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# FORECASTING DISRUPTION, FORFEITING SPEECH: RESTRICTIONS ON STUDENT SPEECH IN EXTRACURRICULAR ACTIVITIES

**Abstract:** The First Amendment speech rights of public school students engaged in extracurricular activities occupy a doctrinal no-man’s land between individual expression and a government-controlled curriculum. Applying Supreme Court precedent, courts tend to characterize extracurricular student speech as either individual speech under *Tinker v. Des Moines Independent School District* or “school-sponsored” speech under *Hazelwood School District v. Kuhlmeier*. More recently, some courts have analogized students to government employees, particularly when school officials “forecast” that speech will be disruptive. Voluntary, extracurricular activities, and student speech within those activities, play essential roles in education. Applying a forecast of disruption standard, however, to student extracurricular speech shifts the burden from schools to students to show that speech is not disruptive. As a result, the forecast of disruption standard may condition student participation on giving up free speech rights, contrary to schools’ educational missions. This Note proposes requiring school officials relying on a forecast of disruption to punish student speech to demonstrate that the disruption materially and substantially interferes with the educational goal of the particular extracurricular activity.

## INTRODUCTION

At a basketball game in February 2009, Silsbee High School officials gave sixteen-year-old H.S., a female student and cheerleader, a choice: cheer by name for basketball star Rakheem Bolton or leave the game.<sup>1</sup> Four months prior, in October 2008, H.S. had attended a party where Bolton and two other young men allegedly raped her.<sup>2</sup> Bolton was arrested two days after the incident, but a grand jury elected not to indict him, and Bolton returned to school in January 2009.<sup>3</sup> H.S. began

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<sup>1</sup> Selena Roberts, *High School Dissonance*, SPORTS ILLUSTRATED, Nov. 8, 2010, at 82, 82; David L. Hudson, Jr., *5th Circuit: Cheerleader Can’t Refuse to Cheer*, FIRST AMENDMENT CENTER (Sept. 24, 2010), <http://archive.firstamendmentcenter.org/analysis.aspx?id=23416>.

<sup>2</sup> Bob Egelko, *Cheerleader Suit Tackles Students’ Rights Issue*, S.F. CHRON., Nov. 5, 2010, at A14.

<sup>3</sup> *Id.*; Roberts, *supra* note 1, at 82. Bolton and a teammate were later indicted on sexual assault charges; Bolton pled guilty to a misdemeanor assault charge, was fined \$2500, and was

therapy and was advised to maintain her routine as a way to cope with the trauma she had experienced, including continuing to cheer with the high school cheerleading squad.<sup>4</sup>

The squad had a custom of cheering for basketball players by name when the players took foul shots.<sup>5</sup> At the game in February, H.S. refused to cheer for Bolton and instead folded her arms, stepped back from the group, and sat down in silence.<sup>6</sup> At half time, school officials told H.S. to cheer for Bolton by name or go home, and H.S. left with her parents.<sup>7</sup> The following week, the cheerleading coach removed H.S. from the squad for the remainder of the season.<sup>8</sup>

H.S. and her parents sued the district attorney, Silsbee Independent School District (“SISD”), the superintendent, principal, the coach, and Rakheem Bolton.<sup>9</sup> They argued that H.S.’s silence constituted symbolic expression, and that removing H.S. from the cheerleading squad violated her First Amendment rights to freedom of speech.<sup>10</sup>

In October 2009, the U.S. District Court for the Eastern District of Texas granted the defendants’ motion to dismiss and, in September 2010, a panel of the U.S. Court of Appeals for the Fifth Circuit reviewed the decision *de novo* and affirmed the dismissal of the First Amendment claim.<sup>11</sup> Reasoning that H.S. “was contractually required to cheer,” the Fifth Circuit concluded that H.S.’s “failure to cheer consti-

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ordered to perform 150 hours of community service and to enroll in an anger-management course. Egelko, *supra* note 2.

<sup>4</sup> Roberts, *supra* note 1, at 82.

<sup>5</sup> *Id.*

<sup>6</sup> Egelko, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; Roberts, *supra* note 1, at 82. H.S. was permitted to cheer with the squad the following year. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x 852, 853 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011).

<sup>9</sup> *Doe*, 402 F. App’x at 853.

<sup>10</sup> *See id.* at 855. H.S. and her parents also claimed that the District Attorney deprived H.S. of her First Amendment rights to freedom of speech by retaliating against H.S. for filing sexual assault charges against Rakheem Bolton and another student allegedly involved in the attack in October, Christian Rountree. *Id.* at 853, 855.

<sup>11</sup> *See id.* at 853, 856. The attorney for H.S. and her parents requested a review of the three-judge panel’s decision by the full Court of Appeals and, in February 2011, they appealed the Fifth Circuit’s decision to the U.S. Supreme Court. Petition for Writ of Certiorari at 12, *Doe*, 402 F. App’x 852 (No. 10-1056), 2010 WL 3736233, at \*1-2; Bob Egelko, *Texas Cheerleader Takes Lawsuit to Supreme Court*, S.F. CHRON., Dec. 23, 2010, at A11; David L. Hudson, Jr., *Cheerleader’s Silence Not ‘Disruptive,’* FIRST AMENDMENT CENTER (Nov. 11, 2010), <http://www.firstamendmentcenter.org/cheerleaders-silence-not-disruptive>. The Supreme Court denied certiorari in May 2011. *Doe v. Silsbee Indep. Sch. Dist.*, 131 S. Ct. 2875, 2875 (2011).

tuted valid grounds for her removal” from the squad.<sup>12</sup> By participating in the extracurricular activity, H.S. voluntarily forfeited individual speech rights and became the school’s representative: “H.S. served as a mouthpiece through which SISD could disseminate speech—namely, support for its athletic teams.”<sup>13</sup>

In a four-page opinion, the Fifth Circuit held that H.S.’s silence was substantially disruptive because she attended the basketball game voluntarily, for the purpose of cheering.<sup>14</sup> Although in some circumstances schools must tolerate individual student speech, the court reasoned that the school was not required to “promote H.S.’s message by allowing her to cheer or not cheer, as she saw fit.”<sup>15</sup>

H.S.’s case tests the limits placed on public school students’ First Amendment speech rights when they participate in extracurricular activities.<sup>16</sup> Although the Framers in 1791 included the right to freedom of speech in the First Amendment in the Bill of Rights, the U.S. Supreme Court’s recognition of students’ First Amendment speech rights is relatively recent.<sup>17</sup> In 1969, in *Tinker v. Des Moines Independent Community School District*, the Court set out strong protections for student speech in public schools.<sup>18</sup> In student speech cases since *Tinker*, however, the Court has shown greater deference to school officials to regulate school environments.<sup>19</sup> The Court has recognized that students’

<sup>12</sup> *Doe*, 402 F. App’x at 853–54.

<sup>13</sup> *See id.* at 855.

<sup>14</sup> *Id.*; *see Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>15</sup> *Doe*, 402 F. App’x at 855; *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988).

<sup>16</sup> The First Amendment to the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I; *see also Tinker*, 393 U.S. at 511 (stating that students are “persons” under the Constitution both in school and outside of school).

<sup>17</sup> *See Tinker*, 393 U.S. at 512–14. *See generally* STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008) (providing a historical overview of the First Amendment); CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* (2007) (same).

<sup>18</sup> 393 U.S. at 506, 512–13. *See generally* EDWARD C. BOLMEIER, *LEGAL LIMITS OF AUTHORITY OVER THE PUPIL* (1970) (providing a contemporary legal analysis of student speech rights, published in the year following the Supreme Court’s decision in *Tinker*).

<sup>19</sup> *See Hazelwood*, 484 U.S. at 270–71; ERWIN C. CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1151 (3d ed. 2006); Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 81–82, 89–90 (2010). *See generally* MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH* (2001) (providing an overview of free expression and censorship issues pertaining to youth); KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (2003)

speech rights are “not automatically coextensive with the rights of adults in other settings.”<sup>20</sup> Those rights may be restricted “in light of the special characteristics of the school environment,”<sup>21</sup> and school officials are not obligated to tolerate student speech that “would undermine the school’s basic educational mission.”<sup>22</sup>

It may be helpful to analyze student speech in extracurricular activities in the context of the broader doctrinal spectrum of courts’ student speech decisions.<sup>23</sup> At one end of this spectrum, student speech rights are most restricted in the classroom and in other curricular settings.<sup>24</sup> At the other end of the spectrum, student speech is least restricted when students speak as individuals, when it is clear that the message conveyed is their own.<sup>25</sup> Student speech cases typically involve a balance between students’ speech rights and the school’s ability to control its message and to achieve educational goals, including in school-sponsored contexts beyond the classroom.<sup>26</sup> Courts frequently distinguish student speech in curricular contexts from non-curricular student speech, such as student attire.<sup>27</sup> Extracurricular student speech

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(providing an analysis advocating greater restrictions on First Amendment rights of youth).

<sup>20</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>21</sup> *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (quoting *Tinker*, 393 U.S. at 506).

<sup>22</sup> *Fraser*, 478 U.S. at 685.

<sup>23</sup> See Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 728 (1987) (describing a “continuum” of speech protection within public schools in which student speech receives less protection in contexts of school activities that have greater educational content).

<sup>24</sup> See *Hazelwood*, 393 U.S. at 271; *Tinker*, 393 U.S. at 512–13; Hafen, *supra* note 23, at 728.

<sup>25</sup> See *Tinker*, 393 U.S. at 512–13; Hafen, *supra* note 23, at 728.

<sup>26</sup> See generally Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825 (2009) (analyzing student speech rights in light of *Morse v. Frederick* and concluding that courts should only defer to school officials’ decisions to restrict *curricular* student speech, and should protect student speech that is outside the curriculum); Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?* 12 LEWIS & CLARK L. REV. 45 (2008) (examining ways the Supreme Court has defined the educational mission of schools in applying student speech standards); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008) (examining scope of student speech rights in use of digital media and concluding that courts tend to give school officials too much authority to restrict student speech rights in student expression through digital media); Mark Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN’S L. REV. 365 (1995) (analyzing the evolution of this balance between student speech rights and schools’ restrictions on student speech in the twenty-five years following the *Tinker* decision).

<sup>27</sup> See *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 736–39 (8th Cir. 2009) (holding that a Confederate flag on student clothing was inherently disruptive in the context of race-related violence at school and within the community); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530–31 (9th Cir. 1992) (holding that buttons worn on student clothing

fits on this spectrum between curricular and non-curricular speech—that is, between individual speech generally evaluated under *Tinker* and school-sponsored speech evaluated under the framework that the Supreme Court set out in 1988 in *Hazelwood School District v. Kuhlmeier*.<sup>28</sup>

This intermediary doctrinal position between curricular and non-curricular speech arises from the complementary role that extracurricular activities play in students' education.<sup>29</sup> Student speech cases arise in a wide range of extracurricular contexts, including participation in student athletic teams,<sup>30</sup> newspapers,<sup>31</sup> performance groups,<sup>32</sup> cheerleading squads,<sup>33</sup> clubs,<sup>34</sup> or government.<sup>35</sup> Although traditionally educational institutions exercise greater control over curriculum than over voluntary, extracurricular activities, those activities frequently involve significant school resources, such as facilities and instruction, and serve educational goals.<sup>36</sup>

containing the word "scab" were not inherently disruptive); Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL RTS. J. 657, 699–712 (2009).

<sup>28</sup> 484 U.S. at 270–71; see *Lowery v. Euverard*, 497 F.3d 584, 588–89 (6th Cir. 2007); Hafen, *supra* note 23, at 728.

<sup>29</sup> See *Bd. of Educ. v. Earls*, 536 U.S. 822, 845–46 (2002) (Ginsburg, J., dissenting) (noting that extracurricular activities are part of the school's educational program and are central to students' educational experience and college prospects); *infra* notes 257–266 and accompanying text. This Note defines an extracurricular activity as a voluntary endeavor for which students do not primarily receive academic credit (though the activity may complement the required curriculum), which may occur on school grounds, be organized by the public school, and be sustained by resources provided by the school to support the activity. See *Hazelwood*, 484 U.S. at 270–71; *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799, 807 (E.D. Mich. 2004).

<sup>30</sup> See *Lowery*, 497 F.3d at 587–88; *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 759 (9th Cir. 2006); *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 769 (8th Cir. 2001); *Seamons v. Snow*, 206 F.3d 1021, 1028 (10th Cir. 2000).

<sup>31</sup> See *Lueneberg v. Everett Sch. Dist. No. 2*, No. C05-2070RSM, 2007 WL 2069859, at \*6–8 (W.D. Wash. July 13, 2007); *Dean*, 345 F. Supp. 2d at 804; *Desilets ex rel. Desilets v. Clearview Reg'l Bd. of Educ.*, 630 A.2d 333, 338 (N.J. Super. Ct. App. Div. 1993).

<sup>32</sup> See *Cleveland v. Blount Cnty. Sch. Dist.* 00050, No. 3:05-CV-380, 2008 WL 250403, at \*3 (E.D. Tenn. Jan. 28, 2008); see also Alison Leigh Cowan, *Play About Iraq War Divides a Connecticut School*, N.Y. TIMES, Mar. 24, 2007, at B1 (describing a high school administrators' decision to cancel a student-written play about the war in Iraq).

<sup>33</sup> See *Doe*, 402 F. App'x at 855.

<sup>34</sup> See *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 669, 691 (E.D. Ky. 2003).

<sup>35</sup> See *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008); *Henerey ex rel. Henerey v. City of St. Charles*, 200 F.3d 1128, 1132–33 (8th Cir. 1999); *Poling v. Murphy*, 872 F.2d 757, 758–59 (6th Cir. 1989).

<sup>36</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *Romano v. Harrington*, 725 F. Supp. 687, 690 (E.D.N.Y. 1989) ("[E]ducators may exercise greater editorial control over what students write for class than what they voluntarily submit to an extra-

Student speech in extracurricular activities may also be examined in the context of First Amendment rights available in other government-regulated institutions—where speech generally receives less protection; a particularly useful comparison is to public employees’ speech rights because, like government employees, students in extracurricular activities may be viewed as representing the school.<sup>37</sup> Although courts frequently defer to government institutions in regulating speech, these institutions’ missions include cultivating and ultimately contributing to the broader “marketplace of ideas.”<sup>38</sup> In early cases addressing student speech rights, the Supreme Court emphasized that schools should teach students to be free-thinking citizens in a democracy.<sup>39</sup> Ideally, public schools harmonize the pursuit of institutional goals with upholding student speech rights.<sup>40</sup>

However, student participation in extracurricular activities may entail *greater* government regulation than curricular activities, rather than less.<sup>41</sup> The voluntary nature of extracurricular activities reduces the school’s control over student speech that takes place outside of curricular settings.<sup>42</sup> The Supreme Court, however, has upheld school policies

curricular, albeit school-funded, publication.”); *see also Pinard*, 467 F.3d at 769–70 (describing school resources spent to schedule a basketball game).

<sup>37</sup> *See Doe*, 402 F. App’x at 855; Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829 (2008) (arguing that lawmakers defer to government institutions’ restrictions on speech only to the extent that such restrictions advance the marketplace of ideas); Caplan, *supra* note 19, at 74; Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441–43 (1999); Hafen, *supra* note 23, at 722–25; SCOTT A. MOSS, *Students and Workers and Prisoners—Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1639–41 (2007) (examining two arguments used to support judicial deference to government institutions’ restrictions on speech—“waiver” and “risk”—and proposing that courts apply intermediate scrutiny instead of strict scrutiny to such claims).

<sup>38</sup> *See Tinker*, 393 U.S. at 512; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to [a] robust exchange of ideas . . . .”); Blocher, *supra* note 37, at 829. Protecting free and open debate in a “marketplace of ideas” has long been considered a principal purpose of the First Amendment. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”); GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 9–10 (3d ed. 2008).

<sup>39</sup> *See Tinker*, 393 U.S. at 511–12; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”); Chemerinsky, *supra* note 26, at 826.

<sup>40</sup> *See Chemerinsky*, *supra* note 26, at 826.

<sup>41</sup> *See Earls*, 536 U.S. at 845–47 (Ginsburg, J., dissenting); *Lowery*, 497 F.3d at 597.

<sup>42</sup> *See Axson-Flynn*, 356 F.3d at 1289; *Romano*, 725 F. Supp. at 690.

that restrict other constitutional rights of students participating in extracurricular activities.<sup>43</sup> For example, in 2002, in *Board of Education v. Earls*, the Court held that public schools may require students to submit to random, suspicionless urinalysis drug testing as a condition of participating in competitive extracurricular activities, eroding the students' Fourth Amendment rights against unreasonable searches.<sup>44</sup> The policy applied to an array of activities, including athletics, cheerleading, marching band, choir, and the "Academic Team."<sup>45</sup> As in the Fourth Amendment context, when students participate in voluntary extracurricular activities, to what degree do they also waive First Amendment speech rights?<sup>46</sup>

This Note analyzes the First Amendment speech rights of public school students participating in extracurricular activities.<sup>47</sup> Part I reviews Supreme Court precedent and the implications of these standards for

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<sup>43</sup> See *Earls*, 536 U.S. at 825–26, 828; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57, 664–65 (1995) (holding that school policy of conducting random, suspicionless urinalysis drug testing on students participating in school district's athletic programs did not violate Fourth and Fourteenth Amendments, based in part on student athletes' reduced legitimate expectation of privacy compared to that of other students because student athletes voluntarily subject themselves to greater regulation than other students). *But see* *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995, 1006 (Wash. 2008) (holding that a school's warrantless, random drug testing of student athletes as condition of participating in extracurricular interscholastic athletics violated the state constitution); *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 78, 92 (Pa. 2003) (holding unconstitutional on state law grounds a school policy that authorized random, suspicionless drug and alcohol testing of all students participating in any extracurricular activities—defined as activities in which students participate on a voluntary basis and for which academic credit is not awarded—unless the school demonstrated a specific need for the policy and the policy addressed that need).

<sup>44</sup> 536 U.S. at 825–26, 828; see U.S. CONST. amend. IV; see also Caplan, *supra* note 19, at 102–04 (comparing Fourth Amendment rights available in jails and schools to demonstrate that constitutional rights in these two types of government institutions—including First Amendment speech rights—are similarly restricted).

<sup>45</sup> See *Earls*, 536 U.S. at 826.

<sup>46</sup> See *id.*; *Lowery*, 497 F.3d at 597; Moss, *supra* note 37, at 1645–48 (asserting that students, like others speaking in the context of government institutional oversight, may have "waived" a degree of speech protection by choosing not to leave the school district instead of giving up rights, but concluding that this argument is only tenable if the students' "choice" is realistic).

<sup>47</sup> See *Tinker*, 393 U.S. at 512–13; *Lowery*, 497 F.3d at 597. In general, First Amendment challenges brought by public school students are brought by middle and high school students. Papandrea, *supra* note 26, at 1029 n.5. Under the state action doctrine, the First Amendment applies only when the entity restricting the expression is a state actor; private school students may not claim that their schools have infringed their speech rights under the First Amendment. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 298–99 (2001); Papandrea, *supra* note 26, at 1029 n.5.

student speech in extracurricular contexts.<sup>48</sup> Part II surveys lower court applications of these standards in extracurricular settings and demonstrates that, although courts do not always rely on a single standard, courts tend to treat extracurricular student speech as either curriculum-like, school-sponsored speech, or as individual speech under *Tinker*.<sup>49</sup> In particular, Part II conducts a close analysis of restrictions on student athletes' speech using a "forecast" of disruption under *Tinker* and demonstrates how courts combine this standard with analogies to public employment to support restricting student speech.<sup>50</sup> Part III analyzes the doctrinal and practical effects of this approach in light of the essential role extracurricular activities play in education.<sup>51</sup> Part III also proposes requiring school officials using a forecast of disruption to connect the restriction on student speech to the educational goal of the particular extracurricular activity.<sup>52</sup> This Note argues that using a forecast of disruption conditions student participation in extracurricular activities on giving up First Amendment speech protections, a result that contradicts educational goals.<sup>53</sup>

## I. SUPREME COURT PRECEDENTS: STUDENT SPEECH RIGHTS IN SCHOOL

In early cases addressing the First Amendment expressive rights of public elementary and secondary school students, the Supreme Court recognized that students retain broad constitutional rights in school, including the right not to speak.<sup>54</sup> Later cases, however, weaken student speech rights, eliminating protection for student speech in two narrow categories—vulgar speech and speech that advocates illegal drug use—and eroding student speech protections in school-sponsored contexts.<sup>55</sup>

### A. *Tinker: Student Speech Inside the Schoolhouse Gate*

In 1969, in *Tinker*, the Supreme Court set a strong standard to protect student speech, including in extracurricular settings: school officials may suppress student speech only if the speech materially and sub-

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<sup>48</sup> See *infra* notes 54–100 and accompanying text.

<sup>49</sup> See *infra* notes 101–215 and accompanying text.

<sup>50</sup> See *infra* notes 147–194 and accompanying text.

<sup>51</sup> See *infra* notes 216–270 and accompanying text.

<sup>52</sup> See *infra* notes 271–289 and accompanying text.

<sup>53</sup> See *infra* notes 216–270 and accompanying text.

<sup>54</sup> See *Barnette*, 319 U.S. at 642 (holding that public school students may not be compelled to salute the American flag as part of the school day); Papandrea, *supra* note 26, at 1038.

<sup>55</sup> See *Morse*, 551 U.S. at 397; *Hazelwood*, 484 U.S. at 271; *Fraser*, 478 U.S. at 685–86.

stantially disrupts the work of the school or infringes on others' rights.<sup>56</sup> Middle and high school students John F. Tinker, Mary Beth Tinker, and Christopher Eckhardt wore black armbands to school to demonstrate their opposition to the Vietnam War and were suspended.<sup>57</sup> In upholding the students' First Amendment speech rights, the Court distinguished curricular speech from non-curricular speech<sup>58</sup> and sought to balance protecting student speech rights with upholding school officials' authority to maintain order, discipline, and to achieve the school's educational mission.<sup>59</sup>

Famously declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>60</sup> the Supreme Court held that the armbands did not cause any actual or substantial disruption to the school's work or classes.<sup>61</sup> Singling out the black armbands constituted impermissible viewpoint-based discrimination against political expression.<sup>62</sup>

In an observation that has since become more directly relevant to the extracurricular context, the *Tinker* Court also specified that students' First Amendment rights in schools extend beyond the classroom, both through personal communication among students and in extracurricular and non-curricular settings.<sup>63</sup> Student speech rights are protected when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours," as long as that expression

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<sup>56</sup> See 393 U.S. at 512–13.

<sup>57</sup> *Id.* at 504. See generally JOHN W. JOHNSON, *THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S* (1997) (providing a history of the *Tinker* case).

<sup>58</sup> See *Tinker*, 393 U.S. at 514.

<sup>59</sup> See *id.* at 512–13.

<sup>60</sup> *Id.* at 506.

<sup>61</sup> *Id.* at 508, 514.

<sup>62</sup> See *id.* at 510–11. The distinction between content-based speech restrictions (either viewpoint-based or subject matter-based) and content-neutral speech restrictions is central to First Amendment law. See CHEMERINSKY, *supra* note 19, at 932–34. Viewpoint-based restrictions are presumptively invalid and subject to strict scrutiny, which requires that the speech restriction be narrowly tailored to satisfy a compelling government interest. See *id.* at 540–42, 932–34. In government-regulated institutions, however, content-based restrictions receive greater deference. See *id.* at 1154. Typically, viewpoint-based restrictions are subject to strict scrutiny regardless of the forum, but subject matter restrictions in a non-public forum are subject only to rational basis review. See *Hazelwood*, 484 U.S. at 270–71; CHEMERINSKY, *supra* note 19, at 1152–53. For a discussion of public forum doctrine, see *infra* note 83. As a premise, this Note assumes that Supreme Court student speech precedents make clear that viewpoint-based restrictions of student speech are permitted in schools in certain circumstances. See Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 66 (2008) ("The real question is not *whether Hazelwood* permits viewpoint discrimination, but *when*.").

<sup>63</sup> See *Tinker*, 393 U.S. at 512–13.

does not materially and substantially interfere with the work of the school or infringe others' rights.<sup>64</sup>

For the *Tinker* Court, student speech in these settings must be protected because free speech is crucial to education; the classroom is "peculiarly the marketplace of ideas," a setting for training future leaders in democracy exposed to a "robust exchange of ideas."<sup>65</sup> Lower courts have applied the language in *Tinker* permitting school officials to restrict student speech not only when they can demonstrate that actual disruption occurred, but also when officials can reasonably forecast it.<sup>66</sup> The *Tinker* Court reasoned, however, that school officials have the burden of showing that a particular speech prohibition is "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>67</sup>

### B. Supreme Court Student Speech Cases After *Tinker*

In the decades after *Tinker*, the Supreme Court carved out limitations to the disruption standard.<sup>68</sup> In 1986, in *Bethel School District No. 403 v. Fraser*, the Court held that school officials could punish a high school student for using "lewd" speech at a school assembly.<sup>69</sup> Student Matthew N. Fraser's speech nominating a friend for student body vice president during a school assembly contained sexual innuendo.<sup>70</sup> The

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 512 (quoting *Keyishian*, 385 U.S. at 603).

<sup>66</sup> *See id.* at 514; *Lowery*, 497 F.3d at 592–93; *Pinard*, 467 F.3d at 772.

<sup>67</sup> *Tinker*, 393 U.S. at 509. The justices disagreed on the degree of deference to grant school officials. *See id.* at 526 (Harlan, J., dissenting) (arguing that courts should defer to school officials to maintain "discipline and good order" in schools). In 1982, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, Justice William Brennan, writing for a plurality of the Supreme Court, built on *Tinker* to hold that, although courts should grant broad deference to school officials to select books for the school library, discretion remained limited. 457 U.S. 853, 868, 870–72 (1982). *Pico* further established that students' First Amendment rights to speak in school necessarily include the right to receive information, such as the right to choose library books. *See id.* at 867–68; Yudof, *supra* note 26, at 370–71. The Court held that school officials' disapproval of the content of library books alone would be insufficient to support removing them from the school library. *See Pico*, 457 U.S. at 871–72.

<sup>68</sup> *See Fraser*, 478 U.S. at 685–86; *Tinker*, 393 U.S. at 512–13.

<sup>69</sup> 478 U.S. at 685. The full text of student Matthew Fraser's speech is reprinted in Justice Brennan's concurring opinion. *Id.* at 687 (Brennan, J., concurring in the judgment). Justice Brennan remarked that, having read the speech, it was "difficult to believe that it is the same speech the Court describes." *Id.*

<sup>70</sup> *Id.*; *see* Yudof, *supra* note 26, at 373–74. As Justice Brennan noted, Fraser's speech did not fall into the category of "obscene" speech that is unprotected by the First Amendment. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring in the judgment); *see* *Ginsberg v. New York*, 390 U.S. 629, 641 (1968); *Roth v. United States*, 354 U.S. 476, 484–85 (1957) ("But implicit

day after the assembly, the school's assistant principal notified Fraser that the speech violated a school rule prohibiting obscene language.<sup>71</sup> Fraser was suspended for three days, and his name was removed from the list of candidates for graduation speaker.<sup>72</sup>

The Supreme Court in *Fraser* added an exception to the *Tinker* disruption standard, creating a second, narrower category of student speech doctrine: both in the classroom and in school-sponsored extracurricular settings, such as student government speeches, school officials could restrict "vulgar and lewd" student speech.<sup>73</sup> The Court deferred to school officials and implied that regulating Fraser's speech was constitutional because "vulgar and lewd speech" is inherently disruptive and would interfere with the school's educational mission.<sup>74</sup> The *Fraser* majority reasoned that public schools may dissociate themselves from a student's individual message when the speaker's identity might be unclear; to maintain order, discipline, and control in the school environment; and to teach boundaries of civility and appropriate conduct.<sup>75</sup> Justice John Paul Stevens, though dissenting, agreed with the majority of the Court that school officials could restrict student use of expletives in extracurricular activities when those activities were school-sponsored and conducted on school grounds, in addition to restricting such speech in classroom discussion.<sup>76</sup>

In 1988, in *Hazelwood*, the Supreme Court introduced a third standard for assessing student speech protections, holding that school offi-

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in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

<sup>71</sup> *Fraser*, 478 U.S. at 678.

<sup>72</sup> *Id.* The *Fraser* rule appears to have adopted the *Tinker* disruption standard but specifically applied it to "obscene" language; the rule provided: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *See id.* Despite the removal of his name from the list of candidates for graduation speaker, Fraser was elected graduation speaker by a write-in vote and delivered a speech at commencement. *Id.* at 679.

<sup>73</sup> *See id.* at 685–86; Waldman, *supra* note 62, at 70.

<sup>74</sup> *See Fraser*, 478 U.S. at 685–86 (Brennan, J., concurring). The Court did not apply *Tinker's* material and substantial disruption standard. *See Papandrea, supra* note 26, at 1047.

<sup>75</sup> *See Fraser*, 478 U.S. at 683, 685–86 ("The inculcation of these values is truly the 'work of the schools.'" (quoting *Tinker*, 393 U.S. at 508)).

<sup>76</sup> *See id.* at 691 (Stevens, J., dissenting). Justice Stevens, in his dissent, focused on the disciplinary reaction to Fraser's speech, noting that students are entitled to fair notice of what speech may be punishable, and the scope of potential repercussions. *See id.*; *see also* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1114 (2010) (arguing that students punished for their speech after the fact must be given adequate prior notice and that punishment should be reviewed for reasonableness).

cially may regulate student speech in the context of a school-sponsored, “expressive” activity that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>77</sup> Prior to publication of a student newspaper written as part of a journalism class, the school principal deleted two articles that described divorce in students’ families and students’ experiences with teen pregnancies.<sup>78</sup> The Court distinguished individual student speech that schools must tolerate under *Tinker’s* disruption standard from school-sponsored speech.<sup>79</sup> Such activities “may fairly be characterized as part of the school curriculum,” even when they occur outside the classroom in an extracurricular setting, if the activity is (1) supervised by faculty members and (2) “designed to impart particular knowledge or skills to student participants and audiences.”<sup>80</sup>

The Supreme Court’s analysis in *Hazelwood* arguably marks the beginning of a shift in the Court’s doctrinal starting point, from examining the identity of the speaker to scrutinizing the context of the speech at issue.<sup>81</sup> Once *Hazelwood* applies to the activity, to pass constitutional muster, the restriction on student speech must reasonably relate to “legitimate pedagogical concerns.”<sup>82</sup> The Supreme Court in *Hazelwood* held that the newspaper was a nonpublic forum because publication took place in the context of classroom time and instruction, and thus school officials could regulate its content.<sup>83</sup> *Hazelwood* thus affirmed the

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<sup>77</sup> 484 U.S. at 271–73. Lower courts have interpreted Supreme Court precedent to establish three categories of student speech: (1) vulgar, lewd speech governed by *Fraser*; (2) school-sponsored speech governed by *Hazelwood*; and (3) all other speech governed by *Tinker*. See *Lowery*, 497 F.3d at 588; *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988–89 (9th Cir. 2001) (citing *Chandler v. McMinville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992)); *Cordes*, *supra* note 27, at 667–68.

<sup>78</sup> *Hazelwood*, 484 U.S. at 262–63. The school principal censored the newspaper because he felt that the parents whose divorce was described in one of the articles should have been given an opportunity to respond to the student’s remarks or to consent to publication, and that the identity of pregnant students quoted in the pregnancy story might still be apparent, despite the use of pseudonyms. *Id.* at 263–64. In a footnote, the Court addressed the prong of *Tinker* dealing with the invasion of the rights of others, declining to decide whether *Tinker* meant that school officials could censor the newspaper only if the speech therein could have resulted in tort liability for the school. See *id.* at 273 n.5. See generally Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253 (1992) (providing a contemporary analysis of the impact of *Hazelwood*).

<sup>79</sup> *Hazelwood*, 484 U.S. at 270–71.

<sup>80</sup> See *id.* at 271.

<sup>81</sup> See *id.* at 282 (Brennan, J., dissenting); Chemerinsky, *supra* note 26, at 832.

<sup>82</sup> See *Hazelwood*, 484 U.S. at 273; Waldman, *supra* note 62, at 112.

<sup>83</sup> 484 U.S. at 269–70. The Supreme Court has defined three different arenas in which government actors may regulate speech, each characterized by a different level of protection for speech rights. See CHEMERINSKY, *supra* note 19, at 1127. In a traditional, public

assertion in *Fraser* that school officials have broad control over speech in the classroom and other school-sponsored settings and may restrict student speech based on the viewpoint expressed in such nonpublic forums.<sup>84</sup>

Further, *Hazelwood* applies outside the classroom—and to extracurricular activities that the school can demonstrate are school-sponsored and might reasonably be perceived to bear the school’s “imprimatur.”<sup>85</sup> Justices William Brennan, Thurgood Marshall, and Harold Blackmun, dissenting in *Hazelwood*, argued that schools need not sponsor student curricular or extracurricular work that was “ungrammatical, poorly written, inadequately researched, biased or prejudiced,” but educators could apply the *Tinker* disruption standard to justify making

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forum, such as a public park or sidewalk, government exclusions may be viewpoint-based or subject matter-based only if the government satisfies strict scrutiny, demonstrating that the restriction serves a compelling state interest and is narrowly drawn to achieve that end. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983). The government also may make reasonable time, place, and manner restrictions in a public forum as long as the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication. *Id.* at 45–46. In a limited or “designated” public forum, the government opens up a forum for speech to be generally available to a class of speakers (e.g., students). *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995); *Perry*, 460 U.S. at 45–46; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). The government may not discriminate on the basis of viewpoint in a limited public forum unless it satisfies strict scrutiny (as in a public forum), and content-neutral restrictions must adhere to reasonable time, place, and manner restrictions. *See Perry*, 460 U.S. at 45–46. *But see Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (holding that speech in a limited public forum may be restricted as long as the restriction is viewpoint-neutral and “reasonable in light of the purpose served by the forum” (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985))). Finally, in a nonpublic forum, the government may restrict speech as long as the restriction is reasonable and made on a viewpoint-neutral basis. *See Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814–15 (1984) (holding that lamp-posts constituted a nonpublic forum); *Perry*, 460 U.S. at 46; *CHEMERINKSY*, *supra* note 19, at 1139.

One scholar has provided a discussion of the debate about the role of public forum analysis in student free speech cases. *See Alan Brownstein, The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 721 (2009) (describing this debate and proposing a new category of forum analysis under which to evaluate free speech claims in public schools—the “nonforum”).

<sup>84</sup> *Hazelwood*, 484 U.S. at 270, 273 (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”); *Fraser*, 478 U.S. at 685.

<sup>85</sup> *See Hazelwood*, 484 U.S. at 271.

such edits.<sup>86</sup> The *Hazelwood* Court's analysis of the type of speech forum and its focus on whether the speech at issue could reasonably be construed to bear the school's imprimatur permits schools to apply a curricular standard to school-sponsored speech to extracurricular speech beyond the classroom.<sup>87</sup>

The Supreme Court further eroded *Tinker* in its most recent decision on student speech rights in school.<sup>88</sup> In 2007, in *Morse v. Frederick*, the Court held that a school official may constitutionally restrict student speech that is reasonably regarded as promoting illegal drug use.<sup>89</sup> In January 2002, as the Olympic Torch Relay processed through Juneau, Alaska, Juneau-Douglas High School senior Joseph Frederick stood on the sidewalk across the street from the school and unfurled a fourteen-foot, homemade banner proclaiming, "BONG HiTS 4 JESUS."<sup>90</sup> The Supreme Court reasoned that the concern with Frederick's speech was not its perceived offensiveness, but rather the promotion of illegal drug use, and that school officials could punish such advocacy because drug use threatens student safety.<sup>91</sup> Frederick's speech at the Olympic Torch Relay took place in the context of the school environment because it occurred during normal school hours, and because student and staff attendance was school-sanctioned, like a class trip or school-sanctioned social event.<sup>92</sup> This holding in *Morse* applies *Hazelwood* beyond school-sponsored events to any event permitted by the school, but, within such settings, it only addresses the permissibility of suppression or punishment of speech that could reasonably be perceived to advocate illegal drug use.<sup>93</sup>

Although *Tinker* has not been overruled, the Court has eroded protection for student speech over time and shown greater deference

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<sup>86</sup> See *id.* at 283–84 (Brennan, J., dissenting). Further, the school could distance itself from student speech by publishing a disclaimer in the newspaper or by issuing its own response. See *id.* at 289.

<sup>87</sup> See *id.* at 270–71 (majority opinion); Brownstein, *supra* note 83, at 768 (2009); Salomone, *supra* note 78, at 275–84, 316 (analyzing lower courts' use of the *Hazelwood* standard and various applications of public forum doctrine to student free speech cases).

<sup>88</sup> See *Morse*, 551 U.S. at 396–97.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 397.

<sup>91</sup> See *id.* at 409. In a concurring opinion, Justice Samuel Alito stated that, although school officials may censor student speech if a reasonable observer would interpret it to promote illegal drug use, speech about a political or social issue is protected. See *id.* at 422 (Alito, J., concurring). Further, the special characteristics of the school setting exposed students to dangers they would not face otherwise; advocacy of illegal drug use posed a threat to students' physical safety. See *id.* at 424–25.

<sup>92</sup> See *id.* at 400 (majority opinion).

<sup>93</sup> See *id.*; *Hazelwood*, 484 U.S. at 270–71; Chemerinsky, *supra* note 26, at 830.

to school officials.<sup>94</sup> *Tinker* set strong protections for student expression, including speech in extracurricular activities: school officials may restrict student speech only when the speech materially and substantially disrupts a legitimate curricular function or infringes the rights of others.<sup>95</sup> Under *Fraser*, school officials may restrict lewd or vulgar student speech in a school-sponsored, educational setting when that speech interferes with the school's educational mission and the school's efforts to teach "the boundaries of socially appropriate behavior."<sup>96</sup> *Morse* similarly presents another narrow standard, focused on restricting speech that could reasonably be perceived to advocate illegal drug use within the school environment.<sup>97</sup> In *Hazelwood*, the Court granted broad leeway to school officials to restrict student speech in extracurricular activities that are school-sponsored if the restriction is reasonably related to a legitimate pedagogical concern.<sup>98</sup> The *Hazelwood* pedagogical concern test thus permits schools to treat an inherently "expressive" extracurricular activity as curricular, even when it occurs outside of the classroom.<sup>99</sup> In other settings, however, the *Tinker* forecast of disruption standard permits schools to suppress or punish individual student speech in anticipation of disruption.<sup>100</sup>

## II. EXTRACURRICULAR STUDENT SPEECH

Cases involving student expression in the context of extracurricular activities involve a balance between students' First Amendment speech rights and deference to school officials to carry out the school's educational mission safely and effectively.<sup>101</sup>

Lower courts typically apply the four major Supreme Court precedents addressed in Part I to specific kinds of student speech in schools: (1) the 1986 case of *Bethel School District No. 403 v. Fraser* governs "vulgar and obscene speech," (2) the 1988 case of *Hazelwood School District v. Kuhlmeier* governs "school-sponsored" speech, (3) the 2007 case of *Morse v. Frederick* governs drug-related messages, and (4) the 1969 case of *Tink-*

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<sup>94</sup> See Chemerinsky, *supra* note 26, at 825–26; Papandrea, *supra* note 26, at 1030.

<sup>95</sup> See *Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting); *Tinker*, 393 U.S. at 509; see also Chemerinsky, *supra* note 26, at 825–26 (arguing that courts should afford school officials much less deference to regulate student speech outside of curricular activities).

<sup>96</sup> See *Fraser*, 478 U.S. at 681, 683.

<sup>97</sup> See *Morse*, 551 U.S. at 409.

<sup>98</sup> See *Hazelwood*, 484 U.S. at 273.

<sup>99</sup> See *id.* at 271.

<sup>100</sup> See *Tinker*, 393 U.S. at 514.

<sup>101</sup> See Chemerinsky, *supra* note 26, at 825–26; Hafen, *supra* note 23, at 728.

*er v. Des Moines Independent Community School District* governs all other student speech.<sup>102</sup> Notwithstanding these general classifications, it is not always clear how courts choose which standard to apply.<sup>103</sup> The choice of rule may be particularly important because, often, the main doctrinal issue in extracurricular student speech cases is whether the school has the burden of demonstrating that disruption (or the reasonable forecast thereof) justifies the speech restriction, or whether the burden instead rests with students to show that a speech restriction constitutes an abuse of institutional discretion.<sup>104</sup> Outside specific instances involving speech governed by *Fraser* or *Morse*, courts generally apply either the *Tinker* disruption standard to individual student expression, or the *Hazelwood* legitimate pedagogical concern test to school-sponsored speech in “expressive” activities.<sup>105</sup>

#### A. Student Speech in School-Sponsored “Expressive” Extracurricular Activities

In cases involving student speech in the context of school-sponsored, extracurricular, “expressive” activities that take place outside the classroom, courts tend to apply the *Hazelwood* standard, holding that schools may regulate speech if the restriction is reasonably related to legitimate, pedagogical concerns.<sup>106</sup> Cases involving “school-sponsored,” student speech in extracurricular “expressive” contexts

<sup>102</sup> See *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007).

<sup>103</sup> See *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852, 855 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011) (applying both *Tinker* and *Hazelwood*); *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 765 (9th Cir. 2006) (applying *Tinker* without discussion as to why this standard applies among available student speech standards); *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (applying both *Tinker* and *Fraser*).

<sup>104</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–14 (1969); Hafen, *supra* note 23, at 722–23.

<sup>105</sup> See *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 114 (D. Mass. 2003). Prior to the Supreme Court's decision in 2007 in *Morse v. Frederick*, the U.S. Court of Appeals for the Ninth Circuit similarly classified student speech into (1) the narrow category of vulgar, lewd, obscene, and plainly offensive speech restricted or punished under *Fraser*; (2) school-sponsored speech governed by *Hazelwood*; and (3) all other speech that falls outside of these categories governed by *Tinker*. See *Lowery*, 497 F.3d at 588 (framing Supreme Court student speech precedents similarly); *Pinard*, 467 F.3d at 765 (citing *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992)); see also *Lowery*, 497 F.3d at 602 (Gilman, J., concurring in the judgment) (noting that the Supreme Court in *Morse* declined to add a public concern requirement to the traditional student speech analysis under *Tinker*). Presumably, the Ninth Circuit would add a fourth category under *Morse* for speech that advocates illegal drug use. See *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007).

<sup>106</sup> See *Hazelwood*, 484 U.S. at 271, 273.

have arisen out of student participation in a school newspaper<sup>107</sup> or a student government campaign in which student speech occurs outside of the classroom but in a school-sponsored setting.<sup>108</sup>

### 1. Identifying a Legitimate, Pedagogical Concern

In applying *Hazelwood's* legitimate pedagogical concern standard to student speech in school-sponsored “expressive” activities, courts may consider various factors concerning the degree of control that the school as a government institution exercises over the activity and its relatedness to the curriculum.<sup>109</sup> In 2004, in *Dean v. Utica Community Schools*, the U.S. District Court for the Eastern District of Michigan held that a public school district violated a student’s First Amendment speech rights when school officials censored an article that the student had written for publication in the high school’s student-run newspaper, the *Arrow*.<sup>110</sup> Student journalist Katy Dean and a fellow staff member conducted research for a story about a lawsuit pending against the school district, involving a claim by community members that diesel fumes from idling buses in the district’s bus garage constituted a nuisance that violated their privacy and harmed their health.<sup>111</sup> Based on the article’s content, the district superintendent halted its publication.<sup>112</sup>

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<sup>107</sup> See, e.g., *Desilets v. Clearview Reg'l Bd. of Educ.*, 630 A.2d 333, 338, 340 (N.J. Super. Ct. App. Div. 1993) (finding that *Hazelwood* applies to a broad set of “curricular” activities, but that the school’s pedagogical interests only extended so far as the style and content of the school newspaper, and that school officials violated the student journalist’s First Amendment rights in censoring reviews of R-rated movies).

<sup>108</sup> See, e.g., *Henerey ex rel. Henerey v. City of St. Charles, Sch. Dist.*, 200 F.3d 1128, 1132–33 (8th Cir. 1999) (holding that student’s distribution of condoms attached to stickers bearing his campaign slogan, “Adam Henerey: The Safe Choice,” constituted school-sponsored speech that occurred in a nonpublic forum); *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799, 806, 813–14 (E.D. Mich. 2004) (holding that school-sponsored, extracurricular student newspaper constituted a limited public forum, that suppression of an article in the newspaper was unconstitutional, and that, even if the newspaper was not a public forum, suppression was unreasonable). See generally Sara Prose, Note, *Dean v. Utica Community Schools: A Significant Victory for the Student Press Community and a Potential Guiding Force to the Reexamination of the Hazelwood Holding*, 87 U. DET. MERCY L. REV. 247 (2010) (analyzing the federal district court’s decision in *Dean*). Courts do not consistently apply *Hazelwood* to student newspaper and yearbook cases. See Brownstein, *supra* note 83, at 746.

<sup>109</sup> See *Hazelwood*, 484 U.S. at 271, 273; *Dean*, 345 F. Supp. 2d at 809–10.

<sup>110</sup> 345 F. Supp. 2d at 814.

<sup>111</sup> *Id.* at 802.

<sup>112</sup> *Id.* at 803. Although the litigation had been discussed at a school board meeting and covered in the local newspaper, the principal informed the faculty advisor to the *Arrow* that it would be inappropriate for the student newspaper to run an article on the subject. *Id.* at 802–03.

*Dean* highlights three issues central to applying *Hazelwood* to school-sponsored, “expressive” extracurricular activities: (1) the type of forum, (2) the reasonableness that the speech might be construed to bear the school’s imprimatur, and (3) the reasonableness of the view that the restriction is related to a legitimate pedagogical concern.<sup>113</sup> In applying *Hazelwood*, the district court in *Dean* analyzed both the type of forum and a combination of factors related to the degree of institutional control over the *Arrow* to determine whether the superintendent’s censorship reflected a legitimate, pedagogical concern.<sup>114</sup> The court held that the *Arrow* was a limited public forum that had been opened for use by the public for speech related to matters of concern to the Utica High School community.<sup>115</sup>

The court applied six “intent factors” from *Hazelwood*, plus three factors used by the U.S. Court of Appeals for the Sixth Circuit, including school policy and practice with respect to the forum, and the nature of the property at issue and its compatibility with expressive activity.<sup>116</sup> The six factors from *Hazelwood* were: (1) whether students produced the newspaper as part of the school curriculum, (2) whether students received credits and grades for completing the course, (3) whether a faculty member oversaw the newspaper’s production, (4) whether the school deviated from its policy of producing the newspaper as part of the curriculum, (5) whether the administration or faculty advisor exercised control over the subjects or content of newspaper articles, and (6) whether the board of education had applicable written policies for student publications to indicate that a student publication was not a public forum.<sup>117</sup>

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<sup>113</sup> See *Hazelwood*, 484 U.S. at 270–73; *Dean*, 345 F. Supp. 2d at 805–06; Brownstein, *supra* note 83, at 770–73, 775–76. For a discussion of the Supreme Court’s framework for defining the type of forum applicable in a First Amendment speech case, see *supra* note 83. For a discussion of the *Dean* court’s forum analysis, see *infra* note 115.

<sup>114</sup> See *Dean*, 345 F. Supp. 2d at 805–06.

<sup>115</sup> *Id.* at 806. The court reasoned that *Hazelwood* does not apply if a school-sponsored publication constitutes a limited public forum in which the government may impose only reasonable time, place, and manner regulations, and in instances in which content-based regulations must be narrowly tailored to fulfill a compelling state interest. See *id.* at 805 (citing *Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001) (en banc) (holding that university yearbook was a limited public forum)); see also Brownstein, *supra* note 83, at 770–77 (providing an analysis of forum doctrine applied to school-sponsored activities under *Hazelwood* and describing the inconsistencies in the use of forum analysis in student speech cases and the difficulties in applying the legitimate pedagogical concern test due to the broad range of justifications it permits).

<sup>116</sup> *Dean*, 345 F. Supp. 2d at 807.

<sup>117</sup> *Id.* at 807–08.

The court in *Dean* found that the first of these six “intent factors” favored protecting student speech because the students produced the *Arrow* as part of the school curriculum, received credits and grades for their participation, and were supervised by a faculty member.<sup>118</sup> As to the fourth factor, however, the school district deviated from its policy of producing the newspaper as an exclusively curricular activity because the district repeatedly encouraged students to take the class for credit, as an extracurricular activity.<sup>119</sup> Further, the district delegated editorial control in practice to the student staff of the *Arrow*.<sup>120</sup> The school’s written policies, the *Arrow*’s masthead, and the broad distribution in the community also contributed to the court’s determination that the *Arrow* constituted a limited public forum subject to heightened judicial scrutiny.<sup>121</sup> Finally, the court drew on the newspaper’s educational purpose, reasoning that the decision to publish Katy Dean’s article was “consistent with the traditions of the paper and the inherent nature of newspaper journalism in a democracy.”<sup>122</sup>

The district court in *Dean* also held that, even if the *Arrow* constituted a nonpublic forum, suppressing the articles did not meet the *Hazelwood* legitimate pedagogical concern test because it was not reasonably related to legitimate pedagogical concerns.<sup>123</sup> According to the court, the school district’s arguments that the student’s article lacked factual accuracy and was biased were unsupported.<sup>124</sup> Further, among other potential objections, the court reasoned that the article did not raise privacy concerns; it did not contain sexual content that might be perceived to be inappropriate for immature audiences; the reporting was fair and balanced; the article could have been revised; and the article’s grammar, writing quality, and accuracy met journalistic standards.<sup>125</sup>

The Court in *Dean* concluded that the district superintendent suppressed the article because she disagreed with the content expressed therein.<sup>126</sup> The article contained a disclaimer, disassociating the student author’s reporting from the official position of the school district.<sup>127</sup> The court held that the article did not bear the imprimatur of

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 807–08.

<sup>120</sup> *Id.* at 808.

<sup>121</sup> *See id.* at 807–09.

<sup>122</sup> *Dean*, 345 F. Supp. 2d at 809.

<sup>123</sup> *See Hazelwood*, 484 U.S. at 273; *Dean*, 345 F. Supp. 2d at 809.

<sup>124</sup> *Dean*, 345 F. Supp. 2d at 809 n.4, 813.

<sup>125</sup> *Id.* at 810–12.

<sup>126</sup> *Id.* at 813.

<sup>127</sup> *Id.*

the school because no reasonable reader would conclude that the district endorsed the viewpoints expressed by subjects that students interviewed for the *Arrow* article.<sup>128</sup>

*Dean* demonstrates the variety of factors that a court might consider in applying *Hazelwood* to student speech in school-sponsored, “expressive” extracurricular activities.<sup>129</sup> *Dean* also highlights the three main questions raised in applying *Hazelwood* to extracurricular student speech: (1) the nature of the forum, (2) the reasonableness of the relationship between the restriction and a legitimate, pedagogical concern, and (3) the reasonableness that the speech might be construed to bear the school’s imprimatur.<sup>130</sup> If the school district had exercised greater control over the *Arrow*, it might have met *Hazelwood*’s imprimatur standard.<sup>131</sup> Although the district court in *Dean* held that the newspaper was a limited public forum where school officials exercise limited control over student speech, in other cases school officials may still censor student speech in similar activities if the restriction is reasonably related to a legitimate pedagogical concern.<sup>132</sup>

## 2. *Hazelwood* Applied in Student Government Cases

Outside the newspaper context where the analogue to *Hazelwood* may be more obvious,<sup>133</sup> courts sometimes apply *Hazelwood*’s legitimate pedagogical concern test to student government election activities.<sup>134</sup> For example, in 1999, in *Henerey ex rel. Henerey v. City of St. Charles, School District*, the U.S. Court of Appeals for the Eighth Circuit addressed student speech rights in an “expressive” extracurricular activity that it concluded constituted a nonpublic forum.<sup>135</sup> The case concerned the free speech rights of a student participating in a high school election campaign for junior class president.<sup>136</sup> On the morning of the election,

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 807.

<sup>130</sup> *See Hazelwood*, 484 U.S. at 267–69, 271, 273.

<sup>131</sup> *See id.* at 273; *Dean*, 345 F. Supp. 2d at 813.

<sup>132</sup> *See Hazelwood*, 484 U.S. at 273; *Dean*, 345 F. Supp. 2d at 809.

<sup>133</sup> *See Hazelwood*, 484 U.S. at 273; *Dean*, 345 F. Supp. 2d at 809–10.

<sup>134</sup> *See Henerey*, 200 F.3d at 1132–33; *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989); *see also Doninger v. Niehoff*, 527 F.3d 41, 47, 50–52 (2d Cir. 2008) (applying *Tinker* to student online speech criticizing school administration for which a student was punished by not being permitted to run for class secretary, and holding that school officials could reasonably forecast that the student speech would be substantially disruptive under *Tinker*).

<sup>135</sup> 200 F.3d at 1133.

<sup>136</sup> *Id.* at 1132–33.

Adam Henerey, a candidate for junior class president, distributed condoms attached to stickers bearing his campaign slogan, “Adam Henerey: The Safe Choice.”<sup>137</sup> Although a later count revealed that Henerey won the election, the school principal barred him from taking office due to complaints about the distribution of condoms.<sup>138</sup>

The Eighth Circuit stated that the election constituted a nonpublic forum because the election was not opened to the public, and because the school demonstrated intent to control speech associated with the election—the school required candidates to sign an agreement to obey school rules and to obtain prior approval before distributing campaign materials.<sup>139</sup> The Eighth Circuit also held that the election was a school-sponsored activity “that was part of the school’s curriculum” because it was operated by school administration; therefore, members of the public could reasonably conclude that distribution of campaign materials was approved by the school and that the election had a pedagogical purpose.<sup>140</sup> The court concluded that regulating distribution of condoms thus served the school’s legitimate, pedagogical interest “in divorcing its extracurricular programs from controversial and sensitive topics, such as teenage sex . . . .”<sup>141</sup> This conclusion demonstrates how the pedagogical concern and imprimatur functions of *Hazelwood* may be conflated: school officials can claim that a speech restriction inherently serves a pedagogical purpose solely because the restriction distances the school from the speech.<sup>142</sup>

Decisions like *Henerey* and *Dean* ultimately define extracurricular activities as part of the curriculum, permitting school officials to restrict student speech when the school demonstrates that the speech conflicts with a legitimate pedagogical purpose and could be construed as the school’s speech.<sup>143</sup> The difference in results in such cases seems to rest

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<sup>137</sup> *Id.* at 1131. Henerey distributed fewer than one dozen condoms. *Id.*

<sup>138</sup> *Id.* The principal claimed the disqualification was due to Henerey’s failure to comply with a school rule requiring prior approval from the school principal or assistant principal to distribute materials in the hallways. *Id.*

<sup>139</sup> *Id.* at 1133.

<sup>140</sup> *Id.*

<sup>141</sup> *Henerey*, 200 F.3d at 1135–36.

<sup>142</sup> See *Hazelwood*, 484 U.S. at 271–73; see also Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 702, 699 n.24 (2011) (discussing tension between the government’s ability to promote a particular message as its own and to implement its goals for a particular program).

<sup>143</sup> See *Henerey*, 200 F.3d at 1133 (holding that the election was “a school-sponsored activity that was a part of the school’s curriculum”); *Poling*, 872 F.2d at 762 (“The universe of legitimate pedagogical concerns is by no means confined to the academic . . . .”); see also *Cleveland v. Blount Cnty. Sch. Dist.* 00050, No. 3:05-CV-380, 2008 WL 250403, at \*1, \*3–4

in part on the type of forum; where a student can demonstrate the existence of a limited public forum instead of a non-public forum, the speech is less likely to be construed as that of the school or as school-sanctioned.<sup>144</sup> Further, the “intent” factors that the district court applied in *Dean* addressed the degree of school control, helping to define and explain why the speech at issue was not the school’s message.<sup>145</sup> Under *Hazelwood’s* pedagogical concern test, however, finding that student speech in an expressive extracurricular activity is not protected effectively equates an extracurricular with a curricular setting.<sup>146</sup>

### B. *On and Off the Playing Field: Student Athletes’ Speech*

In examining student speech rights in the context of extracurricular athletics, courts have tended to apply *Tinker’s* holding that school officials may restrict student speech that is substantially disruptive, rather than the legitimate pedagogical concern test set out in *Hazelwood*.<sup>147</sup> In the extracurricular athletics context, courts have emphasized the need to maintain order, discipline, and top-down authoritarian structures on sports teams.<sup>148</sup> One court has analogized student athletes to government employees.<sup>149</sup> Other courts, however, have rejected this approach.<sup>150</sup>

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(E.D. Tenn. Jan. 28, 2008) (finding dissolution of student extracurricular step team due to concerns that the team’s “suggestive dance moves” were inappropriate for the maturity level of audiences at basketball games constituted a reasonable restriction based on a valid educational purpose). In 1989, in *Poling v. Murphy*, the Sixth Circuit held that a student’s election campaign speech was “speech sponsored by the school and disseminated under its auspices.” 872 F.2d at 763. This holding defers to school officials to decide whether a student’s speech is consistent with a school’s educational mission or whether the speech is likely to cause disruption. See Lynn S. Brackman, Note, *High Schools and the First Amendment: The Eighth Circuit Leaves Students’ Rights at the Schoolhouse Gate*, 66 MO. L. REV. 169, 183–85 (2001).

<sup>144</sup> See *Henery*, 200 F.3d at 1132–33; *Dean*, 345 F. Supp. 2d at 804, 806; Brownstein, *supra* note 83, at 771–72.

<sup>145</sup> See *Dean*, 345 F. Supp. 2d at 810–13.

<sup>146</sup> See *Hazelwood*, 484 U.S. at 272–73; *Poling*, 872 F.2d at 762–64.

<sup>147</sup> See *Lowery*, 497 F.3d at 588; *Pinard*, 467 F.3d at 768–70; *Wildman*, 249 F.3d at 771–72; *Seamons v. Snow (Seamons I)*, 84 F.3d 1226, 1237–38 (10th Cir. 1996).

<sup>148</sup> See *Lowery*, 497 F.3d at 594; *Wildman*, 249 F.3d at 772.

<sup>149</sup> See *Lowery*, 497 F.3d at 587, 597–600 (describing greater restrictions on student athletes as analogous to greater restrictions on government employees); see also Edmund Donnelly, Comment, *What Happens When Student-Athletes Are the Ones Who Blow the Whistle?: How Lowery v. Euverard Exposes a Deficiency in the First Amendment Rights of Student-Athletes*, 43 NEW ENG. L. REV. 943, 963–67 (2009) (proposing adding government employee whistleblower protections to the *Tinker* disruption standard for student speech).

<sup>150</sup> See *Pinard*, 467 F.3d at 765 (holding that the public concern test for government employee speech set out in *Pickering v. Board of Education of Township High School District 205*,

Although *Tinker* only permits school officials to restrict student speech that is materially and substantially disruptive, courts frequently hinge decisions on a caveat in *Tinker*; in meeting their burden of proof, school officials need not demonstrate that student speech actually *caused* the disruption, but rather that the official can reasonably “forecast substantial disruption of or material interference with school activities.”<sup>151</sup> In applying this forecast of disruption standard, courts emphasize the voluntary nature of extracurricular activities, granting wide deference to school authorities to restrict student speech, even when the speech occurs off the field or court, outside of practice or competition, and only in communication with other players.<sup>152</sup>

### 1. Public Employee Speech Applied to Student Athletes

In recent cases addressing student athletes’ First Amendment speech rights, the Sixth Circuit has applied government employee speech standards, departing from the position of the Ninth and Tenth Circuits, which have rejected this approach.<sup>153</sup> The voluntary nature of student athletics, combined with the government employee speech model, may result in conditioning participation in extracurricular ath-

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*Will County* and *Connick v. Myers* should not be applied in student speech context); *Seamons v. Snow (Seamons II)*, 206 F.3d 1021, 1030 n.4 (10th Cir. 2000) (implying that courts should not apply government employee speech standards to student speech).

<sup>151</sup> See *Tinker*, 393 U.S. at 514 (emphasis added); *Lowery*, 497 F.3d at 592 (citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989, 992 (9th Cir. 2001)); *Pinard*, 467 F.3d at 772 (holding that basketball players’ petition could not reasonably have led school officials to forecast substantial disruption or material interference with a school activity).

<sup>152</sup> See *Lowery*, 497 F.3d at 599–600; *Wildman*, 249 F.3d at 772 (holding that the letter that the high school basketball player distributed to teammates constituted “insubordinate speech toward her coaches,” and distinguishing between speech in the classroom and ability to play on extracurricular athletic team). But see *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (noting that schools traditionally exercise more control in curricular settings than over extracurricular activities); *Romano v. Harrington*, 725 F. Supp. 687, 690 (E.D.N.Y. 1989) (“[E]ducators may exercise greater editorial control over what students write for class than what they voluntarily submit to an extra-curricular, albeit school-funded, publication.”). Deference to school officials’ forecast of substantial disruption may occur in other contexts as well. See *Doninger*, 527 F.3d at 51–53 (holding that school officials could reasonably forecast that student speech on a personal blog would be substantially disruptive).

<sup>153</sup> Compare *Lowery*, 497 F.3d at 597–99 (analogizing student athletes to government employees), with *Pinard*, 467 U.S. at 765–67 (holding that the public concern test for government employee speech should not be applied to students), and *Seamons II*, 206 F.3d at 1030 n.4 (implying that student speech rights should not be evaluated under speech standards applicable to government employees).

letics on forfeiting the ability to critique the coach or other school authorities.<sup>154</sup>

Public employee speech doctrine protects the First Amendment speech rights of citizens employed by the government under limited circumstances.<sup>155</sup> In 1968, in *Pickering v. Board of Education of Township High School District 205, Will County*, the Supreme Court held that public employment reduces the employee's speech rights, and that courts must balance an employee's right against the government's interest in restricting the speech.<sup>156</sup> In 1983, in *Connick v. Myers*, the Supreme Court further qualified this standard by adding a "public concern test," requiring that courts consider the "content, form, and context" of the speech to determine whether the employee was commenting on a matter of public concern.<sup>157</sup> Most recently, in 2006, in *Garcetti v. Ceballos*, the Supreme Court added another benchmark, holding that a public employee's speech pursuant to "official duties" is not protected.<sup>158</sup>

In 2007, in *Lowery v. Euverard*, the Sixth Circuit used *Tinker's* forecast of disruption standard to characterize student athletes' speech rights as a balance between students' First Amendment rights and the coach's authority in what the court found to be a public employment-like setting.<sup>159</sup> Public high school football players at Jefferson County High School in Tennessee sued the school district and the high school's head football coach, principal, and athletic director after the players were dismissed from the football team for signing and circulating a petition expressing their dissatisfaction with the coach, Marty Euverard.<sup>160</sup> The coach discovered the petition and called a team meeting, interviewing the players individually.<sup>161</sup> He asked players if they had heard about the petition, whether they had signed it, who had asked them to sign it, and whether they wanted to play football with him as the coach.<sup>162</sup> Players who signed the petition but apologized

<sup>154</sup> See *Lowery*, 497 F.3d at 597–99.

<sup>155</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

<sup>156</sup> 391 U.S. 563, 568, 574–75 (1968).

<sup>157</sup> 461 U.S. at 147–48.

<sup>158</sup> 547 U.S. at 421.

<sup>159</sup> See 497 F.3d at 587, 597.

<sup>160</sup> *Id.* at 585. The petition stated, "I hate Coach Euverard [sic] and I don't want to play for him." *Id.* The players objected to Euverard's coaching methods, including allegedly striking a player on the helmet, throwing away college recruiting letters to disfavored players, humiliating and degrading players, and requiring a year-round conditioning program in violation of high school rules. *Id.*

<sup>161</sup> *Id.* at 603–04 (Gilman, J., concurring in the judgment).

<sup>162</sup> *Id.* at 586 (majority opinion).

were permitted to remain on the football team; those who refused were removed from the team.<sup>163</sup>

The Sixth Circuit reasoned that, unlike the classroom, where schools train students to be informed citizens in a democracy and to appreciate and evaluate competing viewpoints, on the playing field, the goal of the team is to win the game, and maintaining the coach's authority is crucial to achieving this goal.<sup>164</sup> The court held that the players' petition was not protected speech under the First Amendment because it threatened team unity and directly challenged the coach's authority, effects that school officials could reasonably forecast would be disruptive.<sup>165</sup> The need for greater oversight in the athletics context permitted the school to impose greater restrictions on athletes than on other students.<sup>166</sup>

In *Lowery*, the Sixth Circuit also applied greater speech restrictions to the football players on grounds that student athletes are analogous to government employees.<sup>167</sup> The Sixth Circuit in *Lowery* compared the football players' petition to the questionnaire that the public employee in *Connick* circulated at work, which asked, among other questions, whether employees had confidence in their supervisors.<sup>168</sup> In addition to holding that the football players' petition was disruptive because it challenged the coach's authority, the Sixth Circuit also concluded that the school, like the government employer in *Connick*, had a right to restrict a voluntary program it administers.<sup>169</sup> Student athletes' participation on the extracurricular football team, like the choice of government employees to work for the government, was voluntary.<sup>170</sup> The Sixth Circuit held that the students retained a right to express views about their coach, but not as members of the football team.<sup>171</sup> Football was volun-

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<sup>163</sup> *Id.*

<sup>164</sup> *See id.* at 589.

<sup>165</sup> *See Lowery*, 497 F.3d at 594–96.

<sup>166</sup> *See id.* at 589 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (holding that student athletes have a lower expectation of privacy than other students and that suspicionless random drug testing of student athletes by urinalysis is constitutional)). *But see* *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995, 1006 (Wash. 2008) (holding that a school's warrantless random drug testing of student athletes as condition of participating in extracurricular interscholastic athletics violated the state constitution).

<sup>167</sup> *See* 497 F.3d at 597–98.

<sup>168</sup> *See id.* at 597–99 (citing *Connick*, 461 U.S. at 148–49, 152, 154).

<sup>169</sup> *See id.* at 599.

<sup>170</sup> *See id.* at 600 (“What [student athletes] are *not* free to do is continue to play football for [Coach Euverard] while actively working to undermine his authority.”).

<sup>171</sup> *See id.* at 599–600.

tary, and participation could require abdicating the right to dissent, even when the speech occurred outside practice or competition.<sup>172</sup>

Similarly, in 2001, in *Wildman ex rel. Wildman v. Marshalltown School District*, the U.S. Court of Appeals for the Eighth Circuit held that a high school basketball player's letter to her teammates, composed on her home computer and distributed on a Saturday in the school's locker room, constituted insubordinate speech that lacked First Amendment protection.<sup>173</sup> The Eighth Circuit drew on the *Fraser* standard permitting school officials to punish vulgar expression but also relied on *Tinker*, and affirmed the district court's holding that the letter substantially disrupted a school activity.<sup>174</sup> The decision leaves unclear which standard carried the day.<sup>175</sup>

The Eighth Circuit distinguished basketball player Rebecca Wildman's speech from student athlete speech about "egregious conduct."<sup>176</sup> A year before, in 2000, in *Seamons v. Snow*, the U.S. Court of Appeals for the Tenth Circuit had upheld the First Amendment speech rights of a football player who was not permitted to play after he refused to apologize for reporting a hazing incident in which fellow teammates physically assaulted him in the locker room.<sup>177</sup> The Tenth Circuit in *Seamons* explicitly declined to apply public employee speech standards to student athletes.<sup>178</sup>

In *Wildman*, however, the Eighth Circuit implied that the basketball player's letter to her teammates would have been protected in the context of the kind of egregious conduct revealed by the speech in *Seamons*.<sup>179</sup> The Eighth Circuit in *Wildman*, though not explicitly embracing a government employee speech paradigm, alluded to its application in holding the basketball player's letter to be "insubordinate

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<sup>172</sup> See *id.*

<sup>173</sup> See *Wildman*, 249 F.3d at 772. The letter suggested that some of the sophomore players should be playing on the varsity or junior varsity teams. *Id.* at 770. The letter stated, "We as a team have to do something about this," and "[The coach] needs us next year and the year after and what if we aren't there for him? It is time to give him back some of the bullshit that he has given us. . . . We now need to stand up for what we believe in!!!" *Id.*

<sup>174</sup> See *id.* at 771. The court seemed to rely on the school district's argument that speech like Wildman's constituted disruption and would impair the team's cohesiveness. See *id.*

<sup>175</sup> See *id.* at 771–72.

<sup>176</sup> See *id.* at 772 (citing *Seamons II*, 206 F.3d at 1028).

<sup>177</sup> See *Seamons II*, 206 F.3d at 1024, 1028 (reversing the district court's grant of summary judgment on the First Amendment claim); *Seamons I*, 84 F.3d at 1237–38 (reversing the district court's grant of a motion to dismiss on the First Amendment claim).

<sup>178</sup> *Seamons II*, 206 F.3d at 1030 n.4.

<sup>179</sup> *Wildman*, 249 F.3d at 772.

speech toward her coaches,” and, absent egregious, whistleblower-type circumstances, it was therefore punishable.<sup>180</sup>

Student athletes’ speech may be reduced because speech that challenges a coach’s authority may be considered disruptive.<sup>181</sup> Furthermore, permitting school officials to forecast substantial disruption before it occurs shifts the burden to students to show that their speech is *not* disruptive, instead of requiring the school official to demonstrate that the disruption was substantial.<sup>182</sup>

## 2. Rejections of Public Employee Speech Models

In 2006, in *Pinard v. Clatskanie School District 6J*, the U.S. Court of Appeals for the Ninth Circuit held that student athletes’ complaints about their basketball coach constituted protected speech under *Tinker* because the speech could not reasonably have prompted school officials to forecast substantial disruption of a school activity.<sup>183</sup> The coach was verbally abusive and highly intimidating.<sup>184</sup> He told the team he would be willing to resign if they requested it.<sup>185</sup> Several weeks later, the co-captains called a team meeting outside of school, at a local restaurant, which all but one varsity player attended.<sup>186</sup> The players discussed a petition requesting their coach’s resignation, and every player except the coach’s son signed it.<sup>187</sup> The co-captains delivered the petition to the coach the next morning.<sup>188</sup> Believing that their coach would be coaching the scheduled game at another school that evening, the players refused to board the bus to the game.<sup>189</sup>

On these facts—similar to those the Sixth Circuit confronted in *Lowery*—the Ninth Circuit held that the petition was pure speech, like the armbands in *Tinker*.<sup>190</sup> The students’ refusal to board the bus, how-

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<sup>180</sup> See *id.*; *Seamons I*, 84 F.3d at 1237–38; see also Donnelly, *supra* note 149, at 963–67.

<sup>181</sup> See *Lowery*, 497 F.3d at 597; *Wildman*, 249 F.3d at 771–72.

<sup>182</sup> See *Lowery*, 497 F.3d at 603–04 (Gilman, J., concurring in the judgment).

<sup>183</sup> *Pinard*, 467 F.3d at 759.

<sup>184</sup> *Id.* at 760.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 760–61.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *Pinard*, 467 F.3d at 761–62. The players stated that they would not have refused to board the bus and play in the game if they had known that a replacement coach had been located for that game. *Id.* at 762.

<sup>190</sup> See *id.* at 764, 768–69.

ever, was punishable as substantially disruptive of a school program—hosting and organizing extracurricular events.<sup>191</sup>

The Ninth Circuit in *Pinard* also explicitly rejected comparisons to government employee speech.<sup>192</sup> The court explained that the district court's use of the *Connick* public concern test—that the complaints against the coach were a private matter and therefore not protected—demonstrates a misapplication of Supreme Court and Ninth Circuit precedents.<sup>193</sup> Although the public concern test has been applied in analogous relationships between the government and individuals, the court observed no such similarity in the school context.<sup>194</sup>

### C. “Tinker”ing with School-Sponsorship: Two Standards Combined

Although courts tend to apply *Hazelwood* to student speech in “inherently expressive” school-sponsored extracurricular activities and *Tinker* to student athletes’ speech, the choice of standard is not always clear.<sup>195</sup> The distinction between school-sponsored speech and individual speech, however, seems to imply that *Hazelwood* and *Tinker* are mutually exclusive standards—the *Tinker* disruption standard generally applies if the speech is *not* school-sponsored and thus falls outside of the *Hazelwood* legitimate pedagogical concern and imprimatur tests.<sup>196</sup>

In 2010, in *Doe ex rel. Doe v. Silsbee Independent School District*, however, the U.S. Court of Appeals for the Fifth Circuit applied elements of both *Tinker* and *Hazelwood* in determining that cheerleader H.S.’s refusal to cheer individually for a student who assaulted her was not protected speech.<sup>197</sup> The court implied that cheerleading constituted a school-sponsored expressive activity that might reasonably be perceived to bear the school’s imprimatur under *Hazelwood*, perhaps because H.S. and the other cheerleaders wore the school uniform or because their

<sup>191</sup> See *id.* at 764–65, 769. The court did not reach the question of whether the “boycott” was expressive in nature because it held this conduct disruptive under *Tinker*. See *id.* at 765, 769–70.

<sup>192</sup> *Id.* at 765–67.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 766 n.16.

<sup>195</sup> See *Wildman*, 249 F.3d at 771 (applying both *Tinker* and *Fraser* without explicitly specifying which standard carried the day or if the standards may be combined); *Doe*, 402 F. App’x at 855; see also *Lowery*, 497 F.3d at 604 (Gilman, J., concurring in the judgment) (noting that the Eighth Circuit in *Wildman* did not elucidate which standard—*Tinker* or *Fraser*—applied).

<sup>196</sup> See *Hazelwood*, 484 U.S. at 272–73; *Tinker*, 393 U.S. at 512–13; Brownstein, *supra* note 83, at 823–24.

<sup>197</sup> See 402 F. App’x at 855.

cheers clearly identified them with the school and its athletic program.<sup>198</sup> Further, cheerleading could be characterized as part of the curriculum under *Hazelwood* because the team was supervised by a coach hired by the school and because cheerleading was an activity “designed to impart particular knowledge or skills to student participants and audiences.”<sup>199</sup> The Fifth Circuit concluded that “allowing [H.S.] to cheer or not cheer, as she saw fit”—that is, *not* punishing H.S. by removing her from the squad—would have been promoting her expressive conduct, not simply tolerating it.<sup>200</sup>

The Fifth Circuit also applied *Tinker’s* disruption standard, holding that H.S.’s choice not to cheer for Rakheem Bolton individually constituted “substantial interference with the work of the school.”<sup>201</sup> The court reasoned that school officials could punish H.S. because she attended the basketball game voluntarily, “for the purpose of cheering,” but the decision does not further explain why H.S.’s silence was disruptive.<sup>202</sup> Furthermore, although school officials generally retain greater control over curricular content than content in extracurricular settings,<sup>203</sup> here, as in *Lowery* and *Wildman*, the voluntary nature of the activity weighed *against* H.S.’s speech rights.<sup>204</sup>

The Fifth Circuit thus applied both *Tinker* and *Hazelwood*, an approach which implies that individual student speech in an extracurricular activity, normally evaluated under *Tinker* as either disruptive or not, might also become school-sponsored speech under *Hazelwood*.<sup>205</sup> The short opinion in *Doe* did not specify under what circumstances both standards together might apply to student speech, but the court’s description of H.S.’s role on the team may be informative.<sup>206</sup> In *Doe*, the Fifth Circuit reasoned that H.S.’s choice to join the cheerleading squad in the first place imposed a contractual obligation to cheer for a par-

<sup>198</sup> See *Hazelwood*, 484 U.S. at 271; *Doe*, 402 F. App’x at 855. The court did not explain the factual basis for its conclusion that H.S. was a “mouthpiece” for her school. See *Doe*, 402 F. App’x at 855.

<sup>199</sup> See *Hazelwood*, 484 U.S. at 271; *Doe*, 402 F. App’x at 855.

<sup>200</sup> See *Doe*, 402 F. App’x at 855.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *Axson-Flynn*, 356 F.3d at 1289 (“[E]ducational institutions have traditionally exercised greater control over curriculum than over extracurricular activities.”); *Romano*, 725 F. Supp. at 690 (“[E]ducators may exercise greater editorial control over what students write for class than what they voluntarily submit to an extra-curricular, albeit school-funded, publication.”).

<sup>204</sup> *Doe*, 402 F. App’x at 855; see *Lowery*, 497 F.3d at 597; *Wildman*, 249 F.3d at 771–72.

<sup>205</sup> See *Doe*, 402 F. App’x at 855.

<sup>206</sup> See *id.*

ticular player.<sup>207</sup> The court, concluding that H.S. “served as a mouthpiece through which [the school district] could disseminate speech—namely, support for its athletic teams,” compared a student to a public employee compelled to convey the government’s message instead of evaluating the student’s speech as that of a participant in an extracurricular activity with educational goals.<sup>208</sup>

Lower courts tend to apply *Hazelwood* to school-sponsored, “expressive” extracurricular activities like a student newspaper or student government elections because such activities are supervised by faculty, intended to impart particular knowledge or skills, and reasonably might be construed to be the school’s message or one approved by it.<sup>209</sup> In the context of extracurricular athletics, however, courts tend to apply *Tinker*’s disruption standard but may rely heavily on school officials’ claims that they reasonably forecasted substantial disruption.<sup>210</sup> In deferring to school officials, one court has explicitly relied on public employee speech analogies in addition to the voluntary nature of extracurricular activities to uphold the choice to suppress or punish student athletes’ expression.<sup>211</sup> In *Doe*, the Fifth Circuit applied both *Tinker* and *Hazelwood*, though either standard might support the opposite result.<sup>212</sup>

The First Amendment concern in applying either *Tinker* or *Hazelwood* is that the government actor—the school—might suppress or punish student speech solely out of disapproval of its content, not for educational purposes.<sup>213</sup> Scholars have addressed what it means for a school activity to be “school-sponsored” and have proposed resolutions to the problem of determining which school restrictions are “reasona-

<sup>207</sup> See *id.* at 853; see also *Lowery*, 497 F.3d at 597; *Wildman*, 249 F.3d at 771–72.

<sup>208</sup> See *Doe*, 402 F. App’x at 855; see also *Lowery*, 497 F.3d at 597; *infra* notes 254–262 and accompanying text (discussing the educational value of extracurricular activities).

<sup>209</sup> See *Hazelwood*, 484 U.S. at 271; *Henerey*, 200 F.3d at 1133; *Dean*, 345 F. Supp. at 810–13.

<sup>210</sup> See *Lowery*, 497 F.3d at 596; *Wildman*, 249 F.3d at 771–72.

<sup>211</sup> See *Lowery*, 497 F.3d at 597–99; *id.* at 605 (Gilman, J., concurring in the judgment); *Pinard*, 467 F.3d at 766–67, 767 n. 18; *Doe*, 402 F. App’x at 853, 855.

<sup>212</sup> See *Doe*, 402 F. App’x at 855. Unlike the student election campaign speech in *Henerey*, a reasonable observer likely would have seen H.S.’s silence as her own individual speech and not speech bearing the school’s imprimatur under *Hazelwood*. See *Hazelwood*, 484 U.S. at 271; *Henerey*, 200 F.3d at 1135; *Doe*, 402 F. App’x at 855. Alternatively, the Fifth Circuit might have concluded that a single cheerleader’s silence during a player’s foul shots did not “materially and substantially disrupt the work and discipline of the school,” whether defined as the basketball game as a whole or as the activities of the cheerleading squad. See *Tinker*, 393 U.S. at 513; *Doe*, 402 F. App’x at 855.

<sup>213</sup> See Chemerinsky, *supra* note 26, at 834–35, 837–39.

bly related to legitimate pedagogical concerns” under *Hazelwood*.<sup>214</sup> The next Part analyzes the problems with school officials’ use of a forecast of disruption standard under *Tinker* as applied to extracurricular student speech.<sup>215</sup>

### III. STUDENT PARTICIPATION IN EXTRACURRICULAR ACTIVITIES JEOPARDIZES INDIVIDUAL STUDENT SPEECH RIGHTS

In student speech cases in extracurricular contexts, courts tend to apply the pedagogical concern test that the Supreme Court set out in 1988 in *Hazelwood School District v. Kuhlmeier* to expressive, school-sponsored speech, and the substantial disruption test that the Court established in 1969 in *Tinker v. Des Moines Independent School District* to individual speech.<sup>216</sup> Although the choice of standard is not always clear,<sup>217</sup> it is logical that courts generally would apply *Tinker* to student athletes communicating with school officials or each other about their coach outside of practice or competition because no one would reasonably confuse their speech to be the school’s.<sup>218</sup> In inherently “expressive” extracurricular activities, however, such as a student newspaper, dance performance, or government elections, student expression is central to the school-sponsored activity.<sup>219</sup>

In these “inherently expressive” extracurricular activities, forum analysis often serves as an initial threshold for upholding or denying student speech rights because courts give greater deference to the school’s ability to control speech in a school-sponsored activity that constitutes a nonpublic forum.<sup>220</sup> A conclusion that the activity is school-sponsored and constitutes a nonpublic forum thus effectively equates

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<sup>214</sup> See Brownstein, *supra* note 83, at 734–36, 784–87; Chemerinsky, *supra* note 26, at 834–35; Waldman, *supra* note 62, at 66, 112–13.

<sup>215</sup> See *infra* notes 232–254 and accompanying text.

<sup>216</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

<sup>217</sup> See *Pimard v. Clatskanie Sch. Dist.*, 6J, 467 F.3d 755, 765 (9th Cir. 2006); *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (applying both *Tinker* and *Bethel School District No. 403 v. Fraser*); *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x 852, 855 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011) (applying both *Tinker* and *Hazelwood*).

<sup>218</sup> See *Hazelwood*, 484 U.S. at 271–73; *Tinker*, 393 U.S. at 512–13; *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007); *Wildman*, 249 F.3d at 770.

<sup>219</sup> See *Hazelwood*, 484 U.S. at 270–71; *Henerey ex rel. Henerey v. City of St. Charles, Sch. Dist.*, 200 F.3d 1128, 1133 (8th Cir. 1999).

<sup>220</sup> See *Hazelwood*, 484 U.S. at 267, 269; *Henerey*, 200 F.3d at 1133; Brownstein, *supra* note 83, at 770–72.

extracurricular activities with the curricular setting.<sup>221</sup> In 2004, in *Dean v. Utica Community Schools*, the U.S. District Court for the Eastern District of Michigan used multiple factors derived from *Hazelwood* to determine whether the school's asserted pedagogical concerns proved legitimate.<sup>222</sup> This fact-intensive analysis of the pedagogical purpose for suppressing or punishing extracurricular student speech helps to ensure that the school's exercise of control over its own message does not infringe student speech.<sup>223</sup>

Unlike student speech in inherently expressive extracurricular activities, speech cases of student athletes tend to involve individual students speaking outside of the activity itself.<sup>224</sup> For example, in 2007, in *Lowery v. Euverard*, Judge Ronald Gilman, concurring in the U.S. Court of Appeals for the Sixth Circuit's judgment, noted that no disruption of the football team occurred until Coach Euverard discovered the student athletes' petition and called a team meeting in response, interviewing players individually.<sup>225</sup> In the athletics context, *Tinker's* forecast of disruption standard permits school officials to restrict student athletes' individual speech made outside practice or competition and communicated primarily to other students or to relevant school officials.<sup>226</sup> In these cases, a forecast that speech outside of practice or competition will be disruptive may result in punishment *within* the activity, such as removal from the team.<sup>227</sup>

This Note argues that the forecast of disruption standard conditions participation in extracurricular activities on forfeiting speech rights.<sup>228</sup> Section III.A outlines the doctrinal and practical problems with applying the forecast of disruption standard to punish student

<sup>221</sup> See *Hazelwood*, 484 U.S. at 271–73; *Henery*, 200 F.3d at 1133.

<sup>222</sup> See 345 F. Supp. 2d 799, 810–13 (E.D. Mich. 2004) (citing *Hazelwood*, 484 U.S. at 271).

<sup>223</sup> See *Hazelwood*, 484 U.S. at 270–72; *Dean*, 345 F. Supp. 2d at 810–13. One author has suggested that *Hazelwood* was designed for and should only apply to restrictions on school-sponsored speech, using a sliding scale approach. See Waldman, *supra* note 62, at 112–13. Under this approach, school officials' decisions to suppress or punish student speech would enjoy greater deference when public perception that the speech bears the school's imprimatur is strongest. See *id.* For example, the author presents two situations in which deference is strongest, on the higher end of this "imprimatur spectrum": (1) when the student speech "changes the permanent physical appearance of the school," or (2) when it "changes the nature of other students' substantive classroom experience." See *id.*

<sup>224</sup> See *Lowery*, 497 F.3d at 585; *Pinard*, 467 F.3d at 760–61.

<sup>225</sup> 497 F.3d at 603–04 (Gilman, J., concurring in the judgment).

<sup>226</sup> See *id.*; *Pinard*, 467 F.3d at 760–61.

<sup>227</sup> See *Lowery*, 497 F.3d at 593–94 (reasoning that the student petition was substantially disruptive because it directly challenged the coach's authority); *Wildman*, 249 F.3d at 772.

<sup>228</sup> See *infra* notes 232–254 and accompanying text.

speech in extracurricular contexts.<sup>229</sup> Section III.B demonstrates that using the forecast of disruption standard to punish student speech about extracurricular activities contradicts the educational purpose of schools and extracurricular activities.<sup>230</sup> Section III.C proposes limiting the scope of *Tinker's* forecast of disruption standard as applied to speech punished in extracurricular contexts to ensure a close connection between speech restrictions and educational goals.<sup>231</sup>

A. *Forecast of Disruption Standard Conditions Participation  
on Reduced Speech Rights*

School officials' use of a forecast of disruption standard to suppress or punish student speech in extracurricular activities frequently erodes student speech rights.<sup>232</sup> Applying this standard to student athletes' speech that takes place off the playing field and addressed to other students or school officials creates a chilling effect on student speech because it provides unclear or no notice of what speech may be restricted.<sup>233</sup> Furthermore, it also shifts the burden from school officials to students to demonstrate that their speech would not have caused disruption.<sup>234</sup> Unlike inherently expressive extracurricular activities in which the school's own message is at issue, use of the forecast of disruption standard may condition individual student athletes' participation in extracurricular athletics on accepting reduced individual speech rights.<sup>235</sup> This result directly contradicts *Tinker's* holding that student speech rights extend beyond classroom hours to the playing field except when school officials demonstrate substantial disruption.<sup>236</sup> Although one might expect school control over student speech to decrease with lessening curriculum-relatedness, thus resulting in greater student speech rights, recent case law establishes the opposite: students

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<sup>229</sup> See *infra* notes 232–254 and accompanying text.

<sup>230</sup> See *infra* notes 255–270 and accompanying text.

<sup>231</sup> See *infra* notes 271–289 and accompanying text.

<sup>232</sup> See *Tinker*, 393 U.S. at 512–13; *Lowery*, 497 F.3d at 596.

<sup>233</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 691 (1986) (Stevens, J., dissenting); *Lowery*, 497 F.3d at 585, 596; *Wildman*, 249 F.3d at 771–72; Waldman, *supra* note 76, at 1114, 1129–30.

<sup>234</sup> *Lowery*, 497 F.3d at 603 (Gilman, J., concurring in the judgment).

<sup>235</sup> See *Hazelwood*, 484 U.S. at 270–71; *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 600; *Wildman*, 249 F.3d at 772; *Seamons v. Snow (Seamons I)*, 84 F.3d 1226, 1236 (10th Cir. 1996).

<sup>236</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 603 (Gilman, J., concurring in the judgment).

may actually lose speech rights *because of* their participation in extracurricular activities.<sup>237</sup>

The forecast of disruption standard erodes student speech rights in two major ways.<sup>238</sup> First, it restricts a student's individual right to speak critically about a school program, even if it is simply in a discussion among teammates outside of the activity itself—that is, outside of practice or competition.<sup>239</sup> Second, applying the forecast of disruption presents a notice problem because it will be difficult for a student athlete to know in advance whether a petition against an abusive coach will be treated as whistleblower-like reporting of egregious conduct or, alternatively, as an insubordinate complaint and threat to authority.<sup>240</sup>

Part of the problem lies in the fact that the possibility of applying the forecast of disruption standard extends to all aspects of the student's time in school—beyond practice and the playing field—particularly if disruption is characterized as a challenge to authority.<sup>241</sup> The location or context of the speech seems not to matter nearly as much as the content of the speech, particularly whether the speech is construed as a challenge to authority.<sup>242</sup> Applying the forecast of disruption standard to students participating in extracurricular activities thus permits school officials to punish student speech on grounds that questioning authority is itself inherently disruptive.<sup>243</sup>

<sup>237</sup> See *Bd. of Educ. v. Earls*, 536 U.S. 822, 845–47 (2002) (Ginsburg, J., dissenting); *Lowery*, 497 F.3d at 597.

<sup>238</sup> See *Lowery*, 497 F.3d at 593–94, 596; *Wildman*, 249 F.3d at 770, 772; *Seamons v. Snow* (*Seamons II*), 206 F.3d 1021, 1024, 1028 (10th Cir. 2000).

<sup>239</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 585, 593–94; *Pinard*, 467 F.3d at 760–61, 772; *Wildman*, 249 F.3d at 770, 772.

<sup>240</sup> See *Lowery*, 497 F.3d at 596; *Wildman*, 249 F.3d at 772; *Seamons II*, 206 F.3d at 1024, 1028.

<sup>241</sup> See *Tinker*, 393 U.S. at 512–13; *Lowery*, 497 F.3d at 585–86, 596; *Wildman*, *supra* note 76, at 1129–30.

<sup>242</sup> See *Lowery*, 497 F.3d at 585. In *Lowery*, football players planned to bring a petition critical of their coach to the attention of school officials only after the season concluded. *Id.* In addition, in 2001, in *Wildman ex rel. Wildman v. Marshalltown School District*, the Eighth Circuit focused its analysis almost exclusively on the text of a basketball player's letter to her teammates distributed in the locker room outside of practice and competition. 249 F.3d at 771–72; accord *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008) (rejecting a student's First Amendment claim on grounds that the student web blog post, written off campus and outside school hours, created foreseeable risk of substantial disruption); see also *Papandrea*, *supra* note 26, at 1056–64, 1090–92 (arguing against a territorial approach to digital student speech).

<sup>243</sup> See *Doninger*, 527 F.3d at 53; *Lowery*, 497 F.3d at 594 (“[The petition] was a direct challenge to [Coach] Euerard's authority, and undermined his ability to lead the team. It could have no other effect.”); *Wildman*, 249 F.3d at 771–72.

This standard relies on an attenuated connection between individual student speech and its potential disruption; its broad reach is also one reason why analogies to public employment are inapt.<sup>244</sup> Once one chooses to work for the government, one gives up certain rights.<sup>245</sup> Participation in student extracurricular activities—athletics included—however, does not create the same kind of individual identity in relation to the government.<sup>246</sup> As Section III.B addresses, the educational mission of extracurricular activities involves precisely the ability to try out *different* identities.<sup>247</sup> Student athletes ideally each have a variety of roles—students, athletes, perhaps also debate team members, actors, or artists—but the forecast of disruption standard can impose one role at all times, reducing speech rights as a result.<sup>248</sup>

Further, use of the forecast of disruption standard reduces students' speech protections *off* the playing field,<sup>249</sup> whereas students participating in a limited public forum expressive activity may express the same opinions through their activity absent a legitimate pedagogical concern for suppressing it.<sup>250</sup> Student journalists engaged in the kind of investigative reporting protected in *Dean* could criticize school district administrators but, absent reporting of "egregious" conduct, student athletes' criticism of coaches has been punished under the forecast of disruption standard.<sup>251</sup>

Reliance on the forecast of disruption thus results in conditioning participation in extracurricular athletics on accepting reduced speech rights compared to other individual students' rights and compared with

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<sup>244</sup> See *Lowery*, 497 F.3d at 602–03 (Gilman, J., concurring in the judgment). Judge Ronald Gilman compared *Lowery* to the U.S. Supreme Court's decision a few months before in *Morse v. Frederick*, 551 U.S. 393 (2007). *Id.* at 601–02. He argued that the school's asserted interests in *Lowery* in protecting the coach from challenges to his authority did not justify the restriction on speech in the way that preventing illegal drug use justified the restriction in *Morse*. *Lowery*, 497 F.3d at 602; see *Morse*, 551 U.S. at 397. This Note suggests another reason why the analogy is inappropriate: students participating in extracurricular activities are fundamentally different from public employees, and the government's interests are also different. See *Lowery*, 497 F.3d at 601–03; *Pinard*, 467 F.3d at 765–66, 766 n.16.

<sup>245</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

<sup>246</sup> See *Garcetti*, 547 U.S. at 421; see *infra* notes 255–270 and accompanying text.

<sup>247</sup> See *infra* notes 255–270 and accompanying text.

<sup>248</sup> See *Garcetti*, 547 U.S. at 421; *Lowery*, 497 F.3d at 599–600; *Wildman*, 249 F.3d at 772; *Waldman*, *supra* note 76, at 1129–30; *infra* notes 255–270 and accompanying text.

<sup>249</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 599–600.

<sup>250</sup> See *Dean*, 345 F. Supp. 2d at 810; cf. *Henery*, 200 F.3d at 1133 (holding that a student election was a nonpublic forum, a school-sponsored activity, and part of the curriculum).

<sup>251</sup> See *Lowery*, 497 F.3d at 597, 599–600; *Wildman*, 249 F.3d at 772; *Seamons II*, 206 F.3d at 1024, 1028; *Dean*, 345 F. Supp. 2d at 806–09.

students involved in some expressive school-sponsored activities.<sup>252</sup> Doing so on grounds that the activity is voluntary—like public employment—compels students to choose between constitutional speech protection and an essential element of education.<sup>253</sup> This analytical combination—using the *Tinker* forecast of disruption standard and analogizing to public employment—undercuts both the educational mission of schools, which is generally the reason for restricting student speech, and the educational goals of extracurricular activities.<sup>254</sup>

### B. *Voluntary, Extracurricular Activities Serve an Essential Role in Education*

Applying the forecast of disruption standard to individual student speech about extracurricular athletics outside of the context of practice or competition conflicts with the school's educational mission.<sup>255</sup> As discussed in Section III.A, the effect is to compel a choice between constitutional rights and participation in extracurricular activities central to the life of the school and students' development.<sup>256</sup>

Participation in extracurricular activities is an essential element of education.<sup>257</sup> Students derive high levels of satisfaction from participating in extracurricular activities, and participation in turn increases their overall satisfaction in school.<sup>258</sup> Further, extracurricular activities also improve students' education; participation in extracurricular activities correlates with higher likelihood of staying in school and higher grades.<sup>259</sup> On a practical level, there are some skills that students can learn *only* by participating in extracurricular activities.<sup>260</sup> The voluntary nature of extracurricular activities also contributes to the value of participation by providing a way for students to "try out" different identities and associate with others who have similar interests or beliefs.<sup>261</sup> Furthermore, participation in extracurricular activities may not be en-

<sup>252</sup> See *Lowery*, 497 F.3d at 596–97, 599–600; *Seamons I*, 84 F.3d at 1236; *Dean*, 345 F. Supp. 2d at 810.

<sup>253</sup> See *Earls*, 536 U.S. at 845–46; Waldman, *supra* note 76, at 1129–30.

<sup>254</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 601–03 (Gilman, J., concurring in the judgment).

<sup>255</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 601–03 (Gilman, J., concurring in the judgment).

<sup>256</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000); *Lowery*, 497 F.3d at 599–600; Brief of Amici Curiae American Academy of Pediatrics et al. at 8–9, *Earls*, 536 U.S. 822 (No. 01-322); *supra* notes 232–254 and accompanying text.

<sup>257</sup> See *Earls*, 536 U.S. at 845–46 (Ginsburg, J., dissenting).

<sup>258</sup> Brief of Amici Curiae American Academy of Pediatrics et al., *supra* note 256, at 8–9.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 8.

<sup>261</sup> *Id.* at 9.

tirely voluntary because it is essentially required for admission to college.<sup>262</sup> Just as the Supreme Court's decision in 2002 in *Board of Education v. Earls* broadly conditions participation in extracurricular activities on giving up Fourth Amendment rights, conditioning participation on reduced speech rights forces students to "choose" between engaging in a central part of the educational experience and speech.<sup>263</sup>

Further, honing students' ability to critique authority in a constructive manner, within the school's own "marketplace of ideas," is itself educational.<sup>264</sup> The investigative journalism upheld in *Dean* provides one example.<sup>265</sup> In other cases involving student speech in school-sponsored, inherently expressive activities, educational purposes—and the school's ability to control its own message—may require suppression or punishment of speech.<sup>266</sup>

Finally, preserving students' ability to criticize a coach off the field to other students or school officials also may serve an important safety function in reporting egregious conduct and dangerous conditions.<sup>267</sup> Extracurricular athletic activities are generally subject to greater safety-based regulation, a fact that has been used to support restricting student athletes' constitutional rights in the Fourth Amendment context.<sup>268</sup> Indeed, participation in extracurricular athletics may involve greater bod-

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<sup>262</sup> See *Earls*, 536 U.S. at 845–46 (Ginsburg, J., dissenting) ("Participation . . . [is] essential in reality for students applying to college. . . . Students 'volunteer' for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.").

<sup>263</sup> See *id.*; *Tinker*, 393 U.S. at 512–14; Waldman, *supra* note 76, at 1129–31.

<sup>264</sup> See *Tinker*, 393 U.S. at 512–13; Chemerinsky, *supra* note 26, at 835–36.

<sup>265</sup> See *Dean*, 345 F. Supp. 2d at 810–13.

<sup>266</sup> See, e.g., *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (dealing with a student punished for a student government election speech which was previously vetted for inappropriate content and in which he subsequently added language ridiculing a school official); see also Blocher, *supra* note 37, at 829 (arguing that courts should defer to government officials in government institutions only to the extent that speech restrictions contribute to the marketplace of ideas).

<sup>267</sup> See *Seamons I*, 84 F.3d at 1237; see also *Pinard*, 467 F.3d at 768–69 (comparing a basketball players' non-disruptive petition with the facts of *Seamons* and finding that the student speech in both cases "was responsibly tailored to the audience of school administrators . . . who needed to know about the incident" (quoting *Seamons I*, 84 F.3d at 1237–38)).

<sup>268</sup> See *Earls*, 536 U.S. at 846 (Ginsburg, J., dissenting). Interestingly, Justice Ruth Bader Ginsburg compared interscholastic athletics to employment in closely regulated industries to justify greater intrusions into student athletes' privacy in the Fourth Amendment context, but she would not have extended the school's ability to conduct random drug testing to permit drug testing students involved in other extracurricular activities. See *id.*

ily risk to students than other extracurricular activities.<sup>269</sup> Protecting robust speech rights in extracurricular contexts thus not only serves essential educational functions of schools; speech protections also preserve a crucial means of reporting abuse or dangerous conduct.<sup>270</sup>

### C. Connecting the Forecast of Disruption Standard to the Educational Mission

This Section proposes tailoring the application of the forecast of disruption standard in extracurricular contexts to ensure that the suppression or punishment of student speech is closely linked to the educational goal of the activity.<sup>271</sup> This Note contends that the voluntary nature of extracurricular activities should not require students to receive a lower degree of speech protection otherwise available to individual students as a condition of participating in extracurricular activities.<sup>272</sup> As discussed in Sections III.A and III.B, doing so creates a chilling effect, hampering the educational mission and discouraging the reporting of abuse.<sup>273</sup>

In school-sponsored extracurricular activities, applying *Hazelwood* often treats an extracurricular activity like the classroom where the school, as a government institution, has an interest in controlling its message.<sup>274</sup> In these contexts, the educational goal of restricting student speech may be more obvious because the speech itself is central to the activity, such as where the speech is the content of a newspaper article.<sup>275</sup> The forecast of disruption standard, however, has been applied

<sup>269</sup> See, e.g., Cameron Smith, *Florida Freshman Dies After Collapsing at Football Practice*, YAHOO! SPORTS (Sept. 8, 2009, 9:49 AM), [http://rivals.yahoo.com/highschool/blog/prep\\_rally/post/Florida-freshman-dies-after-collapsing-at-football-268071](http://rivals.yahoo.com/highschool/blog/prep_rally/post/Florida-freshman-dies-after-collapsing-at-football-268071) (reporting the death of a high school football player after his collapse in practice, possibly due to heat exhaustion); *High School Football Coach Charged in Player's Death*, CNN JUSTICE (Jan. 26, 2009), [http://articles.cnn.com/2009-01-26/justice/football.coach.indicted\\_1\\_jason-stinson-max-gilpin-grand-jury?\\_s=PM:CRIME](http://articles.cnn.com/2009-01-26/justice/football.coach.indicted_1_jason-stinson-max-gilpin-grand-jury?_s=PM:CRIME) (reporting the death from heat exhaustion of a high school football player after his coach reportedly denied him water during practice on a hot day in August). See generally Ben McGrath, *Does Football Have a Future?*, NEW YORKER, Jan. 31, 2011, at 41 (describing the high risk of concussions associated with playing football).

<sup>270</sup> See *Seamons I*, 84 F.3d at 1237; see also *Pinard*, 467 F.3d at 768–69.

<sup>271</sup> See *Tinker*, 393 U.S. at 512–14; cf. Waldman, *supra* note 62, at 120 (arguing that, in the context of school-sponsored expressive activities to which *Hazelwood* applies, when a school's pedagogical interest in applying a viewpoint-based restriction is to avoid potential disruption, the school should establish the pedagogical concern by demonstrating "a significant likelihood that disruption will result").

<sup>272</sup> See *Tinker*, 393 U.S. at 512–13; *Seamons I*, 84 F.3d at 1236.

<sup>273</sup> See *Tinker*, 393 U.S. at 512–13; *Seamons I*, 84 F.3d at 1236.

<sup>274</sup> See *Hazelwood*, 484 U.S. at 272–73; Waldman, *supra* note 62, at 119–20.

<sup>275</sup> See *Hazelwood*, 484 U.S. at 270–71; *Poling*, 872 F.2d at 762.

beyond practice or competition—that is, outside the time and location of the extracurricular activity.<sup>276</sup> Instead, speech outside of the activity is punished within the activity.<sup>277</sup> In these cases, the educational goal that will potentially be disrupted by the speech is not always obvious, and the application of the standard conditions participation on reduced speech rights.<sup>278</sup>

This Note proposes requiring that when school officials rely on a forecast of disruption standard to suppress or punish student speech, they must demonstrate that the speech at issue would materially and substantially interfere with the educational goals of the particular activity.<sup>279</sup> This standard would reflect a more specific application of *Tinker* in cases in which (1) school officials restrict student speech based on forecasting disruption related to extracurricular activities and (2) the result is suppression or punishment related to those activities, such as removal from a team.<sup>280</sup>

In such cases, courts should require school officials to demonstrate based on particular facts that the disruption materially and substantially interferes with the educational goal of the particular activity (or other students' rights), and not merely a broad view of the "work of the schools."<sup>281</sup> The forecast of disruption standard as applied to extracurricular activities conditions participation on reduced speech rights, even if the student is speaking only with friends or administrators, outside of practice or competition.<sup>282</sup> For example, disagreement with a coach's opinion alone—expressed among students, outside of practice—would not be sufficient to demonstrate disruption absent further inquiry into the educational purpose disrupted.<sup>283</sup> Suppression of a challenge to authority in such contexts has no clear educational purpose.<sup>284</sup> A legitimate educational purpose might be upheld, however, if,

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<sup>276</sup> See *Lowery*, 497 F.3d at 586, 599–600; *Pinard*, 467 F.3d at 759–61.

<sup>277</sup> See *Lowery*, 497 F.3d at 586, 599–600; *Pinard*, 467 F.3d at 759–61.

<sup>278</sup> See *Lowery*, 497 F.3d at 594 (reasoning that the student petition challenged the coach's authority and threatened team unity); *Pinard*, 467 F.3d at 772 (holding that the students' refusal to board the bus to basketball game disrupted an organized school activity).

<sup>279</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 603 (Gilman, J., concurring in the judgment); Papandrea, *supra* note 26, at 1090–92.

<sup>280</sup> See *Tinker*, 393 U.S. at 510, 512–14; *Lowery*, 497 F.3d at 603, 605 (Gilman, J., concurring in the judgment); *Wildman*, 249 F.3d at 771–72.

<sup>281</sup> See *Tinker*, 393 U.S. at 508, 513; *Lowery*, 497 F.3d at 601 (Gilman, J., concurring in the judgment).

<sup>282</sup> See *Lowery*, 497 F.3d at 592–93.

<sup>283</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 601–03 (Gilman, J., concurring in the judgment).

<sup>284</sup> See *Tinker*, 393 U.S. at 512–13; Chemerinsky, *supra* note 26, at 835–36.

for example, a coach punished a player who ridiculed a fellow player about that player's basketball skills, and it materially and substantially affected the victim's ability to advance skills in practice.<sup>285</sup> Requiring a showing that forecasted disruption will interfere with the educational goal of a particular activity will ensure that, consistent with *Tinker*, the burden remains with schools, not students, to demonstrate material, substantial disruption of the activity.<sup>286</sup>

Furthermore, tying the analysis to the educational purpose of the activity addresses the problem of comparing student speech related to extracurricular activities to public employee speech.<sup>287</sup> As discussed in Section III.B, schools as government institutions have a fundamentally different goal from that of other public institutions; unlike the contractual nature of public employment, the overarching mission of public schools is to educate students.<sup>288</sup> The standard this Note proposes connects the restriction of potentially disruptive speech to the educational purpose that would be potentially disrupted.<sup>289</sup>

## CONCLUSION

Student speech in extracurricular activities occupies a doctrinal position between individual speech and curricular speech. Beyond the narrow categories governed by the U.S. Supreme Court's decisions in *Bethel School District No. 403 v. Fraser* and *Morse v. Frederick*, courts tend to treat extracurricular student speech as either curriculum-like, school-sponsored speech under *Hazelwood*, when the activities are inherently expressive, or as individual speech under *Tinker*. Applying *Tinker's* forecast of disruption standard, particularly when supported by analogies to

<sup>285</sup> See *Tinker*, 393 U.S. at 512–13. Further, removing a player from competition for yelling at a referee in a disrespectful manner might also be permissible under this standard because the punishment itself teaches sportsmanship. See *id.*; see also *Zamecnik v. Indian Prairie Sch. Dist. # 204*, 636 F.3d 874, 878–79 (7th Cir. 2011) (reaffirming the panel decision granting summary judgment in favor of students who were prohibited from wearing t-shirts with a homophobic message in school and specifying that facts that might lead to forecasting substantial disruption may include “a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school”); *Chemerinsky*, *supra* note 26, at 835–36.

<sup>286</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 603 (Gilman, J., concurring in the judgment).

<sup>287</sup> See *Lowery*, 497 F.3d at 596–600; *Pinard*, 467 F.3d at 765–66.

<sup>288</sup> See *Tinker*, 393 U.S. at 512–13; *Chemerinsky*, *supra* note 26, at 835–36; *supra* notes 255–270 and accompanying text.

<sup>289</sup> See *Tinker*, 393 U.S. at 512–14; *Lowery*, 497 F.3d at 603 (Gilman, J., concurring in the judgment); *Papandrea*, *supra* note 26, at 1090–92 (criticizing a “territorial approach” to student digital speech and the use of *Tinker's* forecast of disruption standard to such speech).

public employee speech, poses doctrinal and practical problems. This standard has a chilling effect that conditions student participation in extracurricular activities on reduced speech rights, similar to conditions restricting students' Fourth Amendment rights. This Note argues that conditioning participation on giving up speech rights contradicts the educational goals of extracurricular activities and of public schools. This Note proposes requiring that school officials using a forecast of disruption standard to punish student speech must connect the speech restriction to the educational goal of the particular extracurricular activity.

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