the school. *Id.* at 263.

58. *Id.* at 273. For a thorough discussion on the reasoning in *Kuhlmeier*, see Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685 (1988) (analyzing the Court’s decision in *Kuhlmeier* that the First Amendment permits educators to supervise student newspapers).

59. *Kuhlmeier*, 484 U.S. at 276 (applying the *Tinker* substantial disruption test and noting that since a school newspaper is a public forum and produced from the schools’ resources, censorship could be justified to prevent substantial disruption of the school or violations of the law).

60. *Id.* at 281 (Brennan, J., dissenting):

On the one hand is censorship “to silence a student’s personal expression that happens to occur on the school premises” . . . [o]n the other hand is censorship of expression that arises in the context of “school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”

See Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 446 (2000) (“It has been suggested that censorship could never be reasonably related to legitimate pedagogical concerns because censorship itself is an educationally unsound practice.”).

61. *Kuhlmeier*, 484 U.S. at 283–84. See May, *supra* note 14, at 1110 (stating that Justice Brennan’s dissenting argument “highlights how the Court’s subsequent cases, rather than reaffirming *Tinker*, merely crafted new exceptions or categories of analysis for student speech”); Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 840 (2008) (“Commentators generally hailed *Tinker*, and deplored what they saw as narrowing of it by *Fraser* and *Kuhlmeier*.”).

62. *Morse v. Frederick*, 551 U.S. 393 (2007). See Shannon L. Noder, Comment, *Morse v. Frederick: Students’ First Amendment Rights Restricted Again*, 43 VAL. U. L. REV. 859 (2009) (analyzing the facts, holding, reasoning, and impact of *Morse*).

63. *Morse*, 551 U.S. at 400.

Jesus” during a school-sponsored event on the basis that promoting illegal drug use was against school policy.⁶⁴ Despite the event occurring off-campus, the Court held that because it happened during school hours at a school-sanctioned event, it fell within the school’s scope of authority.⁶⁵

The Court reiterated that the *Tinker* analysis is not absolute, limiting its application to speech that expresses fear, disturbance, or an unpopular viewpoint; therefore, *Tinker* did not apply to the speech at issue, which posed a more serious societal danger.⁶⁶ Moreover, the Court reasoned that *Fraser* was inapplicable, implying that the category of speech that falls under a *Fraser* analysis includes only lewd, inappropriate, or sexually suggestive speech during school hours.⁶⁷ *Kuhlmeier* also did not apply because it was unreasonable to suggest that the school supported the display of the banner.⁶⁸ *Morse*, therefore, expanded schools’ authority to regulate speech that promotes illegal activity when it occurs off-campus, but at a school-sponsored event.⁶⁹ The Supreme Court has not heard a case regarding student speech since *Morse*.⁷⁰

C. The “True Threat” Limitation on Student Speech

Tinker, *Fraser*, *Kuhlmeier*, and *Morse* stand as the foundational student speech cases, but courts have incorporated another analysis to determine the limits of First Amendment protection of student speech that occurs outside of school.⁷¹ The “true threat” doctrine was first articulated

64. *Id.* at 397–98.

65. *Id.* at 400–01; Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 370–80 (2007) (analyzing the majority, concurring, and dissenting opinions in *Morse* and each opinion’s reasoning).

66. *Morse*, 551 U.S. at 407–08 (explaining the drug abuse problem plaguing the nation’s youth and describing how a *Tinker* analysis cannot apply to situations posing these grave dangers). See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that speech that merely causes a fear of a substantial disruption is not enough to punish a student).

67. *Morse*, 551 U.S. at 405. See Denning & Taylor, *supra* note 61, at 861 (reviewing the Court’s interpretation of *Fraser* in its decision in *Morse*).

68. *Morse*, 551 U.S. at 405–06.

69. *Id.* See Linda Greenhouse, *Vote Against Banner Shows Divide on Speech in Schools*, N.Y. TIMES (June 26, 2007), <http://www.nytimes.com/2007/06/26/washington/26speech.html> (critiquing the conflicting Court in *Morse*); Jason Harrow, *Commentary on Morse v. Frederick*, SCOTUSBLOG (June 27, 2007, 2:10 PM), <http://www.scotusblog.com/2007/06/commentary-on-morse-v-frederick/> (discussing the categories Chief Justice Roberts used in rendering his decision in *Morse*, specifically noting that his opinion made sense as a matter of public policy, but failed to make sense of the conflicting student speech holdings).

70. See Krafte, *supra* note 38, at 399 (stating *Morse* was the last student speech case on which the Supreme Court ruled).

71. See *infra* Part I.C (discussing the “true threat” doctrine). See also The Editorial Board, *What is a True Threat on Facebook?*, N.Y. TIMES (Dec. 1, 2014), <https://www.nytimes.com/2014/12/02/opinion/what-is-a-true-threat-on-facebook.html> (arguing that what constitutes a true threat on Facebook is subjective).

by the Supreme Court in 1969 in *Watts v. United States*, which held threatening speech about the president was protected as political speech.⁷² While the Court made clear that speech that amounts to a “true threat” is outside the protection of the First Amendment, it failed to define what speech constitutes a true threat.⁷³

Justice O’Connor in *Virginia v. Black* interpreted *Watts* to encompass statements threatening violence to a particular individual or group.⁷⁴ Justice Alito in a dissenting opinion in *Elonis v. United States* defined a “true threat” as a statement that expresses an intention to inflict evil, injury, or damage on another.⁷⁵ Thus, for speech to be considered a true threat, one must purposely or knowingly communicate an intention to inflict unlawful harm on a person or persons.⁷⁶

The “true threat” doctrine, while not a bright-line rule, has been used by courts to address student speech issues.⁷⁷ However, the doctrine has been split into two tests—the reasonable speaker test and the reasonable recipient test.⁷⁸ The reasonable speaker test looks at the level of intent

72. 394 U.S. 705, 707 (1969) (per curiam); see Andrew P. Stanner, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385, 390 (2006) (discussing *Watts* and the beginning of the “true threat” doctrine).

73. See Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 288 (2001):

The only Supreme Court case to elaborate on the true threats exception to the First Amendment is *United States v. Watts*, which made clear that . . . “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” However, the Supreme Court did not provide a specific test for making this distinction.

74. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

75. *Elonis v. United States*, 135 S. Ct. 2001, 2014 (2015) (Alito, J., dissenting) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2382 (1976)).

76. Compare *Black*, 538 U.S. at 349 (providing Justice O’Connor’s definition of a true threat), with *Elonis*, 135 S. Ct. at 2014 (Alito, J., dissenting) (providing Justice Alito’s definition of a true threat).

77. See, e.g., *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (using a “true threat” analysis to hold that a student’s drawing was protected speech under the First Amendment); *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (using a “true threat” analysis to uphold the expulsion of a student who threatened the life of his classmate); *Commonwealth v. Milo M.*, 740 N.E.2d 967 (Mass. 2001) (using a “true threat” analysis to uphold disciplinary action of a 12-year-old student who drew a picture of shooting his teacher). For more analysis and examples of cases in which a “true threat” analysis was used, see Stanner, *supra* note 72, at 390.

78. See, e.g., *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (applying an objective test that considers whether a reasonable recipient familiar with the context would interpret the statement as a threat); *Porter*, 393 F.3d at 617–18 (conducting the “true threat” analysis from the recipient’s perspective, but ultimately not coming to a conclusion on the accuracy of a recipient- or speaker-based test); *United States v. Nishnianidze*, 342 F.3d 6, 14–15 (1st Cir. 2003) (finding that a true threat is one that a reasonable recipient familiar with the communication would find threatening); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622–23 (8th Cir. 2002) (using the reasonable recipient standard); *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (using the specific recipient and surrounding context to determine a true threat); *United States v.*

from the speaker's point of view.⁷⁹ Under this test, the speaker must have knowingly made a statement that expresses an intention to inflict harm upon another.⁸⁰ In contrast, the reasonable recipient test looks at the level of intent from the listener's point of view, asking if an ordinary recipient who is familiar with the context of the statement would interpret it as a threat.⁸¹

D. The Federal Appellate Courts' Circuit Split: When, if Ever, Can Schools Regulate Off-Campus Speech?

The federal appellate courts are split on how to analyze students' First Amendment rights when their speech occurs *outside* the schoolhouse.⁸² Absent a clear articulation and ruling from the Supreme Court, lower courts have been left in the dark, and have inconsistently applied the aforementioned tests to analyze the issue of off-campus speech.⁸³ The majority of federal appellate courts apply some variation of *Tinker* to students' off-campus speech, but differ in their applications and use of the exceptions set forth in *Fraser*, *Kuhlmeier*, and *Morse*.⁸⁴

The Second, Seventh, and Eighth Circuits apply the foreseeability threshold to the *Tinker* test.⁸⁵ The Third Circuit also applies the foreseeability threshold to *Tinker*, but tweaks its test to focus on the

Malik, 16 F.3d 45, 48 (2d Cir. 1994) (using a reasonable recipient familiar with the context standard); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) (looking to what the reasonable person would conclude); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) (analyzing a true threat from the speaker's perspective); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) (applying the reasonable recipient standard); *United States v. Welch*, 745 F.2d 614, 619 (10th Cir. 1984) (using a reasonable speaker standard regarding statements to the President of the United States).

79. *Doe*, 306 F.3d at 623.

80. *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991).

81. *United States v. Masionet*, 484 F.2d 1356, 1358 (4th Cir. 1973). While the true threat jurisprudence is vast, this Comment focuses its discussion on "true threat" analysis used in student speech cases. *See infra* Part IV (incorporating the "true threat" approach into a model school social media policy).

82. *See* William Calve, Comment, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L.J. 377, 386 (2016) (analyzing the circuit split between federal appellate courts); Marcus-Toll, *supra* note 23, at 3420 (dissecting the differing approaches that result in inconsistent application of *Tinker* at the federal appellate level).

83. *See* Calve, *supra* note 82 at 386 ("Circuit courts have continuously invoked *Tinker* to regulate off-campus cyberspeech, particularly when the speech is violent or threatening, but the method of application is inconsistent across the country."); *infra* Part III.A (discussing the impact of the inconsistent *Tinker* threshold tests on students).

84. *Compare* *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (applying the reasoning set forth in *Kuhlmeier* with a *Tinker* analysis), *with* *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (emphasizing *Tinker*'s application when dealing with speech that is illegal or threatening, as articulated in *Morse*).

85. *See infra* Parts I.D.1, 5, 6 (examining the Second, Seventh, and Eighth Circuit's "reasonable foreseeability" threshold).

student’s intent.⁸⁶ The Fourth Circuit applies a “sufficient nexus” threshold to *Tinker*, while the Eleventh Circuit applies a “true threat” test, in addition to a traditional *Tinker* analysis.⁸⁷ The Ninth Circuit declines to apply any of these approaches, and extends *Tinker* only when faced with an identifiable threat of school violence,⁸⁸ while the Fifth Circuit’s approach is flexible to accommodate the specific facts before it.⁸⁹ Absent an express ruling from the Supreme Court, the lower courts will continue to rule inconsistently.⁹⁰

For example, while the Third Circuit’s “intent” threshold of its *Tinker* analysis led to the conclusion that a student-created social media account defaming the school’s principal was protected speech,⁹¹ the Fourth Circuit’s “sufficient nexus” *Tinker* threshold led to the conclusion that a student’s social media comments about a fellow student were outside First Amendment protection.⁹² Both decisions were handed down in 2011, thus eliminating any variables related to societal interests or viewpoints of the time that might explain such inconsistent rulings.⁹³ The next Section will break down the various circuits’ approaches in detail, looking at case examples to better understand the discrepancies.⁹⁴

86. See *infra* Part I.D.2 (discussing the Third Circuit’s intent approach). See also Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 210 (3d Cir. 2011) (using the intent precursor to *Tinker*).

87. See *infra* Parts I.D.3, 8 (providing background information on the threshold tests the Fourth Circuit and the Eleventh Circuit use, respectively). Compare *Kowalski*, 653 F.3d at 567 (using a “sufficient nexus” threshold to *Tinker*), with *Boim v. Fulton Cty. Sch. Dist.*, 494 F.3d 978, 985 (11th Cir. 2007) (approaching off-campus student speech cases using a traditional *Tinker* approach).

88. See *infra* Part I.D.7 (discussing the Ninth Circuit’s ‘faced with an identifiable threat of violence’ approach); see also *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (articulating the Ninth Circuit’s test).

89. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 421 (5th Cir. 2015). See generally *Shaver*, *supra* note 15, at 1573 (analyzing the approach by the Fifth Circuit in relation to the other circuits and the need for Supreme Court guidance to combat this inconsistency).

90. *Calve*, *supra* note 82, at 383–84 (discussing the inconsistent approaches of the circuit courts). This Comment focuses on student online speech, but for the purposes of identifying each circuit’s approach to off-campus student speech, cases that do not address online speech specifically are included to demonstrate the test that the circuits will potentially use to rule in student social media cases.

91. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (applying a *Tinker* analysis but focusing on the student’s intent).

92. *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011) (applying a “sufficient nexus” threshold test to *Tinker*).

93. *Id.*; *Snyder*, 650 F.3d at 920. For a look back on the big stories of 2011, see *2011: Year in Review*, L.A. TIMES (Dec. 14, 2012), <http://www.latimes.com/la-2011-year-in-review-gallery-storygallery.html>.

94. See *infra* Parts II.D.1–9 (examining the circuit court approaches and cases decided).

1. Second Circuit

The Second Circuit incorporates an additional threshold into the *Tinker* analysis to decide off-campus student speech cases.⁹⁵ The court first looks to see whether it is reasonably foreseeable that the speech will reach school grounds, then applies *Tinker* to determine if the speech is likely to cause a material and substantial disruption.⁹⁶ The Second Circuit first applied this test in 2007, in *Wisniewski v. Board of Education of the Weedsport Central School District*.⁹⁷ In *Wisniewski*, the court addressed whether a student could be disciplined for sharing a drawing on his social media profile suggesting a teacher be shot and killed.⁹⁸ The court expressly disaffirmed using the “true threat” approach to determine if discipline was permissible, declaring that school administrators’ authority is beyond what the true threat standard allows.⁹⁹ The court announced that if off-campus conduct can create a foreseeable risk of substantial disruption within a school, the school has the authority to discipline the student.¹⁰⁰

A year later, in *Doninger v. Niehoff*, the court addressed whether a student could be disciplined for writing a blog post outside school hours that degraded the school’s administration and encouraged peers to harass them.¹⁰¹ The court used the reasoning set forth in *Wisniewski* to hold that

95. See, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007). As illustrated by these two cases, the Second Circuit uses a reasonable foreseeability threshold to decide off-campus student speech cases.

96. *Wisniewski*, 494 F.3d at 39 (“We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school. . . .”) (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir.1979)).

97. *Wisniewski*, 494 F.3d at 34.

98. *Id.* at 35. The eighth-grade student was using AOL Instant Messaging software on his parents’ home computer. The software enables users to display an icon, serving as an identifier of the sender of a message. The icon was the drawing at issue, which depicted a “pistol firing a bullet at a person’s head, above which were dots representing splattered blood. Beneath the drawing appeared the words ‘Kill Mr. VanderMolen.’” *Wisniewski*, 494 F.3d at 36.

99. *Id.* at 38. See *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1065 (9th Cir. 2013); *infra* Part I.D.7 (explaining the Ninth Circuit’s “identifiable violence” approach to decide a similar fact pattern).

100. *Wisniewski*, 494 F.3d at 39. The court used this reasoning from a footnote in a case decided thirty years prior. In *Thomas v. Board of Education*, the court wrote “[w]e can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.” 607 F.2d 1043, 1052 n.17 (2d Cir. 1979).

101. 527 F.3d 41, 45 (2d Cir. 2008). The blog post at issue is as follows:

jamfest is cancelled due to douchebags in central office. here is an email that we sent out to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, she got pissed off and decided to just cancel the whole thing

because the blog post directly pertained to a school-sponsored event and encouraged other students to harass principals and teachers, it was reasonably foreseeable that the student’s speech would reach the school.¹⁰² The court then concluded that the speech caused a substantial disruption, and thus was not entitled to First Amendment protection.¹⁰³ The Second Circuit has not addressed off-campus speech since 2008.¹⁰⁴

2. Third Circuit

While the Third Circuit also applies a *Tinker* approach to off-campus speech, it tweaks the test and focuses on whether the student intended for his or her speech to cause a disruption in the school.¹⁰⁵ In *J.S. ex rel. Snyder v. Blue Mountain School District*, an eighth-grade student was suspended after he created a fake social media account that ridiculed the school’s principal.¹⁰⁶ The Third Circuit held that *Tinker* could apply to off-campus speech.¹⁰⁷ In contrast with the Second Circuit’s approach, the court looks to the student’s intent to determine whether it is reasonably foreseeable that the speech would cause a substantial disruption in the school.¹⁰⁸ Adding yet another threshold to *Tinker*, the court noted that because the student did not intend for the speech to reach the school, it could not be reasonably foreseeable that her content would cause a

all together. anddd [sic] so basically we aren’t going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18.

Id.

102. *Id.* at 348. See Allison E. Hayes, *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, 271 (2010) (analyzing the reasoning of the Second Circuit in *Doninger*).

103. *Doninger*, 527 F.3d at 49.

104. Although the Second Circuit has not addressed a similar case, and thus has not had the opportunity to apply the reasonably foreseeable threshold to the *Tinker* test, the court ruled on a student speech case in 2001. See generally *R.O. ex rel. Oschorn v. Ithaca City Sch. Dist.*, 645 F.3d 533 (2d Cir. 2011) (holding that under the exceptions to *Tinker* set forth in *Fraser* and *Hazelwood*, the school acted reasonably in preventing the distribution of a school newspaper that contained drawings of stick figures in sexual positions, qualifying as “lewd”).

105. Compare *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc) (applying an “intent” threshold to *Tinker*), with *Doninger*, 527 F.3d at 45 (applying a “reasonably foreseeable” threshold to *Tinker*).

106. *Snyder*, 650 F.3d at 920.

107. *Id.* at 927 (rejecting the argument that *Tinker* could not reach off-campus conduct). See Marcus-Toll, *supra* note 23, at 3423 (discussing the tests for off-campus student speech); *First Amendment – Student Speech – Third Circuit Applies Tinker to Off-Campus Student Speech*. – *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc), 125 HARV. L. REV. 1064 (2012) (discussing the majority and dissenting opinions of *Snyder*).

108. *Snyder*, 650 F.3d at 928. See 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, 659–61(2013) (discussing the “intent” approaches analyzed by scholars and the federal appellate courts).

substantial disruption.¹⁰⁹ Although the court held that this speech could not be subject to discipline, it warned of potential conflicting holdings that would unduly restrict off-campus speech.¹¹⁰

On the same day *Snyder* was decided, the Third Circuit handed down a similar holding in *Layshock ex rel. Layshock v. Hermitage School District*.¹¹¹ In *Layshock*, a student was disciplined for creating a social media profile ridiculing the school's principal.¹¹² The court held that the school did not have the authority to discipline the student because the conduct occurred outside school hours, the student did not intend for the speech to reach the school, and it was not foreseeable that the speech would cause a material and substantial disruption.¹¹³ Additionally, the court warned that schools may only punish expressive conduct that occurs off-campus under very limited circumstances.¹¹⁴

3. Fourth Circuit

The approach taken by the Fourth Circuit incorporates an additional threshold to decide off-campus student speech issues.¹¹⁵ In 2011, the

109. *Snyder*, 650 F.3d at 930 (noting the differences between the intentions of the students in *Doninger*, *Lowery*, and *LaVine* compared to the intentions of the student in the case at bar. The court wrote, “[she] did not intend for the speech to reach the school – in fact, she took specific steps to make the profile “private” so that only her friends could access it”). See *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (noting that the student intended for the speech to reach the schoolhouse); *Lowery v. Euverard*, 497 F.3d 584, 599 (6th Cir. 2007) (noting that the students intended for the speech to reach the administration); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 985 (9th Cir. 2001) (noting that the student’s intention was to cause a disruption in the school because he showed his teacher a disturbing poem).

110. *Snyder*, 650 F.3d at 933 (stating “an opposite holding would significantly broaden school districts’ authority over student speech”).

111. For more information regarding the procedural history of the *Layshock* and *Snyder* cases, see Matthew Beatus, *Layshock ex rel. Layshock v. Hermitage School District*, 56 N.Y.L. SCH. L. REV. 785, 793 n.59 (2011–12) (stating “[b]ecause the cases were so factually similar and confusion ensued, the Third Circuit vacated both opinions and held a rehearing of the consolidated cases en banc on June 3, 2010. The Third Circuit published its opinions following the consolidated en banc rehearing on June 13, 2011”).

112. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 210 (3d Cir. 2011) (en banc). For a rendition of the facts in *Layshock*, see Beatus, *supra* note 111, at 790:

Layshock copied-and-pasted a picture of Trosch from the school district’s website for use in the MySpace profile and falsely answered the survey questions that MySpace asks when users are creating profiles. Some of the information that *Layshock* supplied in creating the profile was as follows: “Birthday: too drunk to remember”; “Are you a health freak: big steroid freak . . .”

113. *Layshock*, 650 F.3d at 213. In a concurring opinion, Judge Jordan argued that any off-campus speech that caused a substantial disruption is punishable, an issue which the majority did not address. *Id.* at 219–20 (Jordan, J., concurring).

114. *Id.* at 219.

115. See Gyory, *supra* note 38, at 224–25 (discussing the different approaches the circuits take in student speech cases). Compare *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011) (using a sufficient nexus test with the *Tinker* threshold), and *Doninger v. Niehoff*, 527 F.3d

Fourth Circuit held in *Kowalski v. Berkeley County Schools* that the school had authority to discipline a student who created a social media web page to post hateful messages about a classmate.¹¹⁶ The court introduced the “sufficient nexus” test, which addresses whether the off-campus conduct is sufficiently connected to the school’s pedagogical interests to warrant disciplinary action.¹¹⁷ The court held that because the student could have reasonably expected the speech to reach the school, as a majority of the web page’s members were peers, the nexus between the conduct and the school’s interests was sufficiently strong.¹¹⁸

4. Fifth Circuit

The Fifth Circuit first addressed off-campus student speech in 1972, shortly after *Tinker* was decided, in *Shanley v. Northeast Independent School District*.¹¹⁹ In *Shanley*, students were suspended for distributing an off-campus newspaper.¹²⁰ The court analyzed the speech under *Tinker* but held the circumstances did not justify the suspensions of the students.¹²¹ A year later, the court addressed a similar question in

41, 49 (2d Cir. 2008) (using the reasonably foreseeable and *Tinker* tests for off-campus speech), with *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928 (3d Cir. 2011) (en banc) (using the reasonably foreseeable and *Tinker* approaches, with emphasis on intent).

116. *Kowalski*, 652 F.3d at 567. The student was suspended for five days for creating a MySpace page titled “S.A.S.H.,” which stood for “Students Against Shay’s Herpes,” referring to a fellow classmate. The student invited over 100 people to join the “hate website,” in which students posted hateful comments and ridiculing photographs depicting their animosity toward the fellow student. *Kowalski*, 652 F.3d at 567–68.

117. *Id.* at 573. See Hofheimer, *supra* note 14, at 984 (discussing the “sufficient nexus” threshold employed by the Fourth Circuit in *Kowalski*).

118. *Kowalski*, 652 F.3d at 573; Hofheimer, *supra* note 14, at 984 (“The court found . . . a sufficient nexus between the speech and the school’s pedagogical goals in protecting its students from such assaultive speech.”).

119. 462 F.2d 960, 960 (5th Cir. 1972).

120. *Id.* The school justified the suspension under a school policy that prohibited the distribution of any material without the express consent of the school. *Id.* at 964. The newspaper, titled *Awakening*, was authored by five students during out-of-school hours and without any school support. The students distributed the newspapers before and after school, near but not on school property. Although some newspapers did turn up at the school, the students did not encourage any distribution of the papers during school hours. The court found that “[t]here was absolutely no disruption of class that resulted from distribution of the newspaper, nor were there any disturbances whatsoever attributable to the distribution. It was acknowledged by all concerned with this case that the students who passed out the newspapers did so politely and in orderly fashion.” *Shanley*, 462 F.2d at 964.

121. *Id.* The court found the suspension was unjustified because no disruption occurred or was reasonably foreseeable to occur. *Shanley* was one of the first decisions regarding off-campus speech post *Tinker*. In its decision, the Fifth Circuit acknowledged that nothing in *Tinker* allows the prohibition of off-campus speech that does not disrupt the schoolhouse and “it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts.” *Shanley*, 462 F.2d at 974. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (applying the material and substantial disruption test).

Sullivan v. Houston Independent School District.¹²² Incorporating the same reasoning as *Shanley*, the court held the students' suspensions for distributing an off-campus newspaper were not justified under *Tinker*.¹²³

However, in 2001, the Fifth Circuit changed its approach to off-campus speech in *Porter v. Ascension Parish School Board*.¹²⁴ In *Porter*, the court expressed discontent with applying *Tinker* to off-campus speech.¹²⁵ The court held that school administrators did not have the authority to punish a student for a drawing, which depicted a violent siege, because he did not intend for this speech to reach the school.¹²⁶ In contrast with its approach in *Shanley* and *Sullivan*, the Fifth Circuit tweaked its *Tinker* analysis to fit the facts before it, foreshadowing the approach the court would take decades later in addressing online off-campus speech.¹²⁷

Shanley, *Sullivan*, and *Porter* dealt with speech that occurred off-campus, but not in cyberspace.¹²⁸ In 2015, the Fifth Circuit, *en banc*,

122. 475 F.2d 1071, 1076 (5th Cir. 1973).

123. Paul's conduct can hardly be characterized as pristine, passive acts of protest "akin to pure speech" involved in *Tinker*. Rather, Paul defied Mr. Cotton's request that he stop selling newspapers, persisted in returning to the campus during the initial six-day suspension period, and twice shouted profanity at Mr. Cotton within the hearing of others. Paul's reappearance on the campus and continued sale of the newspapers on October 26 only served to exacerbate the situation.

Id. at 1075. The court implied that selling the newspapers in an isolated situation would have met the level of constitutional protection afforded by the First Amendment. *Id.* See Waldman, *supra* note 12, at 602 (noting that it was the conduct of the student, not the newspaper, that warranted the suspension).

124. *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004). The court discussed the inconsistencies between courts, and called for the federal circuits to "more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation." *Id.* at 619–20.

125. *Id.* at 620 (noting that "[b]ecause Adam's drawing was composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to [the school] or publicized in a way certain to result in its appearance at [the school], we have found that the drawing is protected by the First Amendment").

126. *Id.* at 611. The sketch depicted his school under siege by machinery, contained obscenities and racial epithets, and showed the school principal under attack. The sketch was discovered by school officials two years later due to the student's younger brother bringing the sketch pad to school for a reason wholly unrelated to the sketch. The student was subsequently enrolled in an alternative school. *Porter*, 393 F.3d at 611–12. See Mary Jo Roberts, *Porter v. Ascension Parish School Board: Drawing in the Contours of First Amendment Protection for Student Art and Expression*, 52 LOY. L. REV. 467 (2006) (discussing the factual underpinnings and reasoning in *Porter*).

127. Compare *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973) (applying a traditional *Tinker* analysis), with *Shanley v. N.E. Indep. Sch. Dist.*, 462 F.2d 960, 967 (5th Cir. 1972) (applying a traditional *Tinker* analysis a year before *Sullivan* was decided).

128. *Porter*, 393 F.3d at 619 (discussing student speech concerning a violent drawing); *Sullivan*, 475 F.2d at 1076 (discussing student speech concerning a newspaper); *Shanley*, 462 F.2d at 965 (discussing student speech concerning a newspaper).

addressed the issue of when a school could discipline a student for his or her off-campus, online speech in *Bell v. Itawamba County School Board*.¹²⁹ The majority opinion held that *Tinker* analysis applied, but failed to adopt or reject approaches advocated by other circuits.¹³⁰ The court simply fashioned a *Tinker* threshold test limited to the facts of the case.¹³¹ Thus, the court held that *Tinker* can apply to off-campus, online speech when a student directs the speech at the school and school officials understand it as harassing a teacher.¹³² Answering these questions in the affirmative, the court then concluded that the discipline was justified because the school officials could foresee the speech would cause a material and substantial disruption in the school.¹³³

5. Seventh Circuit

The Seventh Circuit’s approach to this issue is similar to the Second Circuit because both add a “reasonably foreseeable” threshold to the *Tinker* test.¹³⁴ In 1970, the Seventh Circuit addressed its first case pertaining to off-campus student speech in *Scoville v. Board of Education of Joliet Township*.¹³⁵ In *Scoville*, the court used a *Tinker* analysis to

129. 799 F.3d 379, 383 (5th Cir. 2015). In *Bell*, a student recorded a rap song outside of school and posted the audio on his Facebook profile. *Id.* The rap made derogatory reference to school teachers, accused coaches of sexual harassment, and was full of obscene and vulgar language. *Id.* The student was suspended and brought suit against the school district for violation of his First Amendment rights. *Id.* at 389. See Shaver, *supra* note 15, at 1573 (“[T]he en banc panel of the court was highly divided. Of the twelve judges in the majority, six judges authored or joined in separately written concurring opinions. Four judges dissented from the decision, and each of the dissenting judges wrote a separate dissenting opinion.”).

130. *Bell*, 799 F.3d at 396 (stating “[f]urther, in holding *Tinker* applies to the off-campus speech in this instance, because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance . . .”).

131. *Id.*; Katherine D. Landfried, *Bell v. Itawamba County School Board: The Need for a Balance of Freedom and Authority*, 36 ST. LOUIS U. PUB. L. REV. 193, 202 (2017) (articulating the reasoning the court used to identify the correct threshold under which to consider the facts and concluding that “via process of elimination, the court determines that Bell’s speech should be analyzed under *Tinker*”).

132. *Bell*, 799 F.3d at 386. For more discussion of the test articulated in *Bell*, see Margaret Malloy, *Bell v. Itawamba County School Board: Testing the Limits of First Amendment Protection of Off-Campus Student Speech*, 2016 WIS. L. REV. 1251, 1264–67 (2016).

133. *Bell*, 799 F.3d at 399.

134. Although both circuits use thresholds that rely on foreseeability, the Second Circuit looks at whether it is reasonably foreseeable that the conduct would create a risk of substantial disruption in the school, and the Seventh Circuit looks at whether the school officials could reasonably forecast the conduct would cause a substantial disruption in school. Compare *Wisniewski v. Board of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007) (noting the reasonably foreseeable to cause a substantial disruption threshold), with *Scoville v. Bd. of Ed. of Joliet Twp. High Sch. Dist. 204, Will Cty., State of Ill.*, 425 F.2d 10, 13 (7th Cir. 1970) (discussing whether school officials could “reasonably forecast” the conduct would create a substantial disruption).

135. *Scoville*, 425 F.2d at 15. See generally ALAN GORR, PROBLEMS IN TODAY’S EDUCATION

determine whether high school students who wrote critical off-campus newspaper articles about school policies could be disciplined.¹³⁶ The court held that because school officials could not reasonably foresee that the publication would substantially interfere with the school, the suspension violated the students' First Amendment rights.¹³⁷

The Seventh Circuit again addressed the issue in 1998, in *Boucher v. School Board of the School District of Greenfield*.¹³⁸ The court held that *Tinker* authorized the expulsion of a student who wrote an off-campus newspaper article because the school board could reasonably foresee a material and substantial disruption in school.¹³⁹

6. Eighth Circuit

Similar to the Second and Seventh Circuits, the Eighth Circuit applies the *Tinker* test with the extra foreseeability requirement.¹⁴⁰ In 2011, the Eighth Circuit reviewed two off-campus speech cases dealing with the Internet.¹⁴¹ *D.J.M. v. Hannibal Public School District #60* dealt with a student who sent instant messages from his home computer that referred to shooting other students at school.¹⁴² The court concluded that the statements were not protected under a "true threat" analysis, nor under *Tinker*, because it was reasonably foreseeable that the speech would cause a substantial disruption in the school.¹⁴³

235–55 (1973) (discussing the arguments of the respondent and the petitioner in *Scoville*).

136. *Scoville*, 425 F.3d at 17.

137. *Id.* See Levin, *supra* note 25, at 871 (discussing generally the "reasonably forecast" standard that was employed by the Seventh Circuit in *Scoville*).

138. 134 F.3d 821 (7th Cir. 1988).

139. *Id.* at 822–23. The newspaper article provided instructions on how to hack school computers. The court held that because the content of the article was threatening to the schools' resources, and the article was distributed on school grounds, "a reasonable forecast of disruption is all that would be required of the [school] board" in order to uphold the expulsion. *Boucher*, 134 F.3d at 828.

140. Compare *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (applying a reasonably foreseeable threshold to *Tinker*), with *Scoville*, 425 F.2d at 16 (applying a "reasonably forecast" threshold to *Tinker*, from the administrator's point of view), and *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 760 (8th Cir. 2011) (applying a reasonably foreseeable threshold from the point of view of a reasonable person).

141. *Hannibal*, 647 F.3d at 756; *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2011).

142. *Hannibal*, 647 F.3d at 758 (quoting the transcript of the messages: "C.M. asks D.J.M. 'what kidna gun did your friend have again?' D.J.M. responds '357 magnum.' C.M. then replies, 'haha would you shoot [L.] or let her live?' D.J.M. answers 'i still like her so I would say let her live.' C.M. follows up by asking, 'well who would you shoot then lol,' to which D.J.M. responds 'everyone else'").

143. *Id.* at 764 (in analyzing the speech under the "true threat" doctrine, the court places special emphasis on the speaker's intent, quoting *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 627 (8th Cir. 2002), which defined a true threat as a "statement that a reasonable recipient would have

In *S.J.W ex rel. Wilson v. Lee’s Summit R-7 School District*, the court held that off-campus student speech that causes a substantial disruption in school is not protected.¹⁴⁴ In *Wilson*, students were suspended for writing an online blog that contained offensive, sexually explicit, racist, and degrading comments about other classmates.¹⁴⁵ The court reasoned that because the speech was targeted at the school and it was reasonably foreseeable that it would cause a substantial disruption, *Tinker* applied, regardless of where the speech occurred.¹⁴⁶ As illustrated by these two cases, the Eighth Circuit expressly adopts both a “true threat” and a *Tinker* approach to off-campus student speech.¹⁴⁷

7. Ninth Circuit

The Ninth Circuit’s off-campus student speech jurisprudence, and decisions regarding what rule should govern, contradicts other circuits’ interpretations of *Tinker*.¹⁴⁸ In *LaVine v. Blaine School District*, the court held that schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.¹⁴⁹ However, twelve years later, in *Wynar v. Douglas County*, the court clarified that *Tinker* could only be applied to off-campus speech if there is an identifiable threat of school violence.¹⁵⁰ The *Wynar* court held that students sending

interpreted as a serious expression of an intent to cause harm”). See John L. Hughes III, *Social Networking and Student Safety: Balancing Student First Amendment Rights and Disciplining Threatening Speech*, 7 UMASS. L. REV. 208, 227 (2012) (arguing that the *Hannibal* decision is “illustrative of recent court decisions regarding threatening student speech, as it utilizes both the *Watts* true threat and *Tinker* tests in coming to its decision”).

144. 696 F.3d 771, 776 (8th Cir. 2011).

145. See *id.* at 733 (indicating that the blog posts “contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name. The racist posts discussed fights at Lee’s Summit North and mocked black students. A third student added another racist post”).

146. *Id.* at 778. The court devotes substantial discussion to the other circuits that have applied *Tinker* to off-campus speech; specifically, the Second Circuit’s ruling in *Doninger v. Niehoff*, the Fourth Circuit in *Kowalski v. Berkeley County Schools*, and the Third Circuit in *J.S. v. Blue Mountain School District*. See *supra* Part I.D.1, 2, 3 for further analysis of those cases.

147. *Wilson*, 696 F.3d at 776; *Hannibal*, 647 F.3d at 759. See *supra* Part I.C (discussing the “true threat” test).

148. Compare *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (holding that *Tinker* applies to off-campus speech), with *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (holding that *Tinker* cannot apply to all off-campus speech).

149. *LaVine*, 257 F.3d at 984. The poem at issue depicted a student’s wish to shoot classmates. The court opened by stating, “[t]his case has its genesis in a high school student’s poem which led to his temporary, emergency expulsion from school. It arises against a backdrop of tragic school shootings. . . .” *Id.* For a look at the issue of true threats, freedom of speech, and school shootings, see Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 740 (2000).

150. *Wynar*, 728 F.3d at 1069 (“Here we make explicit what was implicit in *LaVine*: when faced with an identifiable threat of school violence, schools may take disciplinary action in response to

threatening instant messages constituted a threat of school violence, and thus the speech was not protected by the First Amendment.¹⁵¹ However, the court was clear that absent a ruling from the Supreme Court, there is not a one-size-fits-all approach to off-campus speech.¹⁵²

8. Eleventh Circuit

The Eleventh Circuit applied a *Tinker* and true threat approach in *Boim v. Fulton County School District*.¹⁵³ In *Boim*, school authorities expelled a student after they discovered a notebook entry describing a dream in which the student shot and killed a teacher.¹⁵⁴ While the writing took place off campus, the court held the school was justified in punishing the student under the “true threat” and *Tinker* tests.¹⁵⁵ Unlike the Third Circuit in similar circumstances, the Eleventh Circuit did not place emphasis on the student’s intent, declaring the student’s intention to keep the notebook entry private immaterial.¹⁵⁶ While not dealing directly with online speech, the court’s ruling could imply that both *Tinker* and “true

off-campus speech that meets the requirements of *Tinker*.”).

151. *Id.* at 1064. The threatening instant messages consisted of “bragging about his weapons, threatening to shoot specific classmates, [and] intimating that he would ‘take out’ other people at a school shooting on a specific date.” *Id.* at 1065. The court applies the facts to the threshold tests the other circuits have used, but declines to adopt any bright-line test for approaching off campus speech, writing: “given the subject and addressees of Landon’s messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to Landon that his messages would reach campus.” *Id.* at 1069. *See generally* May, *supra* note 14, at 1110 (discussing the circuit split regarding which test to apply to off-campus speech).

152. *See Wynar*, 728 F.3d at 1064 (stating “we are reluctant to try to craft a one-size fits all approach”); Kellman, *supra* note 47, at 374 (discussing the problems arising due to the Court’s silence on the issue of off-campus student speech).

153. 494 F.3d 978, 985 (11th Cir. 2007).

154. *Id.* The notebook entry was titled “Dream” and vividly depicted the student shooting her teacher. *Id.* at 980. School administrators discovered it after the student’s art teacher confiscated it in class. *Id.* at 984.

155. *Id.* The court writes about the importance of maintaining safety in schools, especially after Columbine, stating: “Thus, in this climate of increasing school violence and government oversight, and in light of schools’ undisputedly compelling interest in acting quickly to prevent violence on school property, especially during regular school hours, we must conclude that the defendants did not violate Rachel’s First Amendment rights.” *Id.* at 984. *See* Brief of Appellants David Boim and Kim Boim at 5, *Boim v. Fulton Cty. Sch. Dist.*, 494 F.3d 978 (11th Cir. 2006) (No. 06-14706-JJ), 2006 WL 3671902 (confirming the narrative was written at home); William Bird, *Constitutional Law-True Threat Doctrine and Public School Speech- An Expansive View of A School’s Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus*, 26 U. ARK. LITTLE ROCK L. REV. 111, 129 (2003) (analyzing how the court’s decisions pertaining to threatening speech on and off campus has changed post-Columbine).

156. *See* J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (en banc) (holding that because the student did not intend for the speech to come to school, his speech is protected); *supra* note 109 and accompanying text (describing the different types of intent in various circuits).

threat” analyses could apply to off-campus, online speech if faced with the issue.¹⁵⁷

9. Remaining Circuits

The First, Sixth, Tenth, and D.C. Circuits have not yet addressed the issue of off-campus student speech.¹⁵⁸ For the purposes of this Comment, discussion is limited to the cases that reached the federal appellate courts; district court opinions regarding similar issues are not included.¹⁵⁹

E. School Social Media Policies

School districts enact their own specific policies to regulate students’ conduct outside of school in light of the digital age, similar to the approaches taken by the federal appellate courts.¹⁶⁰ School districts vary in the amount of protection and restriction given to social media speech, and some do not have written restrictions at all.¹⁶¹ For example, Jordan-Elbridge Central School District’s social media policy prohibits students from writing sensitive, confidential, or disparaging posts on personal social media accounts, while Pottsville Area School District expressly prohibits any content that could disrupt the school or rights of others.¹⁶²

157. While this Comment focuses on the holdings of the federal courts of appeals, a ruling from the District Court for the Southern District of Florida in *Evans v. Bayer* is instructive as to how the Eleventh Circuit could rule in future off-campus student speech cases. 684 F. Supp. 2d 1365. The court held that a student could not be punished for creating a social media web page with derogatory comments about a teacher, under *Tinker*, when the speech did not cause any substantial disruption and was not accessed on campus. *Id.* at 1378.

158. See Marcus-Toll, *supra* note 23, at 3369 (discussing each federal appellate court’s review of off-campus student speech, but does not include the First, Sixth, Tenth, and D.C. Circuits because they have not addressed the issue).

159. Because this Comment is focused on the federal appellate courts, it does not discuss any district court rulings on the subject matter. However, in 2013, the District Court for the Eastern Division of Tennessee addressed the issue in *Nixon v. Hardin County Board of Education*. 988 F. Supp. 2d 826 (W.D. Tenn. 2013). In *Nixon*, the student was required to attend an alternative school and participate in counseling because she sent threatening tweets directed toward another student. *Id.* at 832. The court held that because the speech was made off-campus, was not directed at the school, did not involve any school equipment, and did not cause a substantial disruption, the defendants’ summary judgment motion could not succeed. *Id.* at 839. The court used the sufficient nexus precursor to the *Tinker* test to opine on the issue. See generally Catherine E. Mendola, *Big Brother as Parent: Using Surveillance to Patrol Students’ Internet Speech*, 35 B.C. J.L. & SOC. JUST. 153, 182 (2015) (discussing the prevalence of social media in student speech cases).

160. Schools must ensure these policies do not conflict with other policies and meet standards imposed by law. See Steven Anderson, *How to Create Social Media Guidelines for Your School*, EDUTOPIA.ORG (2017), <https://www.edutopia.org/pdfs/edutopia-anderson-social-media-guidelines.pdf> (providing a step-by-step process schools should abide by when creating social media policies).

161. See *infra* Part III.B (comparing and contrasting social media policies and the differences in restrictions and protections in each policy).

162. Compare Jordan-Elbridge CSD Social Media Code of Ethics for Students 7310, JORDAN-

Meanwhile, in its general student handbook, Berkeley County School District prohibits off-campus conduct that could foreseeably cause a disruption in the school.¹⁶³ In Part III of this Comment, these school policies are analyzed in an effort to provide guidance as to how schools can reconcile the differing federal appellate courts' approaches and create policies that protect students' constitutional rights while still maintaining order in the schoolhouse.¹⁶⁴

II. DISCUSSION

While the Supreme Court remains silent on the issue of off-campus student speech, its rulings on the Internet may be instructive for the conflicting federal appellate courts and school districts dealing with student speech on social media.¹⁶⁵ Two seminal holdings in *Reno v. ACLU* and *Packingham v. North Carolina* represent the Court's application of the First Amendment to the Internet.¹⁶⁶ Section A begins by discussing the Court's holding in *Reno*, which held that blanket provisions regulating the Internet were unconstitutional.¹⁶⁷ Next, Section B discusses the factual background and the Court's reasoning in *Packingham*, which established First Amendment protection for social media.¹⁶⁸ Finally, this Part examines the levels of scrutiny applied to the Internet and the differences between content-neutral and content-based regulations.¹⁶⁹

ELBRIDGE CENT. SCH. DIST. (03/02/2016), <http://www.jecsd.org/files/filesystem/SocialMediaPolicyStudents.pdf> [hereinafter *Jordan-Elbridge Social Media Policy*] (listing fourteen restrictions on social media use), with Pottsville Area School District: Social Media Policy 816, POTTSVILLE AREA SCH. DIST. (08/17/2011), <https://www.pottsville.k12.pa.us/cms/lib/PA01916599/Centricity/Domain/38/Social%20Media%20Policy%20-%20Students.pdf> [hereinafter *Pottsville Social Media Policy*] (limiting any conduct which could foreseeably cause a disruption).

163. See Student Handbook: Student Conduct, BERKELEY COUNTY SCHOOL DISTRICT (2015), <https://www.berkeleycountyschools.org/cms/lib02/WV01000962/Centricity/Domain/20/2015-16%20Generic%20Handbook%20Electronic%20Copy.pdf> [hereinafter *Berkeley Policy*] (prohibiting social media postings for the purpose of bullying).

164. See *infra* Part III.B (analyzing the positives and negative of three schools' social media policies).

165. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (stating that social media is one of the most important places to exchange views); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("Today, one of the most important places to exchange views is cyberspace. . .").

166. *Packingham*, 137 S. Ct. at 1738 (holding social media is protected speech); *Reno*, 521 U.S. at 870 (finding the Internet to be protected speech).

167. See *infra* Part II.A (discussing the factual background, holding, and reasoning in *Reno*).

168. See *infra* Part II.B (discussing the background, reasoning, and majority and concurring opinions in *Packingham*).

169. See *infra* Part II.A, B (discussing strict scrutiny as applied to content-based restrictions and intermediate scrutiny as applied to content-neutral restrictions).

A. *Reno Sets the Stage for Judicial Internet Analysis*

Reno was the first Internet-related case to be resolved in the Supreme Court. In *Reno*, the American Civil Liberties Union brought suit against the Attorney General of the United States, arguing that two provisions of the Communications Decency Act violated the First Amendment.¹⁷⁰ These provisions sought to protect minors from obscene and sexual content on the Internet by prohibiting purposeful transmission of any lewd content to a minor.¹⁷¹ The government argued that these provisions were narrow enough to further its interest in protecting minors from harmful content.¹⁷² However, the Court held that the blanket provisions were an impermissible infringement on free speech rights.¹⁷³ The two provisions were content-based restrictions because they regulated the subject matter and type of speech.¹⁷⁴ As such, the Supreme Court applied strict scrutiny to determine the constitutionality of the provisions.¹⁷⁵

In order to withstand strict scrutiny, a content-based restriction must be based on a compelling governmental interest and narrowly tailored to achieve that interest.¹⁷⁶ But, because the content-based restriction in *Reno* was overbroad and vague, as the terms “indecent” and “obscene” were not defined, the statute did not meet strict scrutiny.¹⁷⁷ Further, the

170. *Reno*, 521 U.S. at 861.

171. *Id.* at 858. The first provision, 47 U.S.C. § 223(a), “prohibit[s] the knowing transmission of obscene or indecent messages to any recipient under 18.” *Id.* The second provision, 47 U.S.C. § 223(b), “prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18.” *Id.*

172. *Reno*, 521 U.S. at 858; see Brief for Appellants at 12, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (2007) (No. 96-511), 1997 WL 32931, at *12 (arguing the statute is narrowly tailored to achieve a compelling government interest).

173. *Reno*, 521 U.S. at 868 (noting that the CDA is a content-based blanket restriction on speech). See Andrew H. Montroll, *Students’ Free Speech Rights in Public Schools: Content-Based Versus Public Forum Restrictions*, 13 VT. L. REV. 493, 500 (1989) (describing the connection between content-based restrictions for adults and content-based restrictions for students and giving a general background on content-based restrictions in the court system).

174. *Reno*, 521 U.S. at 864. See Blum et al., *Tests to be applied to content-based and content-neutral regulations*, 16A AM. JUR. 2D CONST. L. § 480 (2017) (describing the analysis concerning content-based restrictions).

175. *Reno*, 521 U.S. at 857. Content-based restrictions on speech are typically held unconstitutional. The Supreme Court illustrated this reasoning in *R.A.V. v. City of St. Paul*, writing: “[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” 505 U.S. 377, 382 (1992) (citations omitted).

176. Blum, *supra* note 174 (discussing the requirements for state-implemented restrictions of expression to survive strict scrutiny); Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1981–82 (1997) (“Using this analysis, the Court asked whether the CDA served a compelling government interest, and whether it was narrowly tailored to accomplish[sic] that end using the least restrictive means.”).

177. *Reno*, 521 U.S. at 860 (holding the statute was unconstitutional because of its over-breadth

Court believed the statute would regulate more content than was intended and potentially chill Internet expression.¹⁷⁸ The Court nonetheless held that if the statute was narrowly rewritten to achieve the compelling purpose of protecting minors, the Internet was not insulated from regulation.¹⁷⁹

The issue the Court addressed in *Reno* involved the Internet as a whole, rather than social media websites specifically.¹⁸⁰ But *Reno* remains fundamental in this discussion because the Court emphasized that the growing role of the Internet in society “continues to be phenomenal,” setting up a line of reasoning that the Court in *Packingham* relied upon.¹⁸¹ Because it is one of the only Supreme Court decisions discussing the impact of the Internet, *Reno* is the starting point for scholarly analysis relating to restrictions on Internet usage—specifically, how far *Reno*’s protection can stretch.¹⁸²

B. *Packingham v. North Carolina: Social Media Has First Amendment Protection*

Packingham presented a challenge to a North Carolina statute that prohibited sex offenders from accessing social networking websites.¹⁸³ In 2002, petitioner Lester Packingham pled guilty to taking indecent

and vagueness). See Jacques, *supra* note 176, at 1982 (discussing the Court’s reasoning pertaining to the vagueness of the statute and noting that “[b]y failing to narrowly tailor the language of the statute . . . Congress passed an act that was dangerously vague and clearly unconstitutional under a strict scrutiny analysis”).

178. *Reno*, 521 U.S. at 871–72 (“The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”). For more information about the chilling effect, see Jennifer M. Kinsley, *CHILL*, 48 LOY. U. CHI. L.J. 253, 268 (2016) (discussing the “chilling effect” and the implications resulting from governmental regulations on speech); see also Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 693 (1978) (describing the fear of the chilling effect in society).

179. *Reno*, 521 U.S. at 880.

180. *Id.* at 885. Although the decision in *Reno* did not discuss social media in particular, the statement “[t]he record demonstrates that the growth of the Internet has been and continues to be phenomenal” foreshadowed a future case, *Packingham v. North Carolina*. In *Packingham*, the Court alluded to the same premise, additionally upholding another realm of the Internet as protected speech. 137 S. Ct. 1730, 1735 (2017).

181. See *Packingham*, 137 S. Ct. at 1735 (providing a background of the “vast democratic forums of the Internet” (quoting *Reno*, 521 U.S. at 868)).

182. Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POL’Y 287, 295 (2001) (discussing *Reno*’s impact on Internet hate speech). See Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 356 (2013) (discussing *Reno*’s potential implication in social media cases).

183. *Packingham*, 137 S. Ct. at 1734. See N.C. GEN. STAT. ANN. § 14-202.5(a) (providing “[i]t is unlawful for a sex offender who is registered . . . to access a commercial social networking Web site . . .”).

liberties with a child and was required to register as a sex offender.¹⁸⁴ In 2010, a state court dismissed a traffic citation against Packingham.¹⁸⁵ In response, he posted a message on his Facebook profile, thanking God for his good luck.¹⁸⁶ However, under N.C. Gen. Stat. Ann. § 14–202.5, his status as a sex offender barred him from accessing social networking sites that he knew minors frequent.¹⁸⁷ Packingham was arrested and convicted for violating the statute.¹⁸⁸

Justice Kennedy wrote for the majority and held the statute unconstitutional, emphasizing the importance of the Internet to First Amendment expression.¹⁸⁹ The Court observed that “while in the past there may have been difficulties in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular.”¹⁹⁰ Providing further insight into the role social media plays in society, the Court noted that seven in ten American adults use at least one social media website and that Facebook’s membership of 1.79 billion users is three times the size of North America.¹⁹¹ Justice Kennedy described the positive impact

184. *Packingham*, 137 S. Ct. at 1734. See *State v. Packingham*, 777 S.E.2d 738, 743–44 (N.C. 2015), *rev’d*, 137 S. Ct. 1730 (2017) (providing a procedural history and in-depth factual background in the North Carolina Supreme Court decision).

185. *Packingham*, 137 S. Ct. at 1734; Brief for Petitioner at 4, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15–1194), 2016 WL 7321777, at *4 [hereinafter *Packingham* Brief for Petitioner].

186. *Packingham*, 137 S. Ct. at 1734. The statement said: “Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. Praise be to GOD, WOW! Thank JESUS!” See *Packingham* Brief for Petitioner, *supra* note 185, at 4 (discussing the petitioner’s intent behind the Facebook post was to express his content and his permitted First Amendment rights).

187. *Packingham*, 137 S. Ct. at 1734. The statute provides that it is:

[U]nlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

N.C. GEN. STAT. ANN. § 14-202.5(a). Violation of the statute is a Class I felony. *Id.* at § 14-202.5(e).

188. *Packingham*, 137 S. Ct. at 1734. Packingham argued that the law violated his First Amendment rights, but he was convicted at trial. However, his conviction was reversed in the North Carolina Court of Appeals. The North Carolina Supreme Court reinstated the ruling of the trial court, finding that the state had sufficient interest in “forestall[ing] the illicit lurking and contact” of registered sex offenders and their victims.” *Packingham*, 777 S.E.2d at 746. See *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App. 2013) (vacating the opinion of the trial court).

189. *Packingham*, 137 S. Ct. at 1735.

190. *Id.* (internal quotations and citation omitted).

191. *Id.* See, e.g., *Social Media Statistics for June 2017*, NAT. ARCHIVES (June 1, 2017), <https://www.archives.gov/files/social-media/reports/social-media-stats-fy-2017-06.pdf> (providing a detailed review of social media statistics as of June 2017); *Social Media Fact Sheet*, PEW

websites like Facebook, LinkedIn, and Twitter have on the expression of diverse ideas and protected First Amendment activity.¹⁹² Specifically, the Court noted the important role social media plays in expressing religious beliefs, debating politics, engaging in the democratic process by petitioning elected officials, and advancing careers.¹⁹³

The Court additionally warned that it must exercise extreme caution before ruling, or even suggesting, that the First Amendment does not provide protection for social media because the forces of the Internet are new and constantly changing.¹⁹⁴ Justice Kennedy likened the Internet to a public park; but, since speech from the Internet has the ability to reach people worldwide, the Internet has now surpassed the public park to become the most important channel for expression.¹⁹⁵ However, the Court recognized that First Amendment protection cannot apply to all circumstances, and there are certainly instances in which speech can be curtailed.¹⁹⁶ In this instance, though, because this content-neutral regulation of speech burdened significantly more speech than necessary to advance the government's important interest in protecting vulnerable victims from dangerous predators, North Carolina did not meet its burden.¹⁹⁷

North Carolina argued, and the Court agreed, that the statute was content-neutral because it prohibited access to websites without regard to the content of viewpoints expressed.¹⁹⁸ Unlike the content-based statute

RESEARCH CTR., (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> (providing statistics on social media use in 2016).

192. *Packingham*, 137 S. Ct. at 1735 (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (internal quotations omitted)). See Marco della Cava, *How Facebook Changed our Lives*, USA TODAY (Feb. 2, 2014, 10:19 AM), <https://www.usatoday.com/story/tech/2014/02/02/facebook-turns-10-cultural-impact/5063979/> (discussing the impact of Facebook and the business model of the social media giant).

193. *Packingham*, 137 S. Ct. at 1735–36 (discussing the impact social media platforms have on citizens' lives, stating: “[i]n short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought’” (quoting *Reno*, 521 U.S. at 870)). See Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Petitioner at 15–16, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15–1194), 2016 WL 7449172 [hereinafter Brief for Electronic Frontier Foundation] (providing statistics of how many people use social media platforms for a wide variety of protected activities).

194. *Packingham*, 137 S. Ct. at 1736.

195. *Id.* at 1737 (“These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” (quoting *Reno*, 521 U.S. at 870)).

196. *Id.* See Blake A. Klinker, *Yes, You Do Have a First Amendment Right to Social Media*, WYO. LAW., Aug. 1, 2017, at 54 (expressing that the Court left open the possibility of crafting a narrow law that would withstand intermediate scrutiny).

197. *Packingham*, 137 S. Ct. at 1738.

198. *Id.* See Brief for Respondent at 40, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)

in *Reno*, a content-neutral regulation controls the circumstances under which speech may take place, also known as time, place, and manner restrictions.¹⁹⁹ Content-neutral regulations are subject to intermediate scrutiny, which triggers analysis of whether the challenged statute advances an important government interest by means that are substantially related to achieving that interest.²⁰⁰ The Court disagreed that the statute could withstand intermediate scrutiny because, while protecting children is certainly an important interest, the means were not substantially related to achieving that interest because the statute burdened significantly more speech than necessary.²⁰¹ But, the Court made it clear that a state could accomplish this goal by enacting a more narrowly written statute.²⁰² Thus, under *Packingham*, a government entity may only regulate the Internet, or social media, when the regulation is specific enough to curtail only the speech that is necessary to further an important government interest.²⁰³

Justice Alito, in a concurring opinion, agreed the content-neutral statute could not withstand intermediate scrutiny because it forbid access to websites unlikely to facilitate the government’s important interest.²⁰⁴ However, Justice Alito argued the majority erred in equating the Internet with a public forum, expressing concern that the Court’s loose rhetoric could prevent states from regulating the Internet altogether.²⁰⁵

(No. 15–1194), 2017 WL 345120 (“Second-guessing the North Carolina Legislature’s judgment, petitioner claims that Section 202.5 is broader than necessary, and that less speech-restrictive measures could as effectively achieve the State’s objective of protecting children from sexual predators. Neither contention is correct.”).

199. *Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring). See 1 RODNEY A. SMOLLA, LAW OF LAWYER ADVERTISING § 2:9 (2017) (discussing content-neutral regulations analyses); Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981) (analyzing the approaches to content-neutral and content-based restrictions on speech).

200. See Montroll, *supra* note 173, at 500 (discussing the content-neutral regulations and the type of analysis rendered when presented in court).

201. *Packingham*, 137 S. Ct. at 1738.

202. *Id.* at 1737; Klinker, *supra* note 196, at 55 (“Thus, it appears that *Packingham* presents an invitation for legislatures to go back to the drawing board to craft laws which more ‘specifically’ target internet-based harms.”).

203. *Packingham*, 137 S. Ct. at 1737. See *infra* Part III (discussing public school policies that would probably not survive under *Packingham* scrutiny).

204. In his concurring opinion for *Packingham*, Justice Alito wrote:

I am troubled by the Court’s loose rhetoric. After noting that “a street or a park is a quintessential forum for the exercise of First Amendment rights,” the Court states that “cyberspace” and “social media in particular” are now the “most important places (in a spatial sense) for the exchange of views.”

Packingham, 137 S. Ct. at 1738 (Alito, J., concurring).

205. *Id.* Justice Alito’s concurring opinion did not go unnoticed, as David Post of *The Washington Post* opined that the concurring justices:

[A]greed with the majority that the NC statute “sweeps far too broadly to satisfy the

Addressing the majority's contention that courts need to be careful before handing down opinions or fashioning rules regarding the Internet, Alito reasoned that the Court explicitly did what it warned of.²⁰⁶ Thus, Alito disagreed with the majority's heightened protection of the Internet and advocated for the enactment of narrower statutes in order to further significant interests without burdening more speech than necessary.²⁰⁷

Justice Kennedy highlighted an important issue when he wrote that courts must be careful before reaching an opinion regarding the Internet because "what they say today might be obsolete tomorrow."²⁰⁸ It takes years before the Supreme Court hears a case, as the United States legal system can be slow and the appellate process is meticulous.²⁰⁹ Therefore, instead of approaching the complicated issue of off-campus, online student speech by waiting for the Court to provide guidance, schools should take matters into their own hands.²¹⁰ Schools should draft social media policies themselves, implementing some of the tests set forth in the federal appellate courts' decisions, as well as the Supreme Court's reasoning in *Packingham*, in order to create clear policies that instruct students on exactly what conduct on social media will be subject to punishment.²¹¹ However, in order to properly craft an ideal policy, it is first necessary to analyze the approaches taken by the federal appellate

demands of the Free Speech Clause," and they had no particular problem with the way the majority characterized and undertook the First Amendment analysis in the case. Rather unusually, I think, their disagreement focused entirely on nuance, characterization and rhetoric . . .

David Post, *Supreme Court Unanimously Overturns North Carolina's Ban on Social-Media Use by Sex Offenders*, WASH. POST (July 3, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/03/supreme-court-unanimously-overturns-north-carolinas-ban-on-social-media-use-by-sex-offenders/?utm_term=.6a428fedab89.

206. *Packingham*, 137 S. Ct. at 1744 (Alito, J., concurring) ("It is regrettable that the Court had not heeded its own admonition of caution.").

207. *Id.*; Klinker, *supra* note 196, at 55 (summarizing Justice Alito's concurring opinion).

208. *Packingham*, 137 S. Ct. at 1736. Justice Kennedy emphasized many of the statistics from the Electronic Frontier Foundation's Amicus Curiae Brief in the text of his opinion. See Brief for Electronic Frontier Foundation, *supra* note 193 (expressing that seven in ten American adults use at least one Internet networking service).

209. Charles B. Elliott, *The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional*, 4 POL. SCI. Q. 224, 249 (1890) (discussing the slow process from the trial court to the Supreme Court and arguing the legislature is better equipped to handle changing societal interests); Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 39 (2015), <http://www.virginialawreview.org/volumes/content/politicians-rob-separation-powers-and-problem-judicial-legislation> (arguing that judges are not equipped to decide political questions left for the legislature, describing the process as slow).

210. See *infra* Part IV (arguing for schools to approach this issue by enacting policies themselves, instead of allowing courts to dictate what speech is protected).

211. See *infra* Part IV (proposing a model policy for school districts to implement to balance their interests and students' First Amendment rights).

courts and some current school policies.

III. ANALYSIS

The federal appellate courts’ inconsistent approach to off-campus student speech has resulted in an unpredictable application of the First Amendment and uncertainty as to when off-campus student speech is protected or within the realm of a school’s disciplinary authority.²¹² In *Tinker*, the Court established students’ First Amendment rights in schools, but subsequent decisions afforded school administrators greater authority to punish student speech.²¹³

The Supreme Court has yet to hold that any particular test applies to off-campus speech, yet the federal appellate courts have taken it upon themselves to apply Supreme Court precedent, particularly *Tinker*, to off-campus, online speech.²¹⁴ While not directly addressing the issue of off-campus speech, the Court in *Packingham* established that social media deserves First Amendment protection; thus, restrictions on social media deserve heightened scrutiny.²¹⁵ As such, courts need to keep *Packingham*’s reasoning in mind while ruling on off-campus, online speech cases.²¹⁶

This Part begins by analyzing and critiquing the threshold tests used by the federal appellate courts and the impact these tests have on student speech.²¹⁷ Next, this Part looks at schools’ social media policies and evaluates whether these restrictions on the Internet would be upheld under the test the Court articulated in *Packingham*.²¹⁸ Finally, this Part addresses the “chilling effect” that results from overbroad restrictions on

212. Levin, *supra* note 25, at 869–70 (criticizing the circuit split and arguing for a uniform approach because “the lower courts’ decisions lack any sense of uniformity”).

213. *See supra* Part I.A (discussing the *Tinker* approach); *supra* Part I.B (discussing the tests articulated in *Fraser*, *Kuhlmeier*, and *Morse* as further restrictions on student speech inside the schoolhouse).

214. *See* Jessica K. Boyd, *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, 1235 (2013) (“The Second, Third, and Fourth Circuits all applied *Tinker* in cases where students were punished for off-campus Internet speech, barely pausing to consider whether the Supreme Court intended *Tinker* to be applicable to students when they left school grounds.”); Courtney M. Willard, *Decoding Student Speech Rights: Clarification and Application of Supreme Court Principles to Online Student Speech Cases*, 43 GOLDEN GATE U. L. REV. 293, 312 (2013) (tracing the history of student speech cases, from the armbands in *Tinker* to the blog post in *Wisniewski*).

215. *Packingham*, 137 S. Ct. at 1737. *See supra* Part I.C for a discussion of the factual background, holding, reasoning, and scrutiny applied in *Packingham*.

216. *See infra* Part IV (proposing a framework for schools to adhere to while crafting social media policies that fit within the reasoning of *Packingham*).

217. *See infra* Part III.A (analyzing the five threshold tests used by the federal appellate courts).

218. *See infra* Part III.B (discussing the policies incorporated by individual public schools).

student speech.²¹⁹

A. The Implications of the Circuits' Inconsistent Threshold Tests

Most circuits apply a *Tinker* analysis to off-campus speech cases, but some circuits tweak the test to focus on different factors that either allow or prohibit the regulation of speech.²²⁰ While the problem lies in the Supreme Court's lack of precedent on the issue, it also lies within school policies pertaining to social media.²²¹ This Section is limited to discussing the various approaches to social media speech and analyzing what types of speech are inside the scope of schools' authority to discipline.²²² Further, the analysis will examine the constitutionality of these tests in light of the holding in *Packingham*.²²³

1. Reasonable Foreseeability Threshold to *Tinker*

The Second, Seventh, and Eighth circuits adopt the reasonable foreseeability threshold to the *Tinker* test to analyze off-campus speech.²²⁴ The courts first consider whether it was reasonably foreseeable that the off-campus speech would reach the schoolhouse.²²⁵ If so, then courts ask whether such off-campus speech would cause a substantial and

219. See *infra* Part III.C (discussing the “chilling effect” stemming from regulations on student speech).

220. See Calve, *supra* note 82, at 386 (noting that “[c]ircuit courts have continuously invoked *Tinker* to regulate off-campus cyberspeech, particularly when the speech is violent or threatening, but the method of application is inconsistent across the country”); Marcus-Toll, *supra* note 23, at 3420 (discussing the split among federal courts of appeals regarding whether *Tinker* extends to off-campus speech).

221. See Calve, *supra* note 82, at 400–01 (“Clashing decisions by lower courts about the applicability of the *Tinker* substantial disruption test to off-campus student speech . . . amplified the necessity for the Court’s guidance.”); Aaron J. Hersh, *Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students’ First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309, 1321 (2007) (arguing that *Tinker* had been degraded over time by subsequent decisions such as *Fraser* and *Morse*).

222. This Comment will not focus on off-campus speech that is written on tangible property, spoken speech, or any speech that does not exist on a social networking website. For a discussion of speech and the judicial analysis used for off-campus speech that does not occur online, see *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004) (holding the punishment of a student for a violent drawing produced off-campus was unconstitutional).

223. See *infra* Part III.A (analyzing the threshold tests used by the federal appellate courts under *Packingham*).

224. See Marcus-Toll, *supra* note 23, at 3420 (discussing the reasonable foreseeability test applied by the Second Circuit). See, e.g., *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (using the reasonably foreseeable test); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (using the reasonable foreseeability threshold); *Scoville v. Bd. of Educ. of Joilet Twp. High Sch. Dist. 204, Cty. of Will., State of Ill.*, 425 F.2d 10 (7th Cir. 1970) (applying the “reasonable foreseeability” test to off-campus speech, but not online off-campus speech).

225. See *Doninger*, 527 F.3d at 348 (articulating the “reasonable foreseeability” test).

material disruption.²²⁶ This two-part test seems reasonable, but has its flaws.²²⁷

First, the test is overly broad, akin to the speech-restrictive statute in *Packingham* which the Court found unconstitutional.²²⁸ The breadth of this test is illustrated in *Doninger v. Niehoff*.²²⁹ In *Doninger*, a student was disciplined for writing a blog post casting administrators in a bad light and encouraging peers to harass them.²³⁰ The Second Circuit reasoned that the post was a foreseeable disruption to the school due to the language used, the incorporation of false information, and the fact that the post directly pertained to a school event.²³¹ While the outcome may have been correct in this limited instance, the test articulated in *Doninger* fails to define the content that is within its intended scope.²³² Consider a hypothetical situation in which a student writes a blog post defending a controversial immigration ban and encouraging others to speak out in the same way.²³³ If it is reasonably foreseeable that the speech would cause a material and substantial disruption in class, the school could lawfully take disciplinary action.²³⁴ Political speech has consistently been

226. *Id.* For an in-depth discussion of what it might take to make speech “reasonably foreseeable” to reach the schoolhouse, see Ronna Greff Schneider, *General Restrictions on Freedom of Speech in Schools*, 1 EDUCATION LAW § 2:3 (2016) (analyzing the *Tinker* opinion and providing in-depth information on the ‘substantial and material disruption’ standard); Levin, *supra* note 25, at 870 (making an argument as to what makes it reasonably foreseeable to administrators that online speech will reach the schoolhouse, but stating that the standard is subjective).

227. Nathan S. Fronk, *Doninger v. Niehoff: An Example of Public Schools’ Paternalism and the Off-Campus Restriction of Students’ First Amendment Rights*, 12 U. PA. J. CONST. L. 1417, 1438 (2009) (arguing the test used in *Doninger* is too broad and will be problematic for students going forward).

228. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). *See* J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (en banc) (holding “[a] bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression”); Marcus-Toll, *supra* note 23, at 3430–31 (criticizing the reasonable foreseeability threshold test).

229. *Doninger*, 527 F.3d at 348.

230. *Id.* *See supra* Part I.D.1 (discussing *Doninger*). *See also supra* note 101 and accompanying text (discussing the speech at issue in *Doninger*).

231. For an in-depth review of the Court’s reasoning and the competing arguments, see Hayes, *supra* note 102, at 260; Travis Miller, *Doninger v. Niehoff: Taking Tinker Too Far*, 5 LIBERTY U. L. REV. 303, 324 (2011) (arguing that the Second Circuit has a misguided approach to applying what *Tinker* was intended to portray, and “[s]uch an exercise of *Tinker*’s substantial disruption test was never considered by the Court”).

232. *See* Fronk, *supra* note 227, at 1420 (arguing “the court did not define how or when its [substantial disruption] test would be met”); Miller, *supra* note 231, at 324 (“This test, as *Doninger* clearly noted, allows a school to suppress speech that it reasonably predicts will cause disruption.”).

233. In *Snyder*, Judge Smith hypothesized a scenario in which a student could be punished for writing a controversial blog post on gay marriage, similar to the hypothetical posed herein. *Snyder*, 650 F.3d at 924.

234. *Id.* For further discussion on what constitutes a “substantial and material” disruption, see Kristi L. Bowman, *Symposium: The Civil Rights Roots of Tinker’s Disruption Tests*, 58 AM. U. L.

protected, but the breadth of this specific test could become a vehicle to suppress this type of conduct.²³⁵

As the Court held in *Packingham*, statutes or policies enacted by a governmental entity must be narrowly written to survive heightened scrutiny.²³⁶ The North Carolina statute that was held unconstitutional in *Packingham* was too broad because it restricted access to websites, and thus speech, that was unrelated to the statute's stated interest of protecting minors from sexual predators.²³⁷ Similar to the statute in *Packingham*, the reasonable foreseeability threshold does not define the type of speech that one could reasonably foresee causing a substantial disruption.²³⁸ In this regard, the test serves to limit more speech than necessary to protect the interests of the schools.²³⁹

Second, the test affords school administrators too much discretion.²⁴⁰

REV. 1129 (2009); Levin, *supra* note 25, at 861 (defining "substantial disruption" as it was intended in *Tinker* and the distorted definition school administrators use today).

235. See 147 CONG. REC. S.3233, 3235 (daily ed. June 19, 2001):

In the 21st Century, it's easy to forget that America's Founding Fathers sacrificed all to give Americans political freedom. These patriots fought and risked their lives and everything they had to secure and protect free political speech, dissent or assent, of all kinds. Free political speech protects us from tyranny.

For a discussion on the history of political speech in the United States, see FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT: WHY FREEDOM OF SPEECH MATTERS* 25 (2017); *Second Circuit Holds That Qualified Immunity Shields School Officials Who Discipline Students for Their Online Speech* — *Doninger v. Niehoff*, 125 HARV. L. REV. 811, 817 (2008) (critiquing the broad test the court promulgated in *Doninger*, and opining that the court "in effect suggested that student speech is not protected when it causes or perpetuates a controversy at school or when it disrupts student government"). See also *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) ("The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'").

236. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (holding "[i]n order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest'" (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014))).

237. See *supra*, Part II.C (discussing *Packingham*). See also Post, *supra* note 205 ("This statute — like many of the laws concerning what sex offenders may and may not do — was preposterously overly broad from the get-go, and the only question in my mind was whether *any* justices could possibly fail to see that.") (emphasis in original).

238. See Miller, *supra* note 231, at 321–23 (criticizing the test the court laid out in *Doninger*, arguing that the "reasonable foreseeability" threshold is inconsistent with *Tinker* and "*Doninger* took a misguided approach regarding when the *Tinker* test should govern"). See also *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988) (stating that the Second Circuit's approach, and thus the reasonable foreseeability threshold, was "in fundamental conflict with the Supreme Court's analysis in *Tinker*").

239. Compare *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (using the reasonable foreseeability threshold and upholding the punishment for an off-campus blog post), with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 210 (3d Cir. 2011) (using the intent threshold to vacate the punishment for an off-campus blog post).

240. R. Chace Ramey, *The School Official's Ability to Limit Student First Amendment Freedom: Exploring the boundaries of Student Speech and Expression in School as Defined by the*

Whether it is reasonably foreseeable that speech will reach school property is certainly subjective, and what is foreseeable to one administrator may not be foreseeable to another.²⁴¹ The Eighth Circuit illustrated this flaw in *Wilson*.²⁴² The school administrators in *Wilson* suspended two students for creating a website containing racist and sexually explicit posts about other students at the high school.²⁴³ The students used a foreign domain website, which prevented people in the United States from finding the website through a typical search.²⁴⁴ But, if a person knew the specific domain address, any user could find the website.²⁴⁵ The court indicated that only a few students knew about the website.²⁴⁶ Nonetheless, the administrators argued, and the court agreed, it was reasonably foreseeable that this speech would reach the school, despite the privacy precautions inherent in the post.²⁴⁷ Thus, the court implied that it is reasonably foreseeable that any online speech pertaining to a student, teacher, or anything in relation to the school will reach school grounds.²⁴⁸ This allows administrators broad discretion to characterize

United States Federal Courts (Spring 2009) (unpublished Ph.D. thesis, Iowa University) (on file with the Iowa University Library system); Jonathan Turley, *Second Circuit Upholds Punishment of High School Student for Out-of-School Web Entry*, JONATHANTURLEY.ORG (May 30, 2008), <https://jonathanturley.org/2008/05/30/second-circuit-upholds-punishment-of-high-school-student-for-out-of-school-web-entry/> (“The continual expansion of the authority of school officials over student speech teaches a foul lesson to these future citizens. I would prefer some obnoxious speech than teaching students that they must please government officials if they want special benefits . . .”).

241. Brief of Appellees at 53, S.J.W. *ex rel.* *Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (No. 12–1727), 2012 WL 2884128 (“[T]he school’s strong authority over student speech extends no further than the schoolhouse gates. Otherwise, simple enrollment in a public school would operate as a partial forfeiture of otherwise inviolable First Amendment rights. This is not, and cannot be, the law.”). See J.S. *ex rel.* *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (holding “[t]hose officials involved in the educational process perform ‘important, delicate, and highly discretionary functions’ . . .” but that “[t]he authority of public school officials is not boundless”).

242. See generally S.J.W. *ex rel.* *Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2011).

243. *Id.* at 771, 774.

244. *Id.* at 774. For an explanation of a “foreign domain” website, see Todd Stone, *What You Didn’t Know About .LY, .TV, .SY and Other Foreign Domain Names*, BUSINESS INSIDER (July 21, 2011, 12:48 PM), <http://www.businessinsider.com/what-you-didnt-know-about-ly-tv-sy-and-other-foreign-domain-names-2011-7>.

245. *Wilson*, 696 F.3d at 774 (“[A]ny U.S. user could access NorthPress if she knew the website address. The site was not password protected.”); Stone, *supra* note 244 (discussing the significance of registering a website under a foreign domain name).

246. *Wilson*, 696 F.3d at 775.

247. *Id.* at 778; Brief of Appellees at 12, S.J.W. *ex rel.* *Wilson v. Lee’s Summit R-7 Sch. Dist.*, *supra* note 241 (noting that the website was not password protected and, as such, it was accessible to anyone).

248. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010) (holding that in the absence of evidence that conduct would result in a substantial disruption, a school official cannot characterize speech as “reasonably foreseeable” to reach school grounds).

any speech they find offensive as reasonably foreseeable to reach school grounds.²⁴⁹ Furthermore, the broad discretion afforded to school administrators potentially limits students' conduct on all social media platforms as well as the Internet in general, creating an impermissibly broad limitation like the statute that was held unconstitutional in *Packingham*.²⁵⁰

Finally, because any online speech may inevitably make its way to school grounds due to the expansive reach of the Internet, the test fails to afford sufficient protection for online speech.²⁵¹ Because so many teens report going online daily, all writings on social media may foreseeably make their way onto school grounds.²⁵² This subjects speech that is spoken or written on paper to a higher degree of protection than speech that is written online due to the pervasive nature of the Internet.²⁵³ Justice Kennedy alluded to this premise in *Packingham* when he cautioned courts

merely because the speech is offensive); Marcus-Toll, *supra* note 23, at 3430 (discussing the potentially broad scope of the *Doninger* test).

249. *Hayes*, *supra* note 102, at 279 (“Giving administrators this sort of unfettered discretion could potentially chill all juvenile speech.”). See Darin M. Williams, *Tinker Operationalized: The Judiciary’s Practical Answer to Student Cyberspeech*, 62 DEPAUL L. REV. 125, 152 (2012) (arguing that “[u]nder the operationalized *Tinker* standard expounded above, schools clearly have broad authority” and “[t]his leads to concern that schools have used, and will continue to use, this wide deference to unconstitutionally infringe upon the First Amendment rights of students”).

250. Miller, *supra* note 231, at 305 (arguing that “[b]y clinging to *Tinker*, the Second Circuit . . . stretched a school’s authority under *Tinker*”). See Abby Marie Mollen, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1510 (2008) (stating that the federal appellate courts have “treated school officials as the protagonists and focused on facilitating their ‘comprehensive authority . . . to prescribe and control conduct in the schools’ . . . an authority that *Tinker* recognized but limited”).

251. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that “social media users employ these websites to engage in a wide array of protected First Amendment activit[ies]”). See TED, *Andrew Blum: What is the Internet, really?*, YOUTUBE (Sept. 19, 2012), https://www.youtube.com/watch?v=XE_FPEFpHt4 (discussing how quickly the Internet reaches across the world and the technology required to post a thought on social media). See generally Gwenn Schurgin O’Keeffe et al., *The Impact of Social Media on Children, Adolescents, and Families*, 127 AMER. ACAD. OF PEDIATRICS 800 (Apr. 2011), <http://pediatrics.aappublications.org/content/pediatrics/127/4/800.full.pdf>.

252. Lehnhart, *supra* note 3 (discussing the widespread use of social media by students); Phillip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 845 (“[S]ocial media facilitates mass participation in collective dialogues in virtual communities of interest.”).

253. See Sally A. Specht, *The Wavering, Unpredictable Line Between “Speech” and Conduct: The Expressive Conduct After Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990), 40 WASH. U. J. URB. & CONTEMP. L. 173, 187 (1991) (using the factual background in *Young v. New York City Transit Authority* as an analogy to categorize spoken speech that is suggestive, but protected, versus speech that is written and unprotected); Kathryn S. Vander Broek, *Schools and Social Media: First Amendment Issues Arising From Student Use of the Internet*, 21 No. 4 INTEL. PROP. & TECH. L.J. 11, 31 (2009) (discussing how frequently teachers create assignments based on at-home social media posting and how difficult it is to regulate content that will be seen by teachers and faculty).

from fashioning tests pertaining to the Internet due to its vast dimensions and ability to reach an unlimited number of people.²⁵⁴

2. Sufficient Nexus Threshold to *Tinker*

The sufficient nexus threshold adopted by the Fourth Circuit in *Kowalski v. Berkeley County Schools* has not been adopted by any other circuit.²⁵⁵ In *Kowalski*, the court held that the school was justified in suspending a student who created a social media account for the purpose of ridiculing another student.²⁵⁶ Under the test used by the Fourth Circuit in *Kowalski*, a school can discipline a student for off-campus speech that has a sufficient nexus to the school’s pedagogical interests.²⁵⁷ This test was first articulated in *Hazelwood School District v. Kuhlmeier*, but the speech in *Kuhlmeier* was a school-sponsored newspaper, rather than a social media post from a personal account.²⁵⁸ Moreover, it is uncertain whether the Court in *Kuhlmeier* could have anticipated its threshold would apply to off-campus speech, particularly speech posted online.²⁵⁹

The sufficient nexus threshold is overly broad and fails to define what interests will warrant discipline for off-campus, online speech.²⁶⁰

254. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017); 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, 235–36 (2010) (expressing “three reasons why it is reasonably foreseeable that nearly any and all controversial or provocative speech that is created and posted [online,] off-campus by a student will come to the attention of school authorities:” (1) tattletale students; (2) curious teachers/administrators; and (3) in-school buzz/discussion). See Alana Nunez-Garcia, *How Much Does Social Media Affect High School Students?*, L.A. TIMES (June 17, 2016), <http://highschool.latimes.com/saint-joseph-high-school/how-much-does-social-media-affect-high-school-students/> (explaining how quickly content on social media travels through students).

255. See Rothman, *supra* note 73, at 294 (discussing the different approaches the circuits take when analyzing student speech). Compare *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011) (using a sufficient nexus threshold with the *Tinker* test), with *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008) (using the reasonably foreseeable and *Tinker* tests for off-campus speech), and *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928 (3d Cir. 2011) (en banc) (using the reasonably foreseeable and *Tinker* approaches, with an emphasis on intent).

256. *Kowalski*, 652 F.3d at 568.

257. *Id.* at 573. See generally *supra* Part I.D.3 (discussing the sufficient nexus test as articulated by the Fourth Circuit).

258. Compare *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988) (restricting students’ distribution of a school newspaper), with *Kowalski*, 652 F.3d at 577 (restricting students’ online speech).

259. Brief of Appellant at 22, *Kowalski v. Berkeley Cty. Pub. Schs.*, 652 F.3d 565 (4th Cir. 2011) (No. 10–1098), 2010 WL 2380373, at *22 (“[I]n Justice White’s majority opinion [in *Kuhlmeier*], the Court recognized that, although the school could censor speech, ‘it could not censor similar speech outside the school.’”). See generally Chemerinsky, *supra* note 11, at 529 (discussing the limits to the reach of the Supreme Court’s student speech cases).

260. Kevin Nathaniel Troy Fowler, *Tinker Tortured: The Scope of Student Off-Campus Viral Speech Rights in the Federal Circuits*, 104 KY. L.J. 719, 739 (2015) (arguing that “‘pedagogical

Although its breadth is not as wide as the reasonable foreseeability approach, schools can justify punishment by setting forth any interest that promotes the education of students and protects their health and safety.²⁶¹ The interests articulated in *Kowalski* were student health and safety against cyberbullying, but school administrators may choose any interest that fits the circumstances of the speech.²⁶² For example, if a student wrote a post on his Facebook profile chastising gay marriage, the administration could cite the interest of institutional diversity and may have authority to punish this speech.²⁶³

As a school could potentially pick any important interest to justify regulating off-campus conduct, the articulation of this threshold test may be overbroad and afford schools too much authority.²⁶⁴ While schools do have an interest in maintaining efficiency and safety, in order to survive *Packingham* scrutiny, the interest must be significant.²⁶⁵ In contrast, under the sufficient nexus approach, the school administrators could choose any interest, so long as it is implicated by the speech.²⁶⁶ Therefore, schools can use the sufficient nexus test to justify discipline

interests' is an extremely vague term that the Court did not spend sufficient time describing"); Marcus-Toll, *supra* note 23, at 3431 (arguing this approach is unclear and thus should not be used to analyze off-campus speech).

261. Compare *Kowalski*, 652 F.3d at 572 (describing the interest the school had in preventing bullying), with *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (Alito, J., concurring) (writing "detering drug use by schoolchildren is an 'important – indeed, perhaps compelling' interest"), and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (stating the school had a legitimate interest in protecting schoolchildren from lewd and indecent language).

262. *Kowalski*, 652 F.3d at 572. See Calvert, *supra* note 254, at 251 (describing the number of interests a school district has in ensuring efficiency).

263. See, e.g., Philip Tegeler, *The 'Compelling Government Interest' in School Diversity: Rebuilding the Case for an Affirmative Government Role*, 47 U. MICH. J.L. REFORM 1021, 1023 (2014) (describing the interests schools have in diverse environments: "[p]roviding students with diverse, inclusive educational opportunities from an early age is crucial to achieving the nation's educational and civic goals . . ." (quoting U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 1 (2011))).

264. See Marcus-Toll, *supra* note 23, at 3431 (asking "would a school's interest in shielding its faculty be sufficient? . . . Or a school's interest in preserving institutional integrity?"); Kevin P. Brady, *Student-Created Fake Online Profiles Using Social Networking Websites: Protected Online Speech Parodies or Defamation?*, 244 WEST EDUC. L. REP. 907, 908 (2009) (noting that "lower courts are faced with unclear and often contradictory legal guidelines of how far a school's legal authority extends when regulating student cyberspeech").

265. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). See *supra* Part II.C (discussing the level of scrutiny applied in *Packingham*). In order for a regulation subject to intermediate scrutiny to be constitutional, it must further an important government interest by means that are substantially related to that interest. See also Redish, *supra* note 199, at 128 (describing intermediate scrutiny).

266. See Tegeler, *supra* note 263, at 1023 (providing examples of important interests schools can have).

that would not survive *Packingham* scrutiny. As such, this test is overly broad.²⁶⁷

In addition, the sufficient nexus test leaves open the question of what makes the nexus between off-campus speech and a school’s pedagogical interests sufficiently strong.²⁶⁸ The sufficient nexus standard may apply when the speech is directed toward a student, administrator, or event;²⁶⁹ or, when the speech pertains to potential violence.²⁷⁰ But, the court did not provide specific guidance to determine when this standard would apply, resulting in possible inconsistent application of the test to different situations.²⁷¹ This inconsistent application will likely restrict students’ right to free expression because of the many interests schools could articulate to justify punishment.²⁷² Further, under *Packingham*, the Court made it clear that in order to survive heightened scrutiny, the statute, or in this case, the threshold test, must be narrowly tailored.²⁷³ Stating that a school administrator needs a sufficient nexus between the speech and the school’s interests does not define the types of conduct for which discipline could be justified. Therefore, the test is not narrowly tailored.²⁷⁴

267. *Id.* See Marcus-Toll, *supra* note 23, at 3431 (noting “[t]he Kowalski court, however, declined to offer guidance on the types of pedagogical interests that would permit jurisdiction”).

268. See Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 626 (2010) (describing the inconsistency of the sufficient nexus test as applied).

269. See, e.g., *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011) (holding the student’s speech was impermissible because it was “aimed at a fellow student” and “created ‘actual or nascent’ substantial disorder and disruption in the school”) (citations omitted); *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008) (holding a student’s speech was subject to discipline because it was targeted at the school principal).

270. See, e.g., *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1070–71 (9th Cir. 2013) (holding violent speech is impermissible because a school has an interest in protecting students); *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 114–15 (2d Cir. 2012) (holding student speech that embraced violence was not protected due to a school’s interest in preventing attacks).

271. Marcus-Toll, *supra* note 23, at 3431. For an in-depth critique of the “sufficient nexus” threshold test, see Tiffany Emrick, *When Myspace Crosses the School Gates: The Implications of Cyberspeech on Students’ Free Speech Rights*, 40 U. TOL. L. REV. 785, 806–10 (2009).

272. See *Kowalski*, 652 F.3d at 573 (stating “we need not fully define that limit here, as we are satisfied that the nexus of Kowalski’s speech to [the school’s interest] was sufficiently strong . . .”); Harriet A. Hoder, *Supervising Cyberspace: A Simple Threshold for Public School Jurisprudence*, 50 B.C. L. REV. 1563, 1585 (2009) (writing “the court still decided to use the less definite ‘sufficient nexus’ test, presumably to allow for flexibility in applying the student speech jurisprudence, depending on the facts of the case”).

273. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

274. See *Kowalski*, 652 F.3d at 573 (stating that the school needs a sufficient nexus between the speech and the school, but not defining what is within the scope of the nexus); SMOLLA, *supra* note 199 (defining intermediate scrutiny).

3. Intent Precursor to the Reasonable Foreseeability Threshold

While the Third Circuit specifically adopts the reasonable foreseeability threshold to the *Tinker* test in off-campus speech cases, the court is unique in its application.²⁷⁵ In assessing whether it is reasonably foreseeable that the speech will reach school grounds and cause a substantial disruption, the court looks at whether the student intended the speech to make its way onto school grounds and if the student intended the content of the speech to be taken seriously.²⁷⁶ In *J.S. ex rel. Snyder v. Blue Mountain School District*, the court held that because the student did not intend for his social media account that ridiculed the school's principal to reach the school, it could not be reasonably foreseeable that this speech could cause a substantial disruption.²⁷⁷ In *Layshock v. Hermitage School District*, the court held the same under nearly identical facts.²⁷⁸ The intent requirement for determining whether discipline can be upheld under *Tinker* may be difficult in application, but it is a step in the right direction in protecting students' First Amendment rights.²⁷⁹

To satisfy the intent requirement, the test requires an express showing that the student meant for his or her speech to reach the school.²⁸⁰ A student will likely not admit that he or she intended this speech to reach

275. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (en banc) (adopting the reasonably foreseeable approach focusing on the student's intent to determine if the speech is subject to First Amendment protection); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 214 (3d Cir. 2011) (en banc) (applying the same test articulated in *Snyder*).

276. See *Snyder*, 650 F.3d at 930 (holding the student did not intend to cause a material disruption because "the profile was so outrageous that no one could have taken it seriously, and no one did"). See also Rashmi Joshi, *Sharing the Digital Sandbox: The Effects of Ubiquitous Computing on Student Speech and Cyberbullying Jurisprudence*, 53 SANTA CLARA L. REV. 629, 657 (2013) (noting "intentional distribution of speech occurs when the student . . . knows to a substantial certainty that the student's actions will cause the speech to be distributed inside the schoolhouse gates") (quoting Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 150 (2007)).

277. *Snyder*, 650 F.3d at 918.

278. *Layshock*, 650 F.3d at 208. For a comparison between *Snyder* and *Layshock*, see Fern L. Kletter, Annotation, *School's Violation of Parents' Substantive Due Process Rights Due to Their Child's Suspension or Expulsion*, 91 A.L.R. 6th 365, II § 4 (2014).

279. See *Layshock*, 650 F.3d at 219 ("[S]chools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here."); Marcus-Toll, *supra* note 23, at 3433 ("Further undergirding several opinions is the notion of intentionality . . . [as] for other potential factors, their role in the analysis is less than clear.").

280. See, e.g., *Snyder*, 650 F.3d at 940 ("Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech."). See also Roy Allen Weeks, *The First Amendment, Public School Student, and the Need for Clear Limits on School Officials' Authority Over Off-Campus Student Speech*, 46 GA. L. REV. 1157, 1182 (2012) (discussing that off-campus speech can be subject to discipline "based on its target audience, whether the audience receives it, and what the recipients do upon receiving it").

the school, and clear evidence to the contrary could be difficult to establish.²⁸¹ Therefore, school administrators might have a difficult time punishing speech without express evidence of an intention to disrupt.²⁸² This express evidence standard results in greater protection of student speech compared to other approaches.²⁸³ For example, the speech in *Wilson*, which was unprotected in the Second Circuit, would be protected under this test due to the precautions taken to make the website private.²⁸⁴

The Third Circuit’s context requirement bolsters students’ rights in the digital age.²⁸⁵ The intent precursor to the reasonable foreseeability threshold allows students to speak on social media platforms about controversial topics without fear of being punished, so long as the speaker does not intend for the speech to cause a substantial disruption in school.²⁸⁶ Moreover, if a student intends to cause a substantial disruption in school based on posts on social media, disciplinary action probably would be warranted.²⁸⁷ The intent requirement, while broad, creates a protective layer for students’ online speech.²⁸⁸ If the North Carolina statute at issue in *Packingham* would have been written to include specific language pertaining to a sex offender’s intent to correspond with

281. See, e.g. T.J. Berndt, *Transitions in Friendship and Friends’ Influence*, in TRANSITIONS THROUGH ADOLESCENCE: INTERPERSONAL DOMAINS AND CONTEXT 57-84 (J.A. Graber et al., eds., 1996) (discussing how school-aged children are significantly influenced by their friends and social surroundings in making decisions); Valerie Ulene, *A Teen’s Friends are a Powerful Influence*, L.A. TIMES (Apr. 11, 2011), <http://articles.latimes.com/2011/apr/11/health/la-he-the-md-teens-friends-20110411> (discussing how children’s bad behavior is often to impress friends).

282. In contrast, schools will have an easier time if there is evidence of an actual substantial disruption. See *infra*, Part IV (proposing a heightened substantial disruption standard).

283. This standard is more speech protective due to the extra requirement for sustaining discipline, as opposed to a mere foreseeability approach used by the Second Circuit. Compare *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (vacating a student’s suspension due to lack of intent), with *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (upholding a student’s suspension based on foreseeability).

284. In *Wilson*, the court used a reasonably foreseeable precursor to *Tinker* to hold a student’s online speech was impermissible, even though the student undertook privacy precautions to prevent peers, parents, and administrators from finding the website. 696 F.3d 771 (8th Cir. 2012). Thus, under the “intent” approach, the Third Circuit would likely find the students’ conduct permissible.

285. See *infra* Part IV (proposing that school policies should include a provision that requires a student to intend for their speech to cause a disruption in the school in order to be subject to disciplinary action).

286. See, e.g., *Layshock*, 650 F.3d at 214 (holding because the student did not intend for his profile, ridiculing the school’s principal, to cause a disruption, it was protected speech); *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc) (holding the same).

287. See *Schenck v. United States*, 249 U.S. 47, 51 (1919) (stating “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic”).

288. See *supra* note 283 and accompanying text (arguing this threshold is more speech protective than others); *infra* Part III.A.4 (discussing how the Ninth Circuit’s approach is arguably the most speech protective).

minors, the Court might have ruled it constitutional.²⁸⁹

4. Faced by an Identifiable Threat of School Violence Test

The Ninth Circuit's threshold test applies a *Tinker* analysis to off-campus speech only when the speech gives rise to an identifiable threat of school violence.²⁹⁰ Similar to the Third Circuit approach, this test affords more protection for student speech.²⁹¹ This premise is demonstrated in *Wynar v. Douglas County School District*.²⁹² In *Wynar*, the court upheld a student's suspension stemming from instant messages to classmates that threatened a school shooting.²⁹³ The court applied *Tinker*'s material and substantial disruption standard after determining that these messages constituted a threat of school violence, placing special emphasis on the school's interest in safety.²⁹⁴ Based on this reasoning, it is likely that the speech in *Doninger, Kowalski, Wilson*, and *Snyder* would be permissible under the First Amendment.²⁹⁵

While this test advocates for the free expression of students and limits the authority of administrators, the test as articulated in *Wynar* does not encompass speech that schools are entitled to suppress.²⁹⁶ The court fails to define what constitutes "violence," whether it be physical violence toward the school as a whole or emotional violence against a classmate

289. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (holding the North Carolina statute is unconstitutional because it is too broad with no *mens rea* requirement).

290. See *Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013). See also Fowler, *supra* note 260, at 730 (noting the Ninth Circuit approach is "highly protective of student speech, and can thus be deemed the most protective of any of those tests developed by other circuits").

291. See *supra* notes 283, 288 and accompanying text (describing the Third Circuit's "intent" threshold as speech protective).

292. *Wynar*, 728 F.3d at 1062.

293. *Id.* at 1065.

294. Given the knowledge the shootings at Columbine, Thurston and Santee high schools, among others, have imparted about the potential for school violence . . . we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either.

Id. at 1069–70. See also KERN ALEXANDER, *THE LAW OF SCHOOLS, STUDENTS AND TEACHERS IN A NUTSHELL* 163 (West Academic ed., 5th ed. 2015) (discussing how in *Wynar*, the court held "school officials do not have to wait for a substantial disruption to occur before taking action").

295. The speech at issue in these cases would be permissible under the First Amendment because in each instance there was not an identifiable threat of violence, just offensive speech. See *Kowalski v. Berkeley Cty. Schs.*, 653 F.3d 565, 567 (4th Cir. 2011) (the speech was hateful toward a peer); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District* 696 F.3d 771, 773 (8th Cir. 2011) (the blog post was sexually explicit); *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (en banc) (the speech ridiculed the school's principal); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (the speech ridiculed the school's principal).

296. *Wynar*, 728 F.3d at 1068 (holding *Tinker* may *only* apply when the speech involves violence, but not identifying what test would apply if the speech was not violent).

through cyberbullying.²⁹⁷ In this case, it seems that the test only encompasses physical harm, forgetting the substantial and detrimental effects that cyberbullying has on students and the school environment.²⁹⁸

Still, by declining to extend *Tinker* to off-campus speech involving anything except threats of school violence, the Ninth Circuit’s test better protects students’ First Amendment rights than other circuits’ tests, and is more in line with the reasoning in *Packingham* and *Reno*.²⁹⁹ Because this a content-based restriction on speech, it is subject to strict scrutiny.³⁰⁰ In disciplining a student for speech on social media that the school thinks is an identifiable threat of school violence, the school would have to prove that this discipline is narrowly tailored to achieve a compelling interest.³⁰¹ Certainly, protecting students from violence would be a compelling interest.³⁰² However, because “violence” is not defined in the test, it would likely not be narrowly tailored to further that interest.³⁰³ If the Ninth Circuit defined what encompasses an identifiable threat of school violence, this test would be consistent with strict scrutiny, the

297. *Id.*; Marcus-Toll, *supra* note 23, at 3432 (arguing that “if the Wynar test is intended to encompass only threats of serious bodily harm, it is uncertain why the line should arbitrarily be drawn there”).

298. Not only does bullying affect students during adolescence, but studies show the effects of bullying last long into adulthood. Alice G. Walton, *The Psychological Effects of Bullying Last Well Into Adulthood*, FORBES (Feb. 21, 2013, 12:17 PM), <https://www.forbes.com/sites/alicegwalton/2013/02/21/the-psychological-effects-of-bullying-last-well-into-adulthood-study-finds/#4aee11f91592>. See Nicholas Bakalar, *Being Bullied Is Bad for Your Health*, N.Y. TIMES (May 12, 2014, 3:08 PM), <https://well.blogs.nytimes.com/2014/05/12/being-bullied-is-bad-for-your-health/> (analyzing studies about the effects of bullying and calling for a legislative response).

299. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1998). See *Wynar*, 728 F.3d at 1069 (holding *Tinker* does not apply absent a threat of violence).

300. Montroll, *supra* note 173, at 500 (discussing content-based restrictions, and noting that while strict scrutiny always mandates the same test, courts often come to different conclusions based on similar facts). See *Reno*, 521 U.S. at 858 (holding a content-based statute unconstitutional).

301. See Blum, *supra* note 174 (discussing strict scrutiny as applied to content-based restrictions). See also *infra* Part IV (proposing a model school policy that will pass strict scrutiny, although it is typically looked upon with disfavor).

302. For a look at the compelling interests schools have after the April 20, 1999, shooting at Columbine High School, see William C. Nevin, *Neither Tinker, Nor Hazelwood, Nor Fraser, Nor Morse: Why Violent Student Assignments Represent a Unique First Amendment Challenge?*, 23 WM. & MARY BILL RTS. J. 785 (2015).

303. In *Reno*, the Supreme Court held that the content-based restriction was not narrowly tailored because the words “lewd” and “obscene” were not defined in the statute. 521 U.S. 844, 870 (1997). Specifically, the Court wrote, “indecenty has *not* been defined to exclude works of serious literary, artistic, political or scientific value.” *Id.* at 863 (emphasis in original). This reasoning can be instructive for the Ninth Circuit critique. Because “violence” is not defined, it cannot serve to exclude acts that should be impermissible, but are not per the statute.

reasoning in *Reno*, and the holding in *Packingham*.³⁰⁴

5. The Fifth Circuit's Case-by-Case Approach

In *Bell v. Itawamba County School Board*, the Fifth Circuit specifically declined to adopt a test to apply to future cases, but ruled on the matter based on the individual facts of the case.³⁰⁵ The majority's reasoning allows *Tinker* to apply to off-campus speech when: "(a) a student intentionally directs speech at the school community, and (b) when the speech is reasonably understood by school officials to threaten, harass, and intimidate a teacher."³⁰⁶ This test is flawed because it limits disciplinary action to speech directed at teachers and does not provide a rule for deciding future cases.³⁰⁷

The first prong of the test—that the student intentionally directs speech at the school—is similar to the Third Circuit's intent precursor, and is thus subject to the same praise and criticism.³⁰⁸ As to the second prong of the test, Judge Dennis in a dissenting opinion criticized this as a content-based restriction, and argued that permissibility hinges on the listener's idiosyncratic interpretation of the speech.³⁰⁹ This vague standard will result in inconsistent First Amendment protections.³¹⁰ This

304. For a commentary regarding the importance of defining terms in a statute or policy, see Jeanne Price, *Wagging, Not Barking*, (Univ. of Nevada, Las Vegas Sch. of Law Scholarly Works Grp., Paper No. 764), <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1786&context=facpub>.

305. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 410 (5th Cir. 2015) (Dennis, J., dissenting) (“[a]s an initial matter, I am compelled to point out that the majority opinion’s test unabashedly adopts almost the precise wording of the Itawamba County School Board’s disciplinary policy”).

306. *Id.* at 396. The majority opinion argues this test is consistent with the Fifth Circuit precedent in *Shanley*, *Sullivan*, and *Porter*. See *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004) (analyzing the speech at issue under *Tinker*, but noting the circuit split regarding off-campus speech); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973) (applying a traditional *Tinker* analysis without any threshold); *Shanley v. N.E. Indep. Sch. Dist., Bexar Cty., Tex.*, 462 F.2d 960, 974–75 (5th Cir. 1972) (applying a traditional *Tinker* analysis).

307. *Bell*, 799 F.3d at 400. See Aleaha Jones, *Schools, Speech, and Smartphones: Online Speech and the Evolution of the Tinker Standard*, 15 DUKE L. & TECH. REV. 155, 167–70 (analyzing what the outcome of *Bell* would be under a true threat test and a traditional *Tinker* analysis, while providing a critique of the majority’s test laid out in *Bell*).

308. See *supra* Part III.A.3 (discussing the intent threshold to *Tinker* as speech protective: “[t]he intent precursor to the reasonable foreseeability threshold allows students to speak on social media platforms about controversial topics without the fear of being punished, so long as the speaker does not intend for the speech to cause a substantial disruption”); see also *supra* notes 283–289 and accompanying text.

309. *Bell*, 799 F.3d at 410 (Dennis, J., dissenting); see *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1998) (stating content-based restrictions are subject to strict scrutiny); Blum, *supra* note 174 (discussing content-based restrictions on speech and the analysis resulting therefrom).

310. *Bell*, 799 F.3d at 391 (explaining that student speech issues should be decided with a bright-line rule, stating “student-speech claims are evaluated ‘in light of the special characteristics

content-based restriction likely would not withstand strict scrutiny under *Reno* because while protection of teachers might be a compelling government interest, the means are certainly not narrowly tailored to achieve this purpose.³¹¹ The court additionally failed to define what speech is intended to be subject to punishment; thus, the test is too broad.³¹²

However, the most problematic part of this test is that it only pertains to speech directed at teachers, leaving out entirely offensive speech made toward peers.³¹³ While a blog post harassing a teacher at a school would be subject to discipline, assuming all the other elements of the test are satisfied, the same post about a student could be permissible under this test.³¹⁴ In this regard, the Fifth Circuit deemphasizes the harmful effects of cyberbullying on students.³¹⁵

of the school environment, beginning by categorizing the student speech at issue”) (quoting *Morgan v. Swanson*, 659 F.3d 359, 375 (5th Cir. 2011)). As one commentator put it, “the Fifth Circuit’s *Bell* . . . decision misapplies *Tinker* and creates even more ambiguity with its vague exception.” Katherine E. Geddes, *First Amendment – Student Speech – Why Bell Tolls a Review of Tinker’s Application to Off-Campus, Online Speech*, 69 SMU L. REV. 275, 281 (2016).

311. *Bell*, 799 F.3d at 399. See Leets, *supra* note 182, at 299 (discussing *Reno*’s application to online hate speech). While the Leets article does not address the facts of *Bell*, it is instructive in evaluating circumstances in which online hate speech would not be protected.

312. *Bell*, 799 F.3d at 399. See Price, *supra* note 304, at 1000 (discussing the importance of defining terms in statutes in order to prevent litigation and confusion in executing a statute). For another interpretation of the reasoning in *Kowalski*, see Marcus-Toll, *supra* note 23, at 3431 (articulating that the test set forth in *Kowalski* in practice is the same as the test articulated in *Doninger* and adopted by the Second and Eighth circuits, stating “the standard is susceptible to the same criticism that the *Doninger* test warrants”).

313. The court in *Bell* articulated the *Tinker* test as follows:

Accordingly, in the light of our court’s precedent, we hold *Tinker* governs our analysis, as in this instance, when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.

Bell, 799 F.3d at 396. The test notably neglects to address speech that threatens, harasses, and intimidates a student. See Shaver, *supra* note 15, at 1573 (discussing problems with the test articulated by the majority and advocating for the Supreme Court to hear a case to resolve this issue).

314. The court may have ruled in this manner due to the school policy’s language. The court states, “the school-district’s policy demonstrates an awareness of *Tinker*’s substantial-disruption standard, and the policy’s violation can be used as evidence” supporting the discipline. *Bell*, 799 F.3d at 399.

315. See *supra* note 288 and accompanying text (describing the harmful effects of cyberbullying carried into adulthood). However, many states have enacted cyberbullying laws to combat the issue of violence against students. See Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 884 (2010) (focusing on how cyberbullying laws fit within the realm of Supreme Court student speech cases, concluding that “[u]ntil the Supreme Court clarifies the authority of schools over online speech, legislators and educators must respond to cyberbullying in a way that avoids restricting students’ free speech rights”).

It is evident that the federal appellate courts need the Supreme Court to articulate a uniform test in order to properly address this pressing issue.³¹⁶ In the meantime, school districts should take matters into their own hands, borrowing some of the tests the various circuits employed to craft their own social media policies.³¹⁷ In order to do so, it is useful to study individual school policies to discover what speech schools find inside the scope of discipline, and what speech is afforded protection.³¹⁸

B. Analyzing School Social Media Policies

Off-campus student speech jurisprudence is in disarray.³¹⁹ Absent guidance from the Supreme Court, the federal appellate courts have distorted the framework of *Tinker* to apply their own, inconsistent analyses to fit the facts before them.³²⁰ While some appellate courts interpret the Court's holdings in cases involving student speech occurring *inside* the school to apply to speech occurring *outside* the school, this may be looking too liberally at these holdings.³²¹ Some public school guidelines, which regulate students' use of social media outside the schoolhouse, are impermissible blanket restrictions on speech masked by

316. This statement has been articulated throughout many scholarly articles discussing the issue. See David L. Hudson, Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621, 625 (2012) (arguing for the Supreme Court to address the issue and analyzing the inconsistent rulings based on the federal appellate court tests); Shaver, *supra* note 15, at 1573 (advocating for the Court to address off-campus online speech and providing a model test for the Supreme Court to use when it does so).

317. See *infra* Part IV (providing a model threshold for schools to implement while drafting policies pertaining to social media).

318. See *infra* Part III.B (analyzing the potential constitutional issues by considering each school policy with a *Packingham* and *Reno* lens, applying the Court's reasoning).

319. See *supra* Part III.A (considering the constitutionality of the many threshold tests to *Tinker* adopted by the federal courts of appeals). For an example of why this jurisprudence is in disarray, compare *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d. Cir. 2008) (using the reasonable foreseeability threshold and upholding the punishment for an off-campus blog post), with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 210 (3d Cir. 2011) (en banc) (using the intent threshold to vacate the punishment for an off-campus blog post). Based on nearly the same facts, the Second Circuit and the Third Circuit had completely different holdings.

320. Scott Dranoff has noted the inconsistency in holdings as a result of numerous tests:

These tests include abandonment of the *Tinker* test in off-campus speech cases, application of the *Tinker* test with additional restrictions, various methods of determining the speaker's intended place of dissemination, and frameworks for determining what types of off-campus speech may be regulated under restrictions for on-campus speech.

Dranoff, *supra* note 108, at 652.

321. See Mary Noe, *Sticks and Stones Will Break My Bones but Whether Words Harm Will Be Decided by a Judge*, 88 N.Y. ST. BAR J. 39, 40 (2016) (discussing that judges have frequently decided whether punishment for student speech is permissible, a decision that should be left to the legislature). But see Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 ST. LOUIS U. L.J. 531, 551 (2015) (arguing that the reasonably foreseeable test is speech protective and judges do not over-extend their authority).

language consistent with *Tinker*.³²² These overbroad policies leave students confused and give administrators too much power to decide what constitutes permissible expression and what should be subject to discipline.³²³ These social media policies, discussed in this Section, would most likely be found impermissible under *Reno* and *Packingham* because they are not narrow enough to survive the scrutiny the Supreme Court applied in those cases.³²⁴

1. Jordan-Elbridge Central School District

Jordan-Elbridge Central School District in Jordan, New York, enacted a social media policy in 2010 that severely limits students’ right to free speech on social media.³²⁵ Specifically, the policy requires students to “refrain from reporting, speculating, discussing or giving any opinions on topics related to the Jordan-Elbridge Central School District or students of the district that could be considered sensitive, confidential or disparaging.”³²⁶ The policy includes fourteen restrictions on students’ personal use of social media, and states that failure to abide by these rules could result in disciplinary action.³²⁷ Because the policy fails to define the type of speech subject to discipline, it serves as an impermissible content-based *and* content-neutral restriction on speech.³²⁸

322. See *infra* Part III.B.2 (analyzing the Pottsville Area School District’s policy, in which the language is consistent with the language found in *Tinker*). For an example of the problems schools face when attempting to regulate social media, see Jon Camp, *I-Team: School fights fuel debate over social media policies*, ABC (May 4, 2017), <http://abc11.com/news/school-fights-fuel-debate-over-social-media-policies-/1952960/>.

323. Cathryn Rudolph, *Unleashing Law Reviews Onto Social Media: Preventing Mishaps with a Social-Media Policy*, 30 T.M. COOLEY L. REV. 187, 187 (2013) (arguing that “[l]aw reviews can successfully implement a social-media plan and avoid mishaps by informing students what is expected, what is prohibited, and how they will be held accountable”). Although this statement pertains to students in graduate schools, its argument applies to students in secondary school as well. *Id.*

324. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (applying intermediate scrutiny to a content-neutral policy); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1998) (applying strict scrutiny to a content-based policy).

325. Jordan-Elbridge Central School District is located in upstate New York, in between Rochester and Syracuse in Onondaga County. For a statistical look at its test scores and comparisons to other public schools in the state of New York, see Evans et al., *New York School Test Scores*, N.Y. TIMES (Aug. 14, 2012), <https://www.nytimes.com/interactive/projects/new-york-schools-test-scores/counties/onondaga/districts/jordan-elbridge-central-school-district>.

326. *Jordan-Elbridge Social Media Policy*, *supra* note 162 (providing a content-based restriction subject to strict scrutiny under *Reno*).

327. *Id.* These fourteen restrictions are limited to conduct on personal social media profiles. Although the school “does not routinely monitor personal online accounts,” it reserves the right to address issues that violate the policy. *Id.*

328. *Id.* The policy requires students to refrain from posting on social media anything that can be considered sensitive, confidential, or disparaging. However, the policy fails to define any of these terms. The Court held in *Reno* that because the statute did not define the words necessary to

2. Pottsville Area School District

The Pottsville Area School District enacted a particularly restrictive social media policy in 2011.³²⁹ The detailed policy restricts certain forms of social media: blogs, social networking sites, media-sharing sites, and virtual worlds.³³⁰ Specifically, the policy limits the content on each of these platforms when the subject matter is sensitive to students and employees, and/or when the content is used for bullying, a defamatory or discriminatory purpose, threats, and/or illegal activities.³³¹ The policy also borrows the *Tinker* language and bans students from posting on social media any content that disrupts the school or the rights of others.³³² Moreover, the policy cautions students from using exaggeration, humor, and characterizations.³³³ Any student who violates these rules will be subject to discipline.³³⁴

This is a content-based restriction, and under the Supreme Court holdings regarding the Internet, it is subject to strict scrutiny.³³⁵ While the interest will probably be considered compelling, the policy may not

hold someone accountable for violating the statute, it did not withstand strict scrutiny. *Reno*, 521 U.S. at 860; *see also* Jacques, *supra* note 176, at 1982 (stating “[b]y failing to narrowly tailor the language of the statute . . . Congress passed an act that was dangerously vague and clearly unconstitutional under a strict scrutiny analysis”).

329. Pottsville Area School District is located in Pottsville, Pennsylvania, outside of Harrisburg, Pennsylvania. As such, it is within the jurisdiction of the Third Circuit. *See supra* Parts I.D.2, III.A.3 (discussing the Third Circuit threshold test as applied to off-campus student speech); *see also Best High Schools: Pennsylvania: Districts: Pottsville Area High School: Rankings*, U.S. NEWS 2017, <https://www.usnews.com/education/best-high-schools/pennsylvania/districts/pottsville-area-sd/pottsville-area-high-school-17290> (last visited Mar. 30, 2018) (providing information about the district’s rankings, scholarly performance, and demographics).

330. *Pottsville Social Media Policy*, *supra* note 162 (listing blogs, microblogs, social networks, media sharing, Wikis, virtual worlds, email, and text messaging as encompassed by the term “social media”).

331. *Compare Pottsville Social Media Policy*, *supra* note 162, at ¶ 4 (stating that students must not promote illegal drugs, activities, or violence), *with* *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (holding speech that promotes illegal activity does not deserve First Amendment protection).

332. Specifically, the policy states, “[s]tudents may not disrupt the learning atmosphere, educational programs, school activities, and the rights of others.” *Pottsville Social Media Policy*, *supra* note 162, at ¶ 1. In *Tinker*, the Supreme Court ruled that conduct that “materially involves substantial disorder or invasion of the rights of others” does not deserve First Amendment protection. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Thus, the policy mimics the rule set forth in *Tinker*, but applies it to off-campus speech.

333. *Pottsville Social Media Policy*, *supra* note 162, at ¶ 4 (stating “students should be cautious when they use exaggeration, colorful language, guesswork, derogatory remarks, humor, and characterizations . . .”).

334. *Id.*

335. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997). *See* Montroll, *supra* note 173, at 500 (providing a background on content-based restrictions and examples of statutes and policies that were upheld under the standard, and those that were struck down).

be written narrowly enough to survive heightened scrutiny due to its blanket restrictions, similar to *Packingham*, on student speech.³³⁶ However, because the policy includes definitions and examples of content inside the scope of authority, it might meet the narrow tailoring requirement.³³⁷ But, the school district still must prove that this regulation is the least restrictive means to achieve its stated interest.³³⁸ Because this policy restricts nearly all content on social media that could cause a disturbance, it encompasses too much speech.³³⁹ To withstand strict scrutiny and fall in line with *Reno* and *Packingham*, this policy should be rewritten with less restrictive language.³⁴⁰

3. Berkeley County School District

The Berkeley County School District does not have a specific social media policy, but within its student conduct manual is a provision that encompasses off-campus student speech.³⁴¹ The provision states that students’ off-campus conduct that is reasonably foreseeable to cause a disruption is subject to punishment.³⁴² However, the only example listed within the policy that falls under this scope of authority is student social media postings for the purpose of inviting others to engage in disruptive and hateful conduct toward another student.³⁴³ By only listing one

336. *Pottsville Social Media Policy*, *supra* note 162. In addressing content-based and content-neutral regulations, the Court has typically upheld the government’s interest as compelling or important. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (finding the government’s interest in protecting minor children important).

337. *Pottsville Social Media Policy*, *supra* note 162. It is specific in that it defines the types of social media covered by the policy, and if it was considered a content-neutral regulation on speech, it might meet the requirements for intermediate scrutiny. *See Packingham*, 137 S. Ct. at 1738. However, because it is a content-based restriction, the definitions should cover not only the fora that are subject to restriction, but the subject matters as well.

338. For a look at what it takes for a regulation or policy to pass the “least restrictive means” test, see Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003).

339. *Pottsville Social Media Policy*, *supra* note 162.

340. *See, e.g., Packingham*, 137 S. Ct. at 1738 (holding a statute unconstitutional because it restricts lawful speech as a means to prevent unlawful speech); *Reno*, 521 U.S. at 868 (holding a restriction on speech must not suppress too much speech).

341. *Berkeley Policy*, *supra* note 163. Berkeley County School District is located in South Carolina and was the defendant in *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011). *See supra* Part I.D.3 (discussing the *Kowalski* decision).

342. *Berkeley Policy*, *supra* note 163, at 27. *See supra* Part III.A.1 (analyzing the constitutionality of the reasonably foreseeable threshold to *Tinker*).

343. Berkeley’s Student Handbook states:

Students’ off-campus conduct that might reasonably be expected to cause disruption in the school is prohibited and may result in disciplinary action. This includes, but is not limited to, blogs and social media postings created for the purpose of inviting others to indulge in disruptive and hateful conduct toward a student or staff member.

Berkeley Policy, *supra* note 163, at 27. For further discussion regarding a student’s intent to cause a disruption, see *supra* Part III.A.3 (discussing the Third Circuit’s intent threshold to *Tinker*,

example of speech within the scope of discipline, this policy is too broad, and leaves out examples of speech that the school is entitled to curtail, such as threats of physical violence.³⁴⁴ Furthermore, because any online speech is reasonably foreseeable to make its way to school grounds, punishment of protected political speech that causes a disruption could curtail students' First Amendment rights.³⁴⁵

Although this policy is on the right track toward being specific enough to achieve the school's interest, in order to meet the threshold and fit within the holding in *Packingham*, the policy must be more narrow to encompass the types of speech that the school has authority to discipline.³⁴⁶ This school policy potentially limits more speech than necessary and, as such, the policy is under-inclusive and is not narrowly tailored to achieve an important interest.³⁴⁷

C. The "Chilling Effect" Stemming from Restrictive Threshold Tests and Limiting School Policies

The circuit split regarding whether *Tinker* can apply to off-campus speech, and to what end it does apply, has led to confusion in the courtroom.³⁴⁸ But, how has it affected students outside the classroom?³⁴⁹ The conduct of the students in *Kowalski* and *Layshock* is very similar, but

considering its positives and negatives).

344. The Second Circuit in *Wisniewski* refused to apply a "true threat" approach because "school officials have significantly broader authority to sanction student speech than the [true threat] standard allows." *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007). This type of thinking could encompass the Berkeley County School District policy, as the school district has authority to discipline more than what is explicitly listed in the policy, such as threats of death or serious bodily harm.

345. See *supra* Part III.A.1 (critiquing the "reasonably foreseeable" threshold to the *Tinker* test in greater detail).

346. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (holding the statute unconstitutional and inviting the North Carolina legislature to craft a more narrowly written statute to withstand strict scrutiny).

347. Compare *Berkeley Policy*, *supra* note 163, at 27 (limiting off-campus social media speech that is reasonably expected to cause a substantial disruption, potentially limiting too much speech), with *Packingham*, 137 S. Ct. at 1735 (holding that the statute limiting social media was unconstitutional because it limited too much speech).

348. See *supra* Part I.D (discussing the circuit split and the tests each circuit uses to address off-campus speech); *supra* Part III.A (analyzing the different approaches taken by the circuits); see also Calve, *supra* note 82, at 386 (arguing for the need for the Supreme Court to put an end to the circuit inconsistency).

349. When policies regarding social media use are vague, students might refuse to speak their mind due to fear of punishment. Justice Kennedy articulated the concept of a chilling effect in *Citizens United v. Federal Elections Commission*: "Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" 558 U.S. 310, 324 (2010) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

their holdings are contradictory.³⁵⁰ The student in *Kowalski* created a social media profile to post hateful messages about another student and the Fourth Circuit upheld the student’s suspension.³⁵¹ The student in *Layshock* created a social media profile to post hateful messages about the school’s principal and the Third Circuit vacated the student’s suspension.³⁵² The only difference was the target of the online speech.³⁵³

Unfortunately for some students, the social media policies adopted by their school districts are likely to have a chilling effect on off-campus expression.³⁵⁴ In a dissenting opinion in *Bell v. Itawamba County School Board*, Judge Harris wrote: “for students whose performance at school largely determines their fate in the future, even the specter of punishment will likely deter them from engaging in off-campus expression that could be deemed controversial or hurtful to school officials.”³⁵⁵ How can a student know that what he or she writes on a personal account is something that a school administrator might find to be a substantial disruption to the school environment?³⁵⁶ While it is important to ensure the school environment is safe, it cannot be at the cost of students’ First Amendment rights.³⁵⁷

The tests employed by each circuit are subjective, given the fact-specific nature of *Tinker*.³⁵⁸ Because the determination of the substantial

350. Compare *Kowalski v. Berkeley Cty. Schs.*, 653 F.3d 565, 577 (4th Cir. 2011) (using the “sufficient nexus” precursor to *Tinker*), with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 210 (3d Cir. 2011) (en banc) (using the intent precursor to *Tinker*).

351. *Kowalski*, 653 F.3d at 567; see *supra* note 116 and accompanying text (explaining the students’ speech).

352. *Layshock*, 650 F.3d at 210; see *supra* note 112 and accompanying text (explaining the students’ speech).

353. See *supra* Parts I.D.2, I.D.3 (discussing the court’s reasoning in *Layshock* and *Kowalski*, respectively).

354. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (en banc) (stating that these standards imposed by the courts “would risk ensnaring any off-campus expression that happened to discuss school related matters”); Kinsley, *supra* note 178, at 258 (discussing the “chilling effect” and tracing its background).

355. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 421 (5th Cir. 2015) (“What will be the direct consequence of these various layers of vagueness upon students’ First Amendment freedoms? ‘[I]t will operate to chill or suppress the exercise of those freedoms by reason of vague terms or overbroad coverage.’”) (quoting *Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 131 (2011)).

356. See *Pottsville Social Media Policy*, *supra* note 162, at ¶ 5 (restricting social media speech that could foreseeably cause a disruption in the school); *supra* note 337 and accompanying text (describing how students will refrain from speaking if policies are not explicit).

357. Hughes, *supra* note 143, at 220 (advocating for a balance between students’ rights and schools’ authority).

358. Marcus-Toll, *supra* note 23, at 3399:

Specifically, the Supreme Court has granted public school officials considerable authority to regulate student expression within the school community. . . . School authority to regulate student speech is typically justified based on the “special

disruption, foreseeability, or potential violence tests depends almost entirely on the facts in the specific cases, students are left in the dark as to the limits within which they can express themselves.³⁵⁹ Due to the risk of chilled speech, schools need to respond by creating policies that take not only the circumstances behind certain speech into account, but also the intent of the speaker and the content of the speech. Such an approach will maintain fairness and encourage free expression, especially during the cyber era.³⁶⁰

IV. PROPOSAL

Public schools have an interest in promoting safety, order, and the well-being of students, while students have an interest in protecting their First Amendment rights.³⁶¹ When these two interests conflict, there needs to be a clearly articulated standard that balances both.³⁶² Student speech that occurs inside the school should be analyzed with the *Tinker* standard,³⁶³ but students' online speech occurring off-campus cannot be subject to the same limitations.³⁶⁴ *Packingham* held that social media is

characteristics" of the school environment and the unique role of public schools in developing the nation's youth.

See Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 752 (2012) (noting the circuit split "created a situation where courts seem to be permitting or disallowing cyberspeech according to their *subjective views* of whether students should be allowed to engage in it or not") (emphasis added).

359. See *supra* Part III.A (analyzing the foreseeability and potential violence approaches); *supra* note 356 and accompanying text (discussing the confusion plaguing students when they do not know what type of speech is subject to restrictions).

360. See *infra* Part IV (proposing a standard that schools should follow when implementing social media policies). See also *School District Affirms Student Speech Rights After Tenth Grader Punished for 'Gay? Fine By Me' T-Shirt*, NEW YORK CIVIL LIBERTIES UNION (Dec. 6, 2007), <https://www.nyclu.org/en/press-releases/school-district-affirms-student-speech-rights-after-10th-grader-punished-gay-fine-me> (quoting a student on censorship issues: "you cannot cure this chill").

361. See Calvert, *supra* note 254, at 251 (noting the need for a clear test to "strike[] a proper balance between the First Amendment speech rights of off-campus minors and the need of schools to function smoothly and effectively as educational institutions will be a prodigious and staggering task"); *supra* note 261 and accompanying text (comparing the interests of schools in cases before the courts).

362. Landfried, *supra* note 131, at 200 (discussing the need for a balance between authority and students' freedoms). See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 389–90 (5th Cir. 2015) (noting the necessity of balancing the constitutional rights of students with the need to protect teachers and principals).

363. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (defining the substantial and material disruption requirement in deciding students' free speech rights on school grounds). See Ceglia, *supra* note 24, at 950 (noting the Supreme Court has not declared that *Tinker* applies to off-campus speech).

364. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, C.J., concurring) (arguing *Tinker* does not apply to off-campus speech and that "the First Amendment protects students engaging in off-campus speech to the same extent it protects

protected speech, but government—in this case, a school district—may pass policies to limit usage so long as the means are substantially related to the school’s important interest.³⁶⁵ Similarly, *Reno* illustrated that content-based restrictions on Internet speech must be analyzed under the strict scrutiny test.³⁶⁶ The holdings in *Reno* and *Packingham* can be used to guide school districts enacting policies governing social media use occurring outside school grounds.³⁶⁷

Because every school district has different needs and interests, this Comment explores a standard for schools to keep in mind while crafting policies that fit the needs of the school, rather than suggesting every school district should use one specific policy. This proposed standard will first consider whether the speech occurred on- or off-campus.³⁶⁸ If the speech occurred off-campus, the speech must have actually caused a material and substantial disruption, unless a ‘true threat’ can be proven, in which case the school will have the authority to punish the speech without proof of a disruption.³⁶⁹ If the speech did cause a material and substantial disruption, the school must then determine the speaker’s intent—specifically, whether he or she purposely caused the disruption in school—which can be achieved by looking at the content and form of the speech.³⁷⁰

A. Defining the Geographical Limits for Speech: On- or Off-Campus?

The first question to address to determine whether the speech can be subject to discipline is where the speech occurred.³⁷¹ As articulated in *Tinker*, the authority to discipline speech is limited to on-campus speech or, as *Morse* held, school-sponsored events.³⁷² A clear indication of on-

speech by citizens in the community at large”).

365. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (articulating that content-neutral regulations on speech are subject to intermediate scrutiny). *See also* Redish, *supra* note 199, at 128 (describing intermediate scrutiny).

366. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1998).

367. *See supra* Part II (discussing the factual background and reasoning in *Reno* and *Packingham*); *see also* Klinker, *supra* note 196 (noting that after *Packingham*, social media is considered protected speech).

368. *See infra* Part IV.A (discussing the jurisdictional limits of authority to discipline).

369. *See infra* Part IV.B.1 (advocating for a heightened material and substantial disruption standard, unless it can be proven that the speech amounts to a “true threat”).

370. *See infra* Part IV.C (determining the jurisdictional limits of authority to discipline).

371. This is important because it determines what test the speech will be subject to: *Tinker* or the proposed standard set forth in this Comment. The Second and Fourth circuits have adopted this geographical test. *See Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (discussing the different tests applied to on- and off-campus speech); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (holding off-campus speech is subject to greater protection than on-campus speech).

372. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”

campus online speech would be if a student uses a school computer on school grounds to post a threatening message on his or her Facebook profile.³⁷³ In contrast, off-campus speech encompasses all speech written, spoken, or posted online occurring off-campus, outside school hours, and not at any school-sponsored event.³⁷⁴ Consider a hypothetical situation in which a student uses her personal cell phone to write a Facebook post in the school's parking lot during a lunch break.³⁷⁵ This type of speech would be considered on-campus speech.³⁷⁶ In contrast, a post that is made while the same student is walking to school, not yet on school property and before school hours begin, would be considered off-campus speech.³⁷⁷ If schools clearly articulate the difference between off-campus and on-campus speech, it will be easier for students to know when their speech will likely be protected and schools will be able to easily determine what analysis to conduct when assessing if the student should be punished.³⁷⁸

B. Substantial and Material Disruption Plus

If speech is deemed to be off-campus, the next step is to determine

but limiting its discussion to on-campus speech).

373. The model policy relating to this on-campus speech could be written as: "On-Campus Student Speech: A student may be subject to disciplinary action for any speech verbally spoken, written, or posted through the Internet occurring during school hours, on a school computer, or at a school-sponsored event when the speech materially and substantially disrupts the school environment." See also *Berkeley Policy*, *supra* note 163, at 21–22 (articulating a separate policy for acceptable use of school technology and computer systems).

374. Justice Brennan, in a concurring opinion in *Bethel Sch. Dist. No. 403 v. Fraser*, alluded to the premise that off-campus speech is subject to different limitations, noting: "If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate." 478 U.S. 675, 688 (1986) (Brennan, J., concurring); *but see Morse v. Frederick*, 551 U.S. 393, 419 (2007) (extending the jurisdiction of school authorities to discipline student speech to off-campus, school-sponsored events).

375. This would be considered on-campus speech because it occurred on school property and during school hours. See *Morse*, 551 U.S. at 424 (providing a policy perspective on this limitation: "[d]uring school hours . . . parents are not present to provide protection and guidance . . ."); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004) (advocating for a clear delineation of geographical limits for protected student speech).

376. *Fraser*, 478 U.S. at 688 (holding speech that occurred on campus is subject to lower protection); *supra* note 375 and accompanying text (comparing cases with geographical standards).

377. *Fraser*, 478 U.S. at 688 (noting the differences in protection speech receives when it occurs on campus or off campus). See generally Fronk, *supra* note 227, at 1438 (providing examples of off-campus speech).

378. Rudolph, *supra* note 323, at 187 (discussing the importance of clear policies so "students know what is expected, what is prohibited, and how they will be held accountable"). For an example of policies that do not meet this standard, see *supra* Part III.B (analyzing the broad policies that leave students confused and chill student speech).

whether it actually caused a substantial and material disruption.³⁷⁹ Unless there is an actual disruption to the school environment, there is not a strong enough nexus to give administrators the authority to justify reaching outside the schoolhouse gate and into the free speech rights of these students.³⁸⁰ Courts have struggled to define what speech rises to the level of a material and substantial disruption, which has led to a skewed delineation between what constitutes a substantial and material disruption and what constitutes an insignificant one.³⁸¹ Therefore, defining these terms is critical if these proposed standards are to withstand any level of scrutiny.³⁸²

Substantial is defined as having “considerable importance, size, or worth and not imaginary or illusory.”³⁸³ Material is “having real importance or great consequences.”³⁸⁴ Many courts have relied on a student’s or a teacher’s negative feelings or mere school gossip to justify their determination that the speech was a material and substantial disruption.³⁸⁵ By including the definitions of material and substantial in school policies, schools are given clear guidelines for making disciplinary decisions without having to base them on the subjective feelings of the target of the speech.³⁸⁶ Further, defining what constitutes a material and substantial disruption precludes discipline for any trivial or offensive conduct that did not cause any harm to the school environment.³⁸⁷ For

379. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (originating the “substantial and material” disruption test); *but see supra* Part III.A (critiquing the additional threshold tests applied to *Tinker* by the federal courts that dilute *Tinker*’s framework).

380. Willard, *supra* note 214, at 312 (“[a] complication of the boundless nature of the internet emerges when a student is disciplined before the speech has the opportunity to affect the school”).

381. Levin, *supra* note 25, at 889 (“[t]he current ad hoc approach to determining whether a school district can reasonably forecast substantial disruption to the school environment has resulted in unpredictable, and therefore unfair, decisions”); *see also* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (en banc) (providing that “[t]hose officials involved in the educational process perform important, delicate, and highly *discretionary* functions . . . the authority of public school officials is not boundless, however”) (emphasis added).

382. Price, *supra* note 304 (discussing the importance of defining terms and providing clear guidelines in order to protect the statute’s true intent). *See* Rudolph, *supra* note 323, at 199 (arguing that defining terms in social media policies is critical to ensure students have knowledge of what is and is not tolerated).

383. *Substantial*, MERRIAM-WEBSTER, (11th ed. 2017).

384. *Material*, MERRIAM-WEBSTER, (11th ed. 2017).

385. *See* *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008) (placing special emphasis on the principal’s feelings and opinion alone to uphold the student’s discipline); *but see* *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863–64 (Pa. 2002) (noting that the teacher’s feelings were important, but it was because the offended feelings contributed to a leave of absence that the speech created a material and substantial disruption).

386. *See supra* notes 381–382 and accompanying text (explaining the inconsistent results due to undefined tests).

387. Marcus-Toll, *supra* note 23, at 3434 (arguing “to be sufficient to justify school discipline

example, a student's blog post about how much he despised a teacher that caused mere chatter in the school and emotional distress to the teacher, but did not cause a greater negative effect on the school environment, would garner First Amendment protection.³⁸⁸ In contrast, the derogatory comments about a teacher in *J.S. ex rel. H.S. v. Bethlehem Area School District* left her unable to complete the school year due to severe stress stemming from the specific post.³⁸⁹ This affected students due to the loss of a cohesive curriculum plan because of the influx of different substitute teachers.³⁹⁰ This is an example of speech that actually caused a material and substantial disruption, while the same speech that did not have this effect probably would not, and thus would be subject to First Amendment protection.³⁹¹

Therefore, the reactions and offended feelings of a student or teacher will not constitute a material and substantial disruption unless it can be shown that there is severe physical or emotional harm endured that also affected the school environment.³⁹² The school administrators, or an objective third party to the speech, will determine if the speech caused a material and substantial disruption based on the facts and circumstances of the situation.³⁹³ Trivial disruptions will not be within the realm of authority to punish because there must be more than some mild distraction or curiosity created by the speech to justify the school abridging students' First Amendment rights.³⁹⁴ While it is important for

under *Tinker*, a student's off-campus speech must be sufficiently severe . . ."); see also *supra* Part III.A (critiquing methods employed by courts that do not rely on the actual outcome of the speech, but only the potential for a substantial disruption to occur).

388. See Willard, *supra* note 214, at 313 (providing examples of situations in which speech would garner protection).

389. *Bethlehem Area Sch. Dist.*, 807 A.2d at 852.

390. *Id.* ("As a result of Mrs. Fulmer's inability to return to work, three substitute teachers were required to be utilized which disrupted the educational process of the students . . ."). For an analysis of how students are affected by teachers' absences, see Raegen T. Miller, Richard J. Murnane, & John B. Willett, *Do Teacher Absences Impact Student Achievement? Longitudinal Evidence from One Urban School District 4-25* (Nat'l Bureau of Econ. Research, Working Paper No. 13356, 2007).

391. This example could be listed in the schools' policy to further clarify what is within the scope of authority and what is not. See Willard, *supra* note 12, at 625 (listing examples of other instances that would cause a substantial and material disruption in a school).

392. This proposed approach is similar to the Ninth Circuit's "faced with an identifiable threat of school violence" approach. See *supra* Part III.A.4 (describing the approach taken by the Ninth Circuit). See, e.g., *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013) (holding that *Tinker* only applies when there is a threat of school violence).

393. It is important to note that school administrators may be the target of the speech, and as such, disciplinary action may be made based on the subjective feelings of the administrator. If this is the case, an objective third party must be brought in to determine whether the speech actually caused a material and substantial disruption.

394. Under this approach, the social media posting in *Bell v. Itawamba County School Board*

schools to provide examples of speech that are within their authority to discipline, it is imperative to include in the policy the caveat that these lists can never be exhaustive due to a constantly changing world.³⁹⁵ Schools must retain authority to react efficiently and maintain order in the school environment when responding to a substantial and material disruption stemming from social media conduct, and this language would provide that authority.³⁹⁶

1. True Threat Exception

To protect the safety of the students and teachers and the general welfare of the school, there must be an exception to the enhanced substantial and material standard when the speech poses a threat of death or serious bodily harm to a member of the school community.³⁹⁷ Instead of waiting for the speech to cause an effect of significant magnitude, administrators must be given the discretion to curtail and punish speech that will potentially have serious consequences.³⁹⁸ Thus, threats made toward a student or teacher will not be permitted under the proposed school policy.³⁹⁹ Borrowing Justice O’Connor’s definition, a “true threat” should be defined in school policies as statements “where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or a group of

would be outside the school’s authority to punish. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015) (upholding a student’s punishment despite a lack of evidence of a substantial and material disruption); *see also supra* note 129 and accompanying text (discussing the speech at issue in *Bell*).

395. *See Pottsville Social Media Policy*, *supra* note 162 (denoting seven instances in which “including, but not limited to” is written to expand the authority to punish speech that is not included in these limited examples).

396. *Calvert*, *supra* note 254, at 251 (noting the need to balance schools’ interests and students’ rights). *See also supra* note 261 and accompanying text (comparing the interests of schools in cases before the courts).

397. *Hughes*, *supra* note 143, at 229 (noting when speech contains a threat “then the student’s First Amendment right to free speech does not come into play and schools can act quickly and decisively to prevent any danger at school”). *See generally supra* Part I.C (discussing the “true threat” test articulated by the Supreme Court).

398. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (holding that administrators may curtail speech when it is likely to cause violence in the school). This exception to the proposed standard allows administrators to react to a true threat when it is “reasonably foreseeable” to cause a substantial disruption, borrowing the reasoning from the “reasonably foreseeable” test and the “faced with an identifiable threat of violence” test. *See supra* Part III.A.1, III.A.4 (discussing the approaches taken by the circuit courts from which this proposal borrows).

399. *See Calvert*, *supra* note 149, at 767 (discussing the interests a school has in protecting students and teachers, noting “[s]chool administrators rightfully are concerned about stopping violence on their campuses . . .”).

individuals.”⁴⁰⁰ The intent prong of this definition is important.⁴⁰¹ This incorporates a portion of the test the Third Circuit uses to analyze off-campus speech, but tweaks it to focus on the intent to inflict harm, rather than the intent to cause a disruption.⁴⁰²

To prove intent, school officials should have the authority to consider the circumstances behind the speech, but place the safety and well-being of the school community above the speech rights of the student.⁴⁰³ Thus, when speech amounts to a true threat, school administrators will have the authority to censor and punish this speech *before* it causes a material and substantial disruption, regardless of whether such a disruption actually occurs.⁴⁰⁴ If these elements are met, the school’s analysis is complete and appropriate discipline may be imposed.⁴⁰⁵

This heightened substantial and material disruption standard incorporates ideas that the federal appellate courts found important, but does not reflect some of the threshold tests that serve to restrict students’ free speech rights.⁴⁰⁶ Moreover, it allows for use of the true threat exception in order to prevent violence and maintain order in the schools, while staying inside the realm of *Packingham*.⁴⁰⁷ Once a school finds that

400. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

401. Stanner, *supra* note 72, at 409–12 (arguing that in the justice system “intent” is necessary to punish a student in a post-Columbine world, as it is often difficult to distinguish between jokes and real threats).

402. *See supra* Part III.A.3 (analyzing the Third Circuit’s intent threshold to *Tinker*); *see also* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214 (3d Cir. 2011) (en banc) (placing special emphasis on the student’s intent in order to vacate his suspension).

403. The Supreme Court alluded to this premise in *Chaplinsky v. New Hampshire*, articulating that state interests in morality and order outweigh the slight social value inherent in such violent speech. 315 U.S. 568, 572 (1942). *But see* Christi Cassel, *Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 650 (2007) (noting that while schools should be concerned with safety, schools lack sufficient guidelines regarding the appropriateness of discipline they impose relating to online speech, resulting in decisions that may violate students’ First Amendment rights).

404. *See supra* note 398 and accompanying text (discussing that it must be reasonably foreseeable that the threat will cause harm).

405. This Comment proposes a three-part test, but if the speech amounts to a true threat, the third part does not have to be analyzed. *See infra* Part IV.C (discussing analysis of the intent of the speaker through content and form to determine if the speech will be protected).

406. *See supra* Part III.A (analyzing the threshold tests incorporated in the proposal); *supra* Part III.A.3 (discussing the “intent” approach taken by the Third Circuit, which is incorporated as an element of this proposal); *see also supra* Part III.A.4 (analyzing the “faced with an identifiable threat of violence” approach taken by the Ninth Circuit, which is also incorporated into this proposal as an exception to the heightened material and substantial disruption test).

407. *See supra* Part IV.B.1 (proposing the “true threat” exception to the heightened material and substantial disruption test). This proposal stays within the confines of *Packingham* because it is not a blanket restriction on social media. Moreover, *Packingham* afforded the government the authority to regulate online speech, so long as it survives intermediate scrutiny. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

the social media speech caused a material and substantial disruption within the scope of the proposed policy, the intent of the speaker must be analyzed before disciplinary action is warranted.⁴⁰⁸

C. Determining the Intent of the Speaker Through Content and Form

The next part of the framework for determining whether off-campus speech deserves First Amendment protection is to look at the intent of the speaker.⁴⁰⁹ It is important to note that this intent analysis is different than the intent threshold the Third Circuit uses because intent should be looked at as intent to materially and substantially cause a disruption, not as intent to reach the schoolhouse gate.⁴¹⁰ Though difficult, determining a speaker’s subjective intent is important, and there are factors to assist administrators in determining the true intent behind the speech: content and form.⁴¹¹

1. Content

Content-based restrictions have been looked upon with disfavor by the Supreme Court and frequently fail to withstand strict scrutiny.⁴¹² On the other hand, content-neutral restrictions are subject to intermediate scrutiny and are more likely to survive judicial review.⁴¹³ This proposal recommends that school districts enact a content-based policy, but rather than restrict specific content, allow it.⁴¹⁴ Online speech created for the

408. See *infra* Part IV.C (proposing an additional layer to the student speech analysis).

409. See *supra* Part III.A.3 (discussing the Third Circuit approach, which serves as inspiration for this prong of the proposal). “Intent” of the speaker is analyzed differently than the true threat exception. See *supra* Part IV.B.1.

410. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 210 (3d Cir. 2011) (en banc) (holding that because the student did not intend for his speech to reach the school, it is not foreseeable that it would cause a substantial disruption). See *generally* Beatus, *supra* note 111 (discussing the approach taken by the Third Circuit).

411. In *Texas v. Johnson*, Justice Brennan discussed the importance of “intent” in First Amendment analysis: “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it.” 491 U.S. 397, 404 (1989) (internal quotation marks omitted).

412. See *generally* Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595 (2003) (providing a background of content-neutral and content-based regulations and the implications resulting from these restrictions). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (noting “[c]ontent-based regulations are presumptively invalid”).

413. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (stating “[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny”) (citation omitted). See *also* Jacobs, *supra* note 412, at 623, 626 (discussing intermediate scrutiny as a lower threshold to analyze speech regulations).

414. Joseph Mead, *The First Amendment Protection of Charitable Speech*, 76 OHIO ST. L.J.

purpose of advancing a political opinion, religious affiliation, social ideology, or matter of public concern is consistently afforded First Amendment protection.⁴¹⁵ The Supreme Court held in *Texas v. Johnson* that burning the American flag fits within First Amendment protection because of the importance of free political expression, although the act is offensive to many.⁴¹⁶ Thus, no matter how offensive or what kind of disruption the speech causes in the school, if it does not encompass a true threat, then political, religious, or social speech may be afforded protection.⁴¹⁷ For example, a student's post on her Facebook page stating that the LGBTQ community should not be afforded special protection would be protected speech, as it expresses a political ideology.⁴¹⁸ This inverted content-based policy, allowing protections for historically protected subject matter, is in accordance with *Reno* and *Packingham*.⁴¹⁹

If the speech does not constitute political, religious, or other similarly protected speech and it causes a substantial and material disruption, then it will be subject to greater scrutiny.⁴²⁰ While there will be no blanket restrictions on any type of speech akin to *Packingham*, speech that might otherwise seem protected that causes a material and substantial disruption

FURTHERMORE 57, 61 (2015) (stating “[w]hile a content-based panhandling law will not survive, the inverse is not necessarily true”). See also Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1430 (2016) (arguing for courts to be less hostile to content-based regulations, stating “the blanket assumption that all distinctions among categories of protected speech are presumptively invalid must be abandoned”).

415. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (stating “private religious speech . . . is fully protected under the Free Speech Clause . . .”); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (holding that the government may not restrict political speech).

416. *Johnson*, 491 U.S. at 409 (1989) (providing First Amendment protection for political speech, regardless of the offensive effect of the speech). See generally C. L. Welborn, *Texas v. Johnson: The United States Supreme Court Reaffirms the Very Principles of Freedom for which the American Flag Stands*, 64 TUL. L. REV. 265 (1989) (discussing the reasoning in *Texas v. Johnson*).

417. In *Snyder v. Phelps*, the Supreme Court addressed whether there is constitutional protection for hateful military funeral protesters. 562 U.S. 443 (2011). In an 8-1 decision, Chief Justice Roberts wrote the First Amendment protects this speech, however offensive, because “speech is powerful” and protection is required of “even hurtful speech on public issues to ensure that we do not stifle public debate.” *Id.* at 460–61. See also Adam Liptak, *Justices Rule for Protestors at Military Funerals*, N.Y. TIMES (Mar. 2, 2011), <http://www.nytimes.com/2011/03/03/us/03scotus.html> (discussing the reasoning and impact of *Snyder v. Phelps*).

418. *Phelps*, 562 U.S. at 460–61 (stating “debate on public issues should be uninhibited, robust, and wide-open”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

419. See Bhagwat, *supra* note 414, at 1430 (advocating for content-based restrictions to be upheld in court); see also Mead, *supra* note 414, at 58 (arguing for content-based charitable speech policies to be permissible).

420. See *supra* Part IV.B (proposing an enhanced material and substantial disruption standard).

will be prohibited.⁴²¹ For example, if a student encourages a senior prank on his Facebook page, and that specific prank causes a material and substantial disruption, the Facebook post will not be protected speech even if the content is not illegal, lewd, or offensive.⁴²² But, if the same student posts about a religious meeting to be held during lunch, and that causes a material and substantial disruption due to offended students and teachers, this type of speech would receive constitutional protection.⁴²³ Because the intent of the speaker in the senior prank example was to cause a material and substantial disruption in the school, this speech will not be protected.⁴²⁴ Conversely, the intent of the student holding the religious meeting is to further a religious message rather than to cause harm, so the speech will be protected.⁴²⁵

2. Form

The form in which the speech is written may further assist schools in determining a student’s intent.⁴²⁶ Often, students use art as a way to express themselves.⁴²⁷ Art forms such as songs, literature, poetry,

421. In *Packingham v. North Carolina*, the Supreme Court held that blanket restrictions on social media cannot survive intermediate scrutiny nor strict scrutiny. 137 S. Ct. 1730, 1736–37 (2017). Because this proposal is not a blanket restriction, as it does not prohibit use of social media as a whole, it fits within the realm of protected Internet speech that *Packingham* intended to protect.

422. Compare *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding there is no First Amendment protection for student speech that is lewd, sexually suggestive, and inappropriate), and *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding the First Amendment does not protect student speech which may reasonably be found to promote drug use or other illegal activity), with *Doninger v. Niehoff*, 527 F.3d 41, 50–51 (2d Cir. 2008) (holding speech that the student intended to cause a substantial disruption is subject to discipline). The type of speech in *Doninger* is akin to the type of speech this example intends to punish.

423. See *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (holding political speech is protected regardless of the offended feelings it incurs); see also *Phelps*, 562 U.S. at 460–61 (holding religious and social speech is protected to encourage debate).

424. In order for this speech to be subject to discipline, it still must actually cause a substantial and material disruption. See *supra* Part IV.B (discussing the standard under which a substantial and material disruption should be analyzed for non-threatening speech).

425. William A. Glaser, *Worshipping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 PEPP. L. REV. 1053, 1107 (stating “the Court has indicated that protecting religious speech is the core concern of the Free Speech Clause”). As religious speech is consistently protected, citizens have very passionate and differing views regarding religious affiliation. For a look at the religious divide in the United States, see *U.S. Religious Landscape Survey: Religious Beliefs and Practices*, PEW RESEARCH CTR. (June 1, 2008), <http://www.pewforum.org/2008/06/01/u-s-religious-landscape-survey-religious-beliefs-and-practices/> (providing statistics on the religious preferences of United States citizens).

426. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 409 (5th Cir. 2015) (Dennis, J., dissenting) (“It is axiomatic that music, like other art forms, has historically functioned as a mechanism to raise awareness of contemporary social issues.”). See also Landfried, *supra* note 131, at 216 (arguing for a different standard to analyze off-campus student speech in which the court should look at the form of the speech in its analysis).

427. Geri Spieler, *Why the Arts Are Still Relevant: Creative Self Expression Matters Even More*

photographs, and film typically enjoy heightened First Amendment protections.⁴²⁸ To ensure that this artistic expression is not curtailed, school officials should afford greater leeway to speech that causes a substantial and material disruption when it could be considered within one of these forms of artistic expression.⁴²⁹ In contrast, a message or simple post on social media will not be given the same heightened protection as a poem or short film posted on social media.⁴³⁰ Still, the school administrators must determine whether the speech is considered a true threat and analyze the additional elements of this proposed test before concluding the art form is protected.⁴³¹ This proposal is not implying that any speech that constitutes an art form is protected, but rather that greater latitude should be given to expressive speech so as to encourage art in the digital age.⁴³²

This proposal is a content-based regulation on speech because the subject matter is at the heart of the analysis.⁴³³ Similar to the Third Circuit approach, the intent of the speaker is analyzed through the content and form of the speech.⁴³⁴ Unlike the school policies analyzed in Part III, this is an inverse content-based regulation, in that it affords heightened

Now, HUFFINGTON POST (July 27, 2017, 11:38 PM), https://www.huffingtonpost.com/entry/why-the-arts-are-still-relevant-creative-self-expression_us_597ab0b5e4b06b305561cf6d. See also Daniel Mach, *The Bold and the Beautiful: Art, Pubic Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 383 (1997) (advocating for First Amendment protection of art “[b]ecause art by its very nature stimulates both intellectual and emotional responses, it is uniquely suited to generate powerful, often conflicting reactions in both artist and viewer”).

428. Mach, *supra* note 427, at 387 (listing art forms that are subject to heightened First Amendment protection).

429. See *id.* (discussing a variety of art forms that enjoy full First Amendment protection when the artistic expression conveys a legitimate message); Landfried, *supra* note 131, at 214 (“To ensure that artistic or therapeutic expression is not being constrained, latitude should be given to speech which is in an artistic form.”).

430. The term “short film” as used here is not intended to encompass all YouTube or other videos that are violent or cause a substantial disruption. But see *supra* notes 20 and 21 for a circumstance in which a YouTube “short film” would be subject to heightened First Amendment protection under this analysis (providing an example of a situation in which a student posted an expressive video on YouTube to raise awareness of the harmful effects of bullying).

431. See *supra* Parts IV.A, B (discussing the “other elements” of this proposal necessary in order to analyze whether speech should be subject to discipline).

432. See Landfried, *supra* note 131, at 214 (stating “[a] student who uses artistic expression as a free pass to engage in inappropriate speech should not be afforded that opportunity”). Moreover, a painting or a song that is a “true threat” will not be protected. See *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39–40 (2d Cir. 2007) (holding that a drawing depicting a teacher being shot is not protected speech).

433. See generally Jacobs, *supra* note 412 (providing a background on content-based regulations). See *supra* Part II (discussing the Supreme Court’s take on content-based and content-neutral regulations).

434. See *supra* Part III.A.3 (arguing the Third Circuit’s context requirement serves a positive purpose in light of students’ rights in the digital age and borrowing its approach).

protection to political or religious speech regardless of the speech’s disruption in school.⁴³⁵ These additional protections serve the purpose of the First Amendment and combat the “chilling effect” on free speech.⁴³⁶ Moreover, it allows school officials the authority to discipline students for social media postings when the speaker intended to cause a substantial and material disruption in the school.⁴³⁷ This proposal successfully balances students’ First Amendment rights with the compelling and important interest of schools by incorporating elements of the federal appellate courts’ approaches while staying within the holdings and scrutiny applied in *Reno* and *Packingham*.⁴³⁸

CONCLUSION

The Internet and social media have become one of the most important, if not the most important, places for people to express themselves and engage in protected First Amendment activities. As technology continues to improve, it will only serve to expand and enhance the ways in which people—and especially students—engage and communicate. Because the Supreme Court has not provided insight on the issue of off-campus student speech, the lower courts are tasked with articulating tests and thresholds to determine the limits of schools’ authority to discipline such speech. As a result, the federal appellate courts have distorted the framework of *Tinker* and applied their own inconsistent analyses, leading to unpredictable First Amendment protection for students.

Due to the inconsistency between and overbroad tests pronounced by the circuit courts, school districts must be the ones to address these issues and create social media policies that balance the First Amendment rights of students and the need for administrators to maintain authority and order in schools. The Supreme Court’s holding in *Packingham* should

435. Compare Part III.B (analyzing the constitutionality of three schools’ social media policies), with Part IV (proposing a standard for schools to follow when crafting social media policies). See also Welborn, *supra* note 416, at 270 (discussing the importance of protecting speech that advances a political viewpoint).

436. Rudolph, *supra* note 323, at 187–88 (arguing for policies restricting social media to be specific so students know when their speech will be protected and when it will not be protected). See generally *supra* Part III.C (discussing the chilling effect on student speech).

437. Hughes, *supra* note 143, at 214 (discussing the need for a test to analyze off-campus student speech that balances students’ First Amendment rights with administrators’ authority to discipline harmful speech); see also Landfried, *supra* note 131, at 218–19 (arguing “[a] clear standard is needed now more than ever, to balance the necessity of keeping schools safe and the rights of students to freely express themselves once they exit the schoolhouse gates”).

438. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (applying intermediate scrutiny to a content-neutral regulation, balancing the government’s interest with sex offenders’ right to free speech); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (applying strict scrutiny to a content-based restriction, balancing the government’s interest with the right to free speech).

guide these schools when crafting social media policies, but it will not be an easy task. Creating a policy that encompasses all situations and provides guidance for every possibility is difficult, but by carefully drafting a policy and defining the limitations on speech, schools can achieve some much needed clarity while they wait for the Supreme Court to address this issue.