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NOTE

DONINGER V. NIEHOFF: TAKING TINKER TOO FAR

Travis Miller[†]

I. INTRODUCTION

Though the Supreme Court has laid a basic framework for teachers, principals, and other school officials to determine whether students can be disciplined for their speech, and whether student speech can be suppressed, the Supreme Court has yet to determine the scope of a school's authority to discipline a student for speech that occurs off-campus and online.¹ This has left both school officials and courts with the difficult task of determining which, if any, Supreme Court precedent applies to a student's online speech. The negative implications associated with teenagers spending an average of twelve hours a week online (such as the increased frequency of cyber-bullying or online threats against teachers) does not make this difficult task any easier.²

For the most part, the substantial disruption test used in *Tinker v. Des Moines Independent Community School District* is the default rule that courts use to determine whether suppressing a student's speech, or whether a student's punishment resulting from his speech, is warranted.³ This rule allows a school to prohibit or punish a student's speech where school authorities reasonably forecast that the student's speech "would materially and substantially disrupt the work and discipline of the school."⁴ But how and when should schools and the courts apply this substantial disruption test? Assuming that a school can use this test for a student's online speech,

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1. *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008).

2. Jane Weaver, *Teens Tune Out TV, Log on Instead*, MSNBC (July 24, 2006), <http://www.msnbc.msn.com/id/3078614/>.

3. *See* *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007) ("The Supreme Court has established three frameworks for evaluating student speech: (1) vulgar and obscene speech is governed by *Bethel School Dist. v. Fraser* . . . (2) school-sponsored speech is governed by *Hazelwood v. Kuhlmeier* . . . and (3) all other speech is governed by *Tinker*.").

4. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

should it be applied the moment school officials discover the online speech, or retroactively to the very moment the student created the online speech? Moreover, exactly how—if at all—should this test relate to a student’s extracurricular activities?

Given no instructions from the Supreme Court on a school’s authority to discipline a student’s online speech, lower courts have used *Tinker* in “situation[s] and scenario[s] that the Court in 1969 could hardly have imagined.”⁵ In *Doninger v. Niehoff*, the United States Court of Appeals for the Second Circuit applied *Tinker*’s substantial disruption test to a message that high school student Avery Doninger, a junior who served on the Student Council as the Junior Class Secretary, posted on her publicly accessible blog hosted by LiveJournal.com.⁶ This case arose “out of a dispute between the school administration and a group of Student Council members at [Lewis Mills High School], including Avery, over the scheduling of an event called ‘Jamfest,’ an annual battle-of-the-bands concert that these Student Council members helped to plan.” Following this dispute, Avery encouraged her fellow students to read and respond to a posting on her blog, where she wrote:

[J]amfest is cancelled due to douchebags in central office. . . . basically, because we sent [the original Jamfest email] out, Paula Schwartz is getting a TON of phone calls and emails and such. . . . however, she got pissed off and decided to just cancel the whole thing all together, andddd [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 18th.⁷

Though the school discovered Avery’s posting after the dispute that it had been directed at was resolved, the Second Circuit still held that the *Tinker* test governed Avery’s posting and ruled for the school district.⁸ But

5. Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1175 (2009).

6. *Doninger*, 527 F.3d at 44-45. See generally *About Us*, LIVEJOURNAL, <http://www.livejournalinc.com/aboutus.php> (“LiveJournal is a community publishing platform, willfully blurring the lines between blogging and social networking. Since 1999 LiveJournal has been home to a wide array of creative individuals looking to share common interests, meet new friends, and express themselves.”) (last visited May 1, 2011).

7. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 206 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008).

8. *Doninger*, 527 F.3d at 46 (“According to [school district superintendent Paula] Schwartz’s testimony, she learned of Avery’s posting only some days after the meeting

the court's use of *Tinker* was unnecessary; the Second Circuit should have solely justified the disciplining of Avery on the basis that her conduct was against her school's standard of conduct for those that participate in student government, which required Avery to "work cooperatively with [her] advisor and with the administration, and promote good citizenship both in school and out."⁹ By clinging to *Tinker*, the Second Circuit both stretched a school's authority under *Tinker*, and missed an important opportunity to reaffirm a school's authority to discipline a student involved in extracurricular activities without using the *Tinker* test.

This Note has five parts. Part II provides a short historical background on student speech, summarizes Supreme Court cases that have addressed the authority of schools to discipline students for their speech, briefly illustrates the disagreements on when and how the *Tinker* rule is to be utilized, and summarizes *Wisniewski v. Board of Education*, a Second Circuit decision that applied *Tinker* to a student's online speech. Part III addresses the problem with the reliance on *Tinker* in *Doninger v. Niehoff*. Part IV argues that the Second Circuit should have decided *Doninger* without using *Tinker's* substantial disruption test. In addition, Part IV provides an alternative solution for affirming the district court's decision in a way that reinforces the authority of schools to require higher standards of conduct for students that participate in voluntary extracurricular activities. Finally, Part V reinforces two conclusions: (1) courts should apply *Tinker* cautiously to a student's online speech, and (2) courts should follow the modern trend of giving schools flexibility in framing and enforcing the conduct requirements that students must follow when participating in extracurricular activities.

II. STUDENT SPEECH AND SUPREME COURT PRECEDENT

It has been said that "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."¹⁰ The power of schools acting *in loco parentis* (in the

[between herself and Avery Doninger] when her adult son found it while using an Internet search engine.").

9. *Id.* at 52.

10. *Morse v. Frederick*, 551 U.S. 393, 410-11 (2007) (Thomas, J., concurring); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 522 (1969) (Black, J., dissenting)

Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject

place of the parent) “stems from a common-law doctrine that has deep roots.”¹¹ According to Sir William Blackstone, a parent may

delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purpose for which he is employed.¹²

Traditionally, schools acting *in loco parentis* were allowed to strictly regulate student speech without judicial interference.¹³ Public school teachers in early America instilled common values in students through strict discipline, and students were punished for behavior that was considered disrespectful, improper, indecent, or vulgar.¹⁴ In these public schools, “[t]eachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”¹⁵ Case law illustrates that “[c]ourts routinely preserved the rights of teachers to punish speech that the school or

he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite.

Id. But see Tony LaCroix, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 263 (2008).

To allow fundamental constitutional protections to be set aside for the sake of convenience, or in deference to the interest of governmental actors charged with quasi-parental action, is patently contrary to the Court’s own recognition that school children do, without any doubt, enjoy the protection of the bedrock constitutional guarantees of liberty and privacy.

Id.

11. ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 9 (2009). But see LaCroix, *supra* note 10, at 270 (“[T]here are better models for describing the student/school relationship and drawing analogies for use in making constitutional decisions about the rights of students, for example, that of the doctor/patient relationship. The modern approach to public schooling is astoundingly diagnostic and treatment-oriented.”).

12. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *454.

13. *Morse*, 551 U.S. at 414 (Thomas, J., concurring).

14. *Id.* at 411, 414 (“By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.”).

15. *Id.* at 412.

teacher thought was contrary to the interests of the school and its educational goals.”¹⁶

Despite the traditional view that public school authorities were allowed to restrict and punish student speech for nearly any reason, “the Supreme Court has recognized since the mid-twentieth century that students do not shed their constitutional rights as a condition of public school attendance.”¹⁷ During the cultural turbulence of the late 1960s, a case reached the Supreme Court that would profoundly change this traditional student-teacher dynamic.¹⁸ This case is *Tinker v. Des Moines*, and it is “the cornerstone on which the student speech right was built.”¹⁹

A. Supreme Court Decisions on Student Speech

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*

In December 1965, a group of students in Des Moines, Iowa, decided to publicize their support for a peaceful resolution to the Vietnam War and to mourn all casualties of the War by wearing black armbands to school.²⁰ The principals of their schools became aware of this plan and collectively “adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”²¹ The students were aware of this policy²² and despite the risk of suspension, they wore black armbands to their schools.²³ True to their word, the schools sent the students home and suspended them until they returned to school without their armbands.²⁴ The

16. *Id.* at 414.

17. STEPHEN B. THOMAS, NELDA H. CAMBRON-McCABE, & MARTHA M. MCCARTHY, *PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS* 106 (6th ed. 2009).

18. DUPRE, *supra* note 11, at 10.

19. *Id.*

20. *Id.* at 12; *see also* JOHN W. JOHNSON, *THE STRUGGLE FOR STUDENT RIGHTS* 4 (1997). Among those subsequently interviewed who had attended the meeting where it was agreed that the students would begin wearing black armbands to class, all agreed that the act “had two purposes: to mourn all the casualties of the Vietnam War . . . and to support Senator Robert Kennedy’s call for an extension of the anticipated Christmas 1965 truce, which it was hoped would lead to a negotiated end of the war.” *Id.*

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

22. *Id.*

23. *Id.*

24. *Id.* (“They [the students] were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year’s Day.”).

students, through their fathers, filed a complaint in federal district court seeking an injunction preventing the disciplining of the students and nominal damages.²⁵ The District Court dismissed the complaint and “upheld the constitutionality of the school authorities’ action on the ground that it was reasonable in order to prevent disturbance of school discipline.”²⁶ The plaintiffs appealed the case, and the Court of Appeals for the Eighth Circuit affirmed.²⁷ The Supreme Court granted certiorari.²⁸

Upon review, the Supreme Court recognized that the problem in the case “lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”²⁹ After all, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁰ The Court found that the students were not punished for the expression of disruptive or intrusive speech, but for the school authorities’ desire to avoid the controversy that could have resulted from the silent expression of opposition towards the war in Vietnam.³¹ This type of “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”³² The Court noted that the Constitution prohibited school officials from denying this form of expression.³³ Such speech, which requires vigilant protection even in public schools, could only be prohibited where it “would materially and substantially disrupt the work and discipline of the school.”³⁴ In effect, *Tinker* “made it clear that students had every right to challenge teachers and

25. *Id.* at 503-04.

26. *Id.* at 504-05.

27. *Id.* at 505; *see also* JOHNSON, *supra* note 20, at 119.

The appeals court ruling was contained in a one-paragraph per curiam opinion.

. . . A per curiam opinion is sometimes issued by a judicial body to mask the reason for a disagreement on the court. The appeals court opinion in *Tinker* served just such a purpose. It contained no analysis whatsoever; it was essentially an order without justification.

Id.

28. *Tinker*, 393 U.S. at 505.

29. *Id.* at 507.

30. *Id.* at 506.

31. *Id.* at 508, 510.

32. *Id.* at 508.

33. *Id.* at 514.

34. *Id.* at 513.

principals as long as they believed their right of free speech was being infringed.”³⁵

Justice Hugo Black, in his dissenting opinion, concluded that the majority in *Tinker* ushered in a new era in which the power to control students, a traditional responsibility of school officials, was transferred to the Supreme Court.³⁶ According to Justice Black, *Tinker* was decided “wholly without constitutional reasons” and “subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”³⁷ In addition, he found the record to demonstrate that the armbands “took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.”³⁸ He concluded that the majority would, in fact, allow students to defy openly the orders of school officials, ushering in a new and revolutionary era of permissiveness towards defiant student conduct.³⁹ Justice Harlan, in his dissent, offered a different standard to govern these types of cases and agreed “state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association.”⁴⁰

2. *Bethel School District No. 403 v. Fraser*

Nearly twenty years after *Tinker*, the Supreme Court considered *Bethel School District No. 403 v. Fraser*, a case involving a Washington high school student who delivered a vulgar speech during a “school-sponsored educational program in self-government.”⁴¹ This student, Matthew N. Fraser, spoke in front of six-hundred high school students to nominate a

35. DUPRE, *supra* note 11, at 24.

36. *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

37. *Id.* at 525.

38. *Id.* at 518. Testimony, by some students, “shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone.” *Id.* at 517. There is also evidence that a mathematics teacher had his lesson period practically “wrecked” chiefly by disputes with Mary Beth Tinker, who wore her armband for her “demonstration.” *Id.*

39. *Id.* at 518.

40. *Id.* at 526 (Harlan, J., dissenting). Justice Harlan proposed a different rule to govern student speech cases: “I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.” *Id.*

41. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986).

fellow student for student elective office.⁴² During the speech, “Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.”⁴³ This is his speech, in whole:

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.⁴⁴

Fraser delivered this inappropriate speech despite warnings from two of his teachers that “severe consequences” may result.⁴⁵ Some students responded to the graphic nature of the speech by yelling, while others made gestures that simulated the sexual acts alluded to by Fraser’s speech.⁴⁶ A few students were embarrassed by the speech, and one teacher found it necessary to forego the time of a scheduled class lesson so she could discuss the speech with her class.⁴⁷

The next day, the school’s Assistant Principal met with Fraser and informed him that he had violated a school disciplinary rule prohibiting the use of obscene language in the school.⁴⁸ Fraser admitted that he intentionally used “sexual innuendo in the speech.”⁴⁹ He was suspended for three days, and told he would no longer be considered a candidate for his school’s commencement exercises.⁵⁰ Fraser was unsuccessful in his appeal to the School District, which affirmed the disciplinary action.⁵¹ He then took his case to the United States District Court for the Western District of

42. *Id.* at 677.

43. *Id.* at 677-78.

44. *Id.* at 687.

45. *Id.* at 675, 678.

46. *Id.* at 678.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 678-79.

Washington, which held, in part, that the school's disciplinary measures violated Fraser's right to free speech under the First Amendment.⁵² The Court of Appeals for the Ninth Circuit affirmed, "holding that [Fraser's] speech was indistinguishable" from Tinker's armband.⁵³ The Ninth Circuit rejected the School District's claim that there had been a disruptive effect on the disciplinary process of the school, and "also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school"⁵⁴ The Ninth Circuit also "rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity."⁵⁵

The Supreme Court reversed, recognizing that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," and holding that the School District acted within its authority "in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."⁵⁶ School authorities, acting *in loco parentis*, have an obvious concern to protect children from this type of speech.⁵⁷ The Court cited its previous First Amendment decisions that "recognized a state interest protecting children from sexually explicit, vulgar, or offensive speech."⁵⁸ The Court distinguished *Fraser* from *Tinker*, noting that the disciplining of Mr. Fraser was "unrelated to any political viewpoint," but still necessary to prevent the undermining of the "school's basic educational mission."⁵⁹ According to some authors, "[t]he majority further rejected the contention that the student had no way of knowing that his expression would evoke disciplinary action; the school rule barring obscene and disruptive expression and teachers' admonitions that his planned speech was inappropriate provided adequate warning of the

52. *Id.* at 679.

53. *Id.*

54. *Id.* at 679-80. Interestingly, but perhaps not surprisingly, the Ninth Circuit's reasoning in support of its conclusion had racial and class-based overtones: "the School District's 'unbridled discretion' to determine what discourse is 'decent' would 'increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.'" *Id.*

55. *Id.* at 680.

56. *Id.* at 682, 685.

57. *Id.* at 685.

58. DUPRE, *supra* note 11, at 53.

59. *Fraser*, 478 U.S. at 685.

consequences of the expression.”⁶⁰ *Fraser* was a marked change from the student-liberty-focused *Tinker* standard, and it reinforced the idea that schools are to inculcate students in the habits and manners of civility.⁶¹ School officials, however, still have the difficult task of determining whether speech is “vulgar” or “offensive.”⁶² “This uncertainty, combined with the asymmetry brought about by the attorney’s fees statute, leaves schools in a vulnerable position that surely has consequences for the day-to-day learning environment in schools.”⁶³

3. *Hazelwood School District v. Kuhlmeier*

In a relatively short time after the *Fraser* decision, the Court addressed the issue of whether school administrators could regulate the content of a student-authored, school-sponsored (and school-funded) newspaper in *Hazelwood School District v. Kuhlmeier*.⁶⁴ This newspaper was authored by members of the Hazelwood East High School’s Journalism II class, and the school’s principal reviewed each issue of the student newspaper prior to publication.⁶⁵ In the spring of 1983, the principal reviewed and objected to two articles scheduled to appear in the upcoming newspaper.⁶⁶ One story “described three Hazelwood East students’ experiences with pregnancy; the other discussed the impact of divorce on students at the school.”⁶⁷

60. THOMAS, CAMBRON-MCCABLE, & MCCARTHY, *supra* note 17, at 107-08. *But see Fraser*, 478 U.S. at 695 (Stevens, J., dissenting). Justice Stevens advocated a more objective approach to disruptive or offensive speech in school, stating:

The fact that respondent reviewed the text of his speech with three different teachers before he gave it does indicate that he must have been aware of the possibility that it would provoke an adverse reaction, but the teachers’ responses certainly did not give him any better notice of the likelihood of discipline than did the student handbook itself. In my opinion, therefore, the most difficult question is whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it.

Id.

61. DUPRE, *supra* note 11, at 56.

62. *Id.* at 72.

63. *Id.* at 72-73.

64. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262, 271 (1988).

65. *Id.* at 263.

66. *Id.*

67. *Id.*

The principal's concern was with the pregnant students being identified through the article (though the story had used false names),⁶⁸ and with the inappropriateness of the article's sexual subject matter.⁶⁹ He believed that the article on divorce, in which a student complained that her father was not spending enough time at home, should allow for the father to comment on these remarks (or to allow for him to consent to the publication of his child's remarks).⁷⁰ These concerns led the principal to eliminate these articles from the final published newspaper.⁷¹ The students brought their action in federal district court, alleging their First Amendment rights were violated by the principal's refusal to allow the articles to be published.⁷² The district court held that "no First Amendment violation had occurred," reasoning that "school officials may impose restraints on students' speech in activities that are 'an integral part of the school's educational function' . . . so long as their decision has 'a substantial and reasonable basis.'"⁷³ The Court of Appeals for the Eighth Circuit reversed, holding that "school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper."⁷⁴ The court concluded that the newspaper's "status as a public forum precluded school officials from censoring its contents except when 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'"⁷⁵

The Supreme Court cut another exception into the *Tinker* standard and reversed the Court of Appeals, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their

68. *Id.*

69. *Id.*

70. *Id.* This fear proved to be mistaken, as the student's name had been deleted from the final draft of the article.

71. *Id.* at 263-64. The principal concluded that the only way for the newspaper to be printed before the end of the school year was "to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all." *Id.* He chose "to withhold from publication the two pages containing the stories on pregnancy and divorce." *Id.* at 264.

72. *Id.* at 264.

73. *Id.* "The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was 'legitimate and reasonable,' given 'the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article.'" *Id.*

74. *Id.* at 265.

75. *Id.*

actions are reasonably related to legitimate pedagogical concerns.”⁷⁶ In doing so, the Court deferred to the judgment of parents, teachers, and school officials, and also justified judicial intervention only where the suppression of school-sponsored student expression was unreasonable.⁷⁷ The Court reasoned that the newspaper was a “supervised learning experience for journalism students,” and concluded that “school officials were entitled to regulate the contents of Spectrum [the student newspaper] in any reasonable manner.”⁷⁸

The Court differentiated this case from *Tinker* in that while *Tinker* required a school to tolerate certain student speech, the question posed in this case asks “whether the First Amendment requires a school affirmatively to promote particular student speech.”⁷⁹ The Court also focused on a school’s interest to “disassociate itself” not only from student speech that would “substantially interfere with [its] work . . . or impinge upon the rights of other students,” but also from student speech that may be “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”⁸⁰

In applying *Hazelwood*, “[c]ourts have reasoned that the school has the right to disassociate itself from controversial expression that conflicts with its mission and have considered school-sponsored activities to include student newspapers supported by the public school, extracurricular activities sponsored by the school, school assemblies, and classroom activities.”⁸¹ Courts, however, have also limited a school’s authority to censor student expression that bears the school’s imprimatur where blatant viewpoint discrimination is involved.⁸² And, “[e]ven if viewpoint

76. *Id.* at 273. *But see id.* at 280 (Brennan, J., dissenting)

If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into “enclaves of totalitarianism,” that “strangle the free mind at its source.” The First Amendment permits no such blanket censorship authority.

Id. (citations omitted).

77. *Id.* at 270.

78. *Id.*

79. *Id.* at 270-71.

80. *Id.* at 271 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

81. THOMAS, CAMBRON-McCABE, & MCCARTHY, *supra* note 17, at 114.

82. *Id.*

discrimination is not involved, censorship actions in a non-public forum must still be based on legitimate pedagogical concerns.”⁸³

4. *Morse v. Frederick*

Recently, the Court again deferred to the authority and judgment of school administrators in *Morse v. Frederick*.⁸⁴ *Morse* involved actions at a school-sanctioned and school-supervised event to watch the Olympic Torch Relay pass through Juneau, Alaska.⁸⁵ At this event, a group of students unfurled a large banner bearing the phrase: “Bong HiTS 4 JESUS.”⁸⁶ The school’s principal, Deborah Morse, instructed the students to take down the banner, and every student but Frederick complied.⁸⁷ Frederick was subsequently suspended from school for advocating the use of illegal drugs during a school-sanctioned activity.⁸⁸ The Juneau School District Superintendent applied *Fraser* to this dispute and upheld the suspension (though reducing its length from ten to eight days), concluding that the principal acted within her authority because the banner was “speech or

There are limits, however, on school authorities’ wide latitude to censor student expression that bears the public school’s imprimatur. Blatant viewpoint discrimination, even in a nonpublic forum, abridges the First Amendment. For example, the Ninth Circuit held that a school board violated students’ First Amendment rights, because it failed to produce a compelling justification for excluding an anti-draft organization’s advertisement from the school newspaper, while allowing military recruitment advertisements. Similarly, the Eleventh Circuit placed the burden on school authorities to justify viewpoint discrimination against a peace activist group that was excluded from the public school’s career day and not allowed to display its literature on school bulletin boards and in counselors’ offices, when military recruiters were allowed such access. The court found no compelling justification for censoring specific views that the board found distasteful.

Id. at 114-15.

83. *Id.* at 115. For example, “[a] Michigan federal district court found no legitimate pedagogical reason for the removal from the school newspaper of a student’s article on a pending lawsuit alleging that school bus diesel fumes constitute a neighborhood nuisance.” *Id.*

84. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007).

85. *Id.* at 397.

86. *Id.*

87. *Id.* at 398.

88. *Id.*

action that intrudes upon the work of the schools.”⁸⁹ This decision was upheld by the Juneau School District Board of Education.⁹⁰

Frederick filed suit under 42 U.S.C. § 1983, alleging the violation of his First Amendment rights by the school board and by Principal Morse.⁹¹ The district court granted summary judgment for the school board and for Principal Morse, holding that “Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity.”⁹² The Court of Appeals for the Ninth Circuit reversed, finding “a violation of Frederick’s First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a ‘risk of substantial disruption.’”⁹³ The Supreme Court granted certiorari to determine, in part, “whether Frederick had a First Amendment right to wield his banner.”⁹⁴

The Supreme Court first set out to determine whether *Fraser* applied to this case. In doing so, the Court distilled two basic principles from *Fraser*.⁹⁵ “First, *Fraser*’s holding demonstrates that ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.’”⁹⁶ Had the student in *Fraser* “delivered the same speech in a public forum outside the school context, it would have been protected.”⁹⁷ “Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute,” as *Fraser* did not apply the substantial disruption analysis prescribed in *Tinker*.⁹⁸

Thus, rejecting both the *Tinker* and *Fraser* tests as applied to this case, the Court held that “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably

89. *Id.* at 399 (quoting Appendix to Petition for Certiorari at 62a, *Morse*, 551 U.S. 393 (No. 06-278)).

90. *Id.*

91. *Id.*

92. *Id.* (quoting Appendix to Petition for Certiorari at 37a, *supra* note 89).

93. *Id.* (quoting *Frederick v. Morse*, 439 F.3d 1114, 1118, 1121-23 (9th Cir. 2006)).

94. *Id.* at 400. *See also* DUPRE, *supra* note 11, at 237-38 (explaining that the order by the Court of Appeals for the Ninth Circuit for the principal to pay money damages to a difficult student may have prompted the Supreme Court to hear the case, as “[d]uring oral argument, some of the justices seemed to be particularly bothered by the damages Deborah Morse would have to pay Joe Frederick if the Ninth Circuit opinion stood”).

95. *Morse*, 551 U.S. at 404.

96. *Id.* (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986)).

97. *Id.* at 405.

98. *Id.*

viewed as promoting illegal drug use.”⁹⁹ The Court reasoned that a school’s deterrence of drug use by its students is an “important—indeed, perhaps compelling” government interest, considering the dangers of illegal drugs and their use by school-age children.¹⁰⁰ In support of the high degree of this governmental interest, the Court also noted the billions of dollars in congressional support provided to schools for the purpose of school drug prevention programs.¹⁰¹ Given these concerns, it was reasonable for the principal to make the on-the-spot decision to conclude that the banner promoted illegal drug use, in violation of school policy, “and that failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use.”¹⁰² In allowing a school to regulate speech that could result in harm (whether that harm is through the disruption of a school’s educational mission or harm to the students themselves), *Morse* thus articulates a standard similar to *Tinker*.¹⁰³

The authority of school officials to discipline a student for his or her speech has slowly been reinforced since *Tinker* was decided in 1969.¹⁰⁴ No longer must schools predict whether a student’s speech would cause a material disruption before a student can be disciplined or the speech suppressed.¹⁰⁵ Rather, schools can look to the vulgarity, content, and appropriateness of student speech to determine whether the speech is

99. *Id.* at 403. *But see id.* at 444 (Stevens, J., dissenting).

Frederick’s credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything . . . The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.

Id.

100. *Id.* at 407 (majority opinion) (quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

101. *Id.* at 408.

102. *Id.* at 410.

103. Michael J. O’Connor, Comment, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse?*, 11 U. PA. J. CONST. L. 459, 467 (2009).

104. See Abby Marie Mollen, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1510 (2008) (noting that, since *Tinker*, the Court has “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”).

105. *Morse*, 551 U.S. at 404-05.

acceptable for school-sponsored expressive activities.¹⁰⁶ In addition, school officials can discipline students for vulgar or indecent expression.¹⁰⁷ Finally, schools can also discipline students for advocating the use of illegal drugs, even at off-campus but school-sponsored events.¹⁰⁸ Nevertheless, difficulty and disagreements arise when determining which Supreme Court test a court should use when reviewing the disciplining or suppression of a student's speech.

B. Application of Tinker to Student Speech: Evident Confusion in Lower Courts

Even Chief Justice John Roberts has admitted that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents”¹⁰⁹ This uncertainty also includes *how* courts should apply school-speech precedents. Though bans on students wearing buttons have typically been upheld,¹¹⁰ a small minority of courts address these bans in an approach that favors student speech.¹¹¹ In addition, in the wake of anti-Vietnam protests, several circuits struggled with determining whether policies of predistribution review of student writings distributed on campus were justified under *Tinker*.¹¹² In *Burch v. Barker*, the Ninth Circuit stated that the Second Circuit's approval of “broad review and censorship of non-school-sponsored publications” was “in fundamental conflict with the Supreme Court's analysis in *Tinker*.”¹¹³

Interestingly, the Ninth Circuit has adopted a broad reading of *Tinker*'s rights-of-others exception by permitting a school to forbid students from wearing t-shirts with a message condemning homosexuality, reasoning it was proper to prevent emotional injury to a particularly vulnerable segment

106. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

107. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986).

108. *Morse*, 551 U.S. at 347, 403.

109. *Id.* at 401.

110. THOMAS, CAMBRON-McCABE, & MCCARTHY, *supra* note 17, at 117.

111. *See Chandler v. McNinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (holding, in part, that buttons with the word “scab” to protest non-union teachers were not inherently disruptive).

112. *Burch v. Barker*, 861 F.2d 1149, 1154-55 (9th Cir. 1988) (providing a survey of the various approaches taken by Circuit Courts of Appeals).

113. *Id.* at 1156-57.

of the student population.¹¹⁴ The United States District Court for the Southern District of Ohio took a different approach to whether *Tinker* allows a school to stop a student from wearing a t-shirt with an anti-gay message, as it focused on *Tinker*'s disruption test and found that the student should be allowed to wear his shirt without repercussions from school officials.¹¹⁵ These disagreements speak to the very real difficulties that courts face when determining how and when the *Tinker* standard governs. And this confusion is not merely restricted to a student's speech at school—some lower courts are misusing *Tinker* to censor off-campus student expression posted on the Internet.¹¹⁶

C. *Wisniewski: The Second Circuit's Recent Application of Tinker to Off-Campus, Online Student Speech*

Despite disagreements about when *Tinker* controls, courts have generally extended the reach of *Tinker* to include situations where a student's online and off-campus speech is directed at his or her school. In the 2007 case, *Wisniewski v. Board of Education*, the Second Circuit considered whether a student could appropriately be suspended for sharing over the Internet a drawing "suggesting that a named teacher should be shot and killed."¹¹⁷ The student's instant messaging icon depicted "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood."¹¹⁸ Under the drawing it read, "Kill Mr. VanderMolen," the

114. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1182 (9th Cir. 2006). This was the first reported opinion that supported a restriction to a student's speech by using *Tinker*'s rights-of-others exception. See Calvert, *supra* note 5, at 1182.

115. Calvert, *supra* note 5, at 1183.

116. *Id.* at 1175.

117. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

118. *Id.* The Second Circuit then explained exactly what instant messaging entails: Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called "buddies" in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a "buddy list" who happen to be on-line at the same time. Different IM programs use different notations for indicating which members of a user's "buddy list" are on-line at any one time. Text sent to and from a "buddy" remains on the computer screen during the entire exchange of messages between any two users of the IM program.

Id. at 35.

student's English teacher.¹¹⁹ The student had created this icon "a couple of weeks after his class was instructed that threats would not be tolerated by the school, and would be treated as acts of violence."¹²⁰ This icon was available for viewing by the student's instant messaging contacts for three weeks.¹²¹ A classmate of the student informed Mr. VanderMolen, who then relayed the information to school officials.¹²² School administration and even the police became involved, as there were investigations to determine whether the student was a threat to his teacher or any other school official.¹²³ The police investigator concluded "that the icon was meant as a joke, that [the student] fully understood the severity of what he had done, and that [he] posed no real threat to VanderMolen or to any other school official."¹²⁴ This situation was also brought before a hearing officer, who found the icon threatening; though it was created and distributed off-campus, "she concluded that it was in violation of school rules and disrupted school operations . . ."¹²⁵ As a result, the student was suspended for a semester.¹²⁶

A suit was then brought on the student's behalf against the school board and the superintendent, alleging in part that the student's icon was protected under the First Amendment.¹²⁷ The district court determined that "the icon was reasonably to be understood as a 'true threat' lacking First Amendment protection."¹²⁸ On appeal, the Second Circuit applied a variation of the *Tinker* standard to the student's off-campus speech, holding that Aaron's transmission of the icon posed a "reasonably foreseeable risk that the icon would come to the attention of school authorities, and that it would 'materially and substantially disrupt the work and discipline of the school.'"¹²⁹

119. *Id.* at 36.

120. *Id.*

121. *Id.*

122. *Id.* Mr. VanderMolen was so distressed by the threatening buddy icon that he was allowed to stop teaching the students' class. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 37.

127. *Id.*

128. *Id.*

129. *Id.* at 38-39 (quoting *Morse v. Frederick*, 551 U.S. 393, 403 (2007)). The Second Circuit did not consider whether the icon presented a 'true threat,' as defined in *Watts v. United States*, 394 U.S. 705 (1969). *Id.* at 38. "Although some courts have assessed a

The Second Circuit found it “reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.”¹³⁰ Further, the court saw no doubt that the icon, once discovered by school administration and the teacher it depicted, “would foreseeably create a risk of substantial disruption within the school environment.”¹³¹ The fact that this was off-campus speech was disregarded, as the court noted that the Second Circuit had previously recognized that off-campus students could cause a substantial disruption within the school.¹³² *Wisniewski*’s reliance on *Tinker* regarding a student’s on-line and off-campus speech was further extended by the Second Circuit in *Doninger v. Niehoff*. But the Second Circuit’s decision in *Doninger* would needlessly depart from the holdings of *Tinker* and *Wisniewski* in a significant way.

III. DONINGER TOOK *TINKER* TOO FAR

Doninger v. Niehoff involved a dispute between Avery Doninger, a junior at Lewis Mills High School (LMHS), and the school’s administration.¹³³ While serving as her school’s Junior Class Secretary, Avery Doninger was involved in planning “‘Jamfest,’ an annual battle-of-the-bands concert.”¹³⁴ A conflict arose with the scheduling of the event, and in response, Avery wrote an inflammatory Livejournal blog post with the purpose of encouraging her fellow students to contact and “piss off” the school district’s “douchebag” superintendent.¹³⁵ In writing this Livejournal

student’s statements concerning the killing of a school official or a fellow student against the ‘true threat’ standard of *Watts* . . . we think that school officials have significantly broader authority to sanction student speech than the *Watts* [sic] standard allows.” *Id.*; see also 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, 228 (2009) (“The rule, then, from *Wisniewski* appears to boil down to a rather primitive ‘if-then’ formula: *If it is reasonably foreseeable that student speech created off campus will come to the attention of school authorities, then school authorities may exert disciplinary authority over it.*”).

130. *Wisniewski*, 494 F.3d at 39.

131. *Id.* at 40.

132. *Id.* at 39 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979) (“We can . . . envision a case in which a group of students incites substantial disruption within the school from some remote locale. We need not, however, address this scenario because, on the facts before us, there was simply no threat or forecast of material and substantial disruption within the school.”)).

133. *Doninger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2008).

134. *Id.* at 44.

135. *Id.* at 45.

blog entry, Avery ignored her Principal's instructions (which were directed to Avery only hours before) that asked her to "work cooperatively with [her] faculty advisor and with the administration in carrying out Student Council objectives."¹³⁶ This blog post was discovered by the superintendent some days after the Jamfest dispute was resolved, and only after the superintendent's son found it using an Internet search engine.¹³⁷ As a result of her vulgar comments, Avery was disqualified from running for Senior Class Secretary.¹³⁸

Avery Doninger's mother, alleging a violation of her daughter's First Amendment rights, had "moved for a preliminary injunction voiding the election for Senior Class Secretary and ordering the school to either hold a new election in which Avery would be allowed to participate or to grant Avery the same title, honors, and obligations as the student elected to the position."¹³⁹ The district court denied this motion.¹⁴⁰ Justifying the school's jurisdictional reach over Avery's speech, the Second Circuit in *Doninger* reasoned that not only was it reasonably foreseeable that Avery's Livejournal posting would reach school property, but that her speech was directed at the school.¹⁴¹ The Second Circuit affirmed the denial of the preliminary injunction motion because "Avery's blog post created a foreseeable risk of substantial disruption at LMHS."¹⁴²

The court relied on three factors to reach this conclusion.¹⁴³ First, Avery's language on her Livejournal blog post was not only offensive, "but also potentially disruptive of efforts to resolve the ongoing controversy."¹⁴⁴ Second, the court found it significant that Avery's post used misleading, or perhaps even false, information in her attempt to encourage more students to communicate with District Superintendent Schwartz.¹⁴⁵ Third, it was noteworthy that the discipline was related to "Avery's extracurricular role as a student government leader."¹⁴⁶

136. *Id.*

137. *Id.* at 46.

138. *Id.*

139. *Id.* at 43.

140. *Id.*

141. *Id.* at 50.

142. *Id.* at 43-44.

143. *Id.* at 50.

144. *Id.* at 50-51.

145. *Id.* at 51 ("It was foreseeable . . . that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery's post.").

146. *Id.* at 52.

Doninger's attorney argued that *Tinker* was not satisfied because the controversy at the school may not have been caused by Avery's Livejournal posting.¹⁴⁷ Rather, the disruption resulted from Avery's mass e-mail.¹⁴⁸ The Second Circuit labeled this argument as misguided, as the argument implied "that *Tinker* requires a showing of actual disruption to justify a restraint on student speech."¹⁴⁹ The court reasoned that school officials had a duty to prevent the harmful effects of disruptions.¹⁵⁰ Therefore, the question was not whether damage had been done, but whether school officials "'might reasonably portend disruption' from the student expression at issue."¹⁵¹

This framing of the issue is consistent with *Tinker*. *Tinker*'s substantial disruption test is forward-looking, and the Second Circuit admitted as much.¹⁵² But exactly where and when must a school look to put *Tinker*'s test to use? In *Wisniewski*, the Second Circuit applied *Tinker*'s substantial disruption test not from the moment the student created the threatening icon, but upon discovery of the icon by the teacher and by other school officials.¹⁵³ Once the icon was discovered, a police investigator and a psychologist had to determine whether the student was a threat to the safety of teachers and other school officials.¹⁵⁴ Unlike *Doninger*, *Wisniewski* involved an actual finding of a disruption of school operations by the special attention given to the situation by "school officials, replacement of the threatened teacher, and interviewing pupils during class time."¹⁵⁵ This materialization of a substantial disturbance reinforces the judgment of the Second Circuit "that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."¹⁵⁶

Nevertheless, *Doninger* took a misguided approach regarding when the *Tinker* test should govern. In *Doninger*, the opportunity for Avery's speech

147. *Id.* at 51.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.* at 51 ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act.>").

153. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007) ("And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.>").

154. *Id.* at 36.

155. *Id.*

156. *Id.* at 40.

to be a possible substantial disruption had already passed once school administrators discovered the speech.¹⁵⁷ Therefore, the court's framing of the question—"whether school officials 'might reasonably portend disruption' from the student expression at issue"—if applied once the communication was discovered, must be answered in the negative.¹⁵⁸ Yet Avery was still disciplined, though her online speech did not cause actual disruption, and the possibility that it would cause a disruption had essentially passed.¹⁵⁹ This is because the Second Circuit applied *Tinker* not from when school administrators discovered Avery's speech, but from when that speech was first written.¹⁶⁰ This use of *Tinker*'s substantial disruption test allows school administrators to punish online student speech that caused no substantial disruption in the past and will not cause a substantial disruption in the future, though it could have, but did not, cause a substantial disruption in the past.

Such an exercise of *Tinker*'s substantial disruption test was never considered by the Court in *Tinker*. According to the Court in *Morse*, "*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" ¹⁶¹ This test, as *Doninger* clearly noted, allows a school to suppress speech that it reasonably predicts will cause disruption.¹⁶² At its essence, *Tinker* allows a school to look to the future consequences of a student's speech to determine whether suppression of that speech is justified. The variation of the *Tinker* test used in *Doninger* is backward-looking, and is thus contrary to *Tinker*.

IV. THE PROPOSAL: IGNORE *TINKER* AND FOCUS ON THE EXTRACURRICULAR ACTIVITY

Without relying on *Tinker*, the Second Circuit should have justified the disciplining of Avery Doninger solely on the relation of the discipline to

157. *Doninger*, 527 F.3d at 46.

158. *Id.* at 51.

159. *See id.* at 45. Avery's request for students to call and email the school administration to gather support for Jamfest was rendered moot after the school administration decided to hold Jamfest. The likelihood that the Livejournal posting would cause a substantial disruption at school was therefore minimal.

160. *Id.* at 51. Ms. Doninger's words were "potentially disruptive of efforts to resolve the ongoing controversy." *Id.* Once her Livejournal posting was discovered, however, the dispute was already resolved. *Id.* at 46.

161. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

162. *Doninger*, 527 F.3d at 51.

“Avery’s extracurricular role as a student government leader.”¹⁶³ The prevailing view among the courts, including the Second Circuit, “is that conditions can be attached to extracurricular participation, because such participation is a privilege rather than a right.”¹⁶⁴ Students who participate in optional extracurricular activities such as school athletics “have reason to expect intrusions upon normal rights and privileges.”¹⁶⁵ Part of the reason for this expected intrusion is that students who choose to participate in extracurricular pursuits “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”¹⁶⁶

The Supreme Court has recognized this principle in a different context. In *Vernonia School District 47J v. Acton*, the Supreme Court considered whether a school district’s policy that “authorize[d] random urinalysis drug testing of students who participate[d] in the District’s school athletics programs . . . violate[d] the *Fourth* and *Fourteenth Amendments to the United States Constitution*.”¹⁶⁷ Justice Scalia, writing for a six-Justice majority, found that “legitimate privacy expectations are even less with regard to student athletes” than with the general student body.¹⁶⁸ In support, Justice Scalia noted “an element of ‘communal undress’ inherent in athletic” sports,¹⁶⁹ and the general lack of privacy to be found in Vernonia’s public school locker rooms.¹⁷⁰

163. *Id.* at 52.

164. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 135; *see also* James v. Tallahassee High Sch., 907 F. Supp. 364 (M.D. Ala. 1995), *aff’d per curiam*, 104 F.3d 372 (11th Cir. 1996); Albach v. Odle, 531 F.2d 983, 984-85 (stating that “[p]articipation in interscholastic athletics is not a constitutionally protected civil right”).

165. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). Some commentators, however, have noted that

[a]lthough students are technically not required to participate in extracurricular activities, they are encouraged to do so to the point where nonparticipation makes them outcasts, and harms their social, physical, and mental well-being. To say that participation in extracurricular activities is optional is to ignore their central, critical importance to public education. Students are not employees of the school, nor are they, in any realistic sense, free to choose non-participation in school activities.

LaCroix, *supra* note 10, at 263.

166. *Vernonia*, 515 U.S. at 657.

167. *Id.* at 648.

168. *Id.* at 657.

169. *Id.* (quoting *Schail v. Tippecanoe Cnty. Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1998)).

170. *See id.*

The Court also found that athletes in the school district must meet insurance requirements, must maintain adequate grades, and must “comply with ‘any rules of conduct, dress, training hours and related matters as may be established for each sport’” by the school’s administration.¹⁷¹ In light of this reduced expectation of privacy from the nature of the extracurricular activity and the rules governing the extracurricular activity, and considering the unobtrusiveness of the search and the interests of the school district in reducing drug use, the Court held that the school district’s random drug testing of students who participate in the district’s athletics program does not violate the Fourth Amendment.¹⁷² And importantly, the Court recognized similarities between First and Fourth Amendment jurisprudence in public schools: “*Fourth Amendment* rights, no less than *First* and *Fourteenth Amendment* rights, are different in public schools than elsewhere.”¹⁷³

Like the student-athletes in *Vernonia*, Avery Doninger was subject to a higher standard of conduct than normal students.¹⁷⁴ The district court found that “[a]s a student leader, Avery had a particular responsibility under the school handbook and school policy to demonstrate qualities of good citizenship at all times.”¹⁷⁵ Principal Niehoff “defined good citizenship as respect for others, behaving appropriately and as a good role model, working to initiate community connections, and promoting positive interactions and conflict resolution,” and she testified that “class officers were expected to work toward the objectives of the Student Council, work cooperatively with their advisor and with the administration, and promote good citizenship both in school and out.”¹⁷⁶ Avery Doninger was well aware of these requirements, as she signed the school handbook, “which included language regarding the social and civic expectations of

171. *Id.*

172. *Id.* at 664 (“Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude that Vernonia’s Policy is reasonable and hence constitutional.”). *But see id.* at 686 (O’Connor, J., dissenting) (“Having reviewed the record here, I cannot avoid the conclusion that the District’s suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the *Fourth Amendment*.” (emphasis added)).

173. *Id.* at 656 (majority opinion) (emphasis added).

174. *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008).

175. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 214 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008).

176. *Id.* at 214.

students.”¹⁷⁷ Avery also discussed these responsibilities with Principal Niehoff on April 24, 2007—after the original Jamfest email had been sent out—where Principal Niehoff “indicated to Avery that such an approach to conflict resolution was . . . inappropriate.”¹⁷⁸ Defiantly, Avery “posted her blog entry the very evening of the day on which that conversation occurred.”¹⁷⁹ This act of insubordination was “a factor of particular relevance” in [Principal Niehoff’s] disciplinary decision.¹⁸⁰

The district court agreed with Principal Niehoff, finding that Avery’s LiveJournal blog entry “clearly violates the school policy of civility and cooperative conflict resolution.”¹⁸¹ The district court noted that not only was Avery’s LiveJournal post “at best misleading, and at worst, entirely false,” but that her encouragement for “her readers to contact Ms. Schwartz specifically to ‘piss her off more’ [was] hardly the type of constructive approach to [dispute resolution] that a school would wish to encourage.”¹⁸² Even worse was that Avery included, in the LiveJournal post, the original e-mail that Principal Niehoff told Avery violated the school’s Internet policy.¹⁸³ Ms. Doninger even admitted that her daughter’s blog entry was offensive, and Avery Doninger “intimated that she opposed the specific punishment chosen rather than denying the appropriateness of any punishment at all[.]”¹⁸⁴ The district court refused to consider the supposed harshness of the penalty administered to Avery, noting that “whether disqualifying Avery from running for class secretary is a ‘fitting punishment’ in the circumstances, or was overly harsh or even too lenient, is not for this Court to determine.”¹⁸⁵ The court deferentially left that question for the school authorities to decide, noting that “[s]uch a question, we believe, represents a judgment call best left to the locally elected school board, not to a distant, life-tenured judiciary.”¹⁸⁶

The Second Circuit found Avery’s case to closely parallel that of *Lowery v. Euverard*, “which involved a group of high school football players who

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 214-15.

183. *Id.* at 215.

184. *Id.* Rather than admit she did not deserve to be punished at all, Ms. Doninger testified at oral argument that “the punishment didn’t fit the crime.” *Id.*

185. *Id.* at 202.

186. *Id.*

were removed from the team after signing a petition expressing their hatred of the coach and their desire not to play for him.”¹⁸⁷ In *Lowery*, the Sixth Circuit applied *Tinker* to this group’s petition, and found the relevant question to be whether “the petition might foreseeably frustrate efforts to teach the values of sportsmanship and team cohesiveness through participation in sport as an extracurricular activity.”¹⁸⁸ The Sixth Circuit noted that it was well established that “student athletes are subject to greater restrictions [on speech] than the student body at large.”¹⁸⁹ When players try out for a team, they implicitly agree to follow the coach’s rules and to submit to the coach’s authority.¹⁹⁰ While the students were free to continue their campaign to have the coach fired, they were not free to “continue to play football for him while actively working to undermine his authority.”¹⁹¹ Though the circumstances of the cases are certainly similar, the Second Circuit should have stopped short of the Sixth Circuit’s use of *Tinker*.

Employing *Tinker* to insubordination by members of a student government requires not only that a student break the rules, but also that a school official reasonably conclude that the student’s conduct will “materially and substantially disrupt the work and discipline of the school.”¹⁹² Yet not all rule-breaking behavior by a student will rise to the *Tinker* standard. Students like Avery Doninger regularly and voluntarily subject themselves to the regulations as a condition of participation.¹⁹³ To apply *Tinker* to Avery’s conduct as a member of her student council is to ignore the principle courts have recognized: school officials may exercise broad discretion in establishing training and conduct standards for students that participate in extracurricular activities to follow.¹⁹⁴

Instead, courts should review a school’s conditions on extracurricular participation under a reasonableness standard like that of *Hazelwood*.¹⁹⁵

187. *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008); see *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007).

188. *Doninger*, 527 F.3d at 52 (quoting *Lowery*, 497 F.3d at 593, 596).

189. *Lowery*, 497 F.3d at 597.

190. *Id.* at 600.

191. *Id.*

192. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). It is reasonable to conclude that not all examples of insubordination within an extracurricular activity would result in the level of disruption required by *Tinker*.

193. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 214 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008).

194. THOMAS, CAMBRON-McCABE & MCCARTHY, *supra* note 17, at 136.

195. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

This standard is consistent with the general rule that courts will typically afford deference to a school's formulation of eligibility rules for extracurricular activities.¹⁹⁶ It is recognized and widely accepted that “[s]chools can impose conditions such as skill prerequisites for athletic teams, academic and leadership criteria for honor societies, and musical proficiency for band and choral groups.”¹⁹⁷ Many students are required to undergo physical examinations to participate on athletic teams.¹⁹⁸ In addition, “courts generally approve residency requirements as conditions of interscholastic competition.”¹⁹⁹ And, the “nationwide trend among school districts is to condition extracurricular participation on satisfactory academic performance.”²⁰⁰ With respect to school speech doctrines, the logical outcome of this deference to school administrators leads to results consistent with *Vernonia*; namely, that students who participate in extracurricular activities should expect intrusions upon normal rights, and that schools can enforce the conditions of their extracurricular activities.²⁰¹

Thus, instead of relying on *Tinker*, the Second Circuit should have upheld the district court's conclusion that “participation in voluntary, extracurricular activities is a ‘privilege’ that can be rescinded when students fail to comply with the obligations inherent in the activities themselves.”²⁰² Avery Doninger's insubordination, and her use of incendiary language to describe the school officials she was subject to, was a clear violation of her responsibility to demonstrate qualities of good citizenship at all times. Her conduct also worked against the basic interests of the student council, which needed a cooperative relationship with the school administration to achieve the objectives of the student government. The violation of these rules alone was enough to justify the disciplining of Avery Doninger.

In summary, the Second Circuit should not have used *Tinker* to justify the disciplining of Avery Doninger. This far-reaching employment of the

196. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 136.

197. *Id.*

198. *Id.* at 137.

199. *Id.*; see also *Doe v. Woodford Cnty. Bd. of Educ.*, 213 F.3d 921, 923 (6th Cir. 2000) (upholding a school district's decision to exclude a hemophiliac student with hepatitis B from participating on a high school junior varsity basketball team).

200. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 138.

201. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

202. *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008). A court's deference to a school's policies regarding extracurricular activities would not necessarily be automatic. The courts could subject these policies—and the disciplining of a student as a result of the violation of these policies—to a reasonableness standard that is similar to that in *Hazelwood*. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Tinker test allows a school to punish student speech that is unlikely to cause a disruption—since the topic of the student speech is already resolved. Simply put, *Tinker* should be interpreted to require a school official to look *forward* in determining whether a student’s speech should be silenced and/or punished. Instead of allowing Avery Doninger’s insubordination to go unpunished, the Second Circuit should have simply recognized well-established limitations on the conduct of a student that participates in extracurricular activities. Avery Doninger broke the rules governing her involvement in student government. It is this fact alone, not the Second Circuit’s over-reliance on and misuse of *Tinker* that justifies the punishment administered by the school.

V. CONCLUSION

More than ever, today’s students have the means to communicate online.²⁰³ Most students have in-home access to a personal computer.²⁰⁴ And, student access to the Internet at home continues to rise.²⁰⁵ Social networking websites like Facebook, Myspace, and LiveJournal, as well as the instant-messaging communication tools seen in *Wisniewski*, are seeing rapid increases in popularity.²⁰⁶ It is estimated that “two-thirds of the world’s Internet population belongs to a social network.”²⁰⁷ The Nielsen Company’s research has uncovered that “global consumers spent more than five and half hours [sic] on social networking sites like Facebook and Twitter in December 2009, an 82% increase from the same time last year when users were spending just over three hours on social networking

203. See Donald F. Roberts et al., *Generation M: Media in the Lives of 8-18 Year-olds*, THE HENRY J. KAISER FAMILY FOUNDATION 30 (Mar. 9, 2005), <http://www.kff.org/entmedia/upload/Generation-M-Media-in-the-Lives-of-8-18-Year-olds-Report.pdf> (“[I]n 1999, 73% of 8- to 18-year olds reported a personal computer in their home; today, 86% report in-home access to a PC. Similarly, the 21% of 8- to 18-year-olds [who] reported having a computer in their bedroom in 1999 has grown to 35% reporting either a bedroom computer or their own laptop. At the same time computer penetration has increased, so too have the computer activities that attract young people.”).

204. *Id.*

205. See *Home Computer Access and Internet Use*, CHILD TRENDS DATABANK, <http://www.childtrendsdatabank.org/?q=node/298> (last updated June 2011) (“[T]he percentage of children who use the internet at home rose from 22 percent in 1997, the first year for which such estimates are available, to 42 percent in 2003 . . .”).

206. Jordan McCollum, *Social Networking Surpasses Email Popularity*, MARKETING PILGRIM (Mar. 5, 2009), <http://www.marketingpilgrim.com/2009/03/social-networking-surpasses-email-popularity.html>.

207. *Id.*

sites.”²⁰⁸ Increased use of social networking websites by students, teachers, and school administrators—coupled with online access at schools—will undoubtedly lead to an increase in online speech that a school determines to be threatening, disruptive, or offensive. School officials will also increasingly find themselves in the difficult position of trying to foresee the disruption that a student’s online speech may cause. With the increased amount of material posted to these websites, legal activity in this arena is bound to increase.²⁰⁹

Because the Supreme Court has not defined the scope of a school’s authority to discipline a student’s online and off-campus speech, lower courts and schools should step lightly in using existing Supreme Court precedent to discipline students. In the absence of a Supreme Court ruling, some schools are filling this void by “adopting policies that attempt to restrict the online, off-campus speech of their students.”²¹⁰ Even assuming that a school is within its authority to discipline a student’s speech that reaches the schoolhouse gate, though it takes place off-campus and online, courts should not extend a school’s scope of disciplinary authority beyond what Supreme Court precedent reasonably allows.²¹¹

Nevertheless, courts must uphold the authority of schools to discipline a student’s online speech if it violates the standard of conduct that an extracurricular activity places upon the student. Part of the justification for this conclusion is that students that participate in these activities voluntarily subject themselves to a higher standard of conduct than that imposed on the general student body.²¹² Further, participation in extracurricular activities—like student government—is a privilege, not a right, and a school needs discretion in its attempts to maintain order, respect, and discipline within these activities.²¹³ Where school boards have established rules for

208. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year over Year*, NIELSENWIRE (Jan. 22, 2010), <http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year>.

209. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 123.

210. Calvert, *supra* note 129, at 219.

211. Understandably, the interpretation and application of Supreme Court precedent to the realm of a student’s online speech is a difficult task.

212. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

213. This argument poses a question as to when a school’s rules governing extracurricular activities are considered to be too much of a burden on a student’s First Amendment rights.

suspending or expelling students from extracurricular activities, courts should require student compliance with the rules.²¹⁴

Tinker held that a student's speech, whether expressive or verbal, may not be prohibited or suppressed unless the school reasonably determines that it will "materially and substantially disrupt the work and discipline of the school."²¹⁵ This substantial disruption test can be a good test for schools to use, provided that it is not used retroactively to punish a student for online and off-campus speech that could have but did not, and likely will not, cause a substantial disruption. By applying *Tinker's* test retroactively, and not from the moment LMHS school officials discovered the speech, the Second Circuit in *Doninger* needlessly extended the basic character of the *Tinker* test. Instead, the Second Circuit should have reaffirmed a school's authority to hold students that participate in extracurricular activities to a higher standard of conduct. Disciplinary action that results from a violation of this code of conduct should not be governed by *Tinker*, but by a reasonableness standard similar to that of *Hazelwood*.

214. See THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 135. Though such a policy by the courts would defer to a school's judgment in establishing its own extracurricular rules, these rules would likely be subject to a reasonableness standard. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

215. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).