RETHINKING THE NARRATIVE ON JUDICIAL DEFERENCE IN STUDENT SPEECH CASES

SEAN R. NUTTALL*

Scholars view Tinker v. Des Moines Independent Community School District *as the high-water mark of student speech protection and the Supreme Court's subsequent decisions,* Bethel School District No. 403 v. Fraser*,* Hazelwood School District v. Kuhlmeier*, and* Morse v. Frederick *(the* Bong Hits *case) as a considerable retreat from this mark. By contrast, this Note argues that* Tinker*, while employing strongly speech-protective rhetoric, nonetheless requires courts to defer to educators' reasonable determinations of what speech may cause a substantial disruption and provides only very modest protection for student speech. Comparing the* Tinker *standard to those of* Fraser *and* Kuhlmeier *reveals that it gives no less deference to educators, and little more protection to student speech. As a consequence of misconstruing* Tinker*,* Fraser*, and* Kuhlmeier*, scholars have failed to address why* Bong Hits*' requirement of deference to educators' reasonable judgments is any less acceptable than* Tinker*'s. Deference under* Tinker *recognizes the difficulty inherent in predicting the potential consequences of speech without eliminating the limited protection provided by* Tinker*'s required showing of potential disruption. By contrast, the sole protection* Bong Hits *provides is in maintaining the line between advocacy and nonadvocacy, yet deferring to the reasonable judgments of educators on this question blurs the line considerably, thereby largely eliminating protection for student speech. To illuminate the differences between the* Tinker *and* Bong Hits *tests, this Note analogizes to Justice Oliver Wendell Holmes's "clear and present danger" and Judge Learned Hand's "express advocacy" tests and concludes that the special policy considerations that apply to the school environment do not justify departing from the principles underlying these paradigmatic First Amendment standards.*

INTRODUCTION

In First Amendment jurisprudence, the Supreme Court has consistently held that the "special characteristics" of the school environment allow for greater restrictions on student speech than are

 J.D., 2008, New York University School of Law; M.Phil., 2005, University of Cambridge; B.A., 2001, Yale University. I would like to thank Professors Deborah Malamud and Geoffrey Stone for their insight and advice, and Jeremy Feigelson of Debevoise & Plimpton LLP for introducing me to *Bong Hits*. I am also grateful to the staff of the *New York University Law Review*, particularly Emily Deininger, Mitra Ebadolahi, Julia Hamilton, Derek Kershaw, Lizzie Seidlin-Bernstein, and Dan Wachtell. Finally, I am indebted to Heather Fletcher for her invaluable editing, research assistance, patience, and support.

generally permitted outside the schoolhouse gate.[1] The Court's decision during the 2006–2007 term in *Morse v. Frederick*,[2] better known as the *Bong Hits* case, is the latest to affirm this principle. The case involved an Alaskan high school principal's confiscation of a student banner reading "BONG HiTS 4 JESUS" during the 2002 Olympic Torch Relay and the subsequent suspension of one of the students holding the sign.[3] In upholding the school's actions, Chief Justice Roberts confirmed that "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'"[4] He then announced a new limitation on students' First Amendment rights: School officials may restrict student speech "that can reasonably be regarded as encouraging illegal drug use."[5]

The nascent scholarly literature on *Bong Hits* has roundly criticized this new carve-out of students' speech rights. Picking up on Justice Stevens's dissenting opinion, commentators question whether the phrase "BONG HiTS 4 JESUS" can actually be understood as advocating student drug use.[6] More fundamentally, the new standard's invocation of "reasonableness" has been sharply criticized. As Justice Stevens stated, "[t]o the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy."[7] On this view, the *Bong Hits* test gives educators too much discretion over what speech should be restricted and the courts too little oversight of educators' decisions.[8]

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[1] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680–81 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[2] Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618 (2007).

[3] *Id.* at 2622–23.

[4] *Id.* at 2622 (quoting *Fraser*, 478 U.S. at 682).

[5] *Id*.

[6] *E.g.*, *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 300–01 (2007) [hereinafter *Leading Cases*]; Dahlia Lithwick, *A Supreme Court Conversation*, SLATE, June 25, 2007, http://www.slate.com/id/2168856/entry/2169029; Posting of Greg Lukianoff to The Torch, http://thefire.org/index.php/article/8189.html (June 29, 2007); Posting of Bill Poser to Language Log, http://itre.cis.upenn.edu/~myl/languagelog/archives/004696.html (July 7, 2007, 05:09); *see also Bong Hits*, 127 S. Ct. at 2649 (Stevens, J., dissenting) ("To the extent the Court independently finds that 'BONG HiTS 4 JESUS' *objectively* amounts to the advocacy of illegal drug use . . . that conclusion practically refutes itself. This is a nonsense message, not advocacy.").

[7] *Bong Hits*, 127 S. Ct. at 2647 (Stevens, J., dissenting).

[8] *See, e.g.*, Hans Bader, *Bong Hits 4 Jesus: The First Amendment Takes a Hit*, 2006–2007 CATO SUP. CT. REV. 133, 145–46 (2007) (arguing that deferring to principal's interpretation is departure from Court's normal practice); Erwin Chemerinsky, *Turning*

Underlying scholars' critique of the *Bong Hits* decision is the supposition that it represents a profound departure from the "magna carta of students' expression rights,"[9] *Tinker v. Des Moines Independent Community School District*, which upheld the right of students to wear black armbands protesting the Vietnam War because the armbands did not pose a likelihood of "substantial disruption" to school activities.[10] Contrasting *Bong Hits*' reasonableness standard with *Tinker*'s ostensibly more protective substantial disruption test,[11] scholars neatly place *Bong Hits* into the dominant academic narrative on student speech, which interprets the Court's post-*Tinker* decisions on student speech, *Bethel School District No. 403 v. Fraser*[12] and *Hazelwood School District v. Kuhlmeier*,[13] as a sharp retreat on student rights.[14] In turn, this shift fits tidily within the ur-narrative of

Sharply to the Right, 10 GREEN BAG 2D 423, 430 (2007) (arguing that *Bong Hits* indicates greater judicial deference to schools in suppressing student speech); Stephen Kanter, *Bong Hits 4 Jesus as a Cautionary Tale of Two Cities*, 12 LEWIS & CLARK L. REV. 61, 88 (2008) (arguing that *Bong Hits*' focus on reasonableness dangerously elevates perception of listener above content of speech and intent of speaker); Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 LEWIS & CLARK L. REV. 27, 36–39 (2008) (arguing that *Bong Hits* departs from general First Amendment analysis); *Leading Cases*, *supra* note 6, at 300 ("The majority's 'can reasonably be regarded as encouraging illegal drug use' test puts almost no practical limitations on a school's ability to censor drug-related student speech."); Joanna Nairn, Recent Development, *Free Speech 4 Students?* Morse v. Frederick *and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 255 (2008) (arguing that deferring to listener's interpretation is "at odds" with Court's First Amendment jurisprudence in other situations); Posting of Mary-Rose Papandrea to Citizen Media Law Project, http://www.citmedialaw.org/u-s-supreme-court-limits-student-speech-rights (June 27, 2007) (arguing that prior to *Bong Hits* prison wardens were only group to receive deference from Court on their interpretation of speech). R

9 Martha McCarthy, *Student Expression Rights: Is a New Standard on the Horizon?*, 216 EDUC. L. REP. 15, 15 (2007).

10 393 U.S. 503, 510 (1969). *Tinker* contains several iterations of this standard. *See infra* note 27. For the sake of brevity and consistency, I will use "substantial disruption" when referring to the *Tinker* standard. R

11 *See, e.g.*, Bader, *supra* note 8, at 133 (noting that Court in *Bong Hits* "countenanced viewpoint-based restrictions on speech" for first time); Chemerinsky, *supra* note 8, at 430 (arguing that *Bong Hits* indicates greater judicial deference to schools in suppressing student speech); Perry A. Zirkel, *The Supreme Court Speaks on Student Expression: A Revised Map*, 221 EDUC. L. REP. 485, 485–87 (2007) (arguing that *Bong Hits* further narrows *Tinker*'s holding); *Leading Cases*, *supra* note 6, at 296 (noting that *Bong Hits* gives courts great latitude in deciding what "viewpoints are simply outside a student's right to freedom of expression"). R R R

12 478 U.S. 675 (1986) (upholding suppression of lewd, vulgar, indecent, and plainly offensive speech).

13 484 U.S. 260, 273 (1988) (upholding restrictions that are reasonably related to legitimate pedagogical concerns on speech in "school-sponsored" activities that reasonably may be interpreted as bearing imprimatur of school).

14 Scholars and other observers have universally kept to this narrative. *See, e.g.*, Edgar Bittle, *The* Tinker *Case: Reflections Thirty Years Later*, 48 DRAKE L. REV. 491, 501, 506

twentieth-century constitutional history, as *Tinker* was decided the term before Earl Warren resigned his position as Chief Justice. Thus, the argued retreat on student rights seems to illustrate the general shift away from the Warren Court's rights-protective decisions in the Burger, Rehnquist, and now Roberts Courts.[15]

The accuracy of the general constitutional narrative aside, this Note argues that scholars have misinterpreted the Supreme Court's student speech cases. This jurisprudence is summarized in Part I. Part II contends that commentators have largely overlooked that *Tinker*, while employing strongly speech-protective rhetoric, nonetheless requires that courts defer to the reasonable judgments of educators and provides only very modest protection for student speech. Comparing the *Tinker* standard against those of *Fraser* and *Kuhlmeier* reveals that, in fact, *Tinker* gives no less deference to educators and grants little more protection to student speech. This argument is borne out by the practice of the lower courts over the past forty years: The majority of lower-court decisions applying *Tinker* have gone against students. As applied, the substantial disruption test undoubtedly has provided incrementally more speech protection than have the later decisions, but the departure is far less dramatic than generally posited.

(2000); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124–27 (2004) [hereinafter Chemerinsky, *Deconstitutionalization of Education*]; Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 529–30, 535, 537–39 (2000) [hereinafter Chemerinsky, *Schoolhouse Gates*]; C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 344–45 (1989); Kelly Frels, *Balancing Students' Rights and Schools' Responsibilities*, 37 HOUS. L. REV. 117, 120–22 (2000); William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949, 955–60 (1988); David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 185–91 (2002); Mary Muehlen Maring, *"Children Should Be Seen and Not Heard": Do Children Shed Their Right to Free Speech at the Schoolhouse Gate?*, 74 N.D. L. REV. 679, 689 (1998); Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 458 (1998); Robert Trager & Joseph A. Russomanno, *Free Speech for Public School Students: A "Basic Educational Mission,"* 17 HAMLINE L. REV. 275, 281–83 (1993); S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 126–37 (1996); Mark G. Yudof, Tinker *Tailored: Good Faith, Civility and Student Expression*, 69 ST. JOHN'S L. REV. 365, 365–66 (1995).

[15] *See, e.g.*, Chemerinsky, *Schoolhouse Gates*, *supra* note 14, at 528 (noting that there were few rulings that protected students' rights during the Burger and Rehnquist Courts); Justin T. Peterson, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at its Source?*, 2005 MICH. ST. L. REV. 931, 959–60 (noting increased conservatism of current Supreme Court); Yudof, *supra* note 14, at 365–66 (stating that although Burger and Rehnquist Courts have not explicitly overruled *Tinker*, they have significantly altered that case's holding). R R

Scholars' misconstruction of *Tinker*, *Fraser*, and *Kuhlmeier* also stains the burgeoning literature on *Bong Hits*. In arguing that the Court's "new" reasonableness standard permits educators too much discretion in suppressing speech, and in lamenting its assumed departure from *Tinker*, scholars have failed to address why *Bong Hits*' deference to school officials' reasonable judgments is any less acceptable than *Tinker*'s. Part III attempts to provide this explanation, focusing on a fundamental difference between the tests articulated in the two decisions: The *Tinker* standard focuses on the potential consequences of speech, whereas the *Bong Hits* standard inquires into the nature and meaning of the speech itself. Deferring to educators' reasonable decisions under *Tinker* recognizes the difficulty inherent in predicting the potential consequences of speech without eliminating the limited protection provided by *Tinker*'s required showing of potential disruption. By contrast, *Bong Hits* does not require any showing of potential harm, but only a demonstration that speech could reasonably constitute advocacy of illegal drug use. The sole protection it provides is in maintaining the line between advocacy and nonadvocacy, yet deferring to the reasonable judgments of educators on this question blurs the line considerably, thereby largely eliminating any protection for student speech.

To illuminate the importance of the doctrinal difference between the *Tinker* and *Bong Hits* tests, Part III analogizes to two paradigmatic First Amendment standards developed in the federal courts' subversive advocacy jurisprudence—namely, Justice Oliver Wendell Holmes's "clear and present danger" and Judge Learned Hand's "express advocacy" tests. Justice Holmes's test, like *Tinker*'s, focuses on the likely consequences of speech; Judge Hand's test, like the one set forth in *Bong Hits*, concentrates on the nature and meaning of the speech itself. Comparing the two types of tests, their underlying principles, and their relative merits supports the argument that judicial deference is consistent with the former type but antithetical to the latter.

Part III concludes by demonstrating that the special policy considerations that apply to children and the school environment reinforce the relative appropriateness of judicial deference under *Tinker* as compared to *Bong Hits*. On the question of potential disruption, educators are better positioned to predict what speech may interfere with the education of their students. By contrast, the determination of the objective meanings of words lies soundly within the competence of the courts. Federalism values also suggest giving educators greater deference in their oversight of the educational process under *Tinker*, but not on their interpretation of what constitutes advocacy of drug

use under *Bong Hits*. In sum, there is good reason for judicial deference under *Tinker*, but none under *Bong Hits*. If unwarranted and potentially severe incursions on student speech are to be avoided, courts and scholars must recognize the fundamental difference between these two types of tests and its implications for the appropriateness of judges' deference to educators' decisions.[16]

I
BACKGROUND

The Supreme Court has consistently held that the First Amendment does not provide the same protections for children's speech in public schools as it does for adult speech.[17] Instead, the Court has developed a distinct jurisprudence on children's speech in the school environment.[18] This Part describes the four Supreme Court decisions that have dealt directly with the question of student speech given the "special characteristics" of the public schools. Taken together, these decisions set out the contours of what student speech is protected within the schoolhouse gate.

A. Tinker

In December 1965, three Iowa students wore black armbands to school to protest the Vietnam War, in knowing contravention of their schools' policies against the armbands.[19] The students were sent home and suspended until they agreed to come back without the offending accoutrements. Instead, they filed a lawsuit seeking a permanent injunction against the schools from disciplining them.[20] The district court dismissed the suit, arguing that "[u]nless the actions of school officials . . . are unreasonable, the Courts should not inter-

[16] To be clear, this Note does not focus on the normative question of how extensive student speech rights should be. Instead, in addition to addressing some fundamental misconceptions among scholars about the Supreme Court's student speech jurisprudence, this Note attempts to answer a limited structural question: Once the balance between protecting students' rights and vindicating society's need to educate children has been struck, whose job is it to hold the line, educators or the federal courts?

[17] *See* cases cited *supra* note 1. **R**

[18] In order to bolster the dominant narrative on student speech, some scholars have noted that the Supreme Court has also treated prisons and the military as special contexts in which normal constitutional protections do not fully apply. *E.g.*, Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 455–60 (1999).

[19] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969). The prohibitions against the armbands had been adopted after the school principals learned of the students' plan. *Id.*

[20] *Id.*

fere,"[21] and holding that it was reasonable for school officials to forecast that the students' display of the armbands would cause a disruption to the school environment.[22]

The Supreme Court reversed. Writing for the majority, Justice Fortas acknowledged that First Amendment rights must be restricted in light of "the special characteristics of the school environment," but nonetheless declared that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[23] He rejected the district court's conclusion that the school authorities' actions had been reasonable, as "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[24]

Rather, the school needed to demonstrate that its action was caused by more than just "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[25] It had to show that the "forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[26] Throughout the opinion, Justice Fortas used different iterations of this substantial disruption standard.[27] Still, as I argue in Part II, *Tinker* should be understood as requiring deference to educators' reasonable predictions that disruption may result from banned speech.

B. Fraser *and* Kuhlmeier

From *Tinker* until the *Bong Hits* decision, the Supreme Court heard only two more student speech cases—*Bethel School District No. 403 v. Fraser*[28] and *Hazelwood School District v. Kuhlmeier*.[29] Both of

[21] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

[22] *Id.* at 973. The Court of Appeals for the Eighth Circuit, hearing the case en banc, divided equally, and so affirmed the district court's decision without issuing an opinion. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988, 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

[23] *Tinker*, 393 U.S. at 506.

[24] *Id.* at 508.

[25] *Id.* at 509.

[26] *Id*. (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[27] For example, Justice Fortas indicated that there must be substantial interference with the work of the school, *id.*, material and substantial interference with schoolwork or discipline, *id.* at 511, material and substantial interference with the requirements of appropriate discipline in the operation of the school, *id*. at 513, material disruption of classwork or substantial disorder, *id*., material and substantial disruption of the work and discipline of the school, *id.*, or substantial disruption of or material interference with school activities, *id.* at 514.

[28] 478 U.S. 675 (1986).

[29] 484 U.S. 260 (1988).

these cases have been interpreted as representing a sharp withdrawal on student speech rights.

In 1986, nearly twenty years after *Tinker*, the Court decided *Fraser*, which involved the disciplining of a student for giving a school-government election speech containing "an elaborate, graphic, and explicit sexual metaphor" during a school assembly.[30] Although the speech caused some disturbance—students "hooted and yelled," and one teacher later had to interrupt class to discuss the speech with her students[31]—the Court did not decide the case under *Tinker*. Differentiating the "political" speech in *Tinker* from the "sexual" speech here, Chief Justice Burger noted that *Tinker* had explicitly distinguished the "nondisruptive, passive"[32] wearing of armbands from speech that "'intrudes upon the work of the schools.'"[33] He then argued that the work of public education includes "'inculcat[ing] the habits and manners of civility'"[34] and "teaching students the boundaries of socially appropriate behavior."[35] Thus,

> Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.[36]

Since the sexual analogy in the speech was "plainly offensive to both teachers and students[,] indeed to any mature person,"[37] allowing it "would undermine the school's basic educational mission."[38] Accordingly, the Court held that the school district acted

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[30] *Fraser*, 478 U.S. at 678. Excerpts of the speech read as follows: "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm . . . . Jeff Kuhlman is a man who takes his point and pounds it in. If necessary . . . he drives hard, pushing and pushing until finally—he succeeds." Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985), *rev'd*, 484 U.S. 260 (1969).

[31] *Fraser*, 478 U.S. at 678.

[32] *Id.* at 680.

[33] *Id.* (quoting *Tinker*, 393 U.S. at 508).

[34] *Id.* at 681 (quoting CHARLES A. BEARD ET AL., THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (3d ed. 1968)).

[35] *Id.*

[36] *Id.* at 683. The exact language Chief Justice Burger uses to define what types of speech may be restricted shifts several times in the opinion: Schools are allowed to prohibit "vulgar and offensive terms," *id.*, "lewd, indecent, or offensive speech," *id.*, "sexually explicit, indecent, or lewd speech," *id.* at 684, "vulgar and lewd speech," *id.* at 685, and "vulgar speech and lewd conduct," *id*.

[37] *Id.* at 683.

[38] *Id.* at 685.

within its authority in suspending Fraser and removing his name from the list of candidates for graduation speaker.[39]

Two years later, with Chief Justice Rehnquist at the helm, the Supreme Court decided *Kuhlmeier*. The case involved a principal's decision to withhold two articles on students' experiences with pregnancy and divorce, respectively, from publication in the school newspaper.[40] Writing for the majority, Justice White distinguished *Tinker*, arguing that educators' ability to control speech that "happens to occur on the school premises" is different than their "authority over school-sponsored publications . . . and other expressive activities" that "might reasonably [be] perceiv[ed] to bear the imprimatur of the school."[41] Over these activities, "[e]ducators are entitled to exercise greater control."[42]

In school-sponsored activities, Justice White stated, school officials can restrict speech even if it does not pose a risk of substantial disruption if, "for example, [it is] ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[43] In sum, schools may exercise editorial control of student speech in school-sponsored activities as long as "their actions are reasonably related to legitimate pedagogical concerns."[44] Since the principal had acted reasonably, his action did not violate the First Amendment.[45]

C. Bong Hits

By the time *Bong Hits* reached the Supreme Court in 2007, the lower federal courts had had nearly forty years to interpret *Tinker* and nearly twenty years to interpret *Fraser* and *Kuhlmeier*. As many scholars have observed, these interpretations had varied substantially,

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[39] *Id.*

[40] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262–63 (1988). The principal received the proofs a few days before the issue went to print, as per the practice at the high school. Concerned about the stories' potential impact on the students involved, the inappropriateness of references to sexual activity and birth control for younger students, and the student reporters' failure to interview parents who were portrayed unfavorably in the divorce story, and believing that there was not sufficient time to make the necessary changes and still print the newspaper before the end of the school year, the principal directed that the two stories be pulled. *Id.* at 263–64.

[41] *Id.* at 270–71.

[42] *Id.* at 271.

[43] *Id.* at 271.

[44] *Id.* at 272–73.

[45] *Id.* at 274–76.

with different circuits disagreeing drastically on when and how each standard should be applied.[46]

Given this variance, the Supreme Court seemingly had many options in choosing how to decide *Bong Hits*.[47] The district court granted summary judgment for the principal and school board under *Fraser*, reasoning that advocating illegal drug use was contrary to the "'school's basic educational mission.'"[48] The Ninth Circuit, applying *Tinker*, noted the school principal's concession that he had not been concerned about potential disruption and reversed.[49] Before the Supreme Court heard oral argument, one commentator even urged that *Kuhlmeier* be applied on the basis that displaying the banner at the Olympic Torch Relay constituted school-sponsored speech.[50]

Instead, Chief Justice Roberts, writing for the Court, proposed a new standard that no amicus had urged nor any pundit predicted. Arguing that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling'—interest,"[51] he drew on dicta from *Kuhlmeier* in holding that speech school officials "reasonably . . . regarded as encouraging illegal drug use" could be restricted.[52] He then went on to analyze the "BONG HiTS 4 JESUS" banner under the new test. Acknowledging that the banner was "cryptic,"[53] Chief Justice Roberts nonetheless parsed the student's message as having at least two possible proscribable meanings: the imperative "[Take]

[46] *E.g.*, David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 487 (1981) (noting "extraordinary lack of consistency in lower court cases"); McCarthy, *supra* note 9, at 18–22 (describing how *Bong Hits* arose in "murky context" of lower courts' inconsistent application of Supreme Court's decisions); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 646 (2002) ("*Tinker* and its progeny have left the lower courts in a state of confusion."). R

[47] *See generally* McCarthy, *supra* note 9, at 26–33 (discussing approaches available to Court in deciding *Bong Hits*). R

[48] Frederick v. Morse, No. J 02-008 CV, 2003 WL 25274689, at *2 (D. Alaska May 29, 2003) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)), *vacated*, 439 F.3d 1114 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007); *see also* Brief for D.A.R.E. America et al. as Amici Curiae in Support of Petitioners at 17–22, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 128589, at *17–22 (arguing that *Fraser* should apply).

[49] Frederick v. Morse, 439 F.3d 1114, 1118–19 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

[50] Murad Hussain, *The "Bong" Show: Viewing* Frederick*'s Publicity Stunt Through* Kuhlmeier*'s Lens*, 116 YALE L.J. POCKET PART 292, 292 (2007).

[51] Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2628 (2007) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[52] *Id.* at 2622; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) ("[Schools] retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ."). Chief Justice Roberts did not cite *Kuhlmeier* for this language, so it is difficult to know if the borrowing was conscious or not.

[53] *Bong Hits*, 127 S. Ct. at 2624.

bong hits," and the celebratory "bong hits [are a good thing]" or "[we take] bong hits."[54] In light of the "paucity of alternative meanings the banner might bear,"[55] he concluded that the banner reasonably could be construed as illegal advocacy and thus upheld the school's actions.[56]

Justice Alito joined the majority opinion but wrote a separate concurrence,[57] in which Justice Kennedy joined, to confirm his understanding that the Court's opinion went "no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."[58] Justice Alito did not endorse the broad reading of *Fraser* adopted by the district court, under which any student speech that interferes with a school's "educational mission" may be proscribed.[59] Going beyond the majority's reliance on the state's interest in deterring drug use among children, he posited that the threat illegal drug use poses to students' physical safety justified the new limitation on student speech.[60]

In dissent, Justice Stevens, joined by Justices Souter and Ginsburg, argued that the majority's opinion "trivialize[d]" the two "cardinal principles" on which *Tinker* was decided: that censorship based on the content or viewpoint of speech "is subject to the most rigorous burden of justification," and that punishment for the advocacy of illegal conduct is constitutional only when the advocacy "is

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[54] *Id.* at 2625 (alterations in original). Chief Justice Roberts thus ignored the "4 JESUS" portion of the banner. In doing so, he also neglected to address the speech's arguably religious nature and any potential free exercise issues that it might raise. Nor did Frederick raise these issues. *See* Respondent's Brief, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 579230.

[55] *Bong Hits*, 127 S. Ct. at 2625.

[56] *Id.* at 2629.

[57] The circuit courts thus far have split on whether Justice Alito's concurrence is controlling or not. *Compare* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (finding that concurrence is not controlling because Justices Alito and Kennedy joined majority), *with* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007) (calling concurrence "controlling"). At the very least, because the votes of Justices Alito and Kennedy were necessary for the majority, the boundaries that the concurring opinion lays out on restricting student speech likely provide a good indication of the approach the present Court may take in any future student speech cases. *See* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1182830987.shtml (June 26, 2007, 00:09) ("Justice Alito's opinion, as the narrowest grounds offered by any of the Justices whose votes were necessary for the majority, thus seems to offer the controlling legal rule."). In addition to Justice Alito's concurrence, Justice Thomas also wrote a concurring opinion, and Justice Breyer wrote an opinion concurring in the judgment in part and dissenting in part. *Bong Hits*, 127 S. Ct. at 2629–36 (Thomas, J., concurring); *id.* at 2638–43 (Breyer, J., concurring and dissenting).

[58] *Bong Hits*, 127 S. Ct. at 2636 (Alito, J., concurring). On *Bong Hits*' alternate usage of "encourage," "promote," and "advocate," see *infra* note 172. **R**

[59] *Bong Hits*, 127 S. Ct. at 2637 (Alito, J., concurring).

[60] *Id.* at 2638.

likely to provoke the harm that the government seeks to avoid."[61] While Justice Stevens conceded that the need to deter drug use might support the suppression of student speech expressly advocating drug use, even on a "relaxed" showing of future harm, he argued that "it is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy."[62] For Justice Stevens, "BONG HiTS 4 JESUS" was a "nonsense message, not advocacy," with little likelihood of increasing student drug use.[63] More fundamentally, he criticized the majority's apparent adoption of a reasonableness standard, arguing that deferring to the principal's "ostensibly reasonable judgment" was an abdication of "constitutional responsibility" on the part of the Court.[64]

Taken together, *Tinker*, *Fraser*, *Kuhlmeier*, and *Bong Hits* define what speech may be prohibited in public schools. How much deference the first three decisions grant to educators and how much protection they afford student speech are the subjects of the next Part.

II
RETHINKING *TINKER*, *FRASER*, AND *KUHLMEIER*

Commentators invariably interpret *Tinker* as requiring significantly less deference to educators and according significantly more protection for student speech than either *Fraser* or *Kuhlmeier*.[65] As this Part attempts to demonstrate, this understanding misconstrues all three decisions.

A. Judicial Deference in Tinker

Due to its highly speech-protective tone and the apparent robustness of the "material and substantial disruption" standard, *Tinker* is commonly understood as requiring school officials to meet a substantial burden of proof regarding the possibility of disruption of the school environment in order to infringe students' First Amendment rights.[66] Contrary to most scholars' understanding, however, the

[61] *Id.* at 2644–45 (Stevens, J., dissenting).

[62] *Id.* at 2646.

[63] *Id.* at 2649.

[64] *Id.* at 2647.

[65] *See* sources cited *supra* note 14. R

[66] *See, e.g.*, Chemerinsky, *supra* note 18, at 455 (describing *Tinker* as "very protective of student speech"); Diamond, *supra* note 46, at 482–85 (noting that *Tinker* Court suggested weighty burden of justification); Paul G. Haskell, *Student Expression in the Public Schools:* Tinker *Distinguished*, 59 GEO. L.J. 37, 53 (1970) (calling *Tinker* standard "the schoolhouse counterpart" of the clear and present danger standard); Wilborn, *supra* note 14, at 128–30 (arguing *Tinker* test requires government to provide "substantial justifica- R R R R

Tinker standard actually mandates deference to the reasonable decisions of educators as to the likelihood of disruption and provides only very modest protection for student speech. This misunderstanding likely arises because of the obscurity of the *Tinker* opinion. Justice Fortas offered several different iterations of the substantial disruption standard[67] without ever clearly indicating how much deference—if any—is due to school officials' determination that disruption may occur. Undoubtedly, Justice Fortas gave the school the burden of demonstrating the likelihood of interference: He repeatedly chided the Des Moines school district for providing no "showing"[68] or "evidence"[69] that the armbands would have led to any interference or disruption. Only at the conclusion of the opinion did he suggest how reviewing courts should evaluate schools' predictions of disruption. Because the record in the case did "not demonstrate any facts *which might reasonably have led school authorities to forecast substantial disruption* of or material interference with school activities," Justice Fortas concluded that the Constitution did not permit officials to deny the students' right to wear the armbands.[70]

The implication is that had school officials made a reasonable prediction of disruption, the Court would have upheld their decision to curtail speech. This interpretation is supported by a close reading of Justice Fortas's argument. In discarding the district court's conclusion that the school officials' actions had been reasonable, he did not reject the lower court's determination that the relevant inquiry was into the reasonableness of these actions. While the "undifferentiated fear or apprehension" the lower court found was not enough to justify the school officials' actions,[71] Justice Fortas examined the record for "evidence that the school authorities had reason to anticipate" a substantial interference with the work of the school.[72] He found none, but the implication again is that had the officials demonstrated a reasonable prediction of disruption, their actions would have been upheld.

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tion" in order to burden student speech). *But see* John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 352–57 (1979) (noting that *Tinker* may be understood as requiring high probability of serious disruption or as allowing considerable leeway for school administrators, and arguing that latter view is justified by policy considerations).

67 *See supra* note 27 (listing iterations). R

68 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

69 *Id.* at 511.

70 *Id.* at 514 (emphasis added).

71 *Id.* at 508.

72 *Id.* at 509.

That *Tinker* requires deference to the reasonable predictions of school officials is further demonstrated by *Burnside v. Byars*,[73] the Fifth Circuit decision from which Justice Fortas drew the substantial disruption test.[74] In *Burnside*, the court's determination of whether there had been a risk of disruption was clearly predicated on whether or not the school officials' evaluation of the situation had been reasonable. The case involved a Mississippi principal's prohibition on "freedom buttons" for fear they "would cause commotion."[75] In holding for the students, the Fifth Circuit reasoned:

> In formulating regulations . . . school officials have a wide latitude of discretion. But the school is always bound by the [First Amendment's] requirement that the rules and regulations must be reasonable. It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities.[76]

Because the record indicated that the buttons caused only "mild curiosity on the part of the other school children," the Fifth Circuit held that the actions of the principal constituted an abuse of discretion.[77] In sum, although the court held for the students in this case, the standard of review was lenient.[78] Adopting the substantial disruption standard, the *Tinker* Court gave no indication that it rejected *Burnside*'s deference to educators' reasonable predictions of disruption.

Moreover, both the Supreme Court and lower federal courts have characterized *Tinker* as requiring just this sort of deference. Indeed, Justice Black's *Tinker* dissent explicitly criticized the majority for adopting a reasonableness test—not because it afforded courts too little oversight of schools' actions, but rather too much. Noting that Justice Fortas's opinion "heavily relies" on cases employing a reasona-

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[73] 363 F.2d 744 (5th Cir. 1966).

[74] *Tinker*, 393 U.S. at 509.

[75] *Burnside*, 363 F.2d at 747. The buttons were about an inch and a half in diameter and had the words "One Man One Vote" around the perimeter, with "SNCC" (Student Nonviolent Coordinating Committee) inscribed in the center. *Id.* at 746.

[76] *Id.* at 748.

[77] *Id.* at 748–49.

[78] *See* Diamond, *supra* note 46, at 484 ("[T]he Fifth Circuit, while purporting to protect first amendment rights, required only reasonable regulation to tip the balance in favor of the school. This much-reduced burden corresponds to the standard that the state must meet in due process challenges to ordinary state actions."). In a companion case to *Burnside*, also cited in *Tinker*, the Fifth Circuit applied the same "reasonableness" standard in finding for school officials when identical buttons did cause disruption at the school. Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 752 (5th Cir. 1966). R

bleness standard,[79] Justice Black argued that this test "gives judges power to strike down any law they do not like."[80] He maintained that the Court should instead defer completely to school officials, according them the "right to determine for themselves to what extent free expression should be allowed."[81] In *Kuhlmeier* and, more explicitly, in *Bong Hits*, the Court agreed with Justice Black's characterization of *Tinker* as requiring deference to school officials' reasonable predictions of disruption,[82] as have the overwhelming majority of lower-court decisions over the last forty years.[83]

In light of this evidence, *Tinker* is properly understood as mandating deference to the *reasonable* forecasts of school officials. Nonetheless, scholars have overwhelmingly argued that *Tinker* imposes a significant burden of justification on educators. Many focus on the highly speech-protective language of the opinion: Erwin Chemerinsky, for example, argues that "[a] close reading of the

[79] *Tinker*, 393 U.S. at 519 (Black, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390 (1923), and Bartels v. Iowa, 262 U.S. 404 (1923)).

[80] *Id.* at 520.

[81] *Id.* at 524; *see also* Diamond, *supra* note 46, at 481 (summarizing Justice Black's argument); Dienes & Connolly, *supra* note 14, at 360 (noting that for Justice Black, "[t]he schoolhouse context is simply inconsistent with judicially protected student free speech; the first amendment guarantee does not even apply"). It is thus difficult to understand Erwin Chemerinsky's argument that Justice Black believed reasonableness to be the correct standard of review. *See* Chemerinsky, *Schoolhouse Gates*, *supra* note 14, at 534 ("Justice Black repeatedly stated he believed that 'reasonableness' was the appropriate constitutional test in evaluating the schools' regulation of student speech. Reasonableness, of course, connotes the rational basis test and tremendous deference to the government."). R R R

[82] Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2626 (2007) ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" (quoting *Tinker*, 393 U.S. at 513)); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (noting that students cannot be punished unless "school authorities have reason to believe" that speech will lead to disruption).

[83] *See* Garvey, *supra* note 66, at 352 (noting that most lower courts have required only "a reasonable forecast" of disruption). For examples of cases in each circuit requiring that educators demonstrate a reasonable prediction of disruption, see *Scott v. School Board*, 324 F.3d 1246, 1248 (11th Cir. 2003), *West v. Derby Unified School District No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000), *Adams v. Township of Redford*, No. 95-1279, 1996 WL 250578, at *2 (6th Cir. May 10, 1996), *Chandler v. McMinnville School District*, 978 F.2d 524, 529 (9th Cir. 1992), *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977), *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973), *Shanley v. Northeast Independent School District*, 462 F.2d 960, 969–70 (5th Cir. 1972), *Scoville v. Board of Education*, 435 F.2d 10, 13 (7th Cir. 1970), *Demers ex rel. Demers v. Leominster School Department*, 263 F. Supp. 2d 195, 202–03 (D. Mass. 2003), *Beussink v. Woodland R-IV School District*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998), and *Wise v. Sauers*, 345 F. Supp. 90, 93 (E.D. Pa. 1970). It is perhaps in reaction to the vast majority of lower courts requiring only a reasonable fear of substantial disruption that the Third and Fourth Circuits now interpret *Tinker* as requiring a "well-founded" and "specific and significant fear of disruption." This novel and fortified gloss on *Tinker* was first proposed by then–Judge Alito in *Saxe v. State College Area School District*, 240 F.3d 200, 211–12 (3d Cir. 2001). R

majority opinion reveals how emphatic the Court was in holding student speech in schools is constitutionally protected. . . . [I]ts expression of support for student speech is much deeper than its single, most famous sentence."[84] For Chemerinsky, *Tinker*'s rhetoric indicates the need for careful judicial review of schools' speech-restrictive actions.[85] In the same vein, C. Thomas Dienes and Annemargaret Connolly conclude that "[i]n short, the language and spirit of *Tinker* is not judicial avoidance, nor judicial deference under a rationality standard . . . . Instead, the Court demands substantial governmental justification for the burdens that school officials impose on student speech."[86] Yet, in reasoning from the general tone of the opinion to reach conclusions about the specifics of the promulgated standard, these commentators overlook the more direct and objective evidence that *Tinker* requires courts to defer to the reasonable judgments of school officials in reviewing schools' proffered evidence on the risk of disruption. Indeed, even at the rhetorical level, *Tinker* contains language recognizing that school administrators need considerable latitude to control the school environment.[87] Thus, it is difficult to accept the argument that the tone of the *Tinker* opinion justifies overlooking the many other indications that Justice Fortas intended courts to defer to educators' reasonable predictions of disruption.[88]

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[84] *See* Chemerinsky, *Schoolhouse Gates*, *supra* note 14, at 530–32. **R**

[85] *See id.* at 533–34 ("[I]t is not for a court to accept the claims of school officials about the need to stop the speech; the court must independently review the facts and determine whether there is sufficient evidence of significant disruptive effect to justify punishing expression.").

[86] Dienes & Connolly, *supra* note 14, at 359. In support of their argument, Chemerinsky and Dienes and Connolly note Justice Fortas's repeated charge that the school had provided no evidence of the risk of disruption. *See* Chemerinsky, *Schoolhouse Gates*, *supra* note 14, at 533 ("Fortas emphasized the lack of evidence to support punishing the speech."); Dienes & Connolly, *supra* note 14, at 359 ("In applying [the] standard, the Court cited the absence of government evidence or any interference, actual or nascent, with the work of the school or any threat to the rights of other students."). However, as argued below, *see infra* notes 108–10 and accompanying text, the dearth of evidentiary support in *Tinker* does little to indicate what showing schools must meet to demonstrate a likelihood of substantial disruption. *Cf.* Diamond, *supra* note 46, at 485 ("*Tinker* can be read simply as a case which finds that the school board had no basis of any sort for its restriction."). **R** **R** **R** **R** **R**

[87] *See, e.g.*, *Tinker*, 393 U.S. at 507 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

[88] In support of their argument, Dienes and Connolly observe that Justice Fortas cited Supreme Court precedent employing the clear and present danger doctrine. *See* Dienes & Connolly, *supra* note 14, at 359 (quoting passage from *Tinker* citing Terminiello v. Chicago, 337 U.S. 1 (1949)). Similarly, David Diamond argues that Justice Fortas's invocation of *Terminiello* demonstrated his intent to depart from the deferential test in *Burnside* and impose a "higher standard" on school officials. Diamond, *supra* note 46, at 484–85. The **R** **R**

In treating *Tinker* as a highly speech-protective standard, many scholars simply cite one of the stronger versions of the *Tinker* standard and ignore or gloss over Justice Fortas's invocation of reasonableness, as well as the other evidence that *Tinker* requires deference to school officials' reasonable decisions.[89] Others recognize that *Tinker* requires courts to uphold officials' reasonable predictions of disruption, but do not explicitly reconcile this acknowledgement with their view of *Tinker* as strongly speech-protective.[90] I suspect that the reason for this oversight is that these scholars, not unreasonably, view *Tinker*'s substantial disruption requirement as posing a significant obstacle to speech restrictions, regardless of whether courts give deference to educators' predictions of disruption. Andrew Miller provides perhaps the clearest exposition of this argument.[91] In his view, Justice Fortas's insistence on a "material" or "substantial" disruption, rather than just "undifferentiated fear" or "discomfort and unpleasantness," does "not allow much wiggle room."[92] While courts must defer to the reasonable predictions of educators, educators still must show potential for disruption that would satisfy the "material" and "substantial" criteria. Thus, Miller contends, the *Tinker* standard is "a heavy burden" for educators to carry.[93]

While the disruption requirement undoubtedly adds some teeth to the *Tinker* standard, the argument that it strictly limits the scope for suppression of speech is mistaken. In *Tinker*, the Court provided no clear guidance on what showing was necessary to demonstrate that a sufficient disruption has or would have occurred other than the state-

force of this argument is substantially weakened given Justice Fortas's reliance on other cases employing the reasonableness standard, as well as his adoption of the *Burnside* test. Indeed, Diamond acknowledges that *Tinker* equally could be read as adopting the lenient standard from *Burnside*. *Id*. at 485.

[89] *E.g.*, Bittle, *supra* note 14, at 500; Geimer, *supra* note 14, at 955; Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1662 (1986); Trager & Russomano, *supra* note 14, at 277–78; Wilborn, *supra* note 14, at 128–30; R. George Wright, *Free Speech Values, Public Schools, and the Rule of Judicial Deference*, 22 NEW ENG. L. REV. 59, 59–60 (1987); Yudof, *supra* note 14, at 366. R R R

[90] *See, e.g.*, Hudson & Ferguson, *supra* note 14, at 186–87 (calling *Tinker* "a paean to student free-speech rights" while noting that school officials must "reasonably forecast" that student expression would lead to disruption); Maring, *supra* note 14, at 681, 689 (taking similar view). R R

[91] *See, e.g.*, Miller, *supra* note 46, at 651 ("The word 'reasonable' . . . does not water [the test] down to a rational basis level of deference."). R

[92] *Id.* at 651–52; *see also* Chemerinsky, *Schoolhouse Gates*, *supra* note 14, at 533 (noting Justice Fortas's rejection of "mere desire to avoid . . . discomfort"); Dienes & Connolly, *supra* note 14, at 359 (noting rejection of "undifferentiated fear or apprehension"). R R

[93] Miller, *supra* note 46, at 653. R

ment that an "undifferentiated fear" was insufficient.[94] Nor did it clearly indicate what would constitute "material and substantial disruption."[95] While Miller suggests that this standard would be met if there were "acts of violence or threats of violence,"[96] Justice Fortas's opinion favorably cites cases upholding speech restrictions involving considerably less disturbance.[97] Nonetheless, Miller argues, speech will rarely create a substantial disruption, given the difficulty of distracting the "modern juvenile" from the learning process.[98]

This conjecture should seem risible to anyone who remembers his or her "juvenile" years: Students are readily distracted and the learning process easily disrupted. Educators, needing to demonstrate only a reasonable belief that interference with the school's work would have resulted from student speech, have considerable leeway to justify their actions.[99] Indeed, the ease with which student speech may

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[94] Levin, *supra* note 89, at 1662. The *Tinker* defendants made only one suggestion of potential disruption in a memorandum prepared after the students' suspension, which claimed that antiwar protests could create a situation that would be "difficult to control" because a student in the Des Moines school system had been killed in Vietnam and some of his friends were still in school. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 n.3 (1969). **R**

[95] *See* Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006) ("[*Tinker*] alludes to 'threats [and] acts of violence on school premises,' but does not otherwise explain what might qualify as 'materially and substantially disrupt[ing] the work and discipline of the school.'" (quoting *Tinker*, 393 U.S. at 508, 513) (alterations in original) (citation omitted)); Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973) (noting that neither *Tinker* nor *Burnside* featured any disturbance, thus "the two cases which provided the rule give little assistance in its application to specific facts"); Diamond, *supra* note 46, at 487 ("The extraordinary lack of consistency in lower court cases attempting to follow *Tinker* demonstrates the lack of real guidance provided by the Court's decision."). That lower courts have rejected school regulations mirroring the *Tinker* language as unconstitutionally vague, *e.g.*, Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975); Jacobs v. Bd. of Sch. Comm'rs, 490 F.2d 601, 605–06 (7th Cir. 1973), also suggests that the case did not substantially restrict the scope of potential suppression of speech. **R**

[96] Miller, *supra* note 46, at 652. **R**

[97] For example, Miller points approvingly to Justice Fortas's comparison of *Burnside*, which was decided in favor of the students, and *Blackwell*, which was decided in favor of the educators. Miller, *supra* note 46, at 651. But *Blackwell* suggests that the level of disruption required to meet the "material and substantial" requirement is minimal: While the incidents in *Blackwell* escalated significantly, the first occasion where the principal prohibited the wearing of freedom buttons involved "a disturbance by [students] noisily talking in the hall when they were scheduled to be in class." Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 750–51 (5th Cir. 1966). If educators need show only that they reasonably forecast such minor disturbance, the *Tinker* test poses no real burden of justification at all. *Cf.* Gebert v. Hoffman, 336 F. Supp. 694, 696 (E.D. Pa. 1972) (finding disruption where demonstrating students, *inter alia*, "moved noisily through the halls possibly disturbing classes in session in the area"). **R**

[98] Miller, *supra* note 46, at 652–53. **R**

[99] *See, e.g.*, Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1541 (7th Cir. 1996) (citing *Tinker* for proposition that judicial review of educators' decisions is "highly deferential"); Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977) ("[A] federal

disrupt or interfere with the educational process, combined with the Supreme Court's ambiguity as to what constitutes "material and substantial" disruption or interference, or what showing is necessary to demonstrate that this level of disruption could occur, has led lower courts to allow speech restrictions under *Tinker* with relatively minimal showings of interference.

A comprehensive review of lower-court decisions from 1969 to 1986 (the year *Fraser* was decided) belies *Tinker*'s reputation as a strongly speech-protective standard. In the majority of student speech cases decided under *Tinker*, the courts ruled for the schools.[100] Where students won, the factual situations tended to resemble *Tinker* closely,[101] to involve other constitutional rights as well,[102] or to make a showing of potential disruption nearly impossible (for example, when the speech occurred away from school).[103] Even with facts nearly identical to *Tinker*, federal judges more often upheld schools'

court ought not to impose its own views . . . where there is a rational basis for the decisions and actions of the school authorities."); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir. 1972) ("[T]he school board does not have a difficult burden to meet [under *Tinker*]."); Quarterman v. Byrd, 453 F.2d 54, 56–57 (4th Cir. 1971) ("[S]chool authorities must 'have a wide latitude of discretion, subject only to the restriction of reasonableness.'" (quoting Davis v. Ann Arbor Pub. Sch., 313 F. Supp. 1217, 1226 (E.D. Mich. 1970))); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 809 n.6 (2d Cir. 1971) ("[T]he threshold of disturbance which may justify official intervention is relatively low.").

100 A Westlaw search produced forty-eight federal decisions on student speech that were decided under *Tinker* during this period (from www.westlaw.com, search the database ALLFEDS for "Tinker v. Des Moines"). Of these cases, twenty-two were decided in favor of the schools. In addition, five decisions upheld schools' power to require prior approval of students' distribution of written material, but invalidated specific clauses or policies that schools had promulgated. *See infra* notes 105–06 and accompanying text. Only nineteen cases were decided in favor of students. The final two decisions were inconclusive. Sean R. Nuttall, First Amendment Cases (July 20, 2008) (unpublished spreadsheet, on file with *New York University Law Review*); *see also* Chemerinsky, *Schoolhouse Gates*, *supra* note 14, at 530 ("Overall, [lower-court decisions] overwhelmingly have ruled against students' free speech claims."); Diamond, *supra* note 46, at 502 ("Lower courts . . . frequently rely on the 'substantial disruption' and 'special nature of the school' language in *Tinker* to permit local administration control of student behavior in ways that belie a significant first amendment presence in the schools."). *But see* McCarthy, *supra* note 9, at 16 ("*Tinker* was interpreted by lower courts as providing substantial protection to students until the mid-1980s . . . .").

101 *E.g.*, Butts v. Dallas Indep. Sch. Dist., 436 F.2d 728, 732 (5th Cir. 1971) (involving armbands); Aguirre v. Tahoka Indep. Sch. Dist., 311 F. Supp. 664, 667 (N.D. Tex. 1970) (same).

102 *E.g.*, Goetz v. Ansell, 477 F.2d 636, 638 (2d Cir. 1973) (invalidating requirement that students leave classroom as condition for exercising constitutional right not to participate in Pledge of Allegiance); Frain v. Baron, 307 F. Supp. 27, 31–34 (E.D.N.Y. 1969) (same).

103 *E.g.*, Klein v. Smith, 635 F. Supp. 1440, 1440–42 (D. Me. 1986) (striking down suspension of student for making vulgar gesture to teacher off school grounds and after school hours); *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1050–52 (2d Cir. 1979) (refusing to apply *Tinker* to student newspaper published and distributed off-campus).

bans on speech.[104] In numerous cases challenging schools' authority to require advance approval of written material before distribution—a power antithetical to First Amendment protections for adult speech[105]—students succeeded in invalidating specific clauses or policies, but only as courts affirmed schools' general power to exercise this type of prior restraint.[106] In other cases, courts suggested or recognized that students' speech could be protected under *Tinker*, but nonetheless held that students had waived their rights by egregiously flouting school rules[107]—another theory foreign to First Amendment jurisprudence on adult speech. Similarly, courts evaded *Tinker* by limiting its holding to particular types of speech.[108] Finally, the courts

104 *E.g.*, Guzick v. Drebus, 431 F.2d 594, 600–01 (6th Cir. 1970) (upholding ban on antiwar buttons); Wise v. Sauers, 345 F. Supp. 90, 93 (E.D. Pa. 1972) (upholding ban on armbands bearing words "strike," "rally," and "stop the killing"); Hill v. Lewis, 323 F. Supp. 55, 56, 58–59 (E.D.N.C. 1971) (upholding ban on black armbands at school where many students were children of military personnel); Hernandez v. Sch. Dist. No. One, 315 F. Supp. 289, 292 (D. Colo. 1970) (upholding ban on wearing of black berets by students of Mexican descent); *see also* Einhorn v. Maus, 300 F. Supp. 1169, 1171 (E.D. Pa. 1969) (upholding school's decision to send letters to prospective colleges of students detailing students' wearing armbands during protest).

105 *See* Near v. Minnesota, 283 U.S. 697, 713 (1931) (noting that "the chief purpose of [the First Amendment is] to prevent previous restraints upon publication").

106 *E.g.*, Baughman v. Freienmuth, 478 F.2d 1345, 1350 (4th Cir. 1973) (upholding in part and striking down in part school's prior approval policy); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 977 (5th Cir. 1972) (striking down school policy on distribution of written material but only because unconstitutionally vague); Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971) (finding school policy prohibiting unapproved written materials unconstitutional only because it lacked guidelines for approval and procedural safeguards); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971) (rejecting school board's prior review procedures only because they did not ensure expeditious review); Hernandez v. Hanson, 430 F. Supp. 1154, 1158–61 (D. Neb. 1977) (holding that school policy requiring prior approval for distribution of non-school materials to small numbers of students went too far because likelihood of disruption was minimal). *But see* Fujishina v. Bd. of Educ., 460 F.2d 1355, 1357 (7th Cir. 1972) (holding that *Tinker* does not permit prior restraints).

107 *E.g.*, Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1076 (5th Cir. 1973) (holding that student's distribution of newspaper was not sufficiently protected by First Amendment to preclude discipline given student's "flagrant disregard" of school regulations); Graham v. Houston Indep. Sch. Dist., 335 F. Supp. 1164, 1166 (S.D. Tex. 1970) (holding that *Tinker* did not apply because students were punished for their disobedience in distributing unauthorized publication, not for publication's content); Schwartz v. Schuker, 298 F. Supp. 238, 241–42 (E.D.N.Y. 1969) (holding that gross disrespect and contempt for school officials may justify punishment regardless of First Amendment violation).

108 *E.g.*, Williams v. Spencer, 622 F.2d 1200, 1205–06 (4th Cir. 1980) (arguing that disruption under *Tinker* is not only legitimate justification for restricting student speech); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 527 (C.D. Cal. 1969) (arguing that *Tinker* does not apply when "profanity and vulgarity" are involved).

upheld relatively serious incursions on student speech rights under *Tinker* despite minimal showings of actual or potential disruption.[109]

In sum, the "material and substantial" criterion adds only very modest judicial scrutiny to *Tinker*'s requirement that educators' reasonable predictions of disruption be upheld.[110] Thus, *Tinker* is best understood as imposing quite limited judicial oversight of schools' decisions to restrict student speech.

B. Judicial Deference in Fraser *and* Kuhlmeier

Scholars typically argue that, as compared to *Tinker*, *Fraser* and *Kuhlmeier* mandate increased judicial deference to school authorities and provide less protection for student rights.[111] In fact, these decisions require no more deference than does *Tinker* and provide little less protection for student rights.

Indeed, if both decisions are read correctly, *Fraser* actually requires less deference to school officials than *Tinker*.[112] Chief Justice Burger's *Fraser* opinion, while not considered a model of clarity,[113] is best understood as requiring no deference to educators' determinations that student speech is lewd, indecent, or offensive. Although he argued that schools, in pursuing their mission of inculcating civility,

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[109] *E.g.*, Tate v. Bd. of Educ., 453 F.2d 975, 976 (8th Cir. 1972) (upholding suspension of students for "quiet procession" from pep rally to protest playing of "Dixie"); *Guzick*, 431 F.2d at 599–600 (upholding ban on antiwar buttons because of racial tensions in absence of showing of potential disruption due to debate over war); Frasca v. Andrews, 463 F. Supp. 1043, 1050–52 (E.D.N.Y. 1979) (upholding principal's seizure of student newspaper based on disruptive potential of threatening letter to editor and terse reply); Pound v. Holladay, 322 F. Supp. 1000, 1002–03, 1006 (N.D. Miss. 1971) (upholding hairstyle regulations as necessary to alleviate interference with educational process); Press v. Pasadena Indep. Sch. Dist., 326 F. Supp. 550, 563 (S.D. Tex. 1971) (holding student's wearing of pantsuit was disruptive merely because it violated school rule).

[110] A useful analogy here is to the clear and present danger standard, which—despite its strongly speech-protective tone—has proven malleable and manipulable in support of restrictions on speech. *See infra* notes 156–62 and accompanying text (discussing application of clear and present danger standard). *See generally* Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg—*and Beyond*, 1969 SUP. CT. REV. 41 (discussing standard). R

[111] *See, e.g.*, sources cited *supra* note 14. R

[112] Whether the *Tinker* Court would have decided *Fraser* differently is open to significant doubt. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Warren Court upheld a prohibition on distributing sexually explicit magazines to children, arguing that some lewd speech may be inappropriate for youths even if undoubtedly protected for adults. Justice Brennan, who wrote the opinion, concurred in *Fraser*. While arguing that Fraser's innuendos were "far removed" from the explicit magazines in *Ginsberg*, he nevertheless found that the school officials had not acted unreasonably in concluding that Fraser's remarks were disruptive and inappropriate for the school assembly. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688–89, 689 n.2 (1986) (Brennan, J., concurring).

[113] *See* Dienes & Connolly, *supra* note 14, at 363 (calling *Fraser* "a rambling, ambiguous opinion"). R

have complete discretion to prohibit such speech,[114] Chief Justice Burger gave no deference to the Bethel School District's determination that Fraser's particular speech was in fact inappropriate. Rather, he made this inquiry de novo, concluding that the speech was "plainly offensive" to teachers and students, as well as to "any mature person."[115] In effect, schools have complete discretion to prohibit lewd, vulgar, or offensive speech, but the final determination of whether particular speech falls into this category rests with the courts.[116] This de novo review is less deferential than *Tinker*'s more limited inquiry into the reasonableness of educators' prediction of potential disruption.

By contrast, the *Kuhlmeier* test allows restrictions on school-sponsored speech that are reasonably related to legitimate pedagogical concerns. Thus, although *Tinker* and *Kuhlmeier* both require deference to the school officials' reasonable actions, one might plausibly argue that showing a reasonable relation to legitimate pedagogical concerns is less onerous than demonstrating a reasonable prediction of substantial disruption.[117] In fact, there is good reason to allow more judicial deference to educators' decisions under *Kuhlmeier* than under *Tinker*. When the school acts "as publisher of a school newspaper or producer of a school play,"[118] it invests time—via teachers' involvement and supervision—and resources into student activities. Because of its direct involvement, as well as the potential for

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114 *Fraser*, 478 U.S. at 683 ("Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate . . . ."). Several commentators take this language, as well as Chief Justice Burger's statement that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *id.*, to indicate the Court's renunciation of any role in reviewing restrictions on student speech. *E.g.*, Chemerinsky, *Deconstitutionalization of Education*, *supra* note 14, at 125; Dienes & Connolly, *supra* note 14, at 367. This argument takes Chief Justice Burger's language for more than it is worth. If the Constitution permitted schools complete authority over determining the appropriateness of student speech, the Court would lack jurisdiction to hear the case. The better reading of Chief Justice Burger's admittedly loose wording is that schools have the authority to determine that lewd, indecent, and offensive speech can be prohibited, but not the final word on what constitutes lewdness, indecency, or offensiveness. R

115 *Fraser*, 478 U.S. at 683.

116 *See* Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2648 (2007) (Stevens, J., dissenting) ("[I]n *Fraser*, we made no inquiry into whether the school administrators reasonably thought the student's speech was obscene or profane; we rather satisfied ourselves that '[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive . . . .'" (quoting *Fraser*, 478 U.S. at 683)); Wright, *supra* note 89, at 74 ("In [*Fraser*], the Court's majority was willing to itself characterize the respondent speaker's remarks at a school assembly as offensively lewd, indecent, and vulgar . . . ."). R

117 *See* Miller, *supra* note 46, at 633 (calling *Kuhlmeier* rule "an extremely lenient standard of constitutional scrutiny"). R

118 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

observers to interpret the activities as bearing its imprimatur, the school is a joint "speaker" in these situations.[119] School officials thus legitimately may be allowed more deference and control over the speech produced under these circumstances.[120]

Even though there is good reason to permit more deference under *Kuhlmeier* than *Tinker*, comparing the standards on two axes—the magnitude of the showing needed to justify a speech restriction and the range of circumstances under which speech may be limited—demonstrates that there is considerable overlap in the scope of censorship allowed under these cases. On the first axis, the magnitude of showing needed to justify a restriction, *Kuhlmeier* requires only a reasonable relation between the restriction and legitimate pedagogical concerns. Thus, educators may exercise editorial control over school-sponsored speech that is, for instance, "ungrammatical, poorly written, inadequately researched, biased, . . . vulgar or profane."[121] These examples suggest that school officials' burden in satisfying the *Kuhlmeier* standard is relatively light. However, as discussed in Part II.A, *Tinker* does not make clear what showing is necessary to demonstrate a reasonable forecast of material and substantial disruption.[122] Because of the ready potential for student speech to interfere with the school's work and activities,[123] the requisite showing here may also be quite low.[124]

On the second axis, the range of circumstances under which speech may be limited, *Kuhlmeier* is less broad, as it only applies to school-sponsored speech. Even within the realm of school-sponsored speech, however, both standards may allow for speech restrictions under a comparably wide range of circumstances. *Kuhlmeier* allows school officials to exercise control over speech whenever there is a reasonable relation between the action taken and legitimate pedagog-

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[119] *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (arguing that in situations where speech is produced jointly by private citizens and government, both should be understood as "speaking"); *see also Bong Hits*, 127 S. Ct. at 2637 (Alito, J., concurring) (arguing that *Kuhlmeier* "allows a school to regulate what is in essence the school's own speech"); Yudof, *supra* note 14, at 375–76 ("The *Hazelwood* decision simply clarifies the distinction between personal and government expression."). R

[120] *See Kuhlmeier*, 484 U.S. at 270–71 ("[W]hether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. . . . Educators are entitled to exercise greater control over this second form of student expression . . . .").

[121] *Kuhlmeier*, 484 U.S. at 271.

[122] *See supra* notes 94–95 and accompanying text. R

[123] *See supra* notes 98–99 and accompanying text. R

[124] *See* cases cited *supra* note 109. R

ical concerns. At first glance, this seems to allow for restrictions on school-sponsored speech under a considerably broader set of circumstances than would *Tinker*'s substantial disruption test, as justified by the greater degree of school involvement.[125] Yet *Tinker*'s various iterations lend it significant malleability on this axis.

At various points in *Tinker*, Justice Fortas stated that speech could be limited because of disruption or interference with the "work of the school," school "discipline," "the operation of the school," "classwork," and "school activities."[126] This language covers almost all situations that could arise in the school environment. Moreover, Justice Fortas's invocation of "interference" suggests that limiting speech may be justified when there is a conflict or tension with "the work of the school" or "school activities," even when there is no physical disruption.[127] Under this broad view of the speech that may be limited under *Tinker*, which includes any speech that interferes with a school's work or activities, the decision bears a close resemblance to *Kuhlmeier*, which authorizes limitations due to legitimate pedagogical concerns.

In sum, *Kuhlmeier* and *Fraser* may require no more deference to educators than does *Tinker*, which readily can be read to permit speech restrictions in a broad range of situations and under a relatively small showing of disruption or interference. Nor, arguments to the contrary notwithstanding,[128] have the later two decisions led to a substantial decline in protection for student rights. A comprehensive review of lower-court cases from 1987 to 2007 (before *Bong Hits* was decided) demonstrates that, as in cases before 1987, a majority of decisions have upheld schools' speech-restrictive actions.[129] Admittedly, students have been considerably more likely to lose cases decided

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[125] *See supra* notes 117–20 and accompanying text. **R**

[126] *See supra* note 27. **R**

[127] Accordingly, lower courts have upheld speech restrictions under *Tinker* when there is interference with schools' work or activities, but no showing of physical disruption. *E.g.*, Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977) (upholding ban on sex questionnaire that could cause emotional damage to children); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971) (arguing that state "has authority to minimize or eliminate influences that would dilute or disrupt . . . educational process"); *see also* Diamond, *supra* note 46, at 485 (noting that "disruption of the educational task may take forms other than . . . purely physical ones"). **R**

[128] *E.g.*, McCarthy, *supra* note 9, at 16. **R**

[129] A Westlaw search produced ninety-three federal decisions on student speech decided under *Tinker*, *Fraser*, and *Kuhlmeier* during this period (from www.westlaw.com, search the database ALLFEDS for "Tinker v. Des Moines"). Of these, forty-seven were decided in favor of the schools; thirty-four were decided in favor of the students. In the remainder, the outcome did not clearly favor either party. About two-thirds (sixty-one of ninety-three) of the cases were decided at least in part under *Tinker*. *But see* Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433,

under *Fraser* or *Kuhlmeier* than under *Tinker*.[130] However, the vast majority of these cases might well have been decided in favor of schools had the courts applied *Tinker*. In many cases decided under *Fraser* and *Kuhlmeier*, lower courts indicated that the *Tinker* standard would have been satisfied as well.[131] Similarly, lower-court decisions under *Fraser* and *Kuhlmeier* often have involved factual situations—for example, racially inflammatory speech;[132] speech during class and organized classroom activities;[133] speech that threatens harm to stu-

448 (2000) (arguing that *Kuhlmeier* has significantly limited *Tinker*'s application). *See* Nuttall, *supra* note 100 (listing cases). R

[130] Only six of thirty-eight cases applying *Fraser* or *Kuhlmeier* were decided in favor of students. Nuttall, *supra* note 100. R

[131] *See* Bannon v. Sch. Dist., 387 F.3d 1208, 1217 (11th Cir. 2004) (finding that school's restrictions on religious content of murals were permitted under *Kuhlmeier* because ending disruption to school's learning environment was legitimate pedagogical concern); Scott v. Sch. Bd., 324 F.3d 1246, 1247–48 (11th Cir. 2003) (relying on both *Fraser* and *Tinker* to justify punishment of student for displaying Confederate flag); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1279–81 (W.D. Wash. 2007) (upholding punishment of student under *Fraser* and *Tinker* for creating offensive video of teacher); Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 901–02 (W.D. Mich. 2005) (stating that "[i]nsubordinate speech always interrupts the educational process" under *Tinker* and can be punished under *Fraser*); Griggs *ex rel.* Griggs v. Fort Wayne Sch. Bd., 359 F. Supp. 2d 731, 741–47 (N.D. Ind. 2005) (upholding under *Kuhlmeier* and *Tinker* school policy forbidding clothing displaying symbols of violence); Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643, 648 (N.D. Miss. 2003) (finding that school authorities' desire to avoid possible disruption of educational processes satisfied *Kuhlmeier*); West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1232–34 (D. Kan. 1998) (finding that disciplining student for drawing Confederate flag was acceptable under both *Fraser* and *Tinker*); Snell *ex rel.* Snell v. Prince George's County Bd. of Educ., No. AW-93-1184, 1995 WL 907869, at *2 (D. Md. Aug. 11, 1995) (relying on lower-court cases applying *Tinker* in upholding suspension of student under *Fraser*); Broussard *ex rel.* Lord v. Sch. Bd., 801 F. Supp. 1526, 1534, 1537 (E.D. Va. 1992) (arguing that "Drugs Suck!" T-shirt could be restricted under *Fraser* and also satisfied *Tinker*'s "reasonable forecast of disruption" standard).

[132] *Compare* Denno v. Sch. Bd., 218 F.3d 1267, 1272–75 (11th Cir. 2000) (upholding punishment of student under *Fraser* for displaying Confederate flag), *and* Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1998) (upholding principal's removal of Confederate mascot under *Kuhlmeier*), *with* D.B. *ex rel.* Brogdon v. Lafon, 217 F. App'x 518, 520, 523 (6th Cir. 2007) (upholding suspension of student for unwillingness to stop wearing clothing featuring Confederate flag under *Tinker*), White v. Nichols, No. 05-15064, 2006 WL 1594213, at *1 (11th Cir. June 12, 2006) (same), *Scott*, 324 F.3d at 1247–48 (same), *and* Melton v. Young, 465 F.2d 1332, 1334–35 (6th Cir. 1972) (same). *But see* Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 538 (6th Cir. 2001) (reversing summary judgment for school because fact issues existed on whether Confederate flag clothing posed risk of disruption under *Tinker*).

[133] *Compare* Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 276 (3d Cir. 2003) (upholding restriction on student's distribution of religious messages during "organized and pedagogically-based classroom activity" under *Kuhlmeier*), Denooyer v. Merinelli, No. 92-2080, 1993 WL 477030, at *3 (6th Cir. Nov. 18, 1993) (upholding teacher's decision not to permit videotaped performance for in-class oral presentation under *Kuhlmeier*), *and* Duran *ex rel.* Duran v. Nitsche, 780 F. Supp. 1048, 1054–56 (E.D. Pa. 1991) (upholding teacher's decision not to allow student to give oral presentation on God to class or to distribute survey prepared in conjunction with presentation under

dents or teachers;[134] speech insulting, defaming, or defying school officials;[135] and speech subject to prior restraints on distribution[136]—

Kuhlmeier), *with* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (arguing that forbidding discussion of Vietnam War absent showing of material and substantial disruption would be unconstitutional "except as part of a prescribed classroom exercise"), *and* Walker-Serrano *ex rel.* Walker v. Leonard, 325 F.3d 412, 418–19 (3d Cir. 2003) (finding that school authorities' decision to prohibit circulation of petition during class did not violate *Tinker*); *see also* Settle v. Dickson County Sch. Bd., 53 F.3d 152, 156 (6th Cir. 1995) (arguing that *Tinker* gives teachers broad discretion in limiting speech when administering curriculum and may limit otherwise protected speech if part of "prescribed classroom exercise"); McLaughlin *ex rel.* McLaughlin v. Bd. of Educ., 296 F. Supp. 2d 960, 964 (E.D. Ark. 2003) (finding that gay student had right under *Tinker* to discuss his homosexuality "as long as such speech occurs outside of the classroom or during 'non-instructional' class-time"). All these cases involve "active" speech and not the "passive" expression that was involved in *Tinker*.

134 *Compare* S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 417–19, 423 (3d Cir. 2003) (upholding suspension of student under *Fraser* for saying "I'm going to shoot you" to friends following warning from principal that any threats of violence would be disciplined severely after repeated incidents involving such threats at school), *with* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989–90 (9th Cir. 2001) (upholding expulsion of student under *Tinker* for writing poem describing shooting of other students), *and* D.F. v. Bd. of Educ., 386 F. Supp. 2d 119, 125–26 (E.D.N.Y. 2005) (upholding suspension of student under *Tinker* for writing story in which named students were murdered and sexually assaulted).

135 *Compare* Wildman *ex rel.* Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 771–72 (8th Cir. 2001) (upholding punishment of student athlete under *Fraser* for using "insubordinate" language toward her coaches), Poling v. Murphy, 872 F.2d 757, 762–64 (6th Cir. 1989) (upholding disqualification of candidate for student council president under *Kuhlmeier* for gratuitous verbal attack on school official), Rutherford v. Cypress-Fairbanks Indep. Sch. Dist., No. Civ.A. H-96-3953, 1998 WL 330527, at *2–3 (S.D. Tex. Feb. 25, 1998) (upholding suspension of student athlete under *Fraser* for using disrespectful and derogatory language towards coaches), *and* Gano v. Sch. Dist. No. 411, 674 F. Supp. 796, 798–99 (D. Idaho 1987) (upholding suspension of student for producing T-shirts that "falsely accused" school administrators of committing misdemeanor), *with Requa*, 492 F. Supp. 2d at 1280 ("[D]emeaning, derogatory, sexually suggestive behavior toward an unsuspecting teacher . . . poses a disruption of [the school's] mission whenever it occurs."), *Posthumus*, 380 F. Supp. 2d at 901–02 (stating that "[i]nsubordinate speech always interrupts the educational process" under *Tinker*), Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 527 (C.D. Cal. 1969) (arguing that *Tinker* does not apply when "profanity and vulgarity" are involved), *and* Schwartz v. Schuker, 298 F. Supp. 238, 240–42 (E.D.N.Y. 1969) (upholding ban on newspaper referring to principal as "a big liar" with "racist views and attitudes"). *But see* Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 768 (9th Cir. 2006) (finding that student criticism of coach and petition requesting his resignation could not support reasonable forecast of substantial disruption but players' refusal to board team bus caused actual disruption); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455–56 (W.D. Pa. 2001) (finding that *Tinker* protected "Top Ten" list ridiculing athletic director produced off-campus and brought to school by third party); Boyd v. Bd. of Dirs., 612 F. Supp. 86, 91–92 (E.D. Ark. 1985) (finding that *Tinker* protected student athletes' walking out of pep rally and refusing to play in game to protest racist acts of coach).

136 *Compare* Henerey v. City of St. Charles, 200 F.3d 1128, 1134 (8th Cir. 1999) (denying facial challenge to school policy requiring prior approval of student-distributed materials under *Kuhlmeier*), Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540–43 (7th Cir. 1996) (same), *and* Bystrom *ex rel.* Bystrom v. Fridley High Sch., 822 F.2d

similar to those in which courts applying *Tinker* most frequently have decided for schools.[137] While a few decisions have seized on the "basic educational mission" and other language in *Fraser* and *Kuhlmeier* to justify considerable infringements on student speech,[138] similar aberrations also occurred under *Tinker*.[139] Moreover, other decisions have interpreted *Fraser* and *Kuhlmeier* strictly in striking down unjustified school actions.[140]

To summarize, the situation after these two decisions is much the same as before: The federal courts have generally accorded student speech rights only limited protection. *Fraser* and *Kuhlmeier* have not led to any substantial decline in protection. Most importantly for the purposes of this Note, *Tinker* has been interpreted consistently as requiring deference to schools' reasonable predictions of disruption.

747, 749 (8th Cir. 1987) (same), *with* cases cited *supra* note 106 (addressing school policies requiring prior approval of student-distributed materials under *Tinker*). R

137 *Cf.* Michael Rebell, Tinker*,* Hazelwood*, and the Remedial Role of the Courts in Education Litigation*, 69 ST. JOHN'S L. REV. 539, 546 (1995) ("In applying a general doctrine . . . judges come to understand the impact of their decisions and ascertain the additional factors that must be taken into account. From this perspective, *Fraser* and [*Kuhlmeier*] can be seen as corrections or modifications, but not a reversal, of the original *Tinker* doctrine.").

138 *E.g.*, Brandt v. Bd. of Educ., 480 F.3d 460, 467 (7th Cir. 2007) (finding that "inappropriate" T-shirts are contrary to basic educational mission); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 468–71 (6th Cir. 2000) (upholding ban on Marilyn Manson T-shirt as offensive and violative of basic educational mission); Mercer v. Harr, No. Civ.A. H-04-3454, 2005 WL 1828581, at *5–6 (S.D. Tex. Aug. 2, 2005) (finding "Somebody Went to HOOVER DAM And All I Got Was This 'DAM' Shirt" T-shirt offensive); Anderson v. Milbank Sch. Dist. 25-4, 197 F.R.D. 682, 685, 688 (D.S.D. 2000) (upholding suspension of student for saying "shit" in principal's office); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999) (upholding prohibition on marching band's playing "White Rabbit" for being inconsistent with "shared values of a civilized social order").

139 *See* cases cited *supra* note 109. R

140 *E.g.*, Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322, 327–29 (2d Cir. 2006) (holding under *Fraser* that T-shirt calling George W. Bush "crook," "cocaine addict," and "lying drunk driver" and displaying images of drugs and alcohol was not plainly offensive); Curry *ex rel.* Curry v. Sch. Dist., 452 F. Supp. 2d 723, 734–40 (E.D. Mich. 2006) (holding that Christian message in school project was protected speech under *Kuhlmeier*); Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967, 971 (S.D. Ohio 2005) (holding T-shirt with message "Homosexuality is a sin! Islam is a lie! Abortion is murder!" not plainly offensive); Bragg v. Swanson, 371 F. Supp. 2d 814, 823 (W.D. W. Va. 2005) (holding Confederate flag not per se offensive); Griggs *ex rel.* Griggs v. Fort Wayne Sch. Bd., 359 F. Supp. 2d 731, 741–46 (N.D. Ind. 2005) (holding ban on T-shirt depicting rifle and U.S. Marine creed unconstitutional under *Kuhlmeier*); *see also* Bader, *supra* note 8, at 151 (noting that few lower courts have adopted "basic educational mission" rationale for limiting speech). R

III
RETHINKING *BONG HITS*

With a revised understanding of the relevant Supreme Court precedent, the *Bong Hits* decision can be put in its proper context. The emerging academic literature, following Justice Stevens's *Bong Hits* dissent, has criticized the majority's adoption of a reasonableness standard and its supposed departure from *Tinker*'s pro-speech stance.[141] However, because these accounts fail to recognize that *Tinker* itself requires that school officials' reasonable judgments be upheld, they offer no explanation of why such judicial deference might be more or less appropriate in the later decision. Moreover, fitting *Bong Hits* into the dominant student speech narrative—that the post-*Tinker* cases represent a retreat from the high-water mark set by the Warren Court[142]—may obscure some salutary accomplishments of the decision.

The *Bong Hits* opinion should be commended for going some way towards clarifying the appropriate application of the Court's previous decisions. For the first time, the Court clearly stated that *Tinker*

[141] *See* sources cited *supra* notes 8–9. Several commentators on *Bong Hits* have also argued that its holding, in permitting viewpoint-based restrictions on drug-related speech, is a departure from traditional First Amendment jurisprudence. *See* Bader, *supra* note 8, at 142 ("Whatever other limits the Supreme Court has placed on students' free speech rights in the past, it had never countenanced viewpoint discrimination of student speech prior to *Morse*, as lower courts recognized."); Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 18–19 (2008) (arguing that *Bong Hits* is unique departure from public forum jurisprudence); West, *supra* note 8, at 36–39 (same). To be clear, *Tinker*'s substantial disruption standard expressly allows content and viewpoint discrimination upon a showing that this is necessary to avoid interference with the school's work. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). Indeed, the federal circuit courts have split on whether the *Tinker* standard applies *only* to content- and viewpoint-based restrictions, or whether it also covers content-neutral restrictions. *See* Bar-Navon v. Sch. Bd., No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5–6 & n.2 (M.D. Fla. Nov. 5, 2007) (summarizing circuit split). Similarly, the circuits have split on whether *Kuhlmeier* applies to and permits viewpoint discrimination. *See* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631–32 & n.9 (2d Cir. 2005) (summarizing circuit split). In other words, *Bong Hits* is not necessarily the first Supreme Court decision that, at least arguably, permits viewpoint discrimination. While it may be the first to uphold disciplinary action explicitly targeting speech *because* of its viewpoint, rather than because of its disruptive effect or inconsistency with pedagogical concerns, *see* Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 115–16 (2008) (recognizing that schools have been given broader powers to engage in viewpoint discrimination, but arguing that *Bong Hits* nonetheless goes farther by upholding disciplinary action "squarely and explicitly based on viewpoint"); Nairn, *supra* note 8, at 246–48 (making similar argument), the practical significance of this distinction is not immediately evident, given the relatively low bar that the substantial disruption and legitimate pedagogical concern standards require to be met before particular viewpoints may be restricted. R

[142] *See supra* notes 12–15 and accompanying text. R

allowed for the suppression of speech if "school officials *reasonably* conclude that it will materially and substantially disrupt the work and discipline of the school."[143] In addition, while the majority expressly left open fundamental questions about *Fraser*,[144] Justice Alito's arguably controlling concurrence[145] firmly stated that *Bong Hits* did not endorse the view that the First Amendment permits limiting student speech because it interferes with a school's "basic educational mission."[146] Some lower-court decisions had relied on this language to justify severe restrictions on student speech.[147] As several of the amici supporting Frederick in *Bong Hits* had argued, this language could lead to the suppression of speech in a wide range of circumstances because schools have broad discretion to define their own educational missions.[148] Justice Alito's concurrence may take this overly lenient justification off the table.[149]

These positives aside, the new standard announced is misguided—not because it is a departure from *Tinker*, but because it *shares* the earlier decision's deferential posture toward educators. As the remainder of this Note attempts to demonstrate, deferring to school officials' reasonable decisions may be appropriate under *Tinker*, but it is not under *Bong Hits* because the two decisions incorporate two fundamentally different tests.

A. The Holmes and Hand Tests and Student Speech

Modern First Amendment jurisprudence emerged during World War I and its immediate aftermath in a series of criminal prosecutions of war dissenters and communists for advocating "subversive" and

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143 *Bong Hits*, 127 S. Ct. at 2626 (emphasis added).

144 *See id.* (leaving open question of whether *Fraser* governs content or manner restrictions).

145 *See supra* note 57 (discussing circuit split on status of Justice Alito's opinion). R

146 *Bong Hits*, 127 S. Ct. at 2637 (Alito, J., concurring).

147 *See* cases cited *supra* note 138. R

148 *E.g.*, Brief for Amicus Curiae Lambda Legal Defense and Education Fund, Inc. in Support of Respondent 21–25, *Bong Hits*, 127 S. Ct. 1507 (No. 06-278), 2007 WL 542415.

149 *Bong Hits*, 127 S. Ct. at 2637 (Alito, J., concurring) (noting potential for this language to be "manipulated in dangerous ways" since some schools have defined educational mission broadly to include inculcating specific political and social views); *see also* Bader, *supra* note 8, at 150–52 (commending Alito's rejection of "educational mission" rationale); R
Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 59 (2008) (same); Kanter, *supra* note 8, at 94 (same). Surprisingly, R
however, given Justice Alito's strongly worded concurrence, at least two post–*Bong Hits* lower courts have suggested that the "basic educational mission" rationale for speech restrictions remains viable. Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07 C 1586, 2007 WL 4569720, at *6 (N.D. Ill. Dec. 21, 2007); Nguon v. Wolf, 517 F. Supp. 2d 1177, 1188 (C.D. Cal. 2007).

illegal acts.[150] In these early cases, both Justice Oliver Wendell Holmes and Judge Learned Hand proposed tests by which to evaluate whether subversive advocacy should be protected. Because of the centrality of these cases to the development of robust free speech protection in this county, both tests have been highly influential in First Amendment scholarship and jurisprudence.[151] Their underlying principles help demonstrate why judicial deference to educators is appropriate under *Tinker* but not under *Bong Hits*.

1. Holmes, Clear and Present Danger, and Tinker

In 1919 the Supreme Court affirmed the conviction of Charles T. Schenck, a Socialist Party official, for mailing 15,000 leaflets urging draftees to resist conscription.[152] Writing for the majority, Justice Holmes famously argued, "[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[153] For Justice Holmes, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[154] Because Schenck's leafleting had occurred while the United States "was at war with the German Empire," Justice Holmes found the clear and present danger standard satisfied.[155]

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150 David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207 (1983).

151 The complex historical interaction between the two tests, their relative waxing and waning in First Amendment jurisprudence, and the intertwined role their respective authors played in creating the robust protections for free speech that American adults presently enjoy is a story as fascinating as it is oft-told. For different and competing versions, see Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166–77 (1982), and Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 719–55 (1975).

152 This action violated the 1917 Espionage Act's prohibition on causing or attempting to cause insubordination, disloyalty, or refusal of duty in the military or naval forces, and obstructing the recruiting and enlistment service of the United States. Schenck v. United States, 249 U.S. 47, 48–49 (1919); *see also* Schwartz, *supra* note 151, at 210, 214–15 (describing case). R

153 *Schenck*, 249 U.S. at 52 (citation omitted).

154 *Id.* (emphasis added).

155 *Id.* at 49, 52. As many scholars have argued, Justice Holmes's application of the clear and present danger standard in *Schenck* was not particularly strict, as it is not clear what the precise danger was or why Holmes thought it imminent. *E.g.*, Gunther, *supra* note 151, at 737; Rabban, *supra* note 150, at 1260–65. In a series of later dissenting and concurring opinions in *Abrams v. United States*, 250 U.S. 616 (1919), *Gitlow v. New York*, R

The clear and present danger test, like the *Tinker* test, focuses on the predicted consequences of speech. Justice Holmes's standard asks whether speech creates a clear and present danger of harm; *Tinker* asks whether it is reasonable to predict that speech will create a substantial and material disruption or interference.[156] As such, both tests require a fact-laden, context-dependent analysis. The nexus between speech and the potential danger must "be determined upon the special facts of each case" and is "a question of degree . . . [that] may vary with circumstances."[157] When employing either of these tests, judges make a counterfactual ex post determination of what danger might have occurred if speech had not been restricted, and then use this determination to evaluate the ex ante prediction of danger by the decisionmaker who prohibited the speech at issue.

For Justice Holmes, keeping the danger posed by speech at the center of the inquiry was critical. As he explained, "'The reason for punishing any act must generally be to prevent some harm which is foreseen as likely to follow that act under the circumstances in which it is done.'"[158] Indeed, allowing judges the flexibility to uphold those speech restrictions that pose an actual danger, while protecting speech that poses no such danger, is the major benefit of both the clear and present danger and *Tinker* substantial disruption tests.[159] On the other hand, allowing judges this flexibility entails significant costs. As Judge Hand said about the clear and present danger standard, "[Y]ou give to Tomdickandharry, D.J., so much latitude . . . that the jig is at once up."[160] Because the Holmes/*Tinker* type of test asks judges to

268 U.S. 652 (1925), and *Whitney v. California*, 274 U.S. 357 (1927), Justice Holmes and, later, Justice Brandeis interpreted the test in a significantly more speech-protective manner. These varying interpretations of the clear and present danger test illustrate its considerable malleability. *See infra* notes 160–62 and accompanying text. R

156 In other words, Justice Holmes's clear and present danger test requires a higher probability of harm, but does not specify what harm needs to occur. By contrast, *Tinker* requires a lower probability of harm, but specifies what harm must occur—a substantial and material disruption—albeit in a manner that is subject to considerable variations in interpretation. *See supra* Part II.A.

157 Schwartz, *supra* note 151, at 217 (citation omitted) (internal quotation marks omitted); *see also Schenck*, 249 U.S. at 52 (stating that whether clear and present danger exists "is a question of proximity and degree"). R

158 *See* Schwartz, *supra* note 151, at 216–17 (discussing clear and present danger test in relation to Holmes's theory of criminal attempts) (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 67–68 (1881)). R

159 *See* Redish, *supra* note 151, at 1182–83 (making case for clear and present danger test in light of First Amendment's presumption that speech should be accorded high value); *cf.* Schwartz, *supra* note 151, at 224–27 (making similar argument in discussing clear and present danger test's application in *Abrams*). R R

160 Gunther, *supra* note 151, at 770 (quoting Letter from Judge Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921) (on file with Harvard Law School Library)). R

evaluate decisionmakers' forecast of the future consequences of speech—a determination that differs according to the circumstances and is entirely a matter of degree[161]—it is subject to quite varied interpretations, as well as potential abuse.[162]

Moreover, this type of test requires judges to engage in speculation about hypothetical outcomes of events, a task in which they have no more expertise (and quite possibly less) than the decisionmakers whose actions they are reviewing. Judge Hand made this argument as well. As his leading biographer describes, "To second-guess enforcement officials about probable consequences of subversive speech was to him a questionable judicial function: judges had no special competence to foresee the future."[163]

Given these considerations, judicial deference to the reasonable judgments of decisionmakers is justified when applying this type of outcome-focused test. Both the decisonmaker's choice to limit speech and the judge's evaluation of that choice necessarily involve complex fact- and context-dependent judgments. Judicial deference to reasonable decisions acknowledges the difficulty that decisionmakers face in predicting ex ante the likely consequences of speech and recognizes the problems inherent in judges' ex post, counterfactual second-guessing of these decisions, especially because judges have no more expertise predicting the future than anyone else. Indeed, Part III.B argues that judges' evaluation of the likely consequences of student speech may be *less* reliable than that of school officials.

Of course, deferring to the reasonable judgments of decisionmakers may exacerbate the inherent susceptibility of such tests to inconsistent application and manipulation.[164] However, the increased malleability is at least partially counterbalanced by these tests' requirement of a showing of likely harm. Demanding that there be a clear and present danger of a substantive evil, or that there be the possibility of a substantial and material disruption to school activities, means that there remains at least some check on judicial discretion

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[161] *See supra* note 157 and accompanying text. **R**

[162] Indeed, Judge Hand's warning was borne out in the first subversive advocacy case in which the Court adopted Justice Holmes's test. In upholding the convictions of the nation's top Communist Party leaders, the Court argued that the clear and present danger test was satisfied, despite the lack of any discernible danger. *See* Dennis v. United States, 341 U.S. 494, 588 (1951) (Douglas, J., dissenting) (arguing that "Communism as a political faction or party in this country plainly is" a "bogey-man"); *see also* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 395–407 (2004) (discussing failure of Court to protect speech in *Dennis*).

[163] Gunther, *supra* note 151, at 725. **R**

[164] *See supra* notes 160–62 and accompanying text. **R**

and censorship.[165] As Part III.B explores, there may also be countervailing interests at play, such as those present in the public school system, that support deference to reasonable decisions to restrict speech.

2. *Hand, Express Advocacy, and* Bong Hits

In 1917, as World War I was raging, Judge Learned Hand, then sitting on the district court for the Southern District of New York, decided *Masses Publishing Co. v. Patten*.[166] *The Masses* was "a monthly revolutionary journal" whose editors had sought an injunction against the New York postmaster for refusing to distribute the magazine under the 1917 Espionage Act.[167] Judge Hand ruled that *The Masses* could not be construed as "willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military" under the Espionage Act.[168] Yet he cautioned that there were limits to how far individuals can criticize "the existing law or . . . the policies of war": "One may not counsel or advise others to violate the law as it stands."[169] Judge Hand recognized that one could advocate lawbreaking "as well by indirection as expressly," but he believed that allowing indirect advocacy to be restricted would cut too deeply into free speech rights.[170] Thus, he held that only express advocacy of illegal acts could be criminalized: "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation."[171]

As evident from his later criticism of Justice Holmes's clear and present danger test, Judge Hand was reluctant to ask judges to make predictions about the future and leery of giving them too much flexibility in applying speech-restrictive standards. Thus, Judge Hand's express advocacy test attempted to avoid these problems. Like the *Bong Hits* test, which asks whether student speech advocates illegal drug use,[172] Judge Hand's formulation focuses on the nature of speech

165 Of course, the showing of harm that *Tinker* requires may be quite small. Nonetheless, this requirement does provide some limited protection to student speech, at least as it has been interpreted by the lower courts. *See supra* Part II.A.

166 244 F. 535 (S.D.N.Y. 1917).

167 *See* Gunther, *supra* note 151, at 723 (describing decision). R

168 *Masses*, 244 F. at 539–40.

169 *Id.* at 540.

170 *Id.* ("The distinction [between indirect and express advocacy] is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom . . . .").

171 *Id.*

172 Chief Justice Roberts's standard in *Bong Hits* uses the word "encourage," rather than "advocate." Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2622 (2007). His opinion also occasionally uses the word "promote." *Id.* at 2622, 2624. While "encourage"

itself and not its likely consequences. It thus requires judges to engage in textual analysis, a task in which they have substantial experience and expertise, and not to make counterfactual speculations about the probability of future events.[173]

Unlike *Bong Hits*, however, which permits speech that may be *reasonably* construed as advocacy to be prohibited, Judge Hand's test makes a sharp distinction between express advocacy, which may be proscribed, and speech that does not expressly advocate illegal acts, which may not. This is a critical difference. Judge Hand wanted a test that was "hard," "absolute and objective," and "difficult to evade."[174] Thus, he attempted to formulate a standard that would create a plain division between speech that may be restricted and speech that may not[175]—one that did not include the considerations of context and degree necessitated by Justice Holmes's clear and present danger inquiry.[176] By contrast, *Bong Hits* requires judges to evaluate the reasonableness of educators' determinations, thereby blurring the clean line between proscribable and nonproscribable speech that Judge Hand advocated.

In doing so, the *Bong Hits* test eliminates the main advantage of Judge Hand's standard but retains its principal weakness. The primary benefit of the Hand approach is that a clear, categorical test is difficult to manipulate and less likely to result in inconsistent applica-

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and "promote" might suggest more emphasis on the likely effect of speech than does "advocate," Chief Justice Roberts's focus in *Bong Hits* was on the nature of the speech itself and not its possible consequences. This is evident from his discussion of the *Bong Hits* banner, which is confined almost entirely to a lengthy parsing of whether the language could be reasonably construed as "advocat[ing] the use of illegal drugs." *Id.* at 2625. Moreover, Justice Alito's concurrence uses "advocacy," and not "encouragement," *id.* at 2636, as do Justice Thomas's concurrence, *id.* at 2629–30, and Justice Stevens's dissent, *id.* at 2643–44, confirming that the required inquiry is into the nature of the speech, not its consequences. *But see* Bader, *supra* note 8, at 144–46 (arguing that decision justified censorship because of speculative risk of harm). R

173 *See* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 351–52 (1994) (discussing judicial competence in analyzing texts in context of constitutional interpretation); Gunther, *supra* note 151, at 725 ("[J]udges [have] no special competence to foresee the future."). R

174 *Id.* at 725 (quoting Letter from Judge Learned Hand to Zechariah Chafee, Jr. (Dec. 3, 1919) (on file with Harvard Law School Library), and Letter from Judge Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921) (on file with Harvard Law School Library)).

175 *See* Schwartz, *supra* note 151, at 213 ("The *Masses* test, its author stressed, was an *objective* test."); *see also* Redish, *supra* note 151, at 1183–84 (describing "categorical" First Amendment rules). Of course, every human judgment involves some measure of subjectivity and indeterminacy, but the Hand test attempts to keep this to a minimum. R R

176 *See* Redish, *supra* note 151, at 1183–84 (discussing goals of categorical First Amendment tests). R

tion.[177] However, the price inherent in maintaining this clean line is significant: In eliminating the malleable considerations of context and degree inherent in examining the likely consequences of speech, the express advocacy test allows speech to be prohibited even when it poses no risk of harm.[178]

By comparison, *Bong Hits*' deference to school officials' reasonable decisions makes the judge's inquiry far more flexible, allowing more room for inconsistent results and manipulation. More importantly, blurring the line between speech that constitutes advocacy and speech that does not destroys the main protective characteristic of Judge Hand's test. Since the *Bong Hits* and express advocacy standards, unlike the *Tinker* and clear and present danger standards, allow for the restriction of speech absent a showing of harm, insisting on a clear line is crucial if these tests are to have any power to protect speech. As Martin Redish cogently argues,

> [I]f a court cannot be satisfied by a facial examination of the challenged speech and instead must look to the specific context to determine whether unlawful advocacy [was reasonably predicted], the door is open to significant manipulation and abuse. Indeed, such a modification of [the express advocacy test], if unaccompanied by a required demonstration of a real likelihood of harm, would produce disastrous results. For then the invitation to suppress unpopular groups would be tremendous; authorities would be free from *both* the requirement that the speech advocate unlawful conduct on its face *and* that it present a real likelihood of harm.[179]

In sum, eliminating the hard line between speech that constitutes advocacy and speech that does not is antithetical to this type of test, as it undermines the rigid categorization that gives the test its speech-protective power. This may lead to "disastrous results," as speech can be prohibited even if it neither clearly advocates illegal acts nor poses any likelihood of harm.

It remains too early to predict whether *Bong Hits* will be disastrous. Like the Supreme Court's previous decisions, the Court's new standard is malleable and may be applied inconsistently by the lower

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177 *See id.* at 1188 ("[B]y requiring that the speaker have directly advocated unlawful conduct before speech is to be suppressed, the *Masses* test makes it difficult to employ the danger of speech as a guise for mere dislike [and] seems to leave relatively little room for a judge or jury to manipulate it . . . ."); *see also* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500–08 (1975) (advocating use of this type of categorical rule).

178 *See* Redish, *supra* note 151, at 1188 ("[B]y removing case-by-case flexibility the *Masses* test will often lead to justification of suppression of illegal advocacy that presents absolutely no danger of any harm to anyone. By definition, the test lets nothing turn on a showing of a likelihood of harm flowing from the challenged expression."). R

179 *Id.* at 1189.

courts.[180] Whether the courts generally will construe the decision narrowly or stretch the standard to uphold schools' actions remains to be seen.[181] Nonetheless, its potential to justify considerable restrictions on student speech is clear. Lacking a hard line between speech that constitutes advocacy and speech that does not, and failing to require any showing of harm comparable to that mandated under *Tinker*, the *Bong Hits* standard allows restriction of any speech that educators "reasonably" believe to advocate drug use, regardless of its potential to cause actual damage. As one commentator has argued, this standard "puts almost no practical limitations on a school's ability to censor drug-related student speech."[182] The potential for serious curbs on speech is evident from the *Bong Hits* decision itself, where it is difficult to see how Frederick's banner constituted advocacy of anything[183] or would have any effect on student drug use.[184] Ominously, some lower courts have already relied on Justice Alito's concurrence to justify *Bong Hits*' application to non-drug-related speech that implicates students' physical safety.[185] Thus, *Bong Hits* may well be used to support serious restrictions on student speech in a broad range of circumstances.[186]

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[180] *Cf. supra* notes 100–09, 128–40 and accompanying text (describing lower courts' application of decisions). **R**

[181] Perhaps not surprisingly, courts so far have done both. *Compare* cases cited *infra* note 185 (extending *Bong Hits* to non-drug-related speech), *with* DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 639 (D.N.J. 2007) (limiting *Bong Hits* to drug-related speech), *and* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 596–97 (W.D. Pa. 2007) (same). **R**

[182] *Leading Cases*, *supra* note 6, at 300. **R**

[183] *See supra* note 6 and accompanying text (discussing literature that questions whether banner advocated student drug use); *see also Leading Cases*, *supra* note 6, at 301 ("The Court . . . found the use of a single, contextless drug-related phrase . . . sufficient to warrant suspension."). **R** **R**

[184] *See* Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting) ("Admittedly, some high school students . . . are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it.").

[185] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 772 (5th Cir. 2007) (upholding transfer to special education program of student who threatened "Columbine-style" attack); Boim v. Fulton County Sch. Dist., 494 F.3d 978, 984–85 (11th Cir. 2007) (upholding suspension of student for writing story detailing dream of shooting school teacher). Indeed, while Justice Alito's opinion attempted to demarcate and limit *Bong Hits*' scope, the "physical safety" rationale he adopted may have provided more scope for the expansion of *Bong Hits* than did Chief Justice Roberts's majority opinion, which was careful to discuss only drug-related speech. *See* Bader, *supra* note 8, at 152–53 (noting potential for Justice Alito's concurrence to expand scope of *Bong Hits*); Chemerinsky, *supra* note 141, at 21–22 (same); Volokh, *supra* note 57 (same); *Leading Cases*, *supra* note 6, at 304 (same). **R** **R** **R**

[186] Frederick displayed his banner across the street from school, having come directly from home to the parade; nonetheless, the Supreme Court summarily rejected his argument that this was off-campus speech, not speech in school. *Bong Hits*, 127 S. Ct. at 2624. As several commentators have noted, the Court's decision to overlook the precise location

B. Public Schools' "Special Characteristics"

In analogizing to two tests developed to protect adult speech, Part III.A ignored the "special characteristics" that exist in public schools.[187] This Part argues that these policy considerations add additional weight in favor of judicial deference under *Tinker* but against deference under *Bong Hits*.

Protecting children's speech rights and encouraging their exercise is critical to the continued vitality of a liberal democratic state.[188] At the same time, full speech rights may not be appropriate for children, as they are still learning how to use their developing rational and communicative capacities, with assistance from school teachers charged with educating these future citizens.[189] Thus the Supreme Court has approved restrictions on the First Amendment rights of children against the government in limited circumstances even outside the schoolhouse gate.[190] Inside that gate, the Supreme Court has repeatedly held that teachers and school officials are entitled to substantial deference in their decisions regarding the conduct and control of the educational process.[191]

This deference is based on two related rationales: first, that school boards and teachers have the requisite experience, expertise, and familiarity with local culture and values to determine how best to instruct students, and second, that education policy is primarily the responsibility of the states. Therefore, federal judges, who have little experience or expertise in this regard, should not indiscriminately

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of Frederick's speech may further expand the range of situations in which restrictions on student speech may be justified. *See* Kathleen Conn, *The Long and the Short of the Public School's Disciplinary Arm: Will* Morse v. Frederick *Make a Difference?*, 227 EDUC. L. REP. 1, 9–10 (2008); Kanter, *supra* note 8, at 109. However, it probably goes too far to suggest, as Sonja West has done, that principals may now "sanction any event they choose" and thereby "lessen every student's speech rights at the event with no obligation to give . . . prior notice." West, *supra* note 8, at 40. R R

187 *See supra* note 1 and accompanying text (discussing "special characteristics" of school environment). R

188 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (arguing that "scrupulous protection of Constitutional freedoms" of children is necessary "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes").

189 *See* Dienes & Connolly, *supra* note 14, at 348–56 (discussing these competing interests). R

190 *See* FCC v. Pacifica Foundation, 438 U.S. 726, 749–50 (1978) (upholding FCC's power to control "vulgarity" in broadcasting because of potential exposure to children); Ginsberg v. New York, 390 U.S. 629, 636–37 (1968) (upholding ban on sale of pornography to minors). These cases involved adult speakers, but the Court allowed restrictions on children's rights to hear the speech.

191 *See supra* note 1 and accompanying text (discussing "special characteristics" of school environment). R

overrule educators' decisions. In the Supreme Court's oft-quoted words,

> 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. . . . 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 . . . .[192]

Both of these rationales support deference under *Tinker*. Making an accurate prediction about whether a particular type of speech is likely to cause a substantial disruption involves a complex judgment based on a number of factors, including "past experience in the school, current events influencing student activities and behavior, and instances of actual or threatened disruption relating to the [speech] in question."[193] Given the difficulty of making this type of decision,[194] judges—who do not share the educators' knowledge or experience—should accord considerable respect to teachers' predictions of disruption.[195] Similarly, judicial deference serves federalism values by allowing room for states, local school boards, and teachers to set educational policy, control the classroom environment, and inculcate community values.[196]

By contrast, neither the educational expertise nor the federalism rationales supports deference under *Bong Hits*. Determining whether speech advocates drug use does not involve any consideration of how children should be educated or what may interrupt the educational process. Nor are the factors at play in predicting disruption relevant to the determination of whether speech advocates drug use or not.[197] In short, the school administrator's expertise and experience are not

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[192] Wood v. Strickland, 420 U.S. 308, 326 (1975). Similarly, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court stated, "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* at 104.

[193] Bystrom *ex rel.* Bystrom v. Fridley High Sch., 822 F.2d 747, 754 (8th Cir. 1987).

[194] *See, e.g.*, LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("Forecasting disruption is unmistakably difficult to do.").

[195] *See* Diamond, *supra* note 46, at 497 ("The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning."). *But see* Scott A. Moss, *Students and Workers and Prisoners—Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1658–59 (arguing that need for deference to educators is overblown). R

[196] *See* Diamond, *supra* note 46, at 506–09 (discussing federalism values served by local control of public education); Wright, *supra* note 89, at 84–85 (same). R R

[197] That is not to say that what constitutes advocacy may not vary according to local student culture and jargon. In making her determination, a judge may validly take into account evidence on this score. But evaluating this evidence is unlikely to involve any

implicated in making this judgment. The judge's considerable experience and expertise in textual analysis, on the other hand, are significant assets here.[198] Moreover, the judge's distance from the decision to proscribe speech may improve the objectivity of his analysis; by contrast, the educator's proximity to the decision may impede detached consideration. Finally, federalism values are not served by judicial deference. Deterring drug use by minors is not a matter of state educational policy or local values; rather, it is a national commitment.[199] While local experimentation on handling the problem of juvenile drug use may well help advance national narcotics policy, it is not clear how allowing school boards to define what constitutes advocacy of illegal drug use could possibly do so. All these considerations, therefore, militate against giving any deference to school officials' determination of what constitutes advocacy under *Bong Hits*.[200]

One other potential argument might be raised to support judicial deference under *Bong Hits*. The Supreme Court has allowed restrictions on speech that may harm children because of their susceptibility to outside influence and their still-developing capacity to exercise autonomous choice.[201] Under this justification, one might argue that the threat illegal drug use poses to children is so great that even speech which reasonably might be construed as advocating drug use, as well as speech that expressly does so, should be restricted.[202]

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determination as difficult and context-dependent as that involved in predicting the likelihood of disruption and thus does little to justify judicial deference to educators.

198 *See supra* note 173 and accompanying text (noting judges' expertise in textual analysis). R

199 *See* Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2628 (2007) (discussing national problem of child drug abuse and Congress's efforts to tackle it).

200 *See* Wright, *supra* note 89, at 59 ("[T]he courts should tend to defer to local elected officials on free speech issues where, but only where, the local political decision-makers possess the relevant, decisive comparative advantage with respect to the precise free speech issue at hand."). Of course, one might argue that courts will undermine school discipline if they do not defer to teachers' decisions. Aside from shortchanging students' First Amendment rights, this argument fails to recognize that the law already provides a better mechanism to support the legitimate disciplinary actions of educators: qualified immunity. Under the qualified immunity doctrine, damages lawsuits against state officials will only succeed by showing a violation of a clearly established federal right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This mechanism thus helps insulate educators' reasonable decisions and dispel the specter of students using lawsuits to undermine discipline, while still allowing full protection of student rights. R

201 *See Bong Hits*, 127 S. Ct. at 2638 (Alito, J., concurring) (justifying decision on basis of threat to student's physical safety); *see also* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion) (justifying restrictions on rights of children because of their "peculiar vulnerability" and "inability to make critical decisions" in "informed, mature manner").

202 *Cf.* Garvey, *supra* note 66, at 357 ("[T]hat the child may not appreciate the . . . consequences that can follow incitement may imply that school authorities should be R

Without question, the states' interest in preventing illegal drug use among children is extremely important.[203] Nonetheless, this justification must be balanced against the cost to children's free speech rights. As demonstrated, the rationale of protecting children from harm may easily be extended far beyond drug-related speech,[204] thus potentially permitting restrictions on speech over a broad range of topics. Given this prospect and the inherent costs of requiring judicial deference to "reasonable" school decisions,[205] one doubts whether the incremental protection against juvenile drug use is worth the likely price to student speech.[206]

CONCLUSION

The question of how coextensive the speech rights of children, both in and out of schools, should be with those of adults sits atop a deep tension in liberalism between the commitment to personal liberty and the need for society to educate its young.[207] This tension drives the scholarly debate on how to understand the Supreme Court's student speech jurisprudence. Most academics argue that student speech rights are not adequately protected, pointing to *Tinker* as proof that the Supreme Court once took a more liberal position.[208] A few believe that educators need more control over students, not less, and argue that *Tinker* was misguided.[209] However, whatever scholars' position on the larger question, if any of these arguments is to be accurate, it cannot be predicated on the false idea that the federal

allowed to establish a demilitarized zone between protected speech and dangerous speech, merely as a precaution against students crossing the latter line.").

203 *See Bong Hits*, 127 S. Ct. at 2628 (discussing problem of child drug use).

204 *See supra* notes 185–86 and accompanying text (discussing expansion into non-drug-related areas). R

205 *See supra* notes 182–84 and accompanying text (describing risk of unwarranted restrictions on speech under *Bong Hits*). R

206 How the costs and benefits of this potential additional restriction on speech should be weighed, however, is ultimately a policy question that goes to the broader issue of how student speech should be balanced against other societal interests. *See supra* note 16 (distinguishing broader issue of how much student speech should be protected). R

207 *See generally* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE ch. 5 (1980) (discussing liberalism and education); AMY GUTMANN, DEMOCRATIC EDUCATION (1987) (same).

208 *See* sources cited *supra* note 14. R

209 *See, e.g.*, Diamond, *supra* note 46, at 477 (arguing that courts should apply "minimum rationality standard" to all local school administration action); Garnett, *supra* note 149, at 52–57 (questioning whether *Tinker*'s vision was "insufficiently attentive" to schools' mission to educate and inculcate students); Kay S. Hymowitz, Tinker *and the Lessons from the Slippery Slope*, 48 DRAKE L. REV. 547, 547–48, 555–57 (2000) (arguing that *Tinker* is representative of false understanding of nature of children, leading to breakdown in discipline and learning); Wright, *supra* note 89, at 64–68 (advocating judicial intervention only in "rare instances" of "significant impairment of relevant [free speech] capacity" of child). R R R

courts once gave substantially less discretion to educators, and substantially more protection to student speech, than they do now.

Ancillary to the fundamental tension in liberal values is the second main issue addressed in this Note: Once a balance between children's speech rights and society's educative needs has been struck, what role should different institutions play in monitoring and maintaining the balance? As I have suggested, the answer lies in recognizing the distinctive competencies of different institutions in relation to the tests chosen to safeguard speech.[210] Under the *Tinker* standard, which involves a difficult prediction of the likely future consequences of speech, judges may appropriately defer to the reasonable judgment of educators and local school boards, who are best placed to determine what is likely to disrupt the educative process. Whether judges should interpret the "material and substantial disruption" requirement more strictly in order to give greater protection to student speech, however, is a separate issue, going to the larger question of how children's rights should be balanced against educational requirements.[211]

Similarly, the question of whether to sacrifice the speech rights of students to advocate unpopular positions in the name of the societal interest in deterring drug use goes to the same larger issue.[212] Regardless of the balance struck, however, there is no reason for judicial deference under *Bong Hits*, which involves the type of objective textual analysis in which courts have considerable experience and skill. Thus, unless and until the Supreme Court replaces the *Bong Hits* standard, lower courts should narrowly construe its "reasonableness" language to provide for greater scrutiny of school officials' decisions. Given that the courts have already begun to apply the *Bong*

[210] While this Note has not focused on what level of deference is appropriate under *Fraser* and *Kuhlmeier*, the analysis does suggest an answer. The *Fraser* test focuses on the nature of speech itself—namely, whether it is lewd, profane, or indecent. Because this involves objective textual analysis, deference to educators' judgments is not appropriate. Nonetheless, since what is lewd or indecent is at least partially context-dependent, judges should take into account local culture and values in their analysis. *Cf.* Miller v. California, 413 U.S. 15, 31–32 (1973) (holding that obscenity is defined in relation to "contemporary community standards"). Under *Kuhlmeier*, by contrast, considerably more deference to educators' decisions is justified, as the decision covers only situations where the school plays a substantial role in producing speech. *See supra* notes 117–20 and accompanying text (discussing justified deference under *Kuhlmeier* test). R

[211] *See, e.g.*, Garvey, *supra* note 66, at 351–57 (discussing how strictly *Tinker* should be interpreted for student speech criticizing school personnel and rules). R

[212] One might begin to answer this question by asking whether, if student speech is being sacrificed to deter drug use among children, some showing that the speech will lead to increased drug use should be required. *See* Morse v. Frederick (*Bong Hits*), 127 S. Ct. 2618, 2645–47 (2007) (Stevens, J., dissenting) (arguing that government should have to show nexus between speech and harm government wishes to avoid).

Hits test to non-drug-related speech that implicates student safety,[213] this narrowed construction may be critical in preventing broad and unwarranted suppression of student speech.

[213] *See* cases cited *supra* note 185 (discussing expansion into non-drug-related areas). **R**