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Regulating Student Speech: Suppression
versus Punishment

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REGULATING STUDENT SPEECH: SUPPRESSION VERSUS PUNISHMENT

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I. INTRODUCTION

In the last forty years, the Supreme Court has created a student speech framework that allows schools to restrict certain types of speech that the First Amendment would otherwise protect. Emerging from four cases, this framework prescribes four different standards depending on the type of speech at issue. Student speech that (1) is disseminated through a school-sponsored vehicle can be restricted for any “legitimate pedagogical reason,”¹ while student speech that (2) merely happens to occur at school is protected unless it will either substantially disrupt the work of the school or invade the rights of other students.² Additionally, school officials can generally restrict student speech that (3) is “offensively lewd and indecent”³ or that (4) can “reasonably be regarded as encouraging illegal drug use.”⁴ All of the action in student speech cases, therefore, essentially focuses on determining which of the four categories the speech fits into, and whether the applicable standard has been met.

What this framework fails to build in, however, is any differentiation regarding the speech *restriction* at issue. This is true even though there are two very distinct types of speech restrictions in schools: suppression of the speech itself; and after-the-fact punishment of the student speaker. As the student speech landscape itself gets more complex – given schools’ experimentation with new disciplinary regimes along with the tremendous rise in student cyber-speech – the blurring of that distinction has become increasingly problematic, both doctrinally and theoretically.

This Article contends that the current framework, while appropriate when the speech restriction takes the form of suppression, is insufficient when applied to student punishment. The free speech and due process interests implicated by punishing students for their speech require additional

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¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

² *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

³ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

⁴ *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

protection. In order for a school to constitutionally punish a student for her speech, it should not be enough to show that that speech itself could be suppressed under either *Tinker*, *Fraser*, *Hazelwood*, or *Morse*. Schools should also have to show that (1) the student speaker had adequate prior notice that the speech was prohibited and (2) that the actual punishment was reasonable.

The Article proceeds in three main parts. First, I examine the four Supreme Court student speech cases and demonstrate that the suppression/punishment distinction – while never explicitly articulated in those cases – is consistent with all of them. I situate this discussion in the larger context of the prior restraint doctrine in First Amendment law. Second, I discuss why the distinction *matters* – why after-the-fact punishments of student speakers implicate heightened free speech and due process interests that warrant more protection. Finally, I turn to my proposed standard for student punishment cases, and describe how the additional requirements of notice and reasonableness would provide the necessary extra layer of protection, and effectuate the underlying logic and theory of the Supreme Court’s student speech jurisprudence.

II. THE SUPREME COURT’S STUDENT SPEECH FRAMEWORK

First Amendment law generally recognizes a sharp distinction between advance suppression of speech – a “prior restraint” – and after-the-fact sanctions for such speech, such as civil or criminal liability. Since its 1931 decision in *Near v. Minnesota*,⁵ the Supreme Court has reviewed prior restraints with particular stringency, repeatedly explaining that a prior restraint “comes to this Court bearing a heavy presumption against its constitutionality.”⁶ Theoretically, the greater animosity toward prior restraints stems from the view that while “a criminal statute chills, prior restraint freezes,”⁷ historically, it dates back to the American colonists’

⁵ 283 U.S. 697 (1931).

⁶ See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁷ Alexander M. Bickel, *THE MORALITY OF CONSENT* 61 (1975). The Supreme Court subsequently paraphrased this famous quotation, stating that “[i]f it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

Martin Redish has thoroughly described and analyzed additional commonly-cited concerns about prior restraints, including that they “are easier to obtain than criminal convictions and therefore are likely to be overused, lack the constitutional procedural protections inherent in the criminal process, require adjudication in the abstract, improperly affect audience reception of messages, and unduly extend the state’s power into the individual’s sphere.” Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in*

opposition to England's use of a licensing system to censor the press.⁸ Although the prior restraint doctrine can get blurry at the margins, the basic distinction remains firmly entrenched.⁹

The subset of student speech case law, however, did not develop that way. Since the Supreme Court's first foray into the student speech world in 1969, the Court has never recognized, nor even substantively discussed, a distinction between suppression of student speech and after-the-fact punishment of the student speaker.

Given the Supreme Court's general tendency toward adjusting and reducing constitutional protections in the school setting,¹⁰ it is not entirely surprising that the Supreme Court has dispensed with the prior restraint doctrine in that context. What is striking, however, is that the Supreme Court has created a student speech framework that actually functions *more* logically and speech-protectively when it is applied to speech suppression as opposed to ex-post student punishment. This phenomenon has largely resulted from the specific fact patterns of the four student speech cases that have reached the Supreme Court. As this Article shows below, in none of those four cases was a student speaker punished for his speech without having first received advance warning from school officials about the speech in question.¹¹ In other words, the Supreme Court has never

First Amendment Theory, 70 VA. L. REV. 53, 59 (1984). See also, e.g., Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1 (1989); L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990); Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289 (1999).

⁸ *Near*, 283 U.S. at 714-15; see also, e.g., Scordato, *supra* note 7, at 5.

⁹ See, e.g., Redish, *supra* note 7, at 53 ("Although the prior restraint doctrine pervades Supreme Court rhetoric, the Court's decisions reveal inconsistencies in the doctrine's application."); Scordato, *supra* note 7, at 2 ("Despite the frequency with which the doctrine of prior restraint is cited in court opinions and the level of general recognition it has achieved, relevant case law does not provide a concise and logically coherent definition of a prior restraint on speech. Moreover, the Supreme Court in the years since *Near* has affixed the prior restraint label to an exceptionally diverse group of laws, regulations, and government actions.")

¹⁰ See *infra* text accompanying notes 115-16, 169. See also, e.g., Kristi L. Bowman, *Symposium: The Religion Clauses in the 21st Century: Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. Va. L. Rev. 187, 190 & n. 10 (2007) ("I often tell my education law students that examining constitutional law in K-12 public schools is a bit like looking at one's self in a fun house mirror – although the basic image (or constitutional principle) is the same, we do not have to look very closely to see some significant variations from the image we would expect to be reflected back -- this part is taller, that one is wider, something else is barely there").

¹¹ Indeed, in one of the four cases – *Hazelwood* – there was no punishment at all; the sole method of restriction was suppression of the speech itself. See *infra* text accompanying notes 31-38.

confronted a case where a speech restriction solely took the form of after-the-fact student punishment. As a result, the appropriate protections for that particular scenario have never been built into the Supreme Court framework.

Taking a fresh look at the Supreme Court's four student speech cases with the suppression/punishment distinction in mind is illuminating. First, in *Tinker v. Des Moines*¹² – the landmark 1969 case in which the Supreme Court famously declared that students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”¹³ – the student-plaintiffs were objectors to the Vietnam War and decided to express that view by wearing black armbands to school.¹⁴ When school district officials learned of the plan, they adopted a policy prohibiting all armbands.¹⁵ Despite this ban, several students showed up at school wearing armbands, at which point they were suspended.¹⁶ The students' subsequent First Amendment lawsuit thus implicated both advance suppression and subsequent punishment.

In analyzing the case, the *Tinker* Court stated that prohibiting students from expressing opposition to the Vietnam War would violate their constitutional rights unless the ban could “be justified by a showing [either] that the students' activities would materially and substantially disrupt the work and discipline of the school” or would invade the rights of others.¹⁷ Here, the Court concluded, the school district's actions had been unconstitutional because “the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”¹⁸

The *Tinker* Court's reasoning thus did not draw any distinction between the advance suppression and after-the-fact punishment. To be sure, the Court mentioned the fact that no disruption had actually occurred as a result of the speech. But it made clear that had school officials reasonably forecast substantial disruption (or invasion of other students' rights) in the first place, they would not have had to wait. This prediction would have justified preemptively restricting the speech, and sanctioning any students who violated that ban. On the flip side, because here there was no such reasonable forecast, but rather only an “undifferentiated fear or

¹² 393 U.S. 503 (1969).

¹³ *Id.* at 506.

¹⁴ *Id.* at 504.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 513.

¹⁸ *Id.* at 514.

apprehension of disturbance,”¹⁹ the armband ban was invalid. As such, there was no valid predicate for the students’ suspension. Thus, the constitutionality of the initial speech suppression and the after-the-fact punishment rose and fell together.

Seventeen years later, the Supreme Court decided *Bethel v. Fraser*,²⁰ which involved a very different type of speech from the core political expression in *Tinker*. Matthew Fraser, a high-school student, prepared a speech nominating another student for student council vice president. The speech used an “elaborate, graphic, and explicit sexual metaphor”.²¹ Fraser described the student candidate as a man who was “firm in his pants...who takes his point and pounds it in...[who] drives hard, pushing and pushing until finally—he succeeds.”²² Before giving the speech, Fraser discussed its contents with two different teachers, both of whom advised him that the speech was “inappropriate,” that he “probably should not deliver it,” and that he might suffer “severe consequences as a result.”²³ Additionally, a high school disciplinary rule prohibited conduct that “includ[ed] the use of obscene, profane language.”²⁴ Despite these warnings, Fraser gave the speech. He was then called into the assistant principal’s office; after admitting that he had “deliberately used sexual innuendo in the speech,” Fraser was suspended for three days and told that his name was being removed from the list of candidates for graduation speaker.²⁵

Fraser’s case, like *Tinker*, thus implicated both an advance speech restriction (or, at least, an attempt at such restriction) and an after-the-fact punishment. And, as in *Tinker*, the validity of the advance restriction and the subsequent punishment rose and fell together. Indeed, the Court did not separate them out, but generally stated that it was a “highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse,” asserting that “schools must teach by example the values of a civilized social order” and that the sexual innuendo in Fraser’s speech was “plainly offensive to both teachers and students” and “could well be seriously damaging to its less mature audience.”²⁶ Interestingly, Fraser *did* try to argue that despite the teachers’ warnings, he had not received adequate notice that his speech could subject him to

¹⁹ *Id.* at 508.

²⁰ 478 U.S. 675 (1986).

²¹ *Id.* at 678.

²² *Id.* at 687 (Brennan, *J.*, concurring).

²³ 478 U.S. at 678.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 683.

disciplinary sanctions.²⁷ But the Court rejected this argument, stating that the “full panoply of procedural due process protections” were unnecessary in this context²⁸ and that here, “the school disciplinary rule prohibiting ‘obscene’ language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.”²⁹ (Notably, Justice Stevens dissented on grounds that neither the rule nor the teachers’ warnings had provided Fraser with sufficiently clear notice that he might be punished for his speech.³⁰) The Court therefore did not have to reach the question of whether, had *no* advance warning been given at all, Fraser’s punishment would still have been constitutional.

Viewed through the suppression/punishment lens, therefore, *Tinker* and *Fraser* are essentially mirror images of each other. In *Tinker*, the basis for the initial speech suppression was unconstitutional, and thus the ex-post punishment of the student speakers for violating that ban was unconstitutional as well. Conversely, in *Fraser*, it was permissible for the school to restrict the speech in advance, and thus it was permissible to punish the student speaker for disobeying that restriction.

²⁷ *Id.* at 686.

²⁸ *Id.* Here, the Court made reference to *Goss v. Lopez*, 419 U.S. 565 (1975), where it had held that students subjected to short-term suspensions were entitled to notice of the charges against them and an opportunity to respond to those charges. As this Article subsequently discusses in more detail, Fraser’s due process argument was qualitatively different from the one made in *Goss*, given that Fraser’s argument centered on the need for notice not of the charges against him, but rather about what type of speech was prohibited in the first place. See *infra* text accompanying notes 108-114.

²⁹ *Id.*

³⁰ *Id.* at 691-92. Justice Stevens argued:

It does seem to me...that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion....One might conclude that respondent should have known that he would be punished for giving this speech on three quite different theories: (1) It violated the “Disruptive Conduct” rule published in the student handbook; (2) he was specifically warned by his teachers; or (3) the impropriety is so obvious that no specific notice was required.

Justice Stevens went on to conclude that the student handbook provision (which stated that “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language...”) applied only ambiguously to this situation; that the teachers had advised Fraser not to give the speech but had not told him that it “might violate a school rule,” and that the speech was not so obviously inappropriate that Fraser “must have known that the school administrators would punish him for delivering it.” *Id.* at 693-96.

Hazelwood v. Kuhlmeier,³¹ decided the following year, involved solely an advance speech restriction. There, editors of a high school newspaper filed suit after their school principal censored two articles – one about teen pregnancy and one about divorce – from an issue of the newspaper before it went to the press.³² The principal justified the censorship on grounds that the teen pregnancy article’s sexual references were inappropriate for younger students, and that both articles could invade the privacy of the student subjects and their families.³³ (He was particularly concerned that, in the divorce article, the parents had not been given the chance to comment.³⁴)

The Supreme Court upheld the constitutionality of the principal’s actions, identifying a distinction between speech that just happened to occur on school premises (such as the *Tinker* armbands) and speech that was actually communicated through a school-sponsored medium (such as the school newspaper here).³⁵ The Court ruled that school officials could exercise greater control over the latter category “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”³⁶ In sum, educators “could exercise editorial control over the style and content of student speech in school-sponsored activities so long as their actions [were] reasonably related to legitimate pedagogical concerns.”³⁷ Here, the *Hazelwood* Court reasoned, the principal’s censorship of the articles met that lenient standard, given his cited motivations.³⁸

Finally, the Supreme Court’s most recent student speech case – *Morse v. Frederick*,³⁹ decided in 2007, returned to the *Fraser* and *Tinker* pattern of involving both an initial attempt at speech suppression and a subsequent punishment once that prohibition was disobeyed. In *Morse*, students at a Juneau, Alaska high school were allowed to leave class in order to watch the Olympic torch relay as it passed by the school.⁴⁰ Just as the torchbearers and camera crews approached the school, high school senior Joseph Frederick and his friends unfurled a 14-foot banner that stated

³¹ 484 U.S. 260 (1988).

³² *Id.* at 263-64.

³³ *Id.* at 263.

³⁴ *Id.*

³⁵ *Id.* at 270-71.

³⁶ *Id.* at 271.

³⁷ *Id.* at 273.

³⁸ *Id.* at 276.

³⁹ 127 S. Ct. 2618 (2007).

⁴⁰ *Id.* at 2622.

“BONG HiTS 4 JESUS.” The high school principal, who thought that the banner violated a school rule prohibiting any expression advocating the use of illegal substances, immediately approached the students and ordered them to take down the banner.⁴¹ Frederick’s friends complied, but Frederick did not.⁴² The principal then confiscated the banner and ordered Frederick to report to her office, where she later suspended him for ten days.⁴³ The Supreme Court upheld the constitutionality of the principal’s actions, holding that schools may restrict student speech “that can reasonably be regarded as encouraging illegal drug use.”⁴⁴ Thus, as in *Tinker* and *Fraser*, the constitutionality of the speech suppression attempt and the subsequent student punishment again rose and fell together.

Taken together, these four Supreme Court cases provide a fairly straightforward framework governing *what types* of student speech can be restricted by school officials. As an initial matter, of course, speech that is entirely unprotected by the First Amendment – such as, for example, defamation, true threats, or incitements to imminent lawless action – lacks any protection in schools as well.⁴⁵ Outside of those narrow exceptions, *Tinker* and *Hazelwood* generally divide the student speech universe in two, with *Tinker*’s “substantial disruption”/ “invasion of rights” prongs applying to independent student speech, and *Hazelwood*’s “legitimate pedagogical concern” test applying to school-sponsored student speech. *Fraser* and *Morse*, in turn, provide special rules for particular categories of disfavored student speech – *i.e.*, plainly offensive speech or advocacy of illegal drug use.

Yet nothing in this framework explicitly speaks to *how* school officials can restrict such speech. And the above re-examination of the four cases through the suppression/ punishment lens makes clear why this is so. The Supreme Court has never needed to distinguish between the suppression and punishment methods of restriction. In each case where a student speaker got punished, school officials had also directly tried to suppress his or her speech in advance.

But imagine some counter-factuals. What if, for instance, there had been no applicable school rule in *Morse*, and the high school principal had immediately suspended Frederick without first giving him the opportunity

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2625.

⁴⁵ See, e.g., Gabrielle Russell, *Comment: Pedophiles in Wonderland: Censoring the Sinful in Cyberspace*, 98 J. CRIM. L. & CRIMINOLOGY 1466, 1477 & n. 67 (describing the “nine basic categories of unprotected speech” as including “obscenity, fighting words, defamation, child pornography, perjury, blackmail, incitement to imminent lawless action, true threats, and solicitations to commit crimes”).

to take down the banner on his own? Similarly, what if the *Hazelwood* principal had not objected to the two articles ahead of time, but had simply punished the student journalists after the issue came out? For that matter, what if the teachers to whom Fraser had shown his speech never warned him against giving it, and there was no school policy on point? Would such scenarios present a constitutional problem, notwithstanding the Court's view that the underlying speech in those cases was unprotected?

In this Article's next section, I argue that the answer is yes. Ironically, despite the general presumption that prior restraints do more harm than ex-post sanctions, the Supreme Court has created a student speech framework that is more logical – and indeed more speech-protective – in the context of speech suppression as compared to after-the-fact student punishment. Unfortunately, however, thus far the lower courts have generally failed to focus on this distinction, instead applying the framework with equal force to both categories of cases.

III. A DISTINCTION WITH A DIFFERENCE

There are three related reasons why the Supreme Court's student speech framework is insufficient when the only form of speech restriction is after-the-fact student punishment. First, punishment of a student speaker – when that speaker did not receive adequate notice that his or her speech could lead to such punishment, or when the punishment imposed is so disproportionate as to be unreasonable – is inconsistent with the theoretical justifications for the framework. Second, such punishments encroach on students' First Amendment rights in a way that the framework does not adequately account for. Finally, such punishment also implicates due process rights that warrant more protection.

A. The Theoretical Justifications for the Framework

The significance of the distinction between speech suppression and student punishment becomes clear upon examining the underlying reasoning of the Supreme Court's student speech framework. Its structure is grounded on a fundamental compromise, dating back to *Tinker*: students do not shed their First Amendment rights at the schoolhouse door, but neither do they enjoy the same level of First Amendment protection that adults possess. Indeed, pursuant to the *Tinker/Fraser/Hazelwood/Morse* framework, schools can restrict speech that would otherwise be protected by the First Amendment. As Justice Alito recently stated in *Morse*, the First Amendment reductions authorized by that framework are based on “special

characteristic[s] of the school setting.”⁴⁶ Indeed, all of the Court’s recognized rationales for reducing students’ free speech rights – as variously expressed in *Tinker*, *Fraser*, *Hazelwood*, and *Morse* – can be largely distilled to two school-specific justifications: protection and education.

In all four Supreme Court cases, the need for protection – of other students’ well-being and/or of the school environment as a whole – has been a core justification underlying the particular speech restriction that the Court was permitting. *Tinker*’s “substantial disruption” and “invasion of rights” prongs both center on this concern. Indeed, *Tinker* is the most speech-protective student speech case, yet the Court readily held that student speech that threatened other students’ rights or the functioning of the learning environment could be preemptively restricted. The *Fraser* Court also raised the student protection flag, describing Fraser’s speech as “acutely insulting to teenage girl students” and even stating that the speech could be “seriously damaging to its less mature audience.”⁴⁷

Several of the legitimate pedagogical concerns identified by the *Hazelwood* Court likewise centered on issues of student protection, such as shielding students from speech “that may be inappropriate for their level of maturity”⁴⁸ or that encourages them to engage in unsafe behaviors like “drug or alcohol use” and “irresponsible sex.”⁴⁹ *Hazelwood*’s emphasis on preserving schools’ ability to dissociate themselves from matters of political controversy,⁵⁰ meanwhile, connects up with the notion of protecting the functioning of the educational environment as a whole.

Most recently, the *Morse* Court explicitly relied on the protection rationale in holding that schools could restrict student speech that advocated illegal drug use, even if the speech was not “plainly offensive” under *Fraser*, and did not satisfy either *Tinker*’s “substantial disruption” or “invasion of rights” prong. The Court extensively discussed the dangers that drug use posed to students, and concluded that the link between peer pressure and drug use meant that “[s]tudent speech celebrating illegal drug use...poses a particular challenge for school officials working to protect those entrusted to their care.”⁵¹ This, the Court concluded, entitled schools to restrict such speech. Justice Alito’s *Morse* concurrence similarly emphasized the student protection angle, indeed communicating that he was joining the majority solely on this basis:

⁴⁶ *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

⁴⁷ *Fraser*, 478 U.S. at 683.

⁴⁸ *Hazelwood*, 484 U.S. at 271.

⁴⁹ *Id.* at 272.

⁵⁰ *Id.*

⁵¹ *Id.* at 2628.

[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*'s "substantial disruption" standard permits school officials to step in before actual violence erupts. Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious.... I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits.⁵²

As compared to the protective function of student speech restrictions, their educational function has been a secondary but still significant theme. Particularly in *Fraser* and *Hazelwood*, the Supreme Court indicated that speech restrictions could appropriately be used to educate the student speaker as well as other students. Such lessons might relate either to general civility or to specific coursework. The *Fraser* Court repeatedly emphasized schools' role in teaching students about appropriate behavior, stating that "schools must teach by example the shared values of a civilized social order," that "older students...demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class," and that schools transmit "essential lessons of civil, mature conduct."⁵³ The Court thus characterized the school's advance discouragement and subsequent punishment of Fraser's speech as fulfilling this educational function with respect to both Fraser and the students who had sat in the audience for his speech. The school had first attempted to teach decorum by "prohibit[ing] the use of vulgar and offensive terms in public discourse,"⁵⁴ and the teachers' advance admonitions to Fraser about his speech comported with that message. Once Fraser nonetheless delivered the speech, the Court reasoned, the school justifiably punished him in order to "make the point to pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."⁵⁵

In *Hazelwood*, the Court returned to this educative theme, stating that educators can legitimately restrict school-sponsored speech in order to "assure that participants learn whatever lessons the activity is designed to teach" and to communicate disapproval of "ungrammatical, poorly written,

⁵² *Id.* at 2638 (Alito, *J.*, concurring).

⁵³ *Fraser*, 478 U.S. at 683.

⁵⁴ *Id.*

⁵⁵ *Id.* at 685-86.

[or] inadequately researched speech.”⁵⁶ Indeed, the *Hazelwood* Court recast the principal’s actions as stemming from the belief that “the students who had written and edited these articles had not sufficiently mastered [relevant] portions of the Journalism II curriculum.”⁵⁷ In the Court’s view, therefore, the suppression of the articles had provided the student journalists with a curricular lesson.

These protective and educative justifications for reducing students’ speech rights are a useful lens for evaluating *how* such reductions should actually occur. Both justifications are consistent with speech restrictions that take the form of speech suppression. From a protection rationale, the basic goal is to shield other students and the school environment from being exposed to the harmful speech in the first place. And, should the speech occur before the school is able to prevent it, the protection rationale similarly points toward allowing the school to suppress it as soon as possible in order to limit the damage.

The educational rationale is also consistent with speech suppression. If the point is to teach students to speak civilly or (in the context of school-sponsored speech) to speak in a way that comports with a particular curricular lesson, then restricting student speech that does not meet that standard – and guiding students toward appropriate ways of expressing themselves at school – both educates the student speaker and prevents other students from being exposed to inappropriate examples. Of course, if the substance of the speech does not meet the *Tinker*, *Fraser*, *Hazelwood*, or *Morse* standards for speech restriction, then it cannot be restricted at all. But if it does, suppressing that speech is a logical way to do so.

By contrast, the protective and educational rationales are far less convincing when the speech restriction solely takes the form of after-the-fact punishment, without any prior attempt at speech suppression. Certainly, if the school has already tried to suppress the speech on legitimate grounds, and the student speaker has disobeyed that warning, then punishment is appropriate, provided that it is not wholly disproportionate to the offense. Schools are entitled to enforce their rules. But if the student speaker never received adequate prior notice that his speech was prohibited, it is largely inconsistent with the protective and educational rationales to punish him as opposed to simply suppressing his “harmful” speech. Indeed, when such punishment occurs, the basic compromise underlying the Court’s student speech framework – that student speech rights can be limited to allow schools to fulfill their protective and educative functions – falls out of balance.

To illustrate this, it is helpful to turn back to the *Morse* hypothetical

⁵⁶ *Hazelwood*, 484 U.S. at 271.

⁵⁷ *Id.* at 276.

described above. Imagine, once again, that there was no applicable school rule prohibiting Frederick's "BONG HiTS 4 JESUS" banner at the torch rally, but that the principal nonetheless immediately suspended Frederick without first giving him the opportunity to take it down on his own. As compared to simply suppressing Frederick's banner, such a suspension would serve no additional protective or educative function. From a protection standpoint, the students standing near Frederick would have already seen the banner. Suspending Frederick from school, as opposed to merely ordering him to take the banner down (and punishing him if he did not comply), would do nothing to erase or reduce that exposure. School officials could certainly speak to students to convey disapproval of the banner's message and thus attempt to reduce its "dangerous" impact. Moreover, going forward, the school might choose to adopt a policy of prohibiting advocacy of illegal drug use, both to deter such expression and to provide a basis for punishing students who disobey that rule. But it is difficult to see how punishing Frederick, who had no notice that his banner was prohibited (for purposes of our hypothetical), would protect anyone.⁵⁸ Similarly, such punishment would serve no educational purpose that could not be accomplished by suppressing the banner and explaining to students why such speech would be prohibited from now on.

Of course, in the actual *Morse* case, Frederick did have such notice, given that the school had already adopted such a policy. And notably, the relatively brief *Morse* majority opinion mentioned this policy no less than five separate times, including in the first and last paragraphs. The opinion's second sentence stated: "Consistent with *established school policy* prohibiting such messages at school events, the principal directed the students to take down the banner."⁵⁹ Its penultimate sentence echoed: "It was reasonable for [the principal] to conclude that the banner promoted illegal drug use – in violation of *established school policy* – and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."⁶⁰ The Court thus seems to have implicitly recognized that

⁵⁸ One potential argument is that this sort of notice-free punishment would scare other students, who would observe the potential of being punished even for speech that they did not know was prohibited and would thus be deterred from taking *any* chances with their speech in the future. As discussed further below, however, I believe that this fails to strike an appropriate balance between protecting student expression and deterring "dangerous" speech, given the potential for over-deterrence. To the extent that the specter of punishment is used to deter certain types of speech, such punishment should be grounded on a policy that gives students adequate notice of what speech to avoid, so that they can be deterred to the appropriate extent.

⁵⁹ *Morse*, 127 S. Ct. at 2620 (emphasis added).

⁶⁰ *Id.* at 2629 (emphasis added).

in the absence of any notice on Frederick's part that his banner was prohibited, this would have been a qualitatively different case.

B. Encroachment on First Amendment Rights

In addition to being inconsistent with the theoretical underpinnings of the Supreme Court's student speech framework, punishments that are excessive or are not grounded on prior adequate notice also impose a heightened burden on their First Amendment rights. Particularly given the current uncertainty surrounding schools' jurisdiction over off-campus student speech, as well as some schools' current experimentation with new disciplinary regimes, the potential for such punishment threatens to deter an even wider swath of student speech than that which can actually be restricted.

Several scholars have challenged the presumption that prior restraints are always more injurious to free expression than are ex-post sanctions. As Ariel Bendor writes, "[t]he deterrent effect of criminal and civil sanctions may lead to self-censorship of desirable speech that is broader than that caused by prior restraints."⁶¹ Prior restraints, after all, make clear to the speaker precisely which speech is being restricted. The speaker, in turn, has a concrete prohibition against which he can then mount a legal challenge. By contrast, a regime that operates solely through after-the-fact punishments, without advance speech restrictions, forces speakers to take an undefined risk.

This is particularly true in the student speech context, where the speakers are younger and their First Amendment rights are already less clear and robust. As a pre-*Hazelwood* student note, analyzing *Tinker's* application to school newspapers, observed:

Postpublication review can have a 'chilling effect': a student wishing to address a controversial topic might be unwilling to express herself if she thinks her expression might subject her to sanctions... A properly functioning system of prior submission, unlike a properly functioning system of subsequent punishment, would allow school officials to pass on the potential disruptiveness of student expression before the student risked sanctions, approving the close cases in advance and thus encouraging the publication of protected expression that comes

⁶¹ Bendor, *supra* note 7, at 330. *See also, e.g.*, Scordato, *supra* note 7, at 16 ("[I]t might appear that the current doctrine of prior restraint has it exactly backward...[T]here is good reason to suspect that subsequent sanctions will create a chilling effect that reaches substantially more constitutionally protected speech than will laws in the form of prior restraints.");

close to the borderline.⁶²

The note's assumption that *Tinker's* "substantial disruption"/ "invasion of rights" prongs would apply to the regulation of school newspapers ultimately proved inaccurate, given the Court's 1988 *Hazelwood* decision, which announced a new standard for school-sponsored publications. But its underlying point remains valid. Indeed, the increasing complexity of the student speech landscape means that students are more likely than ever before to be uncertain about the extent of their First Amendment protection.

Consider, for instance, the case of Avery Doninger. In the spring of 2007, Doninger was the Junior Class Secretary at Lewis S. Mills High School in Burlington, Connecticut.⁶³ As part of her Student Council work, Doninger was coordinating Jamfest, a "Battle of the Bands" concert being held at the high school.⁶⁴ Jamfest was originally scheduled to take place on April 28 in the high school auditorium.⁶⁵ But when the teacher responsible for working the light and sound systems in the auditorium became unavailable on that date, the principal decided that either the date or the venue would have to be changed.⁶⁶ (Apparently, a Board of Education policy required that this teacher be present for any such events taking place in the school's new auditorium.⁶⁷) Frustrated, Doninger and several other student council members sent an e-mail from the school computer lab to community members, telling them that administrators had decided that Jamfest could not occur in the auditorium, and asking them to contact the central office to complain.⁶⁸ Later that day, the principal reprimanded them, telling them that they were not acting appropriately as class officers and that using the school computer system to send a personal e-mail violated the school's internet policy.⁶⁹

That night at home, Doninger posted an entry to her publicly accessible livejournal.com blog, stating as follows:

Jamfest is cancelled due to douchebags in central office...basically, because we sent [the original Jamfest e-mail out], Paula Schwartz [the superintendent] is getting a TON of phone calls and e-mails and such...however, she got pissed off and decided to just cancel the

⁶² Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 636 (1984).

⁶³ *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 203 (D. Conn. 2007).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 205.

⁶⁹ *Id.*

whole thing all together...⁷⁰

Doninger also attached the e-mail that she and her fellow student council members had sent out that morning, along with an e-mail that her mother had sent, so that readers could “get an idea of what to write if you want to write something or call [Ms. Schwartz] to piss her off more.”⁷¹

The next day, Doninger and her fellow student council members met with school administrators and worked out a new date for Jamfest.⁷² But several weeks later, the superintendent’s son came across Doninger’s blog posting while using an Internet search engine, and showed it to his mother, who passed it along to the principal. When Doninger came to the principal’s office to accept her nomination for Senior Class Secretary, the principal confronted her with the posting, asking her to apologize to the superintendent, show the blog entry to her mother, and withdraw her candidacy for Senior Class Secretary.⁷³ Doninger agreed to the first two conditions, but balked at the third.⁷⁴ The principal then refused to provide an administrative endorsement for Doninger’s candidacy, thus preventing her from running for office.⁷⁵ Asserting that this “punishment did not fit the crime,” Doninger’s mother filed suit on her behalf.⁷⁶

Doninger’s case garnered wide-ranging attention, generating discussion in academic commentary, the mainstream media, and the blogosphere.⁷⁷ Aside from the “douchebag” humor, most commentators focused on whether Doninger’s high school had the authority to punish her for speech that she had expressed at home on her personal (albeit publicly accessible) blog.⁷⁸ Several decisions had already allowed schools to punish students for violent and threatening speech on their home computers,⁷⁹ but

⁷⁰ *Id.* at 206.

⁷¹ *Id.*

⁷² *Id.* at 207.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 207-08.

⁷⁶ *Id.* at 202.

⁷⁷ See, e.g., Mary-Rose Papandrea, *Dunwoody Distinguished Lecture in Law: Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1062-64 (2008); Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1220-21 (2008); Arielle Levin Becker, *Court Looks at Internet Speech Limits*, HARTFORD COURANT, March 5, 2008; Hassani Gittens, *Court Backs HS Limit on Free Speech*, N.Y. POST, May 30, 2008; *Appeals Court Hears Conn. Teen’s Appeal on School Punishment*, BOSTON GLOBE, March 5, 2008; http://prawfsblawg.blogs.com/prawfsblawg_/2007/07/students-should.html.

⁷⁸ See, e.g., Papandrea, *supra* note 77, at 1062-64.

⁷⁹ See, e.g., *Wisniewski v. Bd. of Educ. of Weedsport Central Sch. Dist.*, 494 F.3d 34

the language here obviously presented a less dire situation.

Nonetheless, both the district court and the circuit court rejected Doninger's bid for a preliminary injunction. Essentially, what doomed Doninger was that she had only been prohibited from running for class office, as opposed to receiving a graver punishment, such as suspension. The district court, in fact, questioned whether the basic student speech protections even applied here.⁸⁰ Doninger "is free to express her opinions about the school administration and their decisions in any manner she wishes," the district court asserted. "However, [she] does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators."⁸¹ In the alternative, the court ruled that if the basic student speech framework *did* apply, then *Fraser's* "plainly offensive" standard justified the school's actions.⁸² The court acknowledged that *Fraser* had not involved off-campus speech, but asserted that the blog was "purposely designed by [Doninger] to come onto the campus,"⁸³ stating that "the content of the blog was related to school issues, and it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it."⁸⁴ This, in turn, rendered the speech sufficiently "on-campus" for purposes of *Fraser*.

The Second Circuit affirmed, but on somewhat different grounds.⁸⁵ Declining to reach the question of whether *Fraser* applied to off-campus speech like Doninger's blog, the court instead used *Tinker's* "substantial disruption" prong to justify the school's actions.⁸⁶ The court noted that the Second Circuit had already recognized schools' regulatory authority over speech that was "reasonably foreseeable...[to] come to the attention of school authorities and [to] create a risk of substantial disruption,"⁸⁷ and concluded that this standard was met here. Moreover, the court argued that given the relatively minor nature of the punishment, the court reasoned that

(2d Cir. 2007) (holding that school could constitutionally punish student who had used an AOL Instant Messenger Icon that depicted a pistol firing at a person's head and dots representing spattered blood, beneath which were the words "Kill Mr. VanderMolen" [an English teacher]); *J.S. v. Bethlehem Area Sch. Dist.*, 847 A.2d 847 (Pa. 2002) (holding that school could constitutionally punish student who had created at home a website entitled "Teacher Sux," which featured, among other things, a picture of a particular teacher with her head cut off and a request for \$20 to "help pay for the hit man").

⁸⁰ *Doninger*, 514 F. Supp. 2d at 213.

⁸¹ *Id.* at 216.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 217.

⁸⁵ *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

⁸⁶ *Doninger*, 527 F.3d at 49-50.

⁸⁷ *Id.* at 50 (citing *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007)).

Tinker's "substantial disruption" test should be ratcheted down as well.⁸⁸ The school did not have to show that Doninger's blog posting had disrupted, or risked disrupting, classwork or school safety and order – the types of disruption typically required by *Tinker*. Instead, it was enough for the school to show that Doninger's conduct risked "disruption of efforts to settle the Jamfest dispute" and "frustration of the proper operation of LMHS's student government and undermining of the values that student government, as an extracurricular activity, is designed to promote."⁸⁹ Implicitly acknowledging that this represented a significantly watered-down version of *Tinker*, the Second Circuit concluded that "we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns."⁹⁰

On the one hand, Doninger's case is not extremely sympathetic. Being disqualified from running for Class Secretary for calling school administrators "douchebags" on a blog certainly differs from being suspended for wearing an armband to protest a war. Nonetheless, two aspects of the *Doninger* decision are troubling.

First, *Doninger* only adds to the growing uncertainty surrounding schools' reach over students' internet speech. As Mary-Rose Papandrea recently described, courts have adopted a variety of approaches to this issue. Some courts have ruled that schools can only restrict or punish speech that the student speaker actually brought to campus, others have ruled that schools have jurisdiction where it was "reasonably foreseeable" that the speech would come to campus, and still others have moved immediately to applying *Tinker*'s substantial disruption test (which, of course, can itself be applied with varying levels of stringency).⁹¹ In *Doninger*, the Second Circuit not only endorsed but broadened the "reasonable foreseeability" standard. The court indicated that because Doninger had blogged about a high school event and had encouraged fellow students to respond to her message and contact the administration, that made it reasonably foreseeable that her blog posting *itself* would reach school grounds.⁹² Indeed, the

⁸⁸ *Id.* at 52 ("[T]he district court correctly determined that it is of no small significance that the discipline here related to [Doninger's] extracurricular role as a student government leader. The district court found this significant in part because participation in voluntary, extracurricular activities is a 'privilege' that can be rescinded when students fail to comply with the obligations inherent in the activities themselves. We consider the relevance of this factor instead in the context of *Tinker* and its recognition that student expression may legitimately be regulated when school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'").

⁸⁹ *Id.*

⁹⁰ *Id.* at 53.

⁹¹ Papandrea, *supra* note 77, at 1056-71.

⁹² *Doninger*, 527 F.3d at 50.

Second Circuit approvingly quoted the district court's finding that the blog posting had been "purposely designed by [Doninger] to come onto campus."⁹³ But neither opinion cited any evidence that Doninger had actually so intended. In fact, school administrators did not even find out about her posting until weeks later, when the superintendent's adult son happened to come across it on the internet. A few sentences later, the Second Circuit used an even broader formulation of this standard, suggesting that the test was not whether the blog posting was likely to physically reach school grounds, but whether "it was reasonably foreseeable that other LMHS students would view the blog and that *school administrators would become aware of it*."⁹⁴ The Second Circuit's broad construction of the "reasonable foreseeability" test thus suggests that schools may possess jurisdiction over virtually all student internet speech that relates to school issues and tries to galvanize student action. Such speech, after all, is likely to generate in-school discussion that may reach the ears of school administrators, who can search for that speech on the internet.⁹⁵

Second, *Doninger* considerably expanded schools' regulatory power over *all* student speech – both on-campus and off-campus – by indicating that *Tinker*'s "substantial disruption" test should be considered relative to the particular punishment at issue. Here, since the punishment was mere disqualification from a student government office, it was enough to show that Doninger's blog posting had "risked...frustration of the proper operation of LMHS's student government."⁹⁶ This approach echoes the Sixth Circuit's recent conclusion in *Lowery v. Eudevard*⁹⁷ that where high school football players had signed a petition to have their football coach

⁹³ *Id.* (citing *Doninger*, 514 F. Supp. 2d at 216).

⁹⁴ *Id.* Here, the Second Circuit again cited the district court's language, referring to the district court's "correct[] determination."

⁹⁵ It is beyond the scope of this Article to propose a standard regarding schools' authority over students' off-campus speech – a topic that, as described above, has generated much discussion among courts, commentators, and the media. *See, e.g.*, Papandrea, *supra* note 77; Brenton, *supra* note 77; Justin P. Markey, *Enough Tinkering With Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129 (2007); Brandon C. Denning and Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Speech*, 35 HASTINGS CONST. L.Q. 835 (2008); Erin Reeves, Notes, *The Scope of a Student: How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127 (2008); Carmen Gentile, *Student Fights Record of Cyber-Bullying*, N.Y. TIMES, Feb. 7, 2009. Rather, as I discuss more fully below, my particular focus is on the way in which the current state of uncertainty on this issue heightens the need for more protection of student speakers generally.

⁹⁶ *Id.* at 52.

⁹⁷ 497 F.3d 584.

fired, *Tinker* justified their dismissal from the team because the petition – in undermining the coach’s authority and threatening morale – “was reasonably likely to cause substantial disruption” on the team.⁹⁸ Just as *Doninger* stated that a more severe punishment might have yielded a different outcome, so too did the *Lowery* court emphasize that the students had not been suspended and that their “regular education ha[d] not been impeded.”⁹⁹ This approach, of course, considerably broadens schools’ ability to satisfy *Tinker*’s “substantial disruption” standard. It implies that if the student speech opposes some aspect of a school activity, then the school – as long as the punishment relates only to the activity in question – can justify its actions simply by pointing to the speech’s potential to interfere with that particular activity. This, of course, will often be easy – almost tautological – to show.

Taken together, these two implications have the potential to deter a tremendous amount of student speech. If schools’ authority extends over all instances of student speech regarding school activities, and if schools can exclude from those activities students who express opposition to the way they are being run, then students are unlikely to feel comfortable expressing such views in any forum. Of course, it is possible to read *Doninger* less strongly, and as courts continue to chart their way in this area, the standards are likely to evolve over time. In the interim, however, students face an increasingly murky landscape and are likely to be justifiably uncertain about the scope of their First Amendment protection.

The speech-deterrent effect of this uncertainty is heightened by the current lack of any distinction between speech suppression and student punishment. Students engaging in speech that is close to the (moving) borderline are risking not only the suppression of their speech itself, but also personal punishment. This trend will only increase if other courts follow *Doninger* and *Lowery* in holding that punishments falling short of suspension should trigger less scrutiny. And, given some schools’ recent

⁹⁸ *Id.* at 594. In so ruling, the *Lowery* Court stated that “[t]he success of an athletic team in large part depends on its coach. The coach determines the strategies and plays, and ‘sets the tone’ for the team....The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. Thus, attacking the authority of the coach necessarily undermines his ability to lead the team.”). See also *Wildman v. Marshalltown*, 249 F.3d 768 (8th Cir. 2001) (upholding school’s requirement that a high school sophomore who wrote a letter to her fellow teammates criticizing the basketball coach apologize in order to be allowed to remain on the team). The Ninth Circuit, however, has held that a student’s petition opposing a basketball coach can be protected speech. *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 760-62, 768-69 (9th Cir. 2006).

⁹⁹ *Lowery*, 497 F.3d at 600. The court added that the students “*are free to continue their campaign to have Euverard fired*. What they are *not* free to do is continue to play football for him while actively working to undermine his authority.” *Id.*

experimentation with new disciplinary regimes that center on participation in extracurricular activities, more courts are likely to face this very issue. An April 2008 *New York Times* article, for instance, described one New York middle school's new policy of barring students from all aspects of extracurricular life if they had poor grades or "bad attitudes."¹⁰⁰ To be sure, the risk of being disqualified from an extracurricular activity does not rise to the level of being suspended, and some students may be undeterred by the possibility of such consequences. But given the significant role that extracurricular activities play in many students' lives,¹⁰¹ many students may well be chilled by that possibility.

Unfortunately, the Second Circuit explicitly rejected in *Doninger* the notion that after-the-fact punishments should trigger any additional inquiry. The court stated that the same standards applied both to "instances of prior restraint, where school authorities prohibit or limit expression before publication, and to cases like this one, where [Doninger's] disqualification from student office followed as a consequence of the post she had already made available to other students."¹⁰² (Indeed, if anything, the court suggested that post-hoc punishments can arguably trigger *less* scrutiny, at least when they fall short of suspension.) The court thus failed to recognize the heightened burden that the specter of post-hoc punishment imposes on students' First Amendment interests. The Seventh Circuit has also implicitly rejected any distinction between speech suppression and student punishment cases.¹⁰³ Only a Ninth Circuit dissent has suggested, albeit without any detailed discussion, that the Supreme Court's student speech

¹⁰⁰ Winnie Hu, *School's New Rule for Pupils: No Fun*, N.Y. TIMES, April 4, 2008.

¹⁰¹ In a different legal context, Justice Ginsburg – citing a brief from the American Academy of Pediatrics –described at length the significance of students' participation in extracurricular activities:

While extracurricular activities are 'voluntary' in the sense that they are not required for graduation, they are part of the school's educational program...Participation in such activities is a key component of school life, essential in reality for students applying to college, and for all participants, a significant contributor to the breadth and quality of the educational experience. 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.

Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 8435-46 (2002). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000) (noting "the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience"). For further discussion of *Earls* and *Santa Fe*, see *infra* text accompanying notes 116-122.

¹⁰² *Doninger*, 527 F.3d at 52 & n. 3.

¹⁰³ *Boucher v. School Board*, 134 F.3d 821, 828 (7th Cir. 1998).

framework justifies only speech suppression, and that additional protection – i.e., prior “clear notice” – is required in the context of student punishment.¹⁰⁴

C. Due Process Concerns

After-the-fact punishments of student speakers without adequate prior notice also raise due process concerns. As discussed above, the Supreme Court itself implied in *Fraser* that the Due Process clause places limits on schools’ ability to punish students for their speech. In response to Fraser’s due process argument, the Court stated that “[g]iven the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be *as detailed* as a criminal code which imposes criminal sanctions,”¹⁰⁵ and that the school rule against obscene language, combined with the advance warnings of the teachers, “gave *adequate warning* to Fraser that his lewd speech could subject him to sanctions.”¹⁰⁶ Thus, although the majority obviously disagreed with Justice Stevens’ view that Fraser had received insufficient notice,¹⁰⁷ the Court did imply that schools must provide students with at least *some* degree of advance warning before punishing them for their speech.

Some might argue that *Fraser* involved a suspension, and that at least where lesser punishments are imposed against student speakers – like the exclusion from student office in *Doninger* – no due process interests are implicated. This position has some surface appeal. After all, the one case in which the Supreme Court recognized students’ procedural due process rights – the 1975 case of *Goss v. Lopez*¹⁰⁸ – involved a school suspension. There, the Court held that a student facing a temporary suspension was entitled to “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”¹⁰⁹ Subsequently, the Supreme Court rejected in *Ingraham v. Wright*¹¹⁰ the argument that students were

¹⁰⁴ *Lavine v. Blaine School District*, 279 F.3d 719, 727 (9th Cir. 2002) (dissent from denial of rehearing en banc) (arguing that *Tinker*, *Fraser*, and *Hazelwood* require students to receive “clear notice that the speech was prohibited and would be punished,” and that absent such notice, a school can only tell the student “not to circulate [the speech] any more in school, and then punish him if he [does].”)

¹⁰⁵ *Fraser*, 478 U.S. at 686.

¹⁰⁶ *Id.*

¹⁰⁷ *Fraser*, 478 U.S. at 691-96 (Stevens, J., dissenting).

¹⁰⁸ 419 U.S. 565 (1975).

¹⁰⁹ *Id.* at 581.

¹¹⁰ 430 U.S. 651 (1977).

entitled to the same procedural due process protections prior to the imposition of corporal punishment.¹¹¹ Since then, many federal and state courts have concluded that students lack any sort of liberty or property interest in participating in extracurricular activities, and that they are therefore not entitled to any sort of notice or hearing before being removed from those activities.¹¹² In fact, the *Doninger* district court – both in its original rejection of Doninger’s bid for a preliminary injunction and in its subsequent decision on the underlying merits – referred specifically to this line of cases in concluding that Doninger’s disqualification from the class secretary position was permissible.¹¹³

That students lack *independent* liberty or property interests in their participation in extracurricular activities, however, should not end the analysis. When such participation is used as a lever for limiting student speech, then a different sort of due process concern is raised. The crucial type of notice is *not* information about the particular charges pending against the student so that he may defend himself, as was at issue in *Goss*. Rather, it is an earlier form of notice: adequate notice of what the applicable rules are in the first place. As Justice Stevens explained in his *Fraser*

¹¹¹ *Id.* at 672-82. The *Ingraham* Court asserted that corporal punishment, unlike school suspensions, did not implicate “the state-created property interest in public education,” *id.* at 674 & n. 43, and that the available post-punishment remedies, such as tort lawsuits alleging excessive punishment, provided the required level of due process, *id.* at 675-82.

¹¹² *See, e.g.,* A.C. v. Bd. of Educ. for Cambridge Community Unit Sch. Dist., 2005 U.S. Dist. LEXIS 38070, at * 5 (noting that “courts in other jurisdictions have repeatedly held that there is no protectable or liberty interest in participating in interscholastic athletics”); *Angstat v. Midd-West Sch. Dist.*, 286 F. Supp. 2d 436, 442 (M.D. Pa. 2003) (“[T]here is no constitutionally protected interest in playing sports...many courts that have considered the question have found that there is no clearly established right to compete or participate in extracurricular activities.”); *Palmer v. Merluzzi*, 689 F. Supp. 400,408-09 (“New Jersey is not alone in recognizing that students do not have a federally protected property interest in extracurricular activities. The great majority of state and federal courts which have considered this issue have reached a similar conclusion.”).

¹¹³ *Doninger*, 514 F. Supp. 2d at 213-216 (“[N]either *Tinker* nor *Fraser* involved participation in voluntary, extracurricular activities, and in other contexts, the Supreme Court and other courts have been willing to accord great discretion to school officials in deciding whether students are eligible to participate in extracurricular activities....[Doninger] does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators.”); *Doninger*, 2009 U.S. Dist. LEXIS 2704, at * 5 (explaining that “The Court believed that this case differed from both *Tinker* and *Fraser* because it did not arise from a suspension or other similar student discipline but rather involved participation in voluntary, extracurricular activities—namely, serving as class secretary...The Court cited one treatise as noting that an ‘overwhelming majority of both federal and state courts have held that participation in extracurricular activities...is a privilege, not a right.’”).

dissent, a hybrid First Amendment/due process interest is implicated here.¹¹⁴ Even if schools do not have to provide notice and a hearing to every student cut from the band, football team, or other extracurricular activity, it does not follow that they can necessarily exclude students from such activities on the basis of their *speech* without having first provided adequate notice of this possibility.

Indeed, an analogy can be drawn here to two fairly recent Supreme Court decisions in a different school law context: *Vernonia School District v. Acton*¹¹⁵ and *Board of Education of Independent School District No. 92 v. Earls*.¹¹⁶ In both *Vernonia* and *Earls*, the Supreme Court analyzed the constitutionality of school policies that required all students participating in various extracurricular activities (respectively, interscholastic athletics and all competitive extracurricular activities) to submit to random drug testing.¹¹⁷ In neither case did the Court hold that because extracurricular

¹¹⁴ *Fraser*, 478 U.S. at 691-92 (Stevens, *J.*, dissenting) (“If a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of his violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.”). *See also, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly...”)

Karen Daly has drawn on Justice Stevens’ *Fraser* dissent in arguing that *teachers* are entitled to sufficient notice before being punished for their classroom speech. She writes: “The link between the First Amendment’s free speech protections and the Fourteenth Amendment’s due process requirements is not always made explicit, but judicial opinions make clear that the need for notice is heightened when policies or regulations threaten to chill speech. One rationale for fair notice in the educational realm, exemplified by the sweeping language of *Keyishian [v. Bd. of Regents]*, 385 U.S. 589 (1967), is to provide sufficient ‘breathing room’ for the valuable First Amendment freedoms realized through teacher speech.” Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 20-21 (2001).

The First Circuit has adopted a similar view, holding that teachers have “a right to notice of what classroom conduct is prohibited.” *Ward v. Hickey*, 996 F.2d 448, 453. In the same case, the First Circuit observed that *Hazelwood* covered only speech *suppression*,” and argued that “[t]his suggests that the Court would agree that postpublication retaliation must derive from some prior limitation.” *Id.* Both Daly’s piece and *Ward*, given their respective discussions of the general educational context and the approach taken in *Hazelwood* (which itself involved the speech of students rather than teachers), thus implicitly support the idea of recognizing a notice requirement when punishing student speakers as well.

¹¹⁵ 515 U.S. 646 (1995).

¹¹⁶ 536 U.S. 822 (2002).

¹¹⁷ In *Vernonia*, the names of all students participating in interscholastic athletics were placed into a “pool”; each week, 10% of the students were randomly selected for drug

activities were a mere “privilege,” the Fourth Amendment protections against unreasonable search and seizure did not apply. Rather, the Court performed a detailed Fourth Amendment analysis of the policies in question, weighing the students’ legitimate expectations of privacy and the character of the intrusion against the nature and immediacy of the governmental concern at issue.¹¹⁸

To be sure, in conducting this analysis, the Court took into account the voluntary nature of these activities, along with the heightened regulations and reduced privacy that the activities already imposed.¹¹⁹ The Court never suggested, however, that because students could avoid the drug testing regimes simply by choosing not to participate in the activities in question, the Fourth Amendment was no longer applicable.

The Court adopted a similar approach in *Santa Fe Independent School District v. Doe*,¹²⁰ which involved an Establishment Clause challenge to a school district’s practice of student-led prayer at high school football games.¹²¹ The Court rejected the district’s argument that there was no Establishment Clause violation because attendance at these football games was merely voluntary, explaining:

Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma...But [the District] also minimizes the importance to many students of attending and participating in extracurricular activities as part of a

testing of their urine. *Vernonia*, 515 U.S. at 650. In *Earls*, all middle and high schoolers participating in extracurricular activities had to agree to submit to random drug testing; in practice, the policy was only applied to competitive extracurricular activities (including the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pom, cheerleading, and athletics). *Earls*, 536 U.S. at 826.

¹¹⁸ *Vernonia*, 515 U.S. at 652-665; *Earls*, 536 U.S. at 828-38.

¹¹⁹ In *Vernonia*, for instance, the Court stated that student-athletes have reduced expectations of limited privacy (given the nature of public school locker rooms and showers) and that “[b]y choosing to ‘go out for the team,’ they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally,” given that they have to submit to physical examinations, maintain minimum grade point averages, and the like. *Vernonia*, 515 U.S. at 657. The *Vernonia* Court added that “[s]omewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.” *Id.*

Similarly, the *Earls* Court observed that “students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs require occasional off-campus travel and communal undress. All of them have their own rules and requirements that do not apply to the student body as a whole.” *Earls*, 536 U.S. at 831-32.

¹²⁰ 530 U.S. 290 (2000).

¹²¹ *Id.* at 294-99.

complete educational experience....To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.”... Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students....¹²²

Just as the voluntary nature of extracurricular activities does not dispose of the potential for a Fourth Amendment or Establishment Clause violation, neither does it negate the potential for a First Amendment/due process violation. Indeed, even when the only sanction for a student’s speech is removal from this sort of activity, that student’s First Amendment interests and concomitant due process interests are still implicated. Only where the punishment is truly insignificant should such claims be rejected. In judging whether a student speaker’s punishment is too *de minimis* to warrant review, courts can usefully draw on the judicially-adopted standard in the context of public employees’ First Amendment claims: whether the response to the speech in question was sufficiently adverse as to “deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.”¹²³ In making this assessment, courts should engage in a highly fact-specific inquiry, just as they do in the employment setting.¹²⁴ In cases where a court finds that the punishment at issue *would* dissuade a similarly-situated student from engaging in the speech in question, then the court should proceed to consider whether the punishment was predicated on adequate prior notice and was substantively reasonable, as discussed in this Article’s next section.

Interestingly, some courts have implicitly recognized the significance of advance notice in connection with the punishment of student

¹²² *Id.* at 311-12.

¹²³ *N.Y. State Law Officers Union v. Andreucci*, 433 F.3d 320, 328 (2d Cir. 2006) (internal citations omitted). *Cf.* *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 68 (holding that Title VII’s anti-retaliation provision covers any employer action that a “reasonable employee would [find] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”) (internal citations and quotation marks omitted).

¹²⁴ *See Burlington*, 548 U.S. at 69 (explaining that “context matters,” and that the significance of a particular act “often depends on a constellation of surrounding circumstances, expectations, and relationships,” such that “an act that would be immaterial in some situations is material in others”) (internal citations and quotation marks omitted).

speakers – at least insofar as they have specifically mentioned, in the course of upholding such punishments, whatever notice was given. As noted above, the Supreme Court in *Fraser* addressed this issue, and the *Morse* Court also repeatedly noted the anti-drug school policy that Frederick’s speech had violated. Similarly, in *Poling v. Murphy*,¹²⁵ the Sixth Circuit upheld the discipline of a student who gave a crude campaign speech, stating at the end of the opinion that the student had been “put on notice before he gave his speech that it considered important for the president of the student council ‘to work in a cooperative way with the Administration’ and was ‘specifically told’ that a particular statement was inappropriate.”¹²⁶ And even in *Doninger* itself, the district court noted that (1) the high school’s handbook “included language regarding the social and civic expectations of students”¹²⁷ and (2) the high school principal had told Doninger that her initial e-mail from the school’s computer represented a failure “to act in a manner appropriate to class officers.”¹²⁸ The court added that the principal “testified that a factor of particular relevance to her disciplinary decision was the fact that Avery posted her blog entry on the very evening of the day on which that conversation occurred.”¹²⁹

Nonetheless, courts have generally stopped short of holding that advance notice is required,¹³⁰ let alone analyzing the further question of what the necessary level of notice would be. Instead, they simply describe what notice – if any – was given, and then refer to that notice for rhetorical effect. Where no real notice was given, that fact is simply ignored. This approach provides insufficient protection to student speakers, leaving open the possibility of punishment even in the absence of adequate notice.

Thus, in this Article’s next section, I describe the two additional protections that are necessary to protect the constitutional interests of student speakers who face punishment for their speech: first, the student speaker must have received adequate prior notice that the speech was prohibited; and second, the ultimate punishment must itself be reasonable.

IV. THE NECESSARY ADDITIONAL PROTECTIONS: NOTICE AND REASONABLENESS

As a starting point, of course, a student speaker should never face

¹²⁵ 872 F.2d 757 (6th Cir. 1989).

¹²⁶ *Id.* at 765.

¹²⁷ *Doninger*, 514 F. Supp. 2d at 214.

¹²⁸ *Id.* at 205.

¹²⁹ *Id.* at 214.

¹³⁰ As discussed above, one notable exception can be found in a 2002 Ninth Circuit dissent. See *supra* text accompanying note 104.

punishment unless the speech at issue is itself suppressible under *Tinker*, *Fraser*, *Hazelwood*, or *Morse* (or, of course, is unprotected by the First Amendment altogether, as in the case of true threats, defamation, incitement to imminent lawless action, and the like). My proposed requirements of notice and reasonableness in no way replace the standards created by those cases. Rather, they are *additional* protections that should be triggered when the school seeks not only to restrict the speech itself pursuant to the *Tinker/Fraser/Hazelwood/Morse* framework, but also to punish the student speaker.

A. Adequate Prior Notice

What level of prior notice provides a sufficient predicate for the punishment of a student speaker? Here, it is helpful to start with *Fraser* and *Morse*, given that in both cases, the Supreme Court – while not prescribing a specific level of required notice – upheld the punishments at issue, which had been preceded by some form of notice. Thus, in order to complement rather than contradict the existing Supreme Court framework, this Article’s formulation of prior adequate notice must be satisfied by the type of warnings that were given in *Fraser* and *Morse*.

Morse is an easy case. Not only was there a school rule prohibiting advocacy of illegal drug use, but the principal punished Frederick only after she specifically ordered him to take down his “BONG HiTS 4 JESUS” banner and he refused to do so (unlike his fellow students, who were not punished).¹³¹ It is difficult to imagine any definition of prior adequate notice that would not be satisfied there.

Fraser is more interesting because of the divergence between the majority and Justice Stevens’ dissent. Without further discussion, the majority stated that the school’s disciplinary rule and the teachers’ “prespeech admonitions” provided “adequate warning to Fraser that his lewd speech could subject him to sanctions,” thus obviating any due process concerns.¹³² Justice Stevens, in turn, clearly felt that a higher level of notice was required, although his own formulation of that standard varied over the course of his dissent. Justice Stevens began by stating that before being punished, a student speaker was entitled to “*fair notice* of the scope of the prohibition and the consequences of its violation.”¹³³ He similarly stated that a student should not be disciplined “if he had *no reason* to

¹³¹ *Morse*, 127 S. Ct. at 2622-23.

¹³² *Fraser*, 478 U.S. at 686.

¹³³ *Id.* at 691 (Stevens, *J.*, dissenting).

anticipate punitive consequences.”¹³⁴ Later, however, his dissent raised the bar, suggesting that the question was whether the Court could “*confidently assert* that [the speaker] *must have known* that the school administration would punish him” for the speech.¹³⁵ It was under that latter formulation that Justice Stevens concluded that adequate notice had not been provided here, asserting that it was “highly unlikely” that Fraser “would have decided to deliver the speech had he known that it would result in his suspension and disqualification from delivering the school commencement address” and that “a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable.”¹³⁶

Justice Stevens’ ultimate formulation of the adequate notice standard – that the question is whether a court is *confident*, even employing a strong presumption in favor of free expression, that the particular student speaker *must have known* that he would be punished for his speech – was so robust that it is not surprising that the *Fraser* majority implicitly rejected it. Indeed, there is room to move several notches down from that standard and still provide student speakers with adequate protection on the notice front.

Cases addressing the need for adequate notice in other due process/First Amendment contexts provide useful guidance here. The Supreme Court suggested in *Grayned* that the fundamental question is whether the regulation “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” and so that arbitrary or discriminatory enforcement is prevented.¹³⁷ Lower courts have adapted this standard to non-criminal sanctions as well. Most relevantly, the First Circuit, when applying this concept to the context of sanctions for teacher speech, framed the test as follows:

[W]hile we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers. The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?¹³⁸

¹³⁴ *Id.* at 693.

¹³⁵ *Id.* at 696.

¹³⁶ *Id.*

¹³⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

¹³⁸ *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993).

Other courts have likewise adopted reasonableness-based inquiries.¹³⁹

This approach is readily adaptable to the student speech context. It is also consistent with the *Fraser* majority's comment that schools need a certain degree of flexibility, such that their disciplinary rules should not have to be as detailed as those contained in a criminal code. Indeed, drawing on the First Circuit's *Ward* formulation, this Article proposes that the appropriate test is simply whether, given existing school regulations, policies, discussions, and other forms of school-student communication, a reasonable student would have recognized that the speech in question (a) was subject to the school's jurisdiction and (b) was prohibited. When these conditions are not met, the only potential option should be suppression of the speech itself (assuming that it can be suppressed at all), rather than any punishment of the student speaker. This approach protects both student speakers and schools, by maintaining schools' authority to immediately react to potentially harmful speech (by suppressing it) while simultaneously making sure that any actual punishment is predicated on prior adequate notice.

1. Jurisdictional Notice

Importantly, this formulation of adequate prior notice encompasses two distinct components. First, given the current uncertainty regarding schools' jurisdiction over off-campus speech (particularly cyber-speech), it is crucial that any school seeking to punish students for such speech has clearly communicated this possibility to students. Because different courts have adopted divergent approaches, different school districts face varying upper limits in terms of how far their jurisdiction can extend. Some may choose to exercise jurisdiction to the maximum extent authorized by the applicable governing law; others may choose to self-limit their jurisdiction in one or more respects. And it is certainly understandable that within this range, schools may follow an *ad hoc* approach depending on the particular speech at issue. But if schools are actually going to punish students for their speech, as opposed to simply suppressing the speech itself, an *ad hoc* approach is unacceptable. In order to protect the First Amendment and due process interests described above, schools need to inform students about the jurisdictional approach that they are adopting, so that the students can make educated judgments about whether and how to express their views. In the

¹³⁹ See, e.g., *Stillwater Mining Co. v. Federal Mine Safety and Health Review Comm'n*, 142 F.3d 1179, 1182 (9th Cir. 1998) (holding, in the context of a civil penalty imposed on a mining company, that the test was whether "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.").

absence of such notice, the default presumption should be in favor of narrow jurisdiction, *i.e.*, that schools can only punish students for speech that they uttered at school, even though their ability to *suppress* such speech extends further.

Indeed, a troubling aspect of *Doninger* is that, at least judging from the reported decisions on the case, there was no school district regulation, policy, or other communication putting students on notice that the school might exercise jurisdiction over their off-campus internet speech. Although the high school principal told Doninger that students could not use the *school computer system* to send personal e-mails, and referred generally to the need for a cooperative working relationship between student council officers and the administration, neither Doninger nor any other students were informed that even their internet speech created at home could subject them to school-based sanctions. (Interestingly, a February 2009 bill proposed by a Connecticut state legislator – in direct response to *Doninger* – would significantly reduce schools’ authority in this respect, by prohibiting schools “from punishing students for the content of electronic correspondence transmitted outside of school facilities or with school equipment, provided such content is not a threat to students, personnel or the school.”¹⁴⁰)

Under this Article’s proposed standard for prior adequate notice, therefore, Doninger’s punishment would have been struck down because, among other things, a reasonable student in her position would not have recognized that her livejournal.com blog posting was subject to the school’s jurisdiction and potentially punishable. At most, the school would have been able to suppress the speech itself by ordering Doninger to remove the relevant part of her posting from her blog.

2. Substantive Notice

In addition to providing students with adequate notice about the school’s jurisdictional reach, this Article’s formulation also requires schools to provide students with sufficient substantive guidance about the types of speech that are prohibited. It is not enough simply to say that the *Tinker*, *Fraser*, *Hazelwood*, and *Morse* decisions themselves provide students with that notice, for two reasons.

First, in marked contrast to the First Amendment standards that apply in the outside world, several of the standards emerging from the

¹⁴⁰ Proposed Bill No. 478, “An Act Concerning the Electronic Correspondence of Students,” State of Connecticut General Assembly (January Session 2009). The bill was introduced by East Hartford State Senator Gary LeBeau. *See also, e.g., Bills Deal With Free Speech, Bullies*, HARTFORD COURANT, February 2, 2009.

student speech framework are quite broad in nature, such as *Hazelwood*'s "reasonably related to legitimate pedagogical concerns" test and *Tinker*'s "invasion of rights" and "material disruption" prongs.¹⁴¹ Even assuming, for instance, that students know that school officials can restrict school-sponsored speech as long as they have a legitimate pedagogical reason for doing so, that does not necessarily translate into any real sense of when that standard will be invoked. Indeed, in *Hazelwood* itself, the journalism teacher evidently considered the articles about divorce and teen pregnancy to be acceptable fare for the high school newspaper, but the principal did not. The Supreme Court deferred to the principal's articulated pedagogical justifications, and thus held that his censorship of the articles did not violate the First Amendment. But that does not mean that the student journalists should – or even realistically could – have anticipated the particular concerns animating the principal's decision, such that it would have been appropriate to move straight to punishing them for their speech.

Second, although it is true that some of the other standards that have emerged from the Supreme Court speech cases are narrower – such as *Morse*'s holding that schools can prohibit speech that advocates illegal drug use – these standards certainly do not *require* schools to prohibit the speech in question. Some schools, for instance, might choose to give students freer rein in this respect, just as they may choose to self-limit their jurisdiction over students' off-campus speech, as discussed above. If schools plan to invoke their authority to punish students for expressing such views, it is appropriate for them to advise students accordingly.

The clearest form of such notice will occur when the school responds to a particular instance of speech, either by warning the student speaker in advance not to engage in the specific speech in question (as in *Tinker* and *Fraser*) and/or by telling him to stop speaking (as in *Morse*). In either case, if the student speaker proceeds with the speech despite such direct admonitions, it will be very difficult for him to argue that he lacked adequate prior notice that he might face punishment for it. Of course, if the speech suppression is itself unconstitutional, like the armband ban in *Tinker*, then any resultant punishment will be unconstitutional as well – and

¹⁴¹ The Supreme Court's decision in *Brandenburg v. Ohio*, for instance, held that the government could prohibit and punish speech that encourages others to break the law only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969). See, e.g., Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (stating that the *Brandenburg* standard is "the most speech-protective standard yet evolved by the Supreme Court"). See generally Thomas Healy, *Brandenburg in a Time of Terror*, NOTRE DAME LAW REVIEW (forthcoming 2009). The closest in-school analogue to *Brandenburg* -- *Tinker*'s "material disruption" standard – is much broader.

some students may choose to take their chances and continue with their speech. But should a court conclude that the school acted within its authority in trying to restrict the speech, any notice-based argument with respect to punishment will be unconvincing.

The closer questions are likely to occur where the only notice comes through a general school policy, as opposed to a speech-specific interaction. Here, courts will need to determine whether the relevant language was sufficiently clear and specific to enable a reasonable student to recognize that his speech was prohibited. Where schools prohibit depictions of particular slogans or messages (such as, for instance, depictions of drugs¹⁴² or representations of the Confederate flag¹⁴³), prior adequate notice will likely be found. On the other hand, some school policies include bans that are more general in nature – such as, for instance, policies that simply track, without elaboration, the more general standards that have been announced in some of the Supreme Court’s student speech cases. A blanket prohibition of all speech that disrupts the educational process or invades the rights of other students,¹⁴⁴ for example, will not always provide students with enough guidance about whether a particular instance of speech is prohibited.¹⁴⁵ Of course, even in the context of broad policies, some speech

¹⁴² See, e.g., *Barr v. Lafon*, 538 F.3d 554, 556 (6th Cir. 2008) (describing school dress code that prohibited clothing that “exhibits written, pictorial, or implied references to illegal substances, drugs, or alcohol...”). In *Morse*’s aftermath, many schools may well adopt similar policies.

¹⁴³ See, e.g., *B.W.A. v. Farmington R-7 School District*, 2009 U.S. App. LEXIS 1981 (8th Cir. 2009)

¹⁴⁴ For example, the dress code in *Barr* went on to prohibit clothing which displayed “negative slogans” or “cause[d] disruption to the educational process.” *Barr*, 538 F.3d at 556.

¹⁴⁵ Such broadly-worded policies also have the potential to sweep in at least some protected speech, raising overbreadth concerns. For example, in *Saxe v. State College Area School District*, the Third Circuit – in an opinion written by then-Judge Alito – struck down as unconstitutional a school policy that prohibited harassment, which it defined as “verbal or physical conduct based on one’s actual perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile or offensive environment.” 240 F.3d 300, 202 (3d Cir. 2001). The opinion concluded that the policy extended beyond the speech restrictions authored by the Supreme Court framework, reasoning:

[T]he Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so...This ignores *Tinker*’s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it. In addition, even if the ‘purpose’ component is ignored, we do not believe that prohibited ‘harassment,’ as defined by the Policy, necessarily rises to the level of a substantial disruption under *Tinker*...Although [the school district] correctly asserts that it has a compelling interest in promoting an

will be so clearly violative that it disposes of any concern about prior notice. When there is a closer question, however, schools should focus on suppressing the speech itself rather than punishing the student speaker, at least until they directly instruct the student speaker to stop engaging in his speech and he refuses to do so.

B. Reasonableness of the Punishment

Even where a punishment is predicated on adequate prior notice to the student speaker, that alone does not guarantee adequate protection of students' constitutional rights. As a backstop, courts should also require that in cases where speech is punished under the *Tinker/Fraser/Hazelwood/Morse* framework (as opposed to situations where speech is entirely unprotected by the First Amendment, as in the case of true threats, incitements to imminent lawless action, and the like), the ultimate punishment itself be reasonable.

The Supreme Court has not specifically ruled on this issue,¹⁴⁶ and to the extent that lower courts have considered it, they are divided over whether their First Amendment inquiry can extend beyond a speech analysis into an assessment of the punishment itself. Most of this division stems from a failure to appreciate the distinction between student speech that falls entirely outside of First Amendment protection and student speech that can be restricted only because of the school-specific *Tinker/Fraser/Hazelwood/Morse* framework. Where the speech is altogether unprotected by the First Amendment – such that any speaker, in any setting, could face civil and/or criminal sanctions for it – it makes sense for courts to not to engage in any substantive review of whether the student speaker's punishment was reasonable. In such cases, there is no real First Amendment interest at all. Here, the only limitation on such punishments should stem from the relevant state laws and regulations

educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.

Id. at 216-17. *Cf. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 669, 675-76 (7th Cir. 2008) (upholding the constitutionality of a school rule that prohibited derogatory comments about a student's race, ethnicity, religion, gender, sexual orientation, or disability, but holding that a student T-shirt stating "Be Happy, Not Gay," was only "tepidly negative" and not sufficiently derogatory to fall within the policy).

¹⁴⁶ Indeed, the plaintiffs in *Tinker*, *Fraser*, and *Morse* do not seem to have raised this as a separate issue. (*Hazelwood*, of course, did not involve a punishment at all.) As discussed above, *Fraser* did challenge his specific punishment, but on grounds of inadequate notice rather than substantive unreasonableness.

regarding student discipline, as well as the procedural protections required by *Goss*.¹⁴⁷

By contrast, when a speech restriction is justified only pursuant to the ratcheted-down First Amendment protection afforded to students in schools – in other words, when the speech would otherwise be protected – then courts’ First Amendment analysis should include a reasonableness review. Although courts should certainly defer to the pedagogical judgments of educators and school boards in this respect, they should still exercise independent review sufficient to rectify any abuses of discretion.

Thus far, however, courts have not explicitly focused on the distinction between these two categories of student speech cases. Some courts have simply assumed that their review must end once they determine that the school was entitled to punish the speech on any grounds. In *Doninger*, for instance, the district court stated:

Whether disqualifying [Doninger] from running for class secretary is a “fitting punishment” in the circumstances, or was overly harsh or even too lenient, is not for this Court to determine. That is for school officials to decide....Once school authorities made the permissible decision to punish [Doninger] for her blog entry, the scope of that punishment lay within their discretion. The Court defers to their experience and judgment, and has no wish to insert itself into the intricacies of the school administrators’ decision-making process.¹⁴⁸

The Fifth and Eighth Circuits have expressed similar views, both citing the Supreme Court’s statement in the 1975 case of *Wood v. Strickland*¹⁴⁹ that “[i]t is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”¹⁵⁰ Interestingly, unlike the blog posting in

¹⁴⁷ See *supra* text accompanying notes 108-09.

¹⁴⁸ *Doninger*, 514 F. Supp. 2d at 202, 215.

¹⁴⁹ 420 U.S. 308 (1975).

¹⁵⁰ *Id.* at 326.

The Fifth Circuit adopted this approach in *Ponce v. Socorro Independent District*, a case involving a student’s writings about a plan to commit a “Columbine shooting” attack on the high school. 508 F.3d 765, 766 (5th Cir. 2007). The *Ponce* court concluded that this amounted to threatening speech “as much beyond the constitutional pale as yelling ‘fire’ in [a] crowded theater,” that “such specific threatening speech to a school or its population is unprotected by the First Amendment,” and that “[b]ecause we conclude that no constitutional violation has occurred, our inquiry ends here. Our role is to enforce constitutional rights, not ‘to set aside decisions of school administrators which [we] may view as lacking a basis in wisdom or compassion. Because the journal’s threatening language is not protected by the First Amendment, [the school district’s] disciplinary action

Doninger, the student speech at issue in the Fifth and Eighth Circuit cases consisted of true threats that were altogether unprotected by the First Amendment. Neither the Fifth nor Eighth Circuit, however, relied on that fact in declining to analyze the reasonableness of the students' punishments. Instead, the decisions' broad language about the need for deference to school authorities suggests that these courts would have refused to review these punishments even had the speech been regulated solely under the specialized student speech framework. In fact, the Fifth Circuit, while ultimately settling on the rationale that the speech amounted to a true threat, also included language suggesting that its holding was partially based on *Morse*'s concern about the safety of students.¹⁵¹ Similarly, the Sixth Circuit recently blended the "true threat" standard with language from *Tinker* and *Morse* to hold that a school could suspend a student for writing in her notebook about killing her math teacher; the court further indicated that it would not engage in any review of the substantive reasonableness of that

against [the student] violated no protected right." *Id.* at 772 (citing *Wood*, 508 F.3d at 326).

The Eighth Circuit followed a similar rationale in *Doe v. Pulaski County Special School District*, which involved an eighth-grader's "violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his ex-girlfriend. 306 F.3d 616, 619 (8th Cir. 2002). The court concluded that the letter containing these rants "amounted to a true threat," and that the school board therefore did not violate the student's First Amendment rights by expelling him. *Id.* at 626-27. The court further commented: "Had we been sitting as the school board, we might very well have approached the situation differently, for it appears to us that the board's action taken against [the student] was unnecessarily harsh. Other options have occurred to us that could have furthered the district's interest in protecting its students, as well as have punished [the student], but also have aided him in understanding the severity and inappropriateness of his conduct. However, 'it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.'" *Id.* at 627 (citing *Wood*, 420 U.S. at 326). The dissent, by contrast, criticized the majority for "acknowledging that the school board's expulsion of [the student]...was unnecessarily harsh, yet [deferring] to the board's discretion." *Id.* at 633 (Heaney, *J.*, dissenting). The dissent agreed that the speech could have been "reasonably regulated to prevent substantial disruption," but thought that the school board had "failed to exercise sound, reasonable, and legal decisionmaking" in expelling the student, and that the court was "obliged to impose our judgment where there has been an abuse of discretion, as in this case." *Id.* at 627, 633-34.

¹⁵¹ *Ponce*, 508 F.3d at 768-72 ("The constitutional concerns of this case...fall precisely within the student speech area demarcated by Justice Alito in *Morse*. That area consists of speech pertaining to grave harms arising from the particular character of the school setting...If school administrators are permitted to prohibit student speech that advocates illegal drug use..., then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.").

punishment.¹⁵²

By contrast, the Ninth Circuit has indicated that at least where a student speech restriction has been upheld under the *Tinker/Fraser/Hazelwood/Morse* framework, courts can proceed to consider the reasonableness of the punishment itself. In *Lavine v. Blaine School District*,¹⁵³ a high school junior was “emergency expelled” after he showed his English teacher a poem that he had written about committing a school shooting.¹⁵⁴ A letter to the student’s parents that documented the reasons for the expulsion was placed in the student’s file.¹⁵⁵ Seventeen days later, pursuant to a psychiatrist’s conclusion that it was safe for the student to return to school, his expulsion was lifted.¹⁵⁶ The student and his parents, however, appealed the sanction to the school board, concerned that the letter describing his expulsion would hurt his chances of entering the military.¹⁵⁷ The school board affirmed the expulsion but agreed to re-write the letter to emphasize that the student had been expelled for safety rather than disciplinary reasons.¹⁵⁸ Unsatisfied with this outcome, the student and his parents filed suit in federal court, seeking damages as well as an order enjoining the school from maintaining any letter in the student’s file regarding the expulsion.¹⁵⁹ The *Lavine* court ultimately concluded that although the emergency expulsion had been justified under *Tinker*,¹⁶⁰ the school should remove any reference to the expulsion from the student’s file, reasoning that the “school need not permanently blemish [the student’s] record and harm his ability to secure future employment.”¹⁶¹ The Ninth

¹⁵² *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984- 85 (11th Cir. 2007) (stating, in response to student’s request that the permanent record of her suspension be removed, that “[t]he plaintiffs fail to convince us that permanent documentation of the disciplinary action taken against Rachel, which did not itself violate her constitutional rights, could somehow violate her First Amendment rights”).

¹⁵³ 257 F.3d 981 (9th Cir. 2001).

¹⁵⁴ *Id.* at 983-85. The emergency expulsion was pursuant to a Section 180-40-295 of the Washington Administrative Code, which provides:

A student may be expelled immediately by a school district superintendent or a designee [based on] good and sufficient reason to believe that the student’s presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process.

¹⁵⁵ *Id.* at 986.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ The court explicitly declined to evaluate the school’s argument that the student’s poem “was a ‘true threat’ and not protected by the First Amendment at all,” explaining that it was instead solely resolving the case under *Tinker*. *Id.* at 989 & n. 5.

¹⁶¹ *Id.* at 992.

Circuit's *Lavine* decision, which implicitly endorsed a separate reasonableness review, thus stands in sharp contrast to the approaches later adopted by the Fifth, Sixth, and Eighth Circuits.

More recently, in *Wisniewski v. Board of Education of the Weedsport Central School District*,¹⁶² the Second Circuit explicitly declined to weigh in on the question of whether, when a speech restriction is justified by the *Tinker/Fraser/Hazelwood/Morse* framework, there are still independent constitutional limitations on the extent of the student speaker's punishment.¹⁶³ Also citing *Wood's* quotation about deference to school administrators, the Second Circuit noted that the student had not specifically raised this argument, and thus it need not be reached.¹⁶⁴

Going forward, courts should recognize the distinction between student speech that is entirely unprotected by the First Amendment and student speech that can be suppressed only under the specialized *Tinker/Fraser/Hazelwood/Morse* framework, and review for reasonableness any punishments imposed under the latter approach. (This, of course, will require them to specify which path justified the school's actions, as opposed to eliding that question.¹⁶⁵) While courts' hesitancy to override the decisions of school administrators is understandable, they should recognize that the Supreme Court's *Wood* admonition is largely inapplicable here. In *Wood*, the Court concluded that the student plaintiffs – who were expelled from high school after spiking punch served at a club meeting, and who claimed that there was insufficient evidence before the school board to prove that the malt liquor they used was in fact intoxicating – had no valid constitutional claim at all.¹⁶⁶ The *Wood* Court explained:

Public high school students do have substantive and procedural

¹⁶² 494 F.3d 34 (2d Cir. 2007).

¹⁶³ *Id.* at 40.

¹⁶⁴ *Id.* (“Although the Appellants contend that the First Amendment barred the imposition of any discipline, they make no distinct challenge to the extent of the discipline. Thus, we need not determine whether such a challenge would have to be grounded on the First Amendment itself or the substantive component of the Due Process Clause of the Fourteenth Amendment. And we are mindful that ‘it is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.’ *Wood*...However, in the absence of a properly presented challenge, we do not decide whether the length of the one semester suspension exceeded whatever constitutional limitation might exist.”) (internal citations omitted).

¹⁶⁵ As discussed above, both the Fifth Circuit in *Ponce* and the Sixth Circuit in *Boim* employed both the “true threat” rationale and the specialized Supreme Court framework in upholding the school district's actions. Meanwhile, the *Wisniewski* court followed the Ninth Circuit's *Lavine* approach of skipping over the true threat analysis and moving straight to a *Tinker* assessment. See *Wisniewski*, 494 U.S. at 38.

¹⁶⁶ *Wood*, 420 U.S. at 323-26.

rights while at school. *See Tinker*...But § 1983 does not extend the right to relitigate in federal courts *evidentiary questions arising in school disciplinary proceedings* or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion *which do not rise to the level of violations of specific constitutional guarantees*.¹⁶⁷

Unlike the plaintiffs in *Wood*, students who assert that they were excessively punished for their speech *do* have a specific constitutional guarantee at the root of their claim: the First Amendment. As discussed above, student speech that is regulated pursuant to the specialized Supreme Court framework exists in an intermediate state: even though such speech would otherwise be protected by the First Amendment, the “special characteristics” of schools – namely, their need to protect and educate their students – gives them broader rein to restrict it. Just as that compromise falls out of balance when student speakers are punished without adequate prior notice, so too does it falter when the punishment is unreasonable in light of the protective and educative rationales underlying the framework.

Thus, in proceeding to a consideration of ultimate reasonableness even after concluding that *some* degree of student speaker punishment was justified under the student speech framework, courts are not overstepping their bounds or violating the framework. Rather, they are fulfilling its underlying purpose and rationale. Where courts truly believe that the punishment imposed was so excessive as to constitute an abuse of discretion, they should rule accordingly, even if they believe that *some* level of punishment would have been justified. Such an approach appropriately echoes the Supreme Court plurality’s observation in *Board of Education v. Pico*¹⁶⁸ that although “local school boards have broad discretion in the management of school affairs,...the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”

Importantly, this Article’s point is *not* that the reasonableness or leniency of a punishment should drive the initial speech analysis – the path that the Second Circuit unfortunately took in *Doninger*, when it held that because the student had only been disqualified as class secretary, it was enough to show that her speech had risked disrupting student government. That a student speaker’s punishment was relatively minor, or limited to a

¹⁶⁷ *Id.* at 326.

¹⁶⁸ 457 U.S. 853, 863-64 (1982) (plurality opinion).

particular context such as an extracurricular activity, should not alter the rigor with which *Tinker*, *Fraser*, *Hazelwood*, and *Morse* are applied. Such an approach, as discussed above, provides schools with too much power to restrict student speech: a letter opposing the football coach will almost always risk some disruption to the football team, just as any speech criticizing the school administration may well risk some friction in the operation of student government. To ensure that students have adequate room to express their opinions about important school issues, and are not deterred by potential repercussions to important aspects of their school lives, courts must hold constant the basic student speech standards, rather than ratcheting them down relative to the punishment at issue.

Indeed, the specific reasonableness review proposed by this Article would in no way expand schools' authority to restrict student speech. Rather, this review would only kick in *after* an assessment of whether (1) the speech was suppressible at all and (2) whether (in the case of student punishment) adequate prior notice was provided. It would thus serve as an additional, independent source of protection for student speakers.

V. CONCLUSION

A spirit of compromise pervades the Supreme Court's approach to students' constitutional rights. In multiple contexts – including students' Fourth Amendment right to be free from unreasonable searches and seizures, their Fourteenth Amendment right to procedural due process, and of course their First Amendment right to free speech – the Court has rejected arguments that students' constitutional rights stop “at the schoolhouse gate,” but has also held that these rights require modification in light of school exigencies.¹⁶⁹ Thus, the Supreme Court has consistently sought a balance between preserving both the essential core of students' constitutional rights and schools' needs to maintain safe, effective learning environments.

This compromise approach extends into the student speech

¹⁶⁹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 331-41 (1985) (holding that the Fourth Amendment applies to school authorities' searches of students, but that such searches – rather than requiring probable cause and a warrant – need only satisfy the Fourth Amendment's “fundamental command” of reasonableness, because “the school setting requires some easing of the restrictions”); *Goss v. Lopez*, 419 U.S. 565, 575-84 (1975) (holding that school suspensions implicate students' procedural due process rights, but that only the rudimentary aspects of due process – notice and an informal hearing – are required, because “further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process”).

framework itself, which draws a sharp distinction between independent student speech (governed by *Tinker*) and school-sponsored student speech (governed by *Hazelwood*). Yet the student speech framework currently fails to account for an equally important dividing line: the *method* by which student speech is restricted. Although the framework strikes an appropriate balance in the context of speech suppression, it lacks the heightened protections that would appropriately counter-balance student punishments.

By requiring that any student punishments be based on adequate prior notice and be substantively reasonable, courts can restore this balance. In so doing, they will ensure that student speakers' First Amendment and due process interests are adequately protected regardless of the speech restriction used, while still affording schools the flexibility they need to respond quickly to harmful speech. This, in turn, will fulfill the underlying rationale and purpose of the Supreme Court's student speech framework.