Article

Just Extracurriculars?

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Extracurricular activities have been the battleground for a striking number of Supreme Court cases set at public schools, from cases involving speech to religion to drug testing. Indeed, the two most recent Supreme Court cases involving constitutional rights at public schools—Kennedy v. Bremerton School District *(2022) and* Mahanoy Area School District v. B.L. *(2021)—both arose in the extracurricular context of school sports. Even so, the Supreme Court has never fully clarified the status of extracurricular activities themselves. Once a school offers an extracurricular activity, is participation merely a privilege? Does the fact that extracurricular activities are voluntary for students affect how their constitutional rights play out there? Where do coaches' and other extracurricular advisors' own constitutional rights fit in? The Supreme Court has not explicitly answered these questions, and its implicit answers have varied.*

This Article brings the key constitutional questions about extracurricular activities from the background to the foreground. It analyzes Mahanoy *and* Kennedy *through the lens of extracurricular activities, showing that here, too, there is inconsistency. The decisions converged in terms of their outcomes—victories for the plaintiffs on their First Amendment claims against the school districts—but diverged in terms of recognizing the significance of extracurricular activities in students' lives. The Article shows how the decisions' inconsistency echoes that of earlier Supreme Court cases and leaves open questions about extracurricular activities that have been percolating in the lower courts for years. It then turns to psychological research about the significance of*

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extracurricular activities in students' lives. This research, which shows that extracurricular activities have major implications for students' academic performance, drop-out rates, social/emotional development, mental health, likelihood of substance abuse, and risk of depression and suicide, points toward the need to take extracurricular activities seriously.

The appropriate way to conceive of extracurricular activities, the Article argues, is to view them as extensions of the school day, rather than minimizing them as "just" extracurriculars. This would have important implications for how students' constitutional rights play out in the extracurricular setting. It would mean that punishing a student for her speech by excluding her from an extracurricular activity should trigger the same sort of robust First Amendment analysis that would apply to removal from a class. It would also make clear that the voluntary nature of extracurricular activities does not mean that religious coercion is less of a concern, or that reasonable expectations of privacy are lower. And it would highlight the need for limitations on a current practice among many school districts: using extracurricular activities as a lever to regulate out-of-school conduct, such as vaccination for COVID-19 or presence at gatherings where alcohol is served, that schools cannot regulate directly. Extracurricular activities are not "just" extracurriculars—and so they need to operate in a way that is just.

INTRODUCTION

A high school football coach's prayer on the fifty-yard line.[1] A ninth-grade cheerleader's "fuck cheer" post to her Snapchat story.[2] The speech in the Supreme Court's two very recent school speech cases—*Kennedy v. Bremerton School District*[3] and *Mahanoy Area School District v. B.L.*[4]—could hardly seem more different. But there is a largely unexplored link between the cases: they both arose in the context of extracurricular activities.[5] In fact, extracurriculars have been the battleground for a striking number of Supreme Court cases set at public schools, from cases involving speech[6] to religion[7] to drug testing.[8] Even so, the

1. Kennedy v. Bremerton Sch. Dist. (*Kennedy Supreme*), 142 S. Ct. 2407, 2415–16 (2022) (describing the petitioner coach's habit of praying after football games).

2. Mahanoy Area Sch. Dist. v. B.L. (*Mahanoy Supreme*), 141 S. Ct. 2038, 2043 (2021) (describing Snapchat post by respondent high school student).

3. *Kennedy Supreme*, 142 S. Ct. 2407 (2022).

4. *Mahanoy Supreme*, 141 S. Ct. 2038 (2021).

5. *Kennedy Supreme*, 142 S. Ct. at 2443 (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000) (noting that American football is an extracurricular activity); *Mahanoy Supreme*, 141 S. Ct. at 2043 (describing the respondent's involvement in cheerleading as an extracurricular activity).

6. *See, e.g.*, *Mahanoy Supreme*, 141 S. Ct. at 2048 (holding that a high school cheerleader's right to free speech was violated when she was suspended after using profane language in a Snapchat post); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (upholding punishment of a student for his crude speech nominating a classmate for student elective office); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (announcing standard for school oversight of student speech that is expressed in school publications, whether or not those publications are produced in a classroom or an extracurricular activity).

7. *See, e.g.*, *Kennedy Supreme*, 142 S. Ct. 2407, 2433 (2022) (holding that a school district's firing of a football coach for praying at the fifty-yard line following football games violated his First Amendment Free Exercise and Free Speech rights); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316–17 (2000) (holding that school practice of facilitating student-led prayer at football games violates the Establishment Clause); Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 253 (1990) (upholding the constitutionality of the Equal Access Act, which prohibits public secondary schools that maintain a "limited open forum" for student groups from "discriminat[ing] against [groups] who wish to conduct a meeting" due to the "religious, political, philosophical, or other content of the speech at such meetings" (quoting 20 U.S.C. § 4071(a))).

8. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–66 (1995) (holding that school practice of requiring all participants in interscholastic athletics to submit to random drug testing does not violate the Fourth Amendment); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls,

Supreme Court has never fully clarified the status of extracurricular activities themselves.[9] Once a school chooses to offer an extracurricular activity, is participation merely a privilege? If First and Fourth Amendment rights play out differently in extracurricular activities than in the classroom, is it because participating students have partially waived those rights, or because those rights themselves operate differently there? And where do coaches' and other extracurricular advisors' *own* constitutional rights, as public school employees, fit in?

Not only has the Supreme Court largely avoided explicitly articulating or answering these questions, but its implicit answers to them have varied. In *Santa Fe v. Doe*, for example, the Court held that a school district's facilitation of student-led, student-initiated prayer at football games violated the Establishment Clause.[10] The Court rejected the school district's argument that the extracurricular nature of football games lowered the stakes, stating that even though participation and attendance were voluntary, the district was "minimiz[ing] the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience."[11] It added that for students, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one."[12] In *Vernonia School District v. Acton* and *Board of Education v. Earls*, however, the Court highlighted the voluntary nature of extracurricular activities in upholding two school districts' random drug testing policies, suggesting that the students had willingly acceded to a reduced expectation of bodily privacy by signing up for sports, choir, band, or other similar activities.[13] The implication was that if

536 U.S. 822, 825, 838 (2002) (holding that school practice of requiring all participants in *any* "competitive" extracurricular activity to submit to random drug testing does not violate the Fourth Amendment).

9. *See infra* Part II.

10. *Santa Fe*, 530 U.S. at 301.

11. *Id.* at 311.

12. *Id.* at 312.

13. *Vernonia*, 515 U.S. at 657 ("There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."); *Earls*, 536 U.S. at 831 ("[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.").

the students were not comfortable with random drug testing, they could just quit.

The Court's *Kennedy* and *Mahanoy* decisions ended up not directly engaging much with the "extracurricular" aspect of the controversies in question.[14] But that aspect loomed large in the background—in the underlying facts, in the briefs, and even in the oral arguments.[15] And, once again, there is inconsistency in the decisions. On the one hand, *Mahanoy* points toward recognizing the significance of extracurricular activities in students' lives. There, when a school district kicked a cheerleader off the team for her "fuck cheer" post to Snapchat, it argued that there was no free speech violation because, among other things, her speech was about an extracurricular activity and the only punishment was removal from that activity.[16] In ruling for the student, the Court necessarily rejected that argument. *Kennedy*, meanwhile, presents a more mixed picture. There, the Court ruled in favor of a football coach who sought to publicly pray on the fifty-yard line after each game.[17] It held that the coach had free speech and free exercise rights to do so, and that the practice did not violate the Establishment Clause because "[s]tudents were not required or expected to participate" in the prayer.[18] The decision thus took extracurricular activities seriously in terms of the *coach's* rights, but it minimized their importance in the lives of *students*, failing to engage with the players' assertions that they felt pressured to participate in the prayers in order to be fully part of the team.[19]

This Article brings the key constitutional questions about extracurricular activities from the background to the foreground. Part I analyzes *Mahanoy* and *Kennedy* through the lens of extracurricular activities, teasing out the implications of the

14. *See infra* Part I.A–B.

15. *See infra* Part I.A–B.

16. *See* B.L. v. Mahanoy Area Sch. Dist. (*Mahanoy District*), 376 F. Supp. 3d 429, 438 (M.D. Pa. 2019); *see also* Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 12, *Mahanoy District*, 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-1734), 2018 WL 8059444 (asserting the argument that because students do not have a right to participate in extracurricular activities, suspending a student from participation in cheerleading cannot have constituted a First Amendment violation).

17. *Kennedy Supreme*, 142 S. Ct. 2407, 2415–16 (2022).

18. *Id.* at 2432.

19. *Id.* at 2440 (Sotomayor, J., dissenting).

two decisions for extracurriculars. Part II shows how the decisions' inconsistency echoes that of earlier Supreme Court cases and fails to address questions about extracurricular activities that have been percolating in the lower courts for years. Part III explores the psychological research about the significance of extracurricular activities in students' lives. While it is unsurprising that extracurricular activities are important to and for students, what *is* perhaps surprising is the breadth of that importance—with implications for students' academic performance, drop-out rates, social/emotional development, susceptibility to bullying, likelihood of substance abuse, and even risk of depression and suicide.

The consistency of these research findings underscores the importance of taking extracurricular activities seriously. Part IV turns to what that would mean under the law. It argues that extracurriculars should essentially be seen as extensions of the school day, rather than being minimized as "just" extracurriculars. This would have important implications for how constitutional rights play out in the extracurricular setting. It would mean that punishing a student for her speech by excluding her from an extracurricular activity should trigger the same sort of robust First Amendment analysis that suspending her from school would. It would also make clear that the voluntary nature of extracurricular activities—just like the voluntary nature of elective classes—does not mean that reasonable expectations of privacy are lower there, or that religious coercion is less of a concern. While extracurricular activities are technically voluntary, they are so important to so many students and have such positive effects on their lives that opting out is neither easy nor desirable.[20]

There are also important implications for another issue: the use of extracurricular activities as a lever to regulate out-of-school conduct that schools cannot regulate directly. For example, throughout the 2021–2022 school year, although New York City public school students did not have to get COVID-19 vaccinations in order to attend school, they *were* required to get vaccinated (if eligible) in order to participate in most extracurricular

20. *See infra* Part III.

activities.[21] Similarly, until May 2, 2023, public schools in Cambridge, Massachusetts, still required students to be fully vaccinated for COVID-19 in order to avoid being excluded from participation in any extracurricular activities, even though failure to be vaccinated did not result in exclusion from school itself.[22] Relatedly, numerous school districts have broad extracurricular activity-related "codes of conduct" that reach far beyond those activities or even school itself. The Highland Park Independent School District (HPISD) in Dallas, Texas, for example, tells students that "participation in the regular curriculum is a right afforded to each student, while participation in the extracurricular program is a privilege," that students in extracurricular activities are representing the district "whether or not they are actively performing, competing, or participating in extracurricular

21. N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, ORDER REQUIRING COVID-19 VACCINATION FOR PARTICIPATION IN HIGH RISK EXTRACURRICULAR ACTIVITIES 3 (Sept. 15, 2021), https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-high-risk-extracurricular.pdf [https://perma.cc/GVU9-HC7S] (requiring COVID-19 vaccination for all eligible students participating in "high risk extracurricular activities," which were defined to include all interscholastic sports as well as other "extracurricular activities that involve increased exhalation, such as singing, shouting, band, orchestra, chorus, musical theatre, dance/dance team, marching band, cheerleading, step teams and flag teams"); *see also* Sharon Otterman, *Why a Covid Vaccine Mandate for N.Y.C. Schoolchildren Is Unlikely Soon*, N.Y. TIMES (May 10, 2022), https://www.nytimes.com/2022/05/10/nyregion/covid-vaccine-mandate-nyc-schools.html [https://perma.cc/B5AW-CXKM] (explaining that New York State had not added the COVID-19 vaccine to the list of mandatory vaccines for school attendance, and that although Mayor Eric Adams was free to add it as a requirement for attendance at New York City public schools, he was unwilling to do so until such vaccines were fully approved for children by the FDA, which had only granted an Emergency Use Authorization of the vaccines for children). For a discussion of New York City's ultimate withdrawal of the COVID-19 vaccine mandate for extracurriculars, see, for example, Alex Zimmerman, *NYC Drops Vaccine Mandate for Student Athletes and Extracurriculars*, CHALKBEAT (Sept. 20, 2022), https://ny.chalkbeat.org/2022/9/20/23363415/nyc-student-athelte-vaccine-mandate-dropped-psal [https://perma.cc/FS5K-P8PV].

22. *Student Vaccination Update*, CAMBRIDGE PUB. SCHS. (Oct. 8, 2021), https://www.cpsd.us/cms/one.aspx?portalId=3042869&pageId=71042991 [https://perma.cc/3MHA-6EB5] (requiring students to be fully vaccinated against COVID-19 to participate in extracurricular activities); CAMBRIDGE SCH. COMM., ORDER C23-087 (May 2, 2023), https://secure1.cpsd.us/school_committee/admin/orders/C23-087.pdf [https://perma.cc/9V5U-NT2D] (announcing that, as of May 2, 2023, students were no longer required to be vaccinated against COVID-19 to participate in extracurricular activities for the 2023–2024 school year).

activities and whether or not they are wearing uniforms or other clothing that identifies the student to the community or public in any setting as HPISD students," and that therefore, "their behavior must be exemplary and reflect the finest attributes of the total HPISD student body *at all times and places*."[23] The code further warns that, among other things, students who "remain[] at any activity after becoming aware that illegal alcohol consumption is occurring [there]"—even if they themselves are not possessing or drinking alcohol—could be suspended from their extracurricular activities for a prescribed period of time.[24] A similar policy for the Southern Columbia Area School District in Catawissa, Pennsylvania, was challenged in federal district court in 2020, but the court rejected the claim.[25]

Putting aside whether it is good policy to encourage students to get vaccinated for COVID-19 or to leave parties where peers are drinking, this deployment of extracurricular activities amounts to a troubling overreach by schools. It has the potential to encroach on students' and parents' own decision-making about off-campus behavior.[26] Here, too, viewing extracurricular activities as extensions of the school day clarifies the analysis. Schools should not be able to rest on the notion that extracurricular activities are a mere privilege to which they can attach unrelated or overbroad conditions. Indeed, extracurriculars are not "just" extracurriculars—but they do need to operate in a way that is just. This Article charts a path toward that outcome.

I. ANALYZING *MAHANOY* AND *KENNEDY* THROUGH AN EXTRACURRICULAR LENS

The *Mahanoy* and *Kennedy* cases both had such major, hot button issues embedded within them that their extracurricular

23. *Extracurricular Code of Conduct 2023-2024*, HIGHLAND PARK INDEP. SCH. DIST. 1 [hereinafter *Extracurricular Code of Conduct*, HIGHLAND PARK] (emphasis added), https://4.files.edl.io/24a9/06/21/23/141637-d5be2500-9101-47de-a042-c95be238b0f7.pdf [https://perma.cc/GJC8-QHBR].

24. *Id.* at 2–3.

25. *See* T.W. v. S. Columbia Area Sch. Dist., No. 4:20-CV-01688, 2020 WL 7027636, at *10 (M.D. Pa. Nov. 30, 2020) (denying plaintiff's motion for a preliminary injunction of the policy).

26. *Cf. Mahanoy Supreme*, 141 S. Ct. 2038, 2053 (2021) (Alito, J., concurring) (noting that students do not relinquish their free speech rights and parents do not relinquish off-campus authority over their children simply because a child is enrolled in a public school).

context fell somewhat into the background.[27] *Mahanoy* implicated the long-simmering question of whether schools have authority over students' off-campus speech.[28] Over the past decade, this has become an absolutely pressing issue, given students' constant communication through digital devices, especially on social media.[29] *Kennedy*, meanwhile, came in the midst of the Supreme Court's recent and very significant reinterpretations of the Free Exercise and Establishment Clauses and their relationship to each other.[30] Lurking beneath the two cases' different

27. *See infra* Part I.A–B.

28. *Mahanoy Supreme*, 141 S. Ct. at 2045–46.

29. *See, e.g.*, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 392 (5th Cir. 2015) ("Over 45 years ago, . . . the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations."); Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013) (noting that the advent of the internet has made "the challenge for administrators . . . all the more difficult because, outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment"); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (discussing how harmful speech disseminated over the internet "raises the metaphysical question of where [the] speech occurred"); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216–19 (3d Cir. 2011) (discussing the challenges of determining when off-campus digital speech may be regulated by the school district); Watt Lesley Black, Jr. & Elizabeth A. Shaver, *The First Amendment, Social Media, and the Public Schools: Emergent Themes and Unanswered Questions*, 20 NEV. L.J. 1, 3 (2019) ("[The] enhanced ability of students and educators to broadcast their expression online has posed unprecedented legal and practical challenges."); Ari Ezra Waldman, *Triggering* Tinker*: Student Speech in the Age of Cyberharassment*, 71 U. MIA. L. REV. 428, 435 (2017) (discussing how the current geographical definition of school authority makes addressing cyberbullying difficult); Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 833 (2016) (discussing how cyberbullying has unique characteristics that make it different and more dangerous than offline bullying).

30. *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (holding that Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments is not required by the Establishment Clause, and in fact, violates the Free Exercise Clause of the First Amendment); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) ("The refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment."); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020) (holding that the Free Exercise Clause prohibits application of the "no-aid" provision of the Montana constitution

top-line issues, however, was the link between them: they both stemmed from extracurricular activities, and even more specifically, high school sports.[31] Indeed, both plaintiffs—a ninth-grade cheerleader and a high school football coach, respectively—sued their school districts because they had been excluded from participation in extracurricular sports due to their speech.[32]

A. *MAHANOY V. B.L.*

The plaintiff in *Mahanoy*, Brandi Levy[33] (known in the case as B.L.), was a ninth grader at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania, where she was on the junior varsity cheerleading team.[34] At the end of ninth grade, she tried out for varsity cheerleading, but only got offered a spot on junior varsity again—even though a student who was one year younger made the varsity team.[35] B.L. also did not get the position she wanted on a private softball team.[36] Frustrated, she posted two images to Snapchat.[37] The first was an image in which she and her friend had their middle fingers raised, with the caption: "[f]uck school fuck softball fuck cheer fuck

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concerning issuing tax credits for families with students attending religious schools); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curium) (laying out the Court's holdings on government regulation of religiously affiliated organizations); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (per curium) (enjoining the New York governor's executive order restricting the gathering of religious groups in certain areas during the COVID-19 pandemic). *See generally* Justin Driver, *Three Hail Marys:* Carson*,* Kennedy*, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 210 (2022) (stating that, according to its detractors, *Carson v. Makin*—decided the week prior to *Kennedy v. Bremerton*—"hastily enacted a radical reinterpretation of the Religion Clauses"); Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 844 (2022) ("Free exercise is in the middle of a revolution. Long neglected, the free exercise of religion has quickly become the favorite child of the Roberts Court.").

31. *See supra* note 5 and accompanying text.

32. *Kennedy Supreme*, 142 S. Ct. 2407, 2419 (2022); *Mahanoy Supreme*, 141 S. Ct. 2038, 2043 (2021).

33. *See* Adam Liptak, *A Lively Supreme Court Argument over a Cheerleader's Vulgar Rant*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/04/28/us/supreme-court-free-speech.html [https://perma.cc/73QN-4262] (naming and depicting Brandi Levy).

34. B.L. v. Mahanoy Area Sch. Dist. (*Mahanoy Circuit*), 964 F.3d 170, 175 (3d Cir. 2020).

35. *Id.*

36. *Id.*

37. *Id.*

everything."[38] The second was a blank image captioned: "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?"[39]

B.L. had about 250 "friends" on Snapchat, some of whom were cheerleaders, and word of the snaps quickly spread.[40] Not surprisingly, screenshots of the snaps quickly made their way to the cheerleading coaches.[41] In fact, one cheerleader who took screenshots was none other than the coach's daughter, who shared them with her mother and the other cheerleading coach.[42] Other cheerleaders did so as well.[43] Also not surprisingly, Mahanoy Area High School was one of the many schools with a far-reaching code of conduct that stated that participation in school sports was a "privilege" and that "participants must earn the right to represent Mahanoy Schools by conducting themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner."[44] The cheerleading team had its own similar rule—which B.L. had signed before tryouts—that "[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet."[45] More striking is the extent of the punishment that the school district imposed after finding that B.L.'s snaps violated these rules. The district, pursuant to the cheerleading coaches' decision, suspended her from the junior varsity cheerleading squad for the entire school year.[46]

B.L. sued, arguing that this punishment violated her free speech rights.[47] And she won.[48] The U.S. District Court for the Middle District of Pennsylvania first granted her a preliminary

38. *Id.*

39. *Id.* (alterations in original).

40. B.L. v. Mahanoy Area Sch. Dist. (*Mahanoy District*), 376 F. Supp. 3d 429, 433 (M.D. Pa. 2019).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Mahanoy Circuit*, 964 F.3d at 193 (quoting the "Personal Conduct Rule" of the Mahanoy Area High School Student Handbook).

45. *Mahanoy District*, 376 F. Supp. 3d at 432 (quoting the "Negative Information Rule" of the "Cheerleading Rules").

46. *Id.* at 433.

47. *Mahanoy Supreme*, 141 S. Ct. 2038, 2043 (2021).

48. *Id.* at 2048.

injunction and then ruled in her favor on the merits.[49] The court rejected the school district's argument that B.L. had waived her First Amendment rights by joining the cheerleading squad.[50] It similarly rejected the district's argument that "mere" removal from an extracurricular activity could not have violated her free speech rights.[51] Having "clear[ed] away [that] argumentative brush,"[52] the court turned to the substance of B.L.'s free speech claim.[53] Here, the court looked to the rough consensus that had developed among the circuits.[54] As of 2019, when the court was deciding B.L.'s case, most courts had begun applying the Supreme Court's 1969 landmark holding in *Tinker v. Des Moines*[55]—that schools can restrict students' on-campus speech only when it is likely to cause a material disruption or invade the rights of other students—to off-campus speech as well.[56] This meant that schools could punish students' off-campus speech if and only if the speech were likely to reach the school and cause substantial disruption there. The district court employed that approach, concluding that B.L.'s snaps had not created any

49. *Mahanoy District*, 376 F. Supp. 3d at 432.

50. *Id.* at 437.

51. *Id.* at 438.

52. *Id.* at 437.

53. *Id.* at 438–45.

54. *Id.*

55. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

56. *See, e.g.*, Doninger v. Niehoff (*Doninger I*), 527 F.3d 41, 50–53 (2d Cir. 2008) (applying *Tinker* and ruling that an off-campus blog post was sufficiently disruptive to merit disciplinary action); Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–40 (2d Cir. 2007) (upholding the dismissal of claims against the school board concluding that the off-campus sharing of a threatening image was sufficiently disruptive to merit disciplinary action); Kowalski v. Berkely Cnty. Schs, 652 F.3d 565, 567 (4th Cir. 2011) (holding that the disciplinary action imposed by the school was permissible after a student "used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech which 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others.'" (quoting *Tinker*, 393 U.S. at 513 (1969))); Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (holding that a rap song with threatening lyrics posted to Facebook and YouTube satisfied the *Tinker* standard); *see also* Emily Gold Waldman, *School Jurisdiction over Online Speech*, *in* THE OXFORD HANDBOOK OF U.S. EDUCATION LAW 525, 529–30 (Kristine L. Bowman ed., 2018) (discussing the adoption of *Tinker's* "substantial disruption" test to students' online speech).

substantial disorder or likelihood thereof, and thus the school could not punish her for them.[57]

The Third Circuit affirmed B.L.'s victory, taking an even more speech-protective stance.[58] In addition to holding that B.L. had not waived her First Amendment rights, the court departed from the consensus that *Tinker* could apply to students' off-campus speech at all.[59] The court stated that the other circuit courts' approaches "sweep in too much speech and distort *Tinker*'s narrow exception into a vast font of regulatory authority," and that it was instead going to "forge [its] own path" by holding that *Tinker* did not apply to off-campus speech.[60] This broad ruling not only created a circuit split, but also generated confusion and alarm for public schools within the Third Circuit, as noted later by both the school district and the Pennsylvania School Boards Association.[61] Did it mean that schools lacked the power to respond to off-campus bullying and harassment?[62] How did the Third Circuit's holding intersect with state laws, such as those in New Jersey, that *required* schools to address off-campus bullying or harassment of students?[63] The school district filed a petition for a writ of certiorari, and the Pennsylvania School Boards Association urged the Supreme Court to grant it, stating

57. *Mahanoy District*, 376 F. Supp. 3d at 441–44 ("Coaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards.").

58. *Compare id.* at 444–45 (declining to rule on the open question of "whether *Tinker* applies to speech uttered beyond the schoolhouse gate"), *with Mahanoy Circuit*, 964 F.3d 170, 191 (3d Cir. 2020) (holding that "*Tinker* does not apply to off-campus speech").

59. *Mahanoy Circuit*, 964 F.3d at 187 (finding the paths chosen by other circuit courts confronting this matter "unsatisfying").

60. *Id.* at 188–89.

61. *See* Brief for Pennsylvania School Boards Association and Pennsylvania Principals Association as Amici Curiae in Support of Petitioner at 8, *Mahanoy Supreme*, 141 S. Ct. 2038 (2021) (No. 20-255) (contending that the ruling "throws a cloud of uncertainty over how teachers and school administrators in the Third Circuit should respond to speech that originates off-campus").

62. *Id.* at 9 ("[T]he Third Circuit's decision . . . offers little in the way of assistance for teachers who struggle to protect and nurture their charges.").

63. Petition for a Writ of Certiorari at 5, *Mahanoy Supreme*, 141 S. Ct. 2038 (No. 20-255) ("Either the decision below cavalierly invalidated that state law *sub silentio*. Or the decision below puts New Jersey administrators to an impossible choice: comply with state law and face federal-court damages suits, or violate state law and face state-law penalties.").

that the Third Circuit's decision had caused confusion "in an area where clarity is critical."[64]

Once the Court granted certiorari, more amicus briefs came in, most of which urged the Court to narrow the Third Circuit's holding. And some briefs even talked specifically about the case's extracurricular context, suggesting that it should reduce the level of free speech protection. The United States, for instance, asserted in its amicus brief that a "specific circumstance, relevant to this case, is when the student's off-campus speech targets an extracurricular athletic program in which the student participates. Such speech might properly be regarded as school speech that is potentially subject to discipline by school officials . . . ."[65] The United States gave as examples a "social-media post lambasting the football coach's play-calling . . . if written by a member of the football team," or a "post suggesting that women are ill-suited to mathematics . . . if posted by a mathlete on a school math team."[66] The National School Boards Association added that "[a]s anyone who has been a member of an athletic team, performing arts group, or other collaborative student group knows, such programs cannot work if a student can publicly ridicule a coach or faculty adviser or attack her decision-making or competence."[67] In its own brief, the Mahanoy Area School District argued that "[t]his Court should not transform disputes over the inner workings of school sports and extracurricular activities into section 1983 lawsuits for money damages."[68]

The extracurricular context also came up at oral argument. In response to a question by Justice Sotomayor about what was so concerning about B.L.'s "fuck cheer" snap, the school district's counsel emphasized that "she's a cheerleader and it's an extracurricular program where she consented to an extra degree of

64. Brief for Pennsylvania School Boards Association and Pennsylvania Principals Association as Amici Curiae in Support of Petitioner, *supra* note 61, at 2.

65. Brief for the United States as Amicus Curiae Supporting Petitioner at 25, *Mahanoy Supreme*, 141 S. Ct. 2038 (No. 20-255).

66. *Id.* at 25–26.

67. Brief of National School Boards Association, AASA, the School Superintendents Association, the National Association of Elementary School Principals, and the National Association of Secondary School Principals as Amici Curiae in Support of Petitioner at 30, *Mahanoy Supreme*, 141 S. Ct. 2038 (No. 20-255).

68. Brief for Petitioner at 47, *Mahanoy Supreme*, 141 S. Ct. 2038 (No. 20-255).

regulation because she's a school ambassador. It's a self-contained program that teaches not just teamwork but respect for coaches."[69] In their questioning, numerous justices even raised the extracurricular issue themselves. "[D]oes it make a difference that this case involved an extracurricular activity?" Justice Gorsuch asked.[70] Again, the school district's counsel asserted that this lowered the stakes: "there was no disciplinary action taken with respect to the *school*. She was suspended from the *cheer team* . . . ."[71] Justice Thomas similarly asked the Deputy Solicitor General of the United States, appearing amicus curiae, "[i]s there a difference in how we should treat team members versus just students?"[72] The Deputy Solicitor General's response tracked that of the school district's counsel: "the punishment *did* fit the crime; that is, B.L. was suspended from the cheerleading squad, not from school."[73]

Justice Kavanaugh, a basketball coach himself, engaged in the fullest exploration of the extracurricular issue, ruminating on the significance of extracurricular activities to students:

> [A]s a judge and maybe as a coach and a parent too, it seems like maybe a bit of over—overreaction by the coach.
>
> So my reaction when I read this, she's competitive, she cares, she blew off steam like millions of other kids have when they're disappointed about being cut from the high school team . . . . [A]nd to show how much it means to people, you know, arguably, the greatest basketball player of all time[, Michael Jordan,] is inducted into the Hall of Fame in 2009 and gives a speech, and what does he talk about? He talks about getting cut as a sophomore from the varsity team. . . .
>
> And I think that's just emblematic of how much it means to kids to make a high school team. It is so important to their lives . . . .
>
> So maybe what bothers me when I read all this is that it didn't seem like the punishment was tailored to the offense given what I just said about how important it is and you know how much it means to the kids. I mean, a year's suspension from the team just seems excessive to me.

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69. Transcript of Oral Argument at 21, *Mahanoy Supreme*, 141 S. Ct. 2038 (No. 20-255) [hereinafter Transcript of Oral Argument, *Mahanoy Supreme*].

70. *Id.* at 28.

71. *Id.* at 29 (emphasis added).

72. *Id.* at 41.

73. *Id.* (emphasis added). Justice Barrett soon followed up to ask whether a school could "seek a waiver of First Amendment rights for participation in an extracurricular activity like cheer," to which the Deputy Solicitor General responded that this would be a different case if "B.L. had been suspended from the cheerleading team because the coach disagreed with her political views." *Id.* at 59.

> But how does that fit into the First Amendment doctrine or does it fit in at all in a case like this?[74]

Unfortunately, although Justice Kavanaugh and others teed up that question in the oral argument, the Supreme Court's ultimate *Mahanoy* decision left it largely unaddressed. The Court ruled in B.L.'s favor by an eight to one vote, but intentionally left many questions unanswered, stating that it was not going to "now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus."[75] Instead, the Court simply stated that although it disagreed with the Third Circuit's holding that *Tinker* could *never* apply to students' off-campus speech, it agreed that B.L. should win in this case.[76] In explaining why, the Court identified three distinguishing features of off-campus speech: (1) that it "normally fall[s] within the zone of parental, rather than school-related, responsibility;" (2) that regulation of off-campus speech would mean that schools essentially have 24/7 oversight over students; and (3) that "school[s] ha[ve] an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[77] The Court said that these considerations militated in B.L.'s favor, and rejected the idea that her snaps had caused "'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action."[78] The Court also noted that apart from a coach's testimony that the "negativity put out there" by B.L. "could impact students in the school," there was "little else . . . suggest[ing] any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion."[79] On the morale point, Justice Alito's concurrence added that "the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but it is self-evident that this authority has

74. *Id.* at 30–31.

75. *Mahanoy Supreme*, 141 S. Ct. at 2045.

76. *Id.* at 2045–48.

77. *Id.* at 2046.

78. *Id.* at 2047 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

79. *Id.* at 2048.

limits."[80] He reasoned that in punishing B.L. by suspending her for an entire year, the school had gone far beyond just taking her messages into account.[81]

Mahanoy did, therefore, offer some guidance for how courts should approach extracurricular activities. The Court certainly rejected the idea that extracurriculars are unequivocally a privilege that schools can retract at will, or that B.L. had fully waived her free speech rights by participating. Otherwise, it could not have ruled in B.L.'s favor. But B.L.'s case was so extreme—a full year's suspension for a snap that did not even mention a coach or student by name—that the Court did not have to engage with the thornier issues. For example, if B.L. *had* criticized the cheerleading coach directly in a social media post, would that in and of itself have been reasonably likely to cause "substantial disruption" to the team, or a "serious decline in team morale"? Or, to return to Justice Kavanaugh's question at oral argument about the "excessive"[82] nature of the punishment, would B.L. still have prevailed if she had been suspended from cheerleading for, say, a month instead of a year?

These types of questions have come up in lower court cases, as discussed in Part II below, but *Mahanoy* did not provide real guidance on them. Indeed, Jenny Diamond Cheng has observed that perhaps the "most complicated issues come out of the fact that [*Mahanoy*] is a case about a student who was suspended from an extracurricular activity, rather than suspended or expelled from school itself," adding that the Court's opinion "offers no conceptual guidance" here and that the existing case law reflects "a very confused—and confusing—jurisprudence."[83] That said, the Court's ruling in favor of B.L—as well as its concern

80. *Id.* at 2058 (Alito, J., concurring).

81. *Id.* at 2059 (believing that the school officials got "carried away" in imposing this punishment).

82. *See* Transcript of Oral Argument, *Mahanoy Supreme*, *supra* note 69, at 31.

83. Jenny Diamond Cheng, *Deciding Not to Decide:* Mahanoy Area School District v. B.L. *and the Supreme Court's Ambivalence Towards Student Speech Rights*, 74 VAND. L. REV. EN BANC 511, 520 (2021); *see also* David L. Hudson Jr., Mahanoy Area School District v. B.L.*: The Court Protects Student Social Media but Leaves Unanswered Questions*, 2020 CATO S. CT. REV. 93, 106 (2021) (noting that one "unanswered question concerns student social media speech that does have more of an impact on a team or extracurricular activity," particularly if, unlike in *Mahanoy*, "coaches or team members claim that a student's post [caused] much more of a disruption of team morale").

about school overreach into what happens outside of school—does help inform the approach that this Article suggests in Part IV.

B. *KENNEDY V. BREMERTON*

About two years before the Mahanoy School District suspended B.L. from the junior varsity cheerleading squad, Joseph Kennedy's face-off with the Bremerton School District in Bremerton, Washington, began. Kennedy first started working as a football coach at Bremerton High School back in 2008, at which point he instituted a practice of praying at the fifty-yard line at the end of each game.[84] During the prayer, which lasted for about thirty seconds, Kennedy would bend one knee and "give thanks through prayer . . . for what the players had accomplished and for the opportunity to be a part of their lives through the game of football."[85] Initially, he prayed alone, but some of the players then asked if they could join him, to which Kennedy responded, "[t]his is a free country. You can do what you want."[86] Eventually, most of the team was joining him, at least for some games.[87] Even players from the opposing team sometimes joined the prayer.[88] The practice developed to include postgame talks in which Kennedy would raise student helmets and make religious references.[89]

In September of 2015, the school district became aware of Kennedy's postgame practice—ironically, not from anyone within the district, but because a coach from an opposing team told the principal that Kennedy had invited his team to join them after the game.[90] The school district then sent Kennedy a letter telling him to change course.[91] The district explained that to avoid a possible Establishment Clause violation, any prayer that

84. Kennedy v. Bremerton Sch. Dist. (*Kennedy District*), 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020).

85. *Id.* (quoting Declaration of Joseph A. Kennedy in Support of Plaintiff's Motion for a Preliminary Injunction at 2–3, *Kennedy District*, 433 F. Supp. 3d 1223 (No. 3:16-CV-05694-RBL).

86. *Kennedy Supreme*, 142 S. Ct. 2407, 2416 (2022) (citing Kennedy v. Bremerton Sch. Dist. (*Kennedy Circuit*), 991 F.3d 1004, 1010 (9th Cir. 2021)).

87. *Id.*

88. *Id.*

89. *Id.* at 2436.

90. *Kennedy Circuit*, 991 F.3d 1004, 1011 (9th Cir. 2021).

91. *Id.* at 1023 (Christen, J., concurring).

he engaged in could not include students, must be physically separate from student activity, and should not be "outwardly discernible as religious activity."[92] Kennedy responded with a letter, drafted by counsel, stating that his religious beliefs compelled him to offer a postgame personal prayer at midfield and that he would do so at the next game on October 16, 2015.[93] He also made media appearances to spread the word that he intended to pray right after the game at the fifty-yard line, to the point where the district began receiving emails, letters, and phone calls about the issue.[94] After the game, many community members rushed to the field to join Kennedy in prayer, knocking down some band members and cheerleaders.[95] The district then told Kennedy that his conduct had risked an Establishment Clause violation and that if it happened again, it would be grounds for discipline or termination.[96] Nonetheless, Kennedy again prayed at the fifty-yard line after the next two football games.[97] At the October 23 game, he kneeled on the field with "players standing nearby" (but not praying with him), and at the October 26 game, he prayed "surrounded by members of the public," with football players joining him at midfield after he stood up from praying.[98] In response, the district placed Kennedy on administrative leave and did not rehire him for the following year.[99] After Kennedy's suspension, there were no further postgame prayers on the field by football players acting alone.[100] Some students and parents later thanked the school district, with some parents saying that their children on the football team had participated in the prayers to ensure playing time or avoid being separated from their teammates.[101]

Kennedy filed suit, alleging that the school district had violated his free speech and free exercise rights.[102] He lost in the

92. *Id.* at 1011.
93. *Kennedy District*, 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020).
94. *Id.*
95. *Id.*
96. *Kennedy Supreme*, 142 S. Ct. 2407, 2439 (2022) (Sotomayor, J., dissenting).
97. *Id.*
98. *Id.*
99. *Id.* at 2439–40.
100. *Id.* at 2440.
101. *Id.*
102. *Kennedy District*, 443 F. Supp. 3d 1223, 1224 (W.D. Wash. 2020).

district court, which ruled that his free speech claim failed because he had been speaking in his capacity as an employee[103] and that his free exercise claim failed because the district's policy was justified by the compelling interest of avoiding an Establishment Clause violation.[104] On the Establishment Clause issue, the district court highlighted the extracurricular activity here: football. The court reasoned that "Kennedy occupied a powerful position in his players' lives, both as a role model and as one of the people controlling their chance to perform on the biggest stage American high schools have to offer: the football field," stating that many of the players were likely to feel "a desire to become an insider by joining Kennedy at the 50-yard line," and that this "coercive effect violates the Establishment Clause."[105] The Ninth Circuit affirmed in full.[106] In a later Ninth Circuit decision denying en banc review, the concurrences again emphasized the extracurricular context, with one noting that "football coaches occupy a significant leadership role in their high school communities and wield undeniable—perhaps unparalleled—influence where their players are concerned."[107] In contrast, Judge O'Scannlain wrote a separate statement in the case characterizing Kennedy's behavior as "the brief, quiet prayer of one man."[108]

The Supreme Court granted Kennedy's petition for certiorari, and amicus briefs came flooding in—including several focusing on the high school football context. Several psychology and neuroscience scholars, for instance, submitted a brief arguing that "[t]he adolescent student athletes would be influenced to follow [Kennedy's] lead because he controlled benefits they valued (such as playing time) and because of his status as a role model and authority figure."[109] A group of Bremerton residents, including a former high school football player, submitted an

103. *Id.* at 1237.

104. *Id.* at 1240.

105. *Id.*

106. *Kennedy Circuit*, 991 F.3d 1004, 1023 (9th Cir. 2021).

107. Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 927 (9th Cir. 2021) (Christen, J., concurring).

108. *Id.* at 940 (O'Scannlain, J., statement respecting the denial of rehearing en banc).

109. Brief for Psychology and Neuroscience Scholars as Amici Curiae in Support of Respondent at 5, *Kennedy Supreme*, 142 S. Ct. 2407 (2022) (No. 21-418).

amicus brief describing those sentiments firsthand.[110] The former player, who hoped to be a college football recruit, said that he "wanted to play football and treated [Kennedy's] prayer time as any other order from a coach such as to exercise, attend study hall, or execute a play. . . . For four years I knelt for [Kennedy] in solidarity as he prayed so there would be no objection to me playing football."[111]

Several former football players and coaches also submitted amicus briefs on both sides: Coach Tommy Bowden (former Clemson University head coach) advocated on Kennedy's behalf, arguing that the school district had "jeopardize[d] a coach's ability to be an effective mentor, counselor, or pseudo-parental figure,"[112] while a group of players and coaches led by Obafemi Ayanbadejo (a former NFL player) countered that the "coach-athlete relationship" is "highly susceptible to the imposition of coercive pressure."[113]

The oral argument picked up on this last point. Justice Kavanaugh, for example, asked Kennedy's lawyer: "[w]hat about the player who thinks, if I don't participate in this, I won't start next week, or the player who thinks, if I do participate in this, I will start this week . . . ?"[114] Kennedy's lawyer answered that the school should send "a clear message that that's inappropriate, that this doesn't matter for those purposes,"[115] to which Justice Kavanaugh responded:

> [T]he problem at the heart of [it is] you're not going to know because the coach is probably not going to say anything, like the reason that I'm starting you is that you were—you knelt at the 50-yard line.

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110. *See* Brief of Bremerton Community Members—BHS Football Team Alumnus, Parents, Community Leaders, and Educators—as Amici Curiae in Support Respondent at 14–19, *Kennedy Supreme*, 142 S. Ct. 2407 (No. 21-418) (describing the experiences of various community members and their views on how students would feel coerced into joining Kennedy's prayers).

111. *Id.* at 15.

112. Amicus Curiae Brief of Coach Tommy Bowden in Support of Petitioner at 4, *Kennedy Supreme*, 142 S. Ct. 2407 (No. 21-418).

113. Brief of Former Professional Football Players Obafemi D. Ayanbadejo, Sr., Christopher J. Kluwe, and Frank T. Lambert, and Various Collegiate Athletes and Coaches, as Amici Curiae in Support of Respondent at 4, 8, *Kennedy Supreme*, 142 S. Ct. 2407 (No. 21-418).

114. Transcript of Oral Argument at 47, *Kennedy Supreme*, 142 S. Ct. 2407 (No. 21-418).

115. *Id.*

> . . . I don't think you can get around [that suspicion]. That's a real thing out there, and, you know, that's going to be a real thing in situations like this. I don't know how to deal with that, frankly, though.[116]

But as in *Mahanoy*, Justice Kavanaugh's pointed question about students in extracurricular activities went unaddressed in the ultimate decision. By a five to four vote, the Supreme Court ruled for Kennedy.[117] As to Kennedy's free speech claim, the Court ruled that when Kennedy prayed on the fifty-yard line, he was not speaking as an employee (which would have doomed the free speech argument) but as a private citizen.[118] The Court analogized his speech to "a Christian aide . . . praying quietly over her lunch in the cafeteria," and suggested that the immediate postgame period was free time for Kennedy to do whatever he chose to do.[119] The Court also held that Kennedy's free exercise rights had been violated because the district had stopped him from engaging in a "sincerely motivated religious exercise."[120] And the Court rejected the school district's argument that prohibiting Kennedy's fifty-yard line prayer was necessary to avoid an Establishment Clause violation.[121] The Court stated that the *Lemon* and endorsement tests were no longer good law[122] and that the only relevant question here was whether Kennedy's practice coerced students to pray.[123]

The Court then took a very narrow—or as Justin Driver has written, "emaciated"[124]—view of what coercion meant. It stated that "[s]tudents were not required or expected to participate" in

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116. *Id.* at 49.

117. *See Kennedy Supreme*, 142 S. Ct. at 2414.

118. *Id.* at 2424–25 (finding that "[t]he timing and circumstances of Mr. Kennedy's prayers confirm[s]" that "his speech was private speech, not government speech").

119. *Id.* at 2425.

120. *Id.* at 2422.

121. *Id.* at 2426–32 ("[T]he District effectively created its own 'vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,' placed itself in the middle, and then chose its preferred way out of its self-imposed trap.").

122. *Id.* at 2427 (describing the *Lemon* test which "called for an examination of a law's purposes, effects, and potential for entanglement with religion" and later came to include "estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion" (first citing Lemon v. Kurtzman, 403 U.S. 602 (1971) (remaining citations omitted)).

123. *Id.* at 2429–32.

124. Driver, *supra* note 30, at 239 ("Justice Gorsuch's opinion in *Kennedy* cast aside the expansive notion of coercion for an emaciated one.").

Kennedy's prayers.[125] It dismissed as hearsay the school district's claim that some parents had reported, after Kennedy's suspension, that their sons had previously joined in only to avoid being separated from their teammates.[126] The Court also suggested that perhaps these students' parents had been more concerned about the postgame inspirational talks (which Kennedy had discontinued) than the actual prayers themselves.[127] It did not acknowledge the amicus brief from the former player who said that he had viewed the prayers as mandatory. And the Court added that during the final three games before the season ended, none of the football players had joined Kennedy in actually praying on the fifty-yard line.[128] (Of course, though only the dissent mentioned this, they did stand near him while he prayed, and at the last game, they joined him at midfield as soon as he stood up.[129]) The Court also expressed skepticism that the school district itself was ever worried about coercion, noting that the district's correspondence with Kennedy had not used the word "coercion" and that a public statement from the district had said there was "no evidence that the students [were] *directly coerced* to pray with Kennedy."[130] The Court did not address Justice Kavanaugh's concern at oral argument that players might privately worry about the effects of not praying. (Justice Kavanaugh joined the majority and did not write separately.) As the dissent observed, "nowhere [did] the Court engage with the unique coercive power of a coach's actions on his adolescent players."[131]

The takeaway from *Kennedy*, in terms of how constitutional rights play out in extracurricular activities, is thus mixed. On the one hand, the decision certainly recognized the importance of the football team to the *coach*. Indeed, there is a certain parallel between the outcomes of *Mahanoy* and *Kennedy*. In both cases, the school district lost, while the plaintiffs' free speech rights were vindicated and their ability to participate in extracurricular activities restored.[132] (In fact, Kennedy ended up with a $1.775 million settlement from the school district, as well as

125. *Kennedy Supreme*, 142 S. Ct. at 2432.
126. *Id.* at 2430.
127. *Id.*
128. *Id.*
129. *Id.* at 2439 (Sotomayor, J., dissenting).
130. *Id.* at 2419 (majority opinion) (emphasis added).
131. *Id.* at 2452 (Sotomayor, J., dissenting).
132. *Id.* at 2407; *Mahanoy Supreme*, 141 S. Ct. 2038, 2038 (2021).

reinstatement to his coaching position.)[133] The cases diverged, though, in how seriously they took the role of extracurricular activities in *students*' lives. Unlike *Mahanoy*, the *Kennedy* decision diminished their importance in that respect. By analogizing Kennedy's post-game prayer on the football field with players to a Christian aide's lunchtime prayer or a Muslim teacher's wearing of a headscarf in the classroom, the Court implied that this sort of coach/player interaction was as peripheral to the job as those situations.[134] Relatedly, the Court suggested that the coercion question was easily resolved by the fact that the student players were not literally required to pray with their coach.[135] The decision never even acknowledged—let alone grappled with—the centrality of the football team and the coach's role in the students' lives, and the psychological pressure that might result.

II. CONTINUED CONFUSION

Mahanoy and *Kennedy* were just the latest entrants in a series of Supreme Court cases involving extracurricular activities. The others include *Santa Fe Independent School District v. Doe*[136] (which involved school facilitation of student prayer at high school football games), *Board of Education of the Westside Community Schools v. Mergens*[137] (which involved the Equal Access Act's prohibition of schools from discriminating against student clubs on the basis of their religious, political, philosophical, or other content), *Vernonia School District v. Acton*[138] (which

133. Zach Barnett, *High School Coach Who Sued over Midfield Prayers Reinstated with $1+ Million Settlement*, FOOTBALL SCOOP (Mar. 22, 2023), https://footballscoop.com/news/joseph-kennedy-bremerton-assistant-coach-prays-midfield-supreme-court-settlement [https://perma.cc/47VP-V4AB].

134. *See Kennedy Supreme*, 142 S. Ct. at 2425 (arguing that "treating everything teachers and coaches say in the workplace as government speech" means a school "could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria").

135. *See id.* at 2429–30 (noting that Kennedy never asked, required, or coerced students to pray and arguing that the school district incorrectly concluded students might be compelled to pray alongside Kennedy due to his authority and influence as a coach).

136. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

137. Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990).

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

involved a school district's random drug testing policy for all students participating in interscholastic athletics), *Board of Education v. Earls*[139] (which involved a school district's random drug testing policy for all students engaged in any competitive extracurricular activity), and *Bethel School District v. Fraser*[140] (which involved a school district's punishment of a student who gave a crude nomination speech for a friend who was running for student government). Relatedly, *Hazelwood School District v. Kuhlmeier*[141] can be considered "extracurricular-adjacent": it involved a high school newspaper that was produced as part of a journalism class, but its holding extended to all "school-sponsored publications" and other activities that were supervised by faculty members and designed to impart knowledge or skills.[142] Indeed, the very number of Supreme Court cases involving extracurricular activities points to their significant presence and importance in students' lives.

In each of these cases, the issue was not some sort of free-standing "right" to participate in extracurricular activities themselves (a notion discussed further below). Rather, the question was how established constitutional rights—such as freedom of speech or freedom from unreasonable searches—play out in the extracurricular context.[143] Here, the cases fall on a spectrum. The Supreme Court has never taken the extreme view that because extracurricular activities are voluntary or a "privilege," students waive their constitutional rights altogether by participating. But some of the cases have pointed toward a *diminution* of students' rights in the extracurricular context, while others have suggested that it is irrelevant whether the setting is curricular or extracurricular.

Santa Fe v. Doe exemplifies the view that students' constitutional rights are essentially as robust in the extracurricular context as in the classroom. There, after a long history of having an elected student council chaplain deliver a prayer over the

139. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002).

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

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

142. *Id.* at 276.

143. *See, e.g.*, *id.* at 262 (addressing "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum" without violating the First Amendment rights of the journal's student staff members).

broadcast system before each football game, the Santa Fe School District shifted (in response to an Establishment Clause lawsuit) to having the students vote on whether to have such a prayer.[144] An Establishment Clause claim was then brought against the revised version of the policy.[145] The school district argued that the prayer represented purely private student speech, and that the "decidedly extracurricular" context reduced any concern because no student had to be present for the prayer anyway.[146] The Supreme Court emphatically rejected that argument. It asserted that even though attendance at football games is not required in the way that "showing up for class" is, and even though football games are not as significant as major events like graduation, football games still matter to students.[147] They matter to the "cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance."[148] And, the Court added, they matter to other students who may simply want to be spectators. "The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience," the Court stated.[149] "Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one."[150] The Court thus concluded that it violated the Establishment Clause to force students to make that choice and struck down the practice as unconstitutional.[151]

Interestingly, *Hazelwood v. Kuhlmeier*[152]—though it ended up ruling *against* the students' First Amendment claim—took a similar approach of treating extracurricular activities as largely similar to curricular ones. In *Hazelwood*, student editors of the school newspaper, which was written and edited by the

144. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294–99 (2000).
145. *Id.* at 290.
146. *Id.* at 311.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 312.
151. *Id.* at 316.
152. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Journalism II class, sued after their principal deleted two pages of the May 13, 1983, issue.[153] The Court observed:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote student speech. . . . The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[154]

The Court then concluded that educators could exercise control over "student speech in school-sponsored expressive activities" as long as their actions were "reasonably related to legitimate pedagogical concerns."[155] This was clearly a much less speech-protective standard than the *Tinker* standard, which requires a school to tolerate individual student speech unless it is likely to cause a substantial disruption or invade the rights of other students.[156] What is notable for this Article's purposes, though, is that *Hazelwood* grouped extracurricular activities (i.e., a school newspaper that operates as a club with a faculty advisor) in the same category as classes (i.e., a school newspaper that is produced through a journalism class with a teacher).[157] Indeed, the *Hazelwood* Court stated that both classes and extracurricular activities function as part of the school curriculum, because both are imparting knowledge or skills and are under faculty supervision.[158] This view of extracurricular activities is consistent with *Santa Fe*'s implication that students' constitutional rights

153. *Id.* at 262–64.

154. *Id.* at 270–71.

155. *Id.* at 273.

156. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

157. *See Hazelwood*, 484 U.S. at 271 (suggesting activities such as school-sponsored publications or theatrical productions may "fairly be characterized as part of the school curriculum, *whether or not* they occur in a traditional classroom setting . . . ." (emphasis added)).

158. *See id.* (noting curricular and extracurricular activities both function as part of the school curriculum "so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences").

in extracurricular activities should be as robust as they are in the classroom.[159]

The Supreme Court's drug testing cases, by contrast, suggest that constitutional protections are lower in the extracurricular setting than the classroom context. In *Vernonia School District v. Acton*, the Court upheld the school district's random drug testing policy for students participating in interscholastic athletics, largely due to the special characteristics of school sports.[160] The Court reasoned that student-athletes have a reduced expectation of privacy (because of the locker room aspect),[161] that drug use is particularly dangerous for student-athletes by increasing their risk of sports-related injuries,[162] that student-athletes are typically role models,[163] and that the Vernonia High School student athletes were currently the "leaders of the drug culture" there.[164] The Court also added that "[b]y choosing to 'go out for the team,' [student-athletes] voluntarily subject[ed] themselves to a degree of regulation even higher than that imposed on students generally."[165] This attention to voluntariness, of course, is applicable to all extracurricular activities. But even here, the Court gave sports-specific examples, like having to get a preseason physical exam and maintain adequate insurance coverage.[166]

In *Board of Education v. Earls*, though, the Court went further with the "voluntariness" point.[167] It held that random drug testing of participants in *all* "competitive extracurricular activities" was reasonable and did not violate the Fourth Amendment.[168] It rejected the argument that nonathletic extracurricular activities were distinguishable, stating that "students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes," and that all such activities had their "own rules and requirements," thus, "further diminish[ing] the

159. *See supra* notes 144–51, and accompanying text.
160. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666 (1995).
161. *Id.* at 657.
162. *Id.* at 662.
163. *Id.* at 663.
164. *Id.* at 649.
165. *Id.* at 657.
166. *Id.*
167. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002).
168. *Id.* at 828–30.

expectation of privacy among schoolchildren."[169] It added that "testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use"[170]—a "rational basis"-sounding standard that conveyed the fairly low level of scrutiny here.

The language in *Vernonia* and *Earls* thus intertwined two rationales: (1) that students waived some degree of their Fourth Amendment rights by "voluntarily" signing up for extracurriculars; and (2) that the Fourth Amendment itself operated differently in extracurricular activities because their other rules and requirements led to a diminished expectation of privacy that made random drug searches "reasonable." The bottom line, however, was that extracurriculars were clearly being treated differently. The Court did not suggest, for example, that a school could implement a random drug-testing regime for all of its students. Rather, its decisions rested on the fact that the policy only applied to extracurriculars.[171] In her *Earls* dissent, Justice Ginsburg criticized the differential treatment:

> While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program . . . . Students "volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.[172]

Lower courts, meanwhile, have grappled with a wide range of cases involving constitutional claims about extracurricular activities—most commonly in terms of how free speech rights play out there and occasionally in terms of whether there is a free-standing right to participate in extracurricular activities at all.

A. FREE SPEECH RIGHTS IN THE CONTEXT OF EXTRACURRICULAR ACTIVITIES

The question of how established constitutional rights play out in extracurricular activities comes up most frequently with students' free speech rights. The controversies often unfold as follows: (1) student is upset about some aspect of an extracurricular activity; (2) student expresses that view; and (3) student is

169. *Id.* at 831–32.
170. *Id.* at 837.
171. *Id.* at 831.
172. *Id.* at 845–46 (Ginsburg, J., dissenting).

removed from extracurricular activity on grounds that the student's expression risked disrupting the activity. *Mahanoy* is just one example of such a controversy. Another well-known example is *Doninger v. Niehoff*,[173] in which Avery Doninger was disqualified from running for Senior Class Secretary after, as Junior Class Secretary, she complained on her blog about the school's cancellation of a battle-of-the-bands event called Jamfest, called the administrators "douchebags," and encouraged students to reach out to them to "piss [them] off more."[174] When Doninger sued, the school argued that her behavior was potentially disruptive, and the Second Circuit agreed.[175] It held that the school was entitled to qualified immunity, explicitly due to the extracurricular context: "Doninger's discipline extended only to her role as a student government representative: she was not suspended from classes or punished in any other way," the Second Circuit observed.[176] The court concluded that it was reasonable for school officials to conclude that Doninger could not serve as a student government officer when she was also engaging in behavior that was "potentially disruptive of student government functions."[177]

Several other courts have similarly suggested that students' free speech rights are ratcheted down in the extracurricular context. In *Lowery v. Euverard*, for instance, a group of football players were kicked off the team after circulating a petition criticizing the football coach's methods, which included "humiliat[ing] and degrad[ing]" discipline.[178] When the students sued, the Sixth Circuit ruled for the school, stating that "[p]laintiffs' regular education ha[d] not been impeded, and, significantly, *they are free to continue their campaign to have Euverard fired*. What they are *not* free to do is continue to play football for him while actively working to undermine his authority."[179] Likewise, in *Wildman v. Marshalltown School District*, a student was kicked off the sophomore basketball team after she refused to apologize for sending a letter to her teammates in which she criticized the

173. Doninger v. Niehoff (*Doninger II*), 642 F.3d 334 (2d Cir. 2011).
174. *Id.* at 339–42.
175. *Id.* at 351.
176. *Id.* at 350.
177. *Id.* at 351.
178. Lowery v. Euverard, 497 F.3d 584, 585–86 (6th Cir. 2007).
179. *Id.* at 600.

varsity basketball coach for not promoting some of them to the varsity level.[180] ("It is time to give him back some of the bullshit that he has given us," she said.)[181] The Eighth Circuit rejected her free speech claim, and once again emphasized the difference between "regular" school and extracurricular activities.[182] "The school did not interfere with Wildman's regular education," said the court.[183] "A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter."[184] The court also apparently agreed that the letter had disrupted team cohesion, noting that "coaches deserve a modicum of respect from athletes."[185]

An even greater diminution of First Amendment rights in the extracurricular context came in *Longoria v. San Benito Independent Consolidated School District*, in which the Fifth Circuit upheld a student's dismissal from the cheerleading team because of her social media posts.[186] The posts were crude (e.g., "i [sic] don't fuck with people who lowkey try to compete with/ out do me"), but said nothing negative about cheerleading.[187] The only reference to cheerleading appeared in the biography section of the student's Twitter profile.[188] Nonetheless, the coaches of the cheerleading team removed her on grounds that she had violated the San Benito High School "Cheerleading Constitution," which required cheerleaders to engage in "appropriate" conduct on their social media accounts.[189] The Fifth Circuit found that "regardless of whether [the student's] rights were violated, the right at issue was not clearly established," and thus the defendants were entitled to qualified immunity.[190] And the court

180. Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 770 (8th Cir. 2001).

181. *Id.* (quoting Letter from Denise Wildman to basketball teammates (Jan. 24, 1998)).

182. *Id.* at 772.

183. *Id.*

184. *Id.*

185. *Id.*

186. Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258 (5th Cir. 2019).

187. *Id.* at 262 (alteration in original).

188. *Id.*

189. *Id.* at 261–62.

190. *Id.* at 265.

echoed others in emphasizing the school/extracurricular distinction, stating that, "most notably, M.L. was dismissed from an *extracurricular activity* as a consequence of her speech—not suspended from school altogether."[191]

Multiple rationales seem to be intertwined in these cases. The opinions all rely on the premise that extracurricular activities are entirely distinct from, and much less important than, "regular" school, such that removal from them is a minor sanction.[192] They also share the idea—most prominent in *Longoria*, which focused on the social media provision of the "Cheerleading Constitution"—that it is appropriate to expect students to accept a diminution in their First Amendment rights in exchange for their extracurricular participation.[193] The cases additionally suggest that when *Tinker*'s "substantial disruption" standard is applied to speech about extracurricular activities, it is enough to show that the student's speech risked substantial disruption to the activity—and they set a very low bar for what counts as "substantial disruption" there.[194] In particular, several have suggested that criticism of how the activity is being conducted is itself inherently disruptive.

Not all courts have been as quick to ratchet down students' speech rights in connection with extracurricular activities. In *T.V. v. Smith-Green Community School Corp.*, an Indiana district court ruled against a school district that suspended two students from extracurricular activities because they had posted lewd photos (such as sucking on phallic-shaped lollipops) on Facebook and MySpace.[195] The district had based the suspension on the district's policy that "[i]f you act in a manner in school or

191. *Id.* at 268.

192. *See, e.g.*, Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 772 (8th Cir. 2001) ("A difference exists between being in the classroom, which was not affected here, and playing on an athletic team . . . .").

193. *See, e.g.*, *Longoria*, 942 F.3d at 270 ("We have held, however, that '[a] student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement.'" (quoting Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980)).

194. *See, e.g.*, Lowery v. Euverard, 497 F.3d 584, 594 (6th Cir. 2007) (finding that it was "reasonably likely" that high school football team members may cause a "substantial disruption" on the football team by circulating a petition calling for their coach's resignation).

195. T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 771–73, 790 (N.D. Ind. 2011).

out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year."[196] The court explained that the photos were a form of speech, and that there was never any actual disruption to any school activities, apart from some gossip about the photos.[197] It added that the wording of the policy itself was vague and overbroad, and thus violated the First Amendment.[198] Accordingly, it held that the students had presented a valid free speech claim.[199]

Some courts have even ruled in favor of students whose speech directly criticized an aspect of extracurricular activities. In *Gonzales* ex rel. *A.G. v. Burley High School*, for example, a district court ruled in favor of cheerleaders who were suspended from the team for staging a sit-in to protest alleged "bullying and favoritism by their cheer coach."[200] The court denied the district's motion to dismiss the case, rejecting the argument that the sit-in had substantially disrupted the school or even the cheerleading team.[201] In particular, courts have been sympathetic when the speech amounts to whistleblowing about truly dangerous extracurricular situations. In *Seamons v. Snow*, for example, the Tenth Circuit held that a football player's free speech rights were violated when he was suspended from the team for refusing to apologize to his teammates whom he had reported to the police for physically assaulting him.[202] Similarly, in *Pinard v. Clatskanie School District*, the Ninth Circuit ruled in favor of basketball players who were suspended from the team for circulating a petition expressing concern about their coach's abusive behavior.[203]

The *Mahanoy* decision provides some limited guidance here. *Mahanoy* certainly confirms that students do not lose all of their

196. *Id.* at 773–74.

197. *Id.* at 784.

198. *Id.* at 788–89.

199. *Id.* at 790.

200. Gonzales *ex rel.* A.G. v. Burley High Sch., 404 F. Supp. 3d 1269, 1275, 1294 (D. Idaho 2019).

201. *Id.* at 1281–82.

202. Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996).

203. Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 758–59 (9th Cir. 2006).

free speech rights in the extracurricular context.[204] And it makes clear that what happened in *Longoria*—where the cheerleader was suspended from the team solely for posts that violated the "Cheerleading Constitution" because of their crudeness[205]—went too far. Indeed, *Longoria* is so factually similar to *Mahanoy* that, if the same thing happened today, the school district would very likely lose.[206] By the same token, *T.V.*'s ruling in favor of the students is clearly consistent with *Mahanoy*.[207] The other cases, however, have an element that was not present in *Mahanoy*: direct and detailed criticism of the authority figure associated with the extracurricular activity, such as the coach.[208] This element makes it easier for a school to argue that the speech was disruptive, by undermining authority or reducing team morale. And *Mahanoy* largely left that question open. In stating that one reason it was ruling for B.L. was that her "fuck cheer" post had *not* caused a substantial decline in team morale or cohesion,[209] the Court implied that such a decline might justify a different outcome. These issues are likely to keep percolating in the lower courts, and Part IV of this Article returns to them.

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204. *See Mahanoy Supreme*, 141 S. Ct. 2038, 2046 (2021) ("[F]eatures of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished.").

205. Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 272 (5th Cir. 2019).

206. *Compare Mahanoy Supreme*, 141 S. Ct. at 2042–43 (outlining the plaintiff's suspension from her high school cheerleading squad because of a social media post containing "vulgar language and gestures criticizing both the school and the school's cheerleading team"), *with Longoria*, 942 F.3d at 261–62 (describing the plaintiff's dismissal from her high school cheerleading squad due to social media activity considered "inappropriate" by the school).

207. *Compare Mahanoy Supreme*, 141 S. Ct. at 2048 (holding that a school district violated a high school student's right to free speech by suspending her from participating in cheerleading because she posted vulgar messages on social media), *with* T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 790 (N.D. Ind. 2011) (finding that the free speech rights of high school students were violated when their school suspended them from participating in extracurricular and cocurricular activities because they posted inappropriate photographs on social media).

208. *See e.g.*, *Pinard*, 467 F.3d at 760–61 (describing the petition that the basketball players created requesting their coach's resignation, stating that "[h]e has made derogative [sic] remarks, made players uncomfortable playing for him, and is not leading the team in the right direction" (alteration in original)).

209. *Mahanoy Supreme*, 141 S. Ct. at 2048.

B. OFF-CAMPUS BEHAVIOR AND EXTRACURRICULAR ACTIVITIES

Not all cases involving exclusion from an extracurricular activity implicate a recognized constitutional right like free speech. What happens when a school removes a student from an extracurricular activity as punishment for misbehavior or poor performance in the classroom, or even for conduct outside of school? This issue has not yet reached the Supreme Court. But the lower courts have largely converged on the idea that because extracurricular activities are merely a privilege, there is no freestanding "right" to participate in them.[210] As such, unless a separate constitutional right is at stake, the excluded students have no real claim to bring. Thus, for example, challenges to "no pass, no play" policies—whereby students cannot participate in extracurriculars if their grade point averages fall below a certain level—have been unsuccessful.[211] Similarly, students who are suspended from extracurricular activities do not have the same due process rights to notice and a hearing that students who are suspended from school do.[212]

More strikingly, courts have even upheld exclusions from extracurricular activities on the basis of purely *off-campus* behavior. So far, the cases addressing this issue have centered on school rules that use extracurricular activities as a lever to dissuade students from drinking or using drugs. An early example was *Bush v. Dassel-Cokato Board of Education*, a 1990 case in which a school district suspended a student from the swim team for being present at a party where alcohol was being served.[213] The district based its decision on the "Student Extra- and Co-Curricular Policy," which stated that "attending parties where alcohol and/or illegal drugs as defined by state law are present . . . will result in counseling . . . with possible suspension."[214] The student sued, arguing that the policy violated her right to associate with her friends for social purposes, but the court found

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210. *See infra* notes 211–37 and accompanying text.

211. *See, e.g.*, Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 559–60 (Tex. 1985) (upholding "no pass, no play rules" on grounds that "a student's right to participate in extracurricular activities *per se* does *not* rise to the level of a fundamental right under our constitution").

212. *See* Palmer v. Merluzzi, 689 F. Supp. 400, 410 (D.N.J. 1988) (holding that suspension from an extracurricular activity does not trigger procedural due process protections).

213. Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990).

214. *Id.* at 564.

that this was not the type of associational right that the First Amendment protected.[215] It thus applied rational basis review and upheld the policy.[216]

Numerous schools have explicitly cited *Bush* in their extracurricular codes of conduct,[217] and courts have continued to uphold such policies. In *Doe v. Banos*, for example, a father (individually and on behalf of his fifteen-year-old daughter, a lacrosse player) tried to challenge the so-called "24/7 Policy" adopted by the school board of Haddonfield, New Jersey.[218] This policy, which had to be signed by students and their parents as a prerequisite for participation in extracurricular activities, "prohibit[ed] students from consuming, possessing, or distributing drugs or alcohol, or attending any gatherings or activities where the presence of drugs or alcohol is reasonably likely to occur," and prescribed penalties for violations.[219] The student's father signed the form, but "scratched out the portion" referring to drug or alcohol use.[220] The district told the family that this was unacceptable and that his daughter could not be on the lacrosse team unless the form was signed in full.[221] The father then signed the form, but attached a cover letter stating that "I believe the 24/7 policy is illegal and unenforceable but have filled out the form under duress."[222] The school district refused to accept the form, and the father then sued, attempting to frame his challenge in free speech terms (i.e., that the school district was infringing his right to dissent).[223] This was an ill-fitting argument, as the

215. *Id.* at 565–71.

216. *Id.* at 571–72.

217. *See, e.g.*, *Lampasas ISD Athletic Policy: Code of Conduct & Expectations*, LAMPASAS INDEP. SCH. DIST. (2019), https://tx02215761.schoolwires.net/cms/lib/TX02215761/Centricity/Domain/86/2019%20Code%20of%20Conduct.pdf [https://perma.cc/2JAC-RP7W]; *Centerville Student Handbook*, CENTERVILLE CMTY. SCH. DIST. 25 (2018), https://www.centervilleschools.org/wp-content/uploads/2018/10/18-19-handbook-2.pdf [https://perma.cc/7SJQ-AJ2C]; *5200- Cocurricular and Extracurricular Programs*, VALLEY CENT. SCH. DIST. (Sept. 24, 2012), https://www.vcsd.k12.ny.us/board-of-education/policies/5200-cocurricular-and-extracurricular-programs [https://perma.cc/L835-7Z5A].

218. Doe v. Banos, 713 F. Supp. 2d 404, 408 (D.N.J. 2010).

219. *Id.*

220. *Id.* at 409.

221. *Id.*

222. *Id.*

223. *Id.* at 410–11.

district court explained, because the school district's refusal to accept the father's permission form

> was designed not so much to compel or deter the father's *speech* as it was to elicit oral affirmation that his daughter's *conduct* would not violate the laws against drug use and underage drinking and that she would willingly join in a collective agreement with her teammates to remain drug and alcohol free during lacrosse season.[224]

Turning to the policy itself, the court stated that "[a]n initial, facial examination of defendants' Policy shows that the Policy is likely constitutional. The policy is targeted at eliminating, or at least curbing, drug and alcohol use by students and attempts to achieve its goals through certain disciplinary remedial mechanisms, such as restrictions on participation in extracurricular activities . . . ."[225] The court thus seemed to apply only rational basis review to the policy, even specifying that "[i]t is rational for school officials to craft a policy that presumes that these pressures [to use drugs and alcohol] may be lessened when student-athletes and other student leaders set the best example."[226]

What if the father in *Doe v. Banos* had instead argued that the policy violated his fundamental right to direct the upbringing of his child? Most recently, in *T.W. v. Southern Columbia Area School District*, parents attempted to do just that[227]—to no avail.[228] That case involved the Southern Columbia School District's Code of Conduct, which stated that participation in extracurriculars was a "privilege and not a right," that, students who participated in extracurriculars would be held to a higher standard in order to effectuate "positive peer pressure," and that all students participating in extracurriculars were prohibited from "attending any event in which underage drinking, smoking, or drug use is occurring."[229] T.W.'s parents sued after he was suspended from the football team for the entire year due to his presence at several parties where peers were drinking.[230] They argued that parents' constitutional rights to direct their children's

224. *Id.* at 412.

225. *Id.* at 413 (footnote omitted).

226. *Id.* at 414.

227. T.W. v. S. Columbia Area Sch. Dist., No. 4:20-CV-01688, 2020 WL 7027636, at *7 (M.D. Pa. Nov. 30, 2020) ("T.W.'s parents assert the substantive right at issue is their right as parents to direct and control their children's upbringing and education.").

228. *Id.* at *10 (denying T.W.'s motion for preliminary injunction).

229. *Id.* at *1.

230. *Id.* at *2–4.

upbringing encompassed "making decisions as to where and when it is acceptable for their children to socialize and under what circumstances."[231] The *T.W.* court, however, disagreed that the fundamental right to direct the upbringing of one's children, as initially articulated in *Meyer v. Nebraska*[232] and *Pierce v. Society of Sisters*,[233] extended this far.[234] It reasoned that the policy did not "directly impose upon T.W.'s parents," because it was not interfering with their custodial rights or forcing them to enroll T.W. in public school.[235] The court thus applied rational basis review, and held that the policy was rationally related to the District's "valid interest in discouraging and preventing alcohol and drug use amongst its students."[236] And the court also trotted out a familiar rationale: "if a student does not want to be subject to these rules, he or she can choose not to participate. Though T.W. may claim such a system is not fair, these are simply the rules of the game."[237]

Of course, it is literally true that students can choose not to participate in extracurriculars if they do not like "the rules," whether those rules mean taking random drug tests, observing the coach praying with other students, being subject to a "Cheerleading Constitution," or agreeing to leave parties where other students are drinking. But is it a *real* choice? And is it a choice that courts should be so sanguine about students making? Part III suggests that the answer to both questions is no.

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231. *Id.* at *8 (quoting Plaintiff's Brief in Support of Their Motion for Temporary Restraining Order and Preliminary Injunction at 16, T.W. v. S. Columbia Area Sch. Dist., No. 4:20-CV-01688, 2020 WL 7027636 (M.D. Pa. Nov. 30, 2020)).

232. Meyer v. Nebraska, 262 U.S. 390, 390–91 (1923) (holding unconstitutional a law that prohibited the teaching of foreign languages to students at primary schools, on grounds that, among other things, it violated parents' rights to direct the upbringing of their children).

233. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding unconstitutional a law that required parents to send their children to public school, on grounds that it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

234. *T.W.*, 2020 WL 7027636, at *7.

235. *Id.* at *7–8.

236. *Id.* at *8.

237. *Id.* at *6.

III. A DEEPER DIVE: EXTRACURRICULAR ACTIVITIES' SIGNIFICANCE IN STUDENTS' LIVES

A large body of psychological research points to the significant role that extracurricular activities play in students' lives. And notably, in contrast to the idea of a sharp divide between "regular" school and extracurricular activities, the research suggests that the two are closely intertwined.[238] Not only do extracurricular activities directly boost school engagement, but they also affect students' social networks and mental health in ways that necessarily affect their time at school as well.[239] The sharp distinction that numerous courts have drawn between being removed from school and being removed from a meaningful extracurricular activity is, in reality, much blurrier.

To be sure, the studies discussed below are observational rather than experimental. The studies did not randomly assign students to groups in which some were required to participate in specific extracurriculars while others were prohibited from participating. Thus, it can be hard to prove exact causality. There are likely relevant differences between the students who choose to participate in activities in the first place and the students who do not.[240] That said, the qualitative data collected in some of these studies (such as by interviewing the students), and the consistency of the findings across a wide variety of schools, point toward clear trends. Additionally, the COVID-19 pandemic, in forcing the cancellation of all extracurricular activities for a period of time, created a sort of natural experiment for some of the studies discussed below.[241]

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238. *See infra* Part III.A–D.

239. *See infra* Part III.B–C.

240. *See* John L. Bradley & Paul F. Conway, *A Dual Step Transfer Model: Sport and Non-Sport Extracurricular Activities and the Enhancement of Academic Achievement*, 42 BRIT. EDUC. RSCH. J. 703, 718 (2016) (noting that there are many factors that affect participation in extracurricular activities and, thus, the relationship between extracurricular activity involvement and academic achievement is "multidimensional").

241. *See* Sümeyye Koç & Ahmet Koç, *The Effect Failing to Perform Extracurricular Activities Has Had on School Culture and Values Education During the COVID-19 Pandemic*, 12 FRONTIERS PSYCH. 1, 2 (2021) ("[Students'] inability to participate in extracurricular activities due to the COVID-19 pandemic [has] affected how they adapt to school culture and to acquiring values."); Press Release, Am. Acad. Pediatrics, COVID-19 Pandemic Cancellations Took Harsh Toll on Teen Athletes, Whose Mental and Physical Health Improved

A. EXTRACURRICULAR ACTIVITIES AND SCHOOL ENGAGEMENT

Extracurricular activities are directly related to school engagement, in terms of academic performance, attendance, and a general sense of connectedness.[242] A case study of the Chicago Public Schools' debate program, tellingly entitled *In School for After School*, explained how this occurs.[243] First, the debate team experience deepened students' cognitive engagement, which in turn made them more ambitious in their schoolwork.[244] Second, the debate team helped students form a sense of connection with their teammates, their coaches (who worked as substitute teachers), and their schools.[245]

Debate, of course, is an academically-oriented extracurricular activity. But notably, even *non*-academically oriented extracurriculars can have a similar effect on academic performance.[246] Research suggests that all school-based extracurricular activities—provided that they have practices several times per week—ultimately have a positive effect on academic achievement.[247] One paper theorized that this is because such activities promote school attachment, and raise students' general motivation levels

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Significantly After Sports Resumed (Oct. 7, 2022), https://www.aap.org/en/news-room/news-releases/conference-news-releases/covid-19-pandemic-cancellations-took-harsh-toll-on-teen-athletes-whose-mental-and-physical-health-improved-significantly-after-sports-resumed [https://perma.cc/9EWE-VT9S] (discussing how COVID-19 sports cancellations impacted the mental health of adolescent athletes).

242. *See* Karlyn J. Gorski, *In School for After School: The Relationship Between Extracurricular Participation and School Engagement*, 36 SOCIO. F. 248, 253–56 (2021) (noting that debate team participation predicted higher test scores, higher attendance, and contributed to a greater sense of connectedness to one's school and peers).

243. *Id.*

244. *See id.* at 262–66. One student commented: "[D]ebate, it takes time, it takes time to understand what you're learning . . . . And it's making a change in my everyday life. . . . [Like] taking time to really read and understand . . . ." *Id.* at 263.

245. *Id.* at 256–61 (finding students on the debate team experience greater "emotional engagement" with their school environment).

246. *See* Bradley & Conway, *supra* note 240, at 713 (explaining extracurricular sports activities can impact non-cognitive skills that help improve academic achievement).

247. *Id.* at 723.

and sense of self-efficacy.[248] Those improvements, in turn, then act "as a pivot point to confer greater learning application and hence potential academic benefit."[249]

There is also a flip side: research suggests that the *lack* of school-based extracurricular participation increases the chance that students will drop out of school.[250] One study examined twelve Montreal public high schools on this issue, and concluded that "it seems clear, based on both present and previous findings, that consistent [extracurricular activity] involvement is generally associated with a lowered risk of dropping out."[251] The researchers added that the key is consistency, rather than intensity, of involvement: "[a] relatively light involvement in one [extracurricular activity] could be enough if this involvement is not interrupted."[252] In this regard, the study specifically identified "No Pass/No Play" policies—whereby students are deemed ineligible for extracurriculars if their grades fall below a certain threshold—as problematic.[253] (This finding is, of course, also relevant to other suspensions from extracurricular activities as well.) Research evaluating the effect of the COVID-19 pandemic also supports this point, with school administrators describing how the loss of extracurricular activities had reduced their ability to transfer "values and school culture to students," with a resulting reduction in "students' commitment to school."[254]

B. EXTRACURRICULAR ACTIVITIES AND SOCIAL-EMOTIONAL DEVELOPMENT

Extracurricular activities also influence students' social-emotional development in several ways. Most simply, extracurriculars help students make friends. A "social network analysis" conducted by one set of researchers, for instance, found that "new friendships were from 1.8 to 2.8 times more likely to form

248. *See id.* at 712–13 ("Being part of an organised school team, practising several times per week and representing the school competitively will promote self-esteem, self-concept and . . . school connectedness.").

249. *Id.* at 721.

250. *See* Éliane Thouin et al., *School-Based Extracurricular Activity Involvement and High School Dropout Among At-Risk Students: Consistency Matters*, 26 APPLIED DEVELOPMENTAL SCI. 303, 303 (2022).

251. *Id.* at 312.

252. *Id.* at 313.

253. *Id.*

254. *See* Koç & Koç, *supra* note 241, at 5.

if adolescents participated in the same activity."[255] Interestingly, extracurriculars' effect on forming *new* friendships was stronger than their effect on maintaining existing friendships between students who had already known each other.[256] In other words, the positive relationship between extracurriculars and friendships does not simply stem from pre-existing friends signing up for activities together, but rather from new friendships forming there.

Those new friendships can also enable greater cross-ethnic understanding. A study of twenty-six public middle schools in a large metropolitan area in California found that extracurriculars play an "important role . . . in connecting youth from different ethnic backgrounds in multi-ethnic schools."[257] In this way, extracurriculars can actually be more impactful than classroom settings, because they bring together students with shared interests and emphasize "experiential learning" and "peer collaboration."[258] "Given the high degree of relatively informal, cooperative interaction among activity members, ethnically diverse activities may be uniquely situated to promote positive intergroup contact in school settings," the researchers explained.[259]

In addition to increasing *positive* social relationships among students, extracurricular activities—in particular, sports—have also been shown to mitigate the effects of negative ones. One study of 728 students with disabilities in the United States found, in fact, that participation in school sports was the most effective way to reduce the negative effects of bullying on students' self-esteem, friendship, and classwork.[260] The study found that "students who did not participate in athletics were almost twice as likely to report that bullying had a greater negative impact on their self-esteem in comparison to students who were

255. David R. Schaefer et al., *The Contribution of Extracurricular Activities to Adolescent Friendships: New Insights Through Social Network Analysis*, 47 DEVELOPMENTAL PSYCH. 1141, 1149–50 (2011).

256. *See id.* at 1148 ("[C]oparticipation [in extracurriculars] had a weaker effect on friendship persistence than new friendship formation.").

257. Casey A. Knifsend & Jaana Juvonen, *Extracurricular Activities in Multiethnic Middle Schools: Ideal Context for Positive Intergroup Attitudes?*, 27 J. RSCH. ON ADOLESCENCE 407, 418 (2016).

258. *Id.* at 407, 418.

259. *Id.* at 418.

260. Kaycee L. Bills, *Helping Children with Disabilities Combat Negative Socio-Emotional Outcomes Caused by Bullying Through Extracurricular Activities*, 30 J. HUM. BEHAV. SOC. ENV'T 573, 574 (2020).

involved in athletics."[261] Participation in non-athletic extracurricular activities, however, did not have the same effect on the students in the study.[262]

C. EXTRACURRICULAR ACTIVITIES AND MENTAL HEALTH

Given the above findings on extracurricular activities' positive effect on students' engagement and social connections, it makes sense that they are also tied to students' mental health. The American Academy of Pediatrics (AAP), in fact, issued a news release about the "harsh toll on teen athletes" imposed by the COVID-19 pandemic's cancellation of sports.[263] The AAP reported that the sports cancellation was accompanied by "startlingly high levels of anxiety and depression," which improved (but not fully) with the resumption of sports as the pandemic receded.[264] Relatedly, a 2017 study of children with depressed mothers found that "only participation in multiple sports was a significant moderator of the relationship between maternal and child depressive symptoms."[265] The researchers attributed this to the biological and social aspects of participating in sports.[266]

Other studies found that participation in certain types of extracurricular activities—namely, sports, creative activities, and music—led to a greater sense of "school belongingness," which in turn reduced students' risk of suicide.[267] In addition to specific mental health issues like depression and suicidality,

261. *Id.* at 578.

262. *Id.* ("[N]on-athletic extracurricular activities did not indicate a statistically significant relationship with the negative impacts bullying has on the student's self-esteem . . . .").

263. *See* Am. Acad. Pediatrics, *supra* note 241.

264. *Id.*

265. Paige M. Ryan et al., *Child's Number of Activities as a Moderator of Depressive Symptoms*, 26 J. CHILD & FAM. STUD. 3535, 3542 (2017).

266. *Id.* (noting that sports activate biological mechanisms associated with decreased depressive symptoms, such as endorphins and increased serotonin availability, while also increasing peer interaction).

267. *See, e.g.*, Andrea D. Mata et al., *Extracurricular Activity Involvement Is Associated with Adolescent Suicidality Through School Belongingness*, 7 VULNERABLE CHILD. & YOUTH STUD. 347, 347 (2012) ("[E]xtracurricular activity participants who reported higher school belongingness were less likely to report suicidality."); Brian W. Bauer et al., *Extracurricular Activities Are Associated with Lower Suicidality Through Decreased Thwarted Belongingness in Young Adults*, 22 ARCHIVES SUICIDE RSCH. 665, 665 (2018) ("An indirect effect of [extracurricular activities] on suicidality through thwarted belongingness was statistically significant . . . .").

extracurricular activities can also have beneficial effects on students' self-esteem.[268]

D. EXTRACURRICULAR ACTIVITIES AND RISKY BEHAVIORS

Finally, research suggests that extracurricular involvement reduces the chance that students will engage in risky behaviors like substance abuse. In *Earls*, Justice Ginsburg's dissent pointed out that "[n]ationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers."[269] The research she cited has been confirmed by more recent work. One recent study, for instance, found that for both female and male adolescents, participation in extracurricular activities had a statistically significant effect on substance use (regardless of whether it rose to the level of "abuse"), with the effect being even stronger on female students.[270] Another study tried to tease apart whether this was merely an issue of correlation—for example, that "adolescents who spend time in extracurricular contexts are simply more conscientious than their non-participating peers and, as a result, engage in less risky behavior."[271] This study, conducted in Australia, found that there was causation, not just correlation: "participation in activities predicted less risky substance use a year later, over and above conscientiousness development."[272] That said, this result was less robust for sports as compared with other extracurriculars; in some grades, sports participation was positively correlated with risky substance abuse.[273]

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268. *See* Lisa A. Kort-Butler & Kellie J. Hagewen, *School-Based Extracurricular Activity Involvement and Adolescent Self-Esteem: A Growth-Curve Analysis*, 40 J. YOUTH & ADOLESCENCE 568 (2011) (describing the positive relationship between adolescent participation in extracurricular activities and measures of well-being, including self-esteem).

269. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting).

270. Amy Kenney & Cory B. Dennis, *Environmental Paths That Inform Adolescent Substance Use Prevention*, 29 J. HUM. BEHAV. SOC. ENV'T 897, 897 (2019).

271. Kira O. McCabe et al., *Participation in Organized Activities Protects Against Adolescents' Risky Substance Use, Even Beyond Development in Conscientiousness*, 45 J. YOUTH & ADOLESCENCE 2292, 2293 (2016).

272. *Id.* at 2292.

273. *See id.* at 2301–02 (finding participation in sports was associated with riskier substance use for students in years ten and eleven of school).

There is also evidence that extracurricular involvement reduces adolescents' likelihood of getting involved in other problematic behavior. One study examined data from adolescents across the United States to explore associations between extracurricular activity involvement and a list of fifty-three risky behaviors, including "selling illegal drugs," "skipping school," and "oral sex."[274] The researchers found that "unsupervised time with peers [wa]s linked to more risky behaviors," whereas nonsports organized activities were associated with fewer risky behaviors and higher work orientation.[275] Involvement in sports did not do as much to reduce rates of risky behaviors (a similar finding to the Australia study), but sports involvement did have positive associations with work orientation and self-identity.[276] Similarly, a study that focused on low-income adolescents found that extracurricular involvement reduced their likelihood of engaging in risky sexual and drug-related behaviors.[277] To their surprise, as compared to the behavioral effects, the researchers did not find that extracurricular participation had a significant impact on the low-income adolescents' *internal* sense of well-being (in terms of depression and anxiety), but they concluded that extracurricular activities still "serve as important protective factors for youth from low-income households" because of the effects on external behavior.[278]

E. EXTRACURRICULAR ACTIVITIES AND COLLEGE ADMISSIONS

All of the research discussed above has focused on extracurricular activities' direct impact on students' lives. Apart from that, it is well known that extracurricular involvement also plays a role in college admissions. Indeed, colleges themselves ask students about their extracurricular activities as part of the admissions process, and admissions officers readily tell students

274. Kenneth T. H. Lee et al., *Out-of-School Time and Behaviors During Adolescence*, 28 J. RSCH. ON ADOLESCENCE 284, 287 (2018).

275. *Id.* at 290.

276. *Id.* at 290–92.

277. Julia S. Feldman et al., *Extracurricular Involvement in the School-Age Period and Adolescent Problem Behavior Among Low-Income Youth*, 89 J. CONSULTING & CLINICAL PSYCH. 947, 947 (2021).

278. *Id.* at 950–52.

that extracurriculars matter.[279] As these officers explain, students' extracurricular involvement in high school can demonstrate their interests and skills, as well as provide a sense of what they might pursue and contribute in college.[280] One study even suggests that extracurricular involvement can predict creativity better than traditional admissions factors.[281] Relatedly, involvement in high school extracurriculars, including but not limited to sports, is a well-known path toward college recruitment and scholarships.

This, too, makes extracurricular involvement feel essentially imperative for many high school students. Indeed, one study that explored students' reasons for participating in extracurriculars found that students mainly participated out of "internal motives," but that "external motives (e.g., résumé-building motives)" also played a role.[282] In fact, the plaintiff in *Earls*, Lindsay Earls, clearly described how her desire to participate in choir and band stemmed from both internal and external

279. A quick perusal of the websites for college admissions offices confirms this. For example, the Admissions Office for the University of South Florida states: "[h]igh school students often wonder if extracurriculars matter in the college admissions process. The short answer is yes." Leigh Perkins, *Do Extracurriculars Matter in the College Admissions Process?*, UNIV. OF S. FLA. (Dec. 18, 2020), https://admissions.usf.edu/blog/do-extracurriculars-matter-in-the-college-admissions-process [https://perma.cc/5XEF-5T9B]. The Cornell University Admissions Office states, under the heading "What does Cornell look for when we review your application?" that the office wants to see: "Involvement. Community engagement. Extracurricular activities. Work experience. Research. Leadership." *Preparing for Your Cornell Application*, CORNELL UNDERGRADUATE ADMISSIONS, https://admissions.cornell.edu/how-to-apply/advice-for-applicants [https://perma.cc/H6FD-5QLD]. The University of Michigan Admissions Office likewise states that one of the "basics" is "extracurricular preparation," explaining that "[y]our extracurricular preparation speaks to what you've done beyond the classroom. How have you become a leader at your school and in your community? To what heights have you taken your training in music, art, or dance? What is your life like beyond your course of studies and how do you connect them?" *Selection Process*, UNDERGRADUATE ADMISSIONS UNIV. OF MICH., https://admissions.umich.edu/apply/first-year-applicants/selection-process [https://perma.cc/QLR2-2KCQ].

280. Perkins, *supra* note 279; CORNELL UNIV., *supra* note 279; UNDERGRADUATE ADMISSIONS UNIV. OF MICH., *supra* note 279.

281. Katherine N. Cotter et al., *Applicant Extracurricular Involvement Predicts Creativity Better Than Traditional Admissions Factors*, 10 PSYCH. AESTHETICS, CREATIVITY, & ARTS 2, 8–11 (2016).

282. Nicolas Roulin & Adrian Bangerter, *Extracurricular Activities in Young Applicants' Résumés: What Are the Motives Behind Their Involvement?*, 48 INT'L J. PSYCH. 871, 877 (2013).

motives.[283] These considerations mattered so much to her that, once Tecumseh High School made participation in random drug testing a requirement for extracurricular activities, she felt trapped.[284] As Earls's complaint explained:

> [Earls] is considering music as a college major and plans to apply for music scholarships. [The District's] Policy would exclude Ms. Earls from her chosen activities and classes and would effectively foreclose her ability to major in music or receive music scholarships solely because she objects to providing her urine on demand to school officials for drug testing. She has met every other criteria for participation in her chosen activities and for enrollment in her chosen classes. Ms. Earls aspires to attend a competitive university after she graduates from high school and wishes to increase her academic skills and musical talents. She fears, however, that exclusion from student activities and classes will jeopardize her future plans and aspirations.[285]

Indeed, her complaint added that once the policy was implemented, she felt "coerced into consenting."[286] Earls's account brings to life just how important extracurricular activities are to many students.

IV. FROM "JUST EXTRACURRICULARS" TO EXTRACURRICULARS WHOSE OPERATIONS ARE JUST

Given the research on extracurricular activities' significant and beneficial role in students' lives—and, specifically, in their school experience itself—it is time to discard the artificial binary between "regular" school and extracurricular activities. Instead, extracurricular activities should be viewed as an extension of the school day, just as Justice Ginsburg's dissent analogized them to honors classes[287] and the *Hazelwood* majority classified them as part of the school curriculum.[288] Extracurriculars may be voluntary, but as these opinions noted, they are designed to impart skills to students, and participation in them is a key aspect of

283. *See* Complaint for Declaratory and Injunctive Relief at ¶ 25, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002) (No. 01-332), 2001 WL 34093961, at *15a–16a (noting that Lindsay Earls planned to participate in choir and band in order to meet her school's fine arts requirement, and that she was considering majoring in music when she went to college).

284. *Id.*

285. *Id.* at ¶ 25, *16a.

286. *Id.* at ¶ 26, *16a.

287. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 845–46 (2002) (Ginsburg, J., dissenting).

288. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).

taking full advantage of the school's offerings. Viewing extracurricular activities as extensions of the school day would significantly—and beneficially—reorient the analysis of all of the legal issues described above.

It is important to note that this approach certainly would not mean that extracurricular activities could not be regulated at all. After all, schools constantly regulate what happens on campus during the school day, from restricting lewd speech to determining who gets into honors classes to giving students detention if they are late. And those sorts of decisions do not trigger the type of procedural due process rights that a longer school suspension does.[289] By the same token, viewing extracurricular activities as part of the school day, akin to honors classes, would not conflict with the case law that states that procedural due process rights do not attach to extracurricular activities.[290]

Bringing extracurricular activities under the umbrella of "regular" school would, however, push back against the idea that extracurricular participation is merely a choice—one among many—for students. It would emphasize that extracurricular participation is important and meaningful, and that removing a student from an extracurricular activity for an extended period of time is a significant punishment. It would challenge the notion that extracurricular activities, once offered, are merely a privilege.[291] Schools often rely on this "privilege" trope to tell students that signing up for extracurriculars means that they are also signing up to represent the school "at all times and places," or "24/7," such that schools can regulate their off-campus speech and behavior.[292] But extracurricular involvement should not connote special ambassadorial status any more than school attendance does, and recognizing extracurriculars as an extension of the school day makes that clear. These principles have important implications for how issues involving speech, religion, and drug testing should play out in the extracurricular

289. *See generally* Palmer v. Merluzzi, 689 F. Supp. 400, 410–12 (D.N.J. 1988) (comparing the due process rights available to students subject to extracurricular penalties to those subject to curricular penalties).

290. *See supra* Part II.B.

291. *See supra* Part II.B.

292. *See Extracurricular Code of Conduct*, HIGHLAND PARK, *supra* note 23; Doe v. Banos, 713 F. Supp. 2d 404, 408 (D.N.J. 2010) (discussing a school's use of such a policy to regulate off-campus behavior).

context.[293] They also highlight what is so problematic about schools' deployment of extracurricular activities to regulate students' off-campus behavior.[294]

A. SPEECH AND EXTRACURRICULAR ACTIVITIES

The *Mahanoy* case depicts a school district that subscribed to all of the problematic notions identified by this Article.[295] The district explicitly told students, in its written code of conduct, that playing school sports was a "privilege," that participating on a sports team meant that they were representing the school district at all times during the sports season, and that they could not tarnish the district's image "in any manner."[296] This was explicitly linked to a reduction of participating students' First Amendment rights: the cheerleaders were told that "[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet."[297] As a result, the school district considered it appropriate to suspend B.L. from cheerleading for an entire year because of her crude "fuck cheer" posting on Snapchat.[298] By the same token, the school district's counsel at the Supreme Court oral argument used the rhetoric of "choice" to defend the school district's treatment of B.L.: "she's a cheerleader and it's an extracurricular program where she *consented* to an extra degree of regulation because she's a *school ambassador*."[299] *Mahanoy* is a case study in how minimizing extracurriculars as "just extracurriculars" can lead to extracurriculars that are unjust.

Fortunately, the Supreme Court recognized that this violated B.L.'s free speech rights.[300] But the decision did not provide much more guidance for how students' free speech rights should play out in the context of extracurricular activities.[301] The overarching concept that extracurriculars should be seen as an

293. *See supra* Part II.

294. *See supra* Part II.

295. *See Mahanoy Circuit*, 964 F.3d 170 (3d Cir. 2020); *see also supra* Part I.A.

296. *Mahanoy Circuit*, 964 F.3d at 193.

297. *Id.*

298. *Id.*

299. Transcript of Oral Argument, *Mahanoy Supreme*, *supra* note 69, at 21.

300. *Mahanoy Supreme*, 141 S. Ct. 2038, 2047–48 (2021).

301. *See id.*

extension of the school day, and the concerns to which it responds, help point toward a more detailed approach.

First, codes of conduct (or other policies) for extracurricular activities should not be permitted to ratchet down students' free speech rights as a condition of participation. Policies that tell students they cannot post anything "negative" or "inappropriate" are not only vague, but also fail to leave room for students to express their own views and individuality.[302] Indeed, as Amy Gutmann argued in her landmark book *Democratic Education*, there is affirmative value to leaving space for student dissent within the public school setting.[303] Gutmann explains that by "respecting conscientious dissent" until it interferes with the education of others, "public schools can offer a valuable lesson in democratic toleration."[304] Students should not have to choose between retaining their full free speech rights and participating in extracurricular activities when both are so important. Rather than being set in opposition, the two interests should be recognized as playing complementary roles in students' development toward adulthood.

Eliminating these sorts of wide-ranging policies would not leave schools powerless over student speech that is connected to extracurricular activities. Doing so would simply put extracurricular activities on the same level as other aspects of the school day, like classes or lunchtime.[305] If a student's speech threatens to substantially disrupt an extracurricular activity, then the school should be able to regulate it, just as it can regulate speech that threatens to substantially disrupt other aspects of the school day.[306] But substantial disruption should be required in the extracurricular context, too.

Second, what counts as "substantial disruption" of an extracurricular activity should not be lower than it is for speech connected to other aspects of the school day. As Part II.A showed, schools have been too ready to find that *any* questioning of the operations of an extracurricular activity is substantially disruptive, and courts have been too willing to defer to such findings.[307]

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302. *See supra* Part I.A.
303. AMY GUTMANN, DEMOCRATIC EDUCATION 123 (rev. ed. 1987).
304. *Id.*
305. *See supra* Part II.
306. *See* Waldman, *supra* note 56, at 525–28.
307. *See supra* Part II.A.

This is especially problematic when it comes to students' off-campus speech because it leaves no room at all for students to express their own views, as *Mahanoy* noted.[308] But it is even problematic when applied to students' on-campus speech. At school, students should be able to talk to one another and express concerns about, for instance, how a coach is conducting practice—as in *Euverard*, where students circulated a petition to object to the football coach's degrading methods[309]—without getting thrown off the team for "undermin[ing] his authority."[310] School sports, as well as other extracurricular activities, are offered by public school districts and subsidized by taxpayers to benefit students and enhance their educational experience.[311] This priority, rather than protecting school officials from any challenges to their authority, should come first. The threshold should be whether the speech is likely to cause a substantial enough disruption that it will prevent other students from gaining the benefits of participating in the extracurricular activity.

Finally, even if a student's speech *does* rise to the level of substantially disrupting an extracurricular activity, the punishment should still be reasonable, in order to account for the First Amendment interests at stake. Removal from an extracurricular activity for the entire school year is a significant sanction that may trigger a host of negative consequences for students' academic performance, social relationships, mental health, and involvement in risky or self-destructive behaviors.[312] Indeed, the study showing that extracurricular involvement has a statistically significant effect on school drop-out rates—but only when it is *uninterrupted*—is particularly relevant here.[313] It is disturbing that in cases like *Doninger*, *Mahanoy*, and *Longoria*, the school's response to the students' crude internet postings—the students' first "offense"—was a year-long sanction.[314] In

308. *Mahanoy Supreme*, 141 S. Ct. 2038, 2047–48 (2021).

309. Lowery v. Euverard, 497 F.3d 584, 585–86 (6th Cir. 2007).

310. *Id.* at 600.

311. *See supra* Part III.

312. *See supra* Part III.

313. Thouin, *supra* note 250, at 312–13.

314. The student in *Doninger* was disqualified from running for student government office in her senior year. *Doninger II*, 642 F.3d 334, 342 (2d Cir. 2011). The students in *Mahanoy* and *Longoria* were immediately kicked off of their respective cheerleading team for the rest of the year. *Mahanoy Supreme*, 141 S.

upholding these sanctions, the *Doninger* and *Longoria* courts asserted that these year-long extracurricular suspensions were minor punishments because they did not involve a loss of classroom time.[315] For the students, though, the suspensions were anything but minor. Even though Justice Kavanaugh's incredulity that B.L. had been removed from cheerleading for an entire year did not make it into the *Mahanoy* opinion,[316] courts should review such punishments less deferentially. Suspending a student from an extracurricular activity for the entire year should be a last resort in situations where it is genuinely untenable for the student to return without continued disruption. Viewing extracurricular activities as extensions of the school day makes that clear.

B. RELIGION AND EXTRACURRICULAR ACTIVITIES

In *Mahanoy*, the school district failed to adequately protect the student's First Amendment rights in connection with the cheerleading team, but the Supreme Court ultimately vindicated them.[317] In *Kennedy*, precisely the reverse occurred.[318] The school district took appropriate action to protect students' First Amendment rights in connection with the football team, but the Supreme Court stymied those efforts.[319] It is likely that at least some other high school football coaches across the country will follow Kennedy's practice of praying on the 50-yard line immediately after the games. This creates an inherently coercive situation for students.[320]

Ct. 2038, 2043 (2021); Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 261–62 (5th Cir. 2019).

315. *See Doninger II*, 642 F.3d at 350 ("Doninger's discipline extended only to her role as a student government representative: she was not suspended from classes or punished in any other way."); *Longoria*, 942 F.3d at 268 ("[M]ost notably, M.L. was dismissed from an *extracurricular activity* as a consequence of her speech—not suspended from school altogether.").

316. *See supra* Part I.A.

317. *Mahanoy Supreme*, 141 S. Ct. at 2047–48.

318. *See Kennedy Supreme*, 142 S. Ct. 2407, 2433 (reversing the Ninth Circuit's holding in favor of the school district and instead ruling that the football coach's prayer at the fifty-yard line was protected under the First Amendment).

319. *See id.* at 2416–19 (outlining the school district's communication with Kennedy regarding his prayer on the football field and that the district ultimately placed Kennedy on administrative leave and advised against his rehiring).

320. *See supra* Part I.B.

The Supreme Court previously recognized in *Lee v. Weisman* that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,"[321] and *Santa Fe* applied that reasoning in the specific context of high school football games.[322] The *Kennedy* Court claimed that "this case looks very different" from *Santa Fe*.[323] But on the relevant points of comparison, it was not very different at all. For example, the *Kennedy* Court said that in *Santa Fe*, football game "attendance was required for 'cheerleaders, members of the band, and, of course, the team members themselves,'"[324] but that "[n]one of that [wa]s true [t]here."[325] However, the Bremerton High School football team *was* required to be at the football game,[326] and cheerleaders and band members were also required to be there (as evidenced by the fact that they got knocked down when community members rushed to the field to join Kennedy's post-game prayer[327]). The *Kennedy* Court must have meant that no student was required to join Kennedy on the fifty-yard line in prayer, but no students had been required to join the student-delivered prayer in *Santa Fe*, either.[328] The only factual distinction was that in *Santa Fe*, the prayer was broadcast over a loudspeaker,[329] while in *Kennedy*, it was not.[330] However, the more significant distinction cuts the other way: in *Kennedy*, it was a coach—an authority figure with influence over who would get playing time—leading the prayer, rather than a fellow student.[331] If anything, then, the level of psychological coercion was even greater in *Kennedy* than in *Santa Fe*. As Justin

321. Lee v. Weisman, 505 U.S. 577, 592 (1992).

322. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000).

323. *Kennedy Supreme*, 142 S. Ct. 2407, 2431 (2022).

324. *Id.* at 2431–32 (emphasis omitted) (quoting *Santa Fe*, 530 U.S. at 311).

325. *Id.* at 2432.

326. *Cf. id.* (specifying that the salient activity the football players were not required to participate in was Kennedy's prayers rather than the game).

327. *Kennedy Distric*t, 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020); *see also supra* Part I.B.

328. *See Santa Fe*, 530 U.S. at 301–03.

329. *Id.* at 307.

330. *Kennedy Supreme*, 142 S. Ct. at 2415 ("Mr. Kennedy offered his prayers quietly . . . .").

331. *Compare Kennedy Supreme*, 142 S. Ct. at 2415 (noting that the person praying was the Petitioner, Joseph Kennedy, who was employed as a high school football coach), *with Santa Fe*, 530 U.S. at 305–06 (noting that students delivered the prayer).

Driver has observed, *Kennedy* raises the "distinct, haunting prospect of student athletes who are desperate for playing time attempting to engage in an unseemly exchange of pray for play. Even if the student athlete is laboring under a false impression, the coercion is all too real."[332]

Viewing extracurricular activities as extensions of the school day crystallizes why *Kennedy* was wrongly decided, as to both Kennedy's free speech claim and the school district's Establishment Clause defense. It suggests that the relevant analogy was not to a "Christian aide . . . praying quietly over her lunch in the cafeteria,"[333] but rather to a teacher conducting "post-class" prayers in the classroom immediately after the bell rings and telling students that they are free to join her. A school district should be able to prohibit that practice, both because of Establishment Clause concerns and because in that instance, the teacher would be acting in her capacity as an employee, disposing of any free speech claim she could bring.[334] The sort of access that a teacher has to students in the classroom right after class only comes with being *employed as a teacher by the school*. The same was true here. Kennedy had access to the fifty-yard line immediately after the football game only because of his position as a coach.[335] As a concurrence to the Ninth Circuit's denial of an en banc rehearing explained:

> Kennedy insisted on expressing his religious speech publicly (indeed, he refused to wait until the audience had left the stadium so his prayers could be observed by all those on the field and in the stadium); the record shows he would not have had access to the field if he had not been working as a coach; [and] he admitted he was on duty when he prayed on the field . . . .[336]

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332. Driver, *supra* note 30, at 247.

333. *Kennedy Supreme*, 142 S. Ct. at 2425.

334. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."); *see also, e.g.*, Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 334, 340 (6th Cir. 2010) (applying *Garcetti* and finding that a high school teacher does not have a free speech claim with regard to deciding which books to use during class and what discussions to have with her class as those activities are within the scope of her employment).

335. *Kennedy Circuit*, 991 F.3d 1004, 1015 (9th Cir. 2021).

336. Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 926 (9th Cir. 2021) (Smith, J., concurring).

None of this is to suggest that extracurricular activities, as a category, should be hostile to religion. Rather, the point is that extracurricular activities are an integral part of the educational program offered to students,[337] and that students' interests should come first. Indeed, the Supreme Court's *Mergens*[338] decision upholding the Equal Access Act (under which public secondary schools cannot "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings"[339]) is instructive here. The Court upheld the Equal Access Act in the face of an Establishment Clause challenge precisely because the statute was about *student-initiated* and *student-led* groups.[340] Indeed, as the Court emphasized in *Mergens*, the Equal Access Act prohibits school officials from promoting, leading, or participating in any religious meetings, allowing school employees to attend such meetings only in a "nonparticipatory capacity."[341] This is logical and appropriate. Student-run clubs are often part of the mix of extracurricular activities offered by public schools. Given the important role of extracurriculars in students' lives, students should be able to form religious clubs just as they can form other clubs. But just as school employees should not be able to participate in the meetings of such clubs for fear of Establishment Clause concerns, neither should they be able to introduce any religious aspects into other extracurricular activities. Doing so risks depriving some students of the full benefits that extracurricular activities offer—whether by prompting them to quit, or by making them feel like outsiders in the very context that was supposed to connect them to each other and to their school in the first place.[342]

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337. *See supra* Part III.

338. Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990).

339. 20 U.S.C. § 4071(a).

340. *Mergens*, 496 U.S. at 252.

341. 20 U.S.C. § 4071(c); *see also Mergens*, 496 U.S. at 253 (explaining the Act's condonation of "custodial oversight" is not in violation of the Establishment Clause).

342. *See supra* Part I.A.

C. RANDOM DRUG TESTING AND EXTRACURRICULAR ACTIVITIES

Just as the notion of "voluntariness" played an oversized role in *Kennedy*'s reasoning, so too did it drive the analysis in *Vernonia* and *Earls*.[343] In *Kennedy,* the "voluntariness" construct was used to emphasize that the football players were not being required to pray; in *Vernonia* and *Earls*, the point was that no one was being forced to play football at all.[344] The *Vernonia* and *Earls* Courts reasoned that by "choosing to go out for the team," the students had voluntarily consented to random drug testing, too.[345]

Were extracurricular activities instead viewed as extensions of the school day, the random drug testing policies would have been analyzed far more stringently. Indeed, lower courts applying *Vernonia* and *Earls* have consistently interpreted them to mean that schools *cannot* randomly search students in the course of the regular school day.[346] In *Doe v. Little Rock School District*, for instance, the Eighth Circuit struck down Little Rock School District's practice of subjecting public school students to random, suspicionless searches, explaining that "the search regime at issue [was] imposed upon the entire student body, so the [District could not] reasonably claim that those subject to search [] made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege."[347] As this Article has argued, however, the notion that students participating in extracurricular activities have made a "voluntary tradeoff" in exchange for a "privilege" does not capture the actual dynamics here.[348]

This is not to say that random drug testing can never be appropriate for specific extracurricular activities. There may be

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343. *Compare Kennedy Supreme*, 142 S. Ct. 2407, 2432 (2022) (pointing out that "[s]tudents were not required or expected to participate" in the coach's prayer), *with* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (stating that by electing to participate in school sports, students "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally"), *and* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 831 (2002) ("[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to . . . intrusions on their privacy . . . .").

344. *See supra* note 343.

345. *Vernonia*, 515 U.S. at 657; *Earls*, 536 U.S. at 832.

346. *E.g.*, Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349 (8th Cir. 2004).

347. *Id.* at 354.

348. *See supra* notes 287–88 and accompanying text.

situations where drug use is so rampant in a particular extracurricular activity—especially an activity where the risks of drug-related injury are especially high, like sports—that it is reasonable under the Fourth Amendment to implement a drug testing regime there. In such a case, though, it is reasonable *not* because the students' legitimate expectations of privacy are any lower than the norm, but because the nature and immediacy of the governmental concern are particularly high. Such instances should be the exception, not the rule.

D. OUT-OF-SCHOOL CONDUCT AND EXTRACURRICULAR ACTIVITIES

Finally, viewing extracurricular activities as extensions of the school day highlights what is so problematic about schools' use of extracurricular activities as a lever to regulate students' off-campus behavior. Essentially, by claiming that extracurriculars are a "privilege," schools have been able to attach conditions to them that they could never attach to school attendance.[349] This is a widespread practice, not limited to the few schools where the policies were actually challenged (unsuccessfully) in court.[350] For example, the Highland Park Independent School District (HPISD) in Dallas, Texas—a large, nationally-regarded district—tells students that "participation in the regular curriculum is a right afforded to each student, while participation in the extracurricular program is a privilege," that students in extracurricular activities are representing the school district "whether or not they are actively performing, competing, or participating in extracurricular activities and whether or not they are wearing uniforms or other clothing that identifies the student to the community or public in any setting as HPISD students," and that therefore, "their behavior must be exemplary and reflect the finest attributes of the total HPISD student body *at all times and places*."[351] Many other districts use very similar language.[352]

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349. *See supra* Part II.B.

350. *See supra* Part II.B.

351. *Extracurricular Code of Conduct*, HIGHLAND PARK, *supra* note 23 (emphasis added).

352. *See supra* Part II.B; *see also, e.g.*, *Hays CISD Extracurricular Code of Conduct*, HAYS CONSOL. INDEP. SCH. DIST. (2022), https://www.hayscisd.net/cms/lib/TX02204837/Centricity/Domain/90/2022-2023_ECC.pdf [https://perma

At a minimum, such codes of conduct typically prohibit alcohol and drug use by students.[353] In addition to prohibiting illegal conduct, however, they sometimes prohibit students from even being *present* at social gatherings where others are using drugs and alcohol, threatening them with suspension from extracurricular activities if they are caught.[354] Indeed, this was the aspect of the policies being challenged in the cases that Part II.B described.[355] While it may be a good idea for students to immediately leave such social gatherings, the school should not be the one policing that decision. It raises the identical point made by *Mahanoy* in explaining why schools typically cannot regulate students' off-campus speech:

> [A] school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally

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.cc/P9Q7-2QN4] ("Participation in extracurricular activities and extracurricular organizations, including interscholastic athletics, is a privilege, not a right. Since extracurricular activities are optional, those who choose to participate are representatives of their respective activities, their school and Hays CISD. Students will be held to higher standards of behavior and performance while in and out of school, both during the activity season and out of season."); *Lake Travis ISD Extracurricular Code of Conduct ("ECC")*, LAKE TRAVIS INDEP. SCH. DIST. 1–2 (July 2017) https://www.ltisdschools.org/cms/lib/TX01800016/Centricity/Domain/781/LTISD%20Extra%20Curricular%20Code%20of%20Conduct%2018_19.pdf [https://perma.cc/5FPE-PD8E] ("Participation in Lake Travis ISD Extracurricular Activities is a privilege and not a right. . . . Extracurricular participants have the responsibility to: [a]lways remember they are representatives of their school, family and community - they must make a constant effort to project a positive, respectful image."); *Extracurricular Code of Conduct*, STILLWATER CENT. SCH. DIST. [hereinafter *Extracurricular Code of Conduct*, STILLWATER CENTRAL], https://www.scsd.org/athletics/extracurricular-code-of-conduct [https://perma.cc/QUB5-EV9E] ("Student participation in extracurriculars is a privilege, not a right.").

353. *See supra* Part II.B.

354. *See supra* Part II.B; *see also, e.g.*, *Extracurricular Code of Conduct*, HIGHLAND PARK, *supra* note 23, at 2 (including, on the list of "Prohibited Conduct," "[a]ttending or remaining at any activity after becoming aware that illegal alcohol consumption is occurring at the activity"); *Extracurricular Code of Conduct*, STILLWATER CENTRAL, *supra* note 352 ("The loitering of a student in the vicinity where alcohol or drugs are used, possessed, sold or distributed illegally is also a violation of the Code of Conduct.").

355. *See supra* Part II.B.

> fall within the zone of parental, rather than school-related, responsibility.[356]

This observation would be just as apt if the word "conduct" replaced the word "speech."

It is true that there is no separate First Amendment violation imposed by these sorts of limitations on students' off-campus conduct.[357] It is notable, however, that the very same language about being a school ambassador "at all times" gets used to justify both off-campus *speech* restrictions (as in *Mahanoy*[358] and *Longoria*[359]) and off-campus *conduct* restrictions.[360] The underlying premise here is the same: extracurriculars are a mere privilege, so schools have a free hand to regulate them, and the fact that students can choose not to participate means that there is no burden on any constitutional rights at all.[361] This is a recipe for abuse of school power. The First Amendment cannot be the vehicle for challenging such policies, but courts should consider whether the Fourteenth Amendment parental due process right should be interpreted as covering situations where schools claim for themselves an *in loco parentis* role to discipline students' off-campus, un-school-related behavior.

Particularly concerning is the lack of any limiting principle here. Indeed, most recently, extracurricular activities were deployed as a lever for regulating a new type of off-campus behavior: COVID-19 vaccination. For example, throughout the 2021–2022 school year, New York City did not (and still does not) require students to get the COVID-19 vaccination in order to attend school.[362] However, it *did* make COVID-19 vaccination a requirement for all "high risk extracurricular activities," a broadly-defined term that swept in all sports (including even

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356. *Mahanoy Supreme*, 141 S. Ct. 2038, 2046 (2021).

357. *See supra* Part II.B.

358. *See supra* note 69 and accompanying text.

359. Appellees/Cross-Appellants' Principal and Response Brief, 942 F.3d 258 (5th Cir. 2019) (No. 18-41060) ("[T]he Fifth Circuit has previously recognized the important role that [cheerleaders] play as ambassadors for the school district . . . . It is not unreasonable, much less unconstitutional, for [them] to be expected to comply with the standard of conduct to which [they] voluntarily agreed as part of [their] participation in the cheerleading squad . . . ." (citation omitted)).

360. *Lake Travis ISD Extracurricular Code of Conduct ("ECC")*, *supra* note 352, at 1.

361. *See supra* Part II.

362. Otterman, *supra* note 21.

low-contact sports like tennis and outdoor track), orchestra, dance, chorus, and more.[363] This meant that unvaccinated students could participate in sports and music classes during the school day, but could not participate in those very same activities after school. Then-Mayor Bill de Blasio justified requiring the vaccine for extracurricular activities on grounds that "[i]t's extracurricular by nature. If a family doesn't think it's important enough to get their child vaccinated for this, they won't participate."[364] Even until May of 2023, the Cambridge Public Schools in Cambridge, Massachusetts, excluded students from extracurricular activities if they had not been vaccinated for COVID-19, even though such students were allowed to attend school.[365] This meant that students who participated in the district's extracurricular performing arts programs had to be vaccinated, while students who participated in the district's credit-bearing performing arts programs did not need to be vaccinated, even if the two programs met at the same time. There was never a logical basis for that differential treatment. From a COVID-19 perspective, there is nothing riskier about acting in a play that does not come with academic credit than acting in a play that *does* have credit attached. The school district simply exploited the distinction between "regular" school and extracurriculars as a lever to indirectly require vaccination.

None of this is to argue that COVID-19 vaccination is a bad idea. But, in a time when scientific and policy arguments for and against various vaccination mandates for students are the subject of debate by elected legislators,[366] public schools should not be unilaterally arrogating this power to themselves. And extracurriculars should not be a vehicle through which they can do so.

Viewing extracurriculars as extensions of the school day would reframe this issue. It makes perfect sense that schools can regulate what happens in the extracurricular activity itself (in

363. N.Y.C. DEP'T OF HEALTH AND & MENTAL HYGIENE, *supra* note 21.

364. Ari Ephraim Feldman, *Vaccines Required for NYC Public School Children Participating in Extracurricular Activities*, N.Y. ONE (Sept. 10, 2021), https://www.ny1.com/nyc/all-boroughs/news/2021/09/10/vaccines-required-for-nyc-public-school-children-participating-extracurricular-activities- [https://perma.cc/54PQ-RNB2].

365. *See supra* note 22 and accompanying text.

366. *See* Otterman, *supra* note 21 (discussing that bills have been introduced into the New York state legislature which would require the COVID-19 vaccine for school attendance, but that there was not enough support to pass them).

terms of who makes a team, who gets cast in a role, how practices are conducted, and so on), just as they can regulate what happens in classrooms. By the same token, schools can—if they so choose—have extracurricular consequences for what happens inside a classroom, such as with "no pass/no play" policies. This is still consistent with viewing extracurricular activities as extensions of the school day. Indeed, it underscores that classes and extracurriculars are both part of the overall program of education. But schools should not be able to use extracurricular activities to control and regulate students' *off-campus* behavior, any more than they can use school attendance to do so. As discussed above, courts should give more thought to potential Fourteenth Amendment challenges here, on grounds that such policies encroach familial decision-making.[367] Indeed, the COVID-19 vaccine example illustrates the dangers of minimizing extracurriculars as "just extracurriculars"—and points to the importance of ensuring that they operate in ways that are just.

CONCLUSION

It is no coincidence that extracurricular activities have been the battleground for a striking number of the Supreme Court's cases involving constitutional rights at schools. Extracurriculars can involve everything from athletics to newspapers to student government to arts to issue-oriented clubs and more. They play a major role in students' lives, with implications for their academic performance, social relationships, mental health, and college admissions. And, as *Kennedy* shows, extracurriculars matter to the adults who run them as well. Yet extracurricular activities currently exist in a sort of liminal status as compared to the classroom context, leaving schools with uncertain parameters over their own authority. All of this creates a complex brew. The combination of *Santa Fe* and *Kennedy*, for example, arguably puts schools in a tremendously difficult position, by simultaneously telling them that they *cannot* allow certain religious prayers at football games and that they *must* allow others.[368] In

367. *See supra* note 356 and accompanying text.

368. *Compare* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (holding that a school's policy of allowing a student-led prayer before football games was unconstitutional), *with Kennedy Supreme*, 142 S. Ct. 2407, 2433 (2022) (holding that a school violated the constitution by disciplining a high school football coach for praying on the fifty-yard line after the games).

this realm, schools now seem to have very little discretion or margin for error. That said, in other realms, schools have seized on extracurricular activities' underdeveloped status as a way of grabbing power for themselves, using the "voluntary" and "privilege" themes to justify encroachments on students' autonomy. This sort of power-grab was most explicit in *Mahanoy*,[369] but it was also at issue in *Earls* and *Vernonia*,[370] and of course in many lower court cases as well.[371] Indeed, the notion of extracurricular activities as a mere privilege to which any number of conditions can be attached has now proliferated among school districts across the country.

Recognizing extracurricular activities as extensions of the school day would surely not eliminate the legal conflicts that occur in the extracurricular context. But it *would* help clarify those issues for schools and courts. More importantly, it would center the most important constituency: the students. For students, extracurricular activities are not "just" extracurriculars—and so they need to operate in a way that is just.

369. *See supra* note 69 and accompanying text.

370. *See supra* note 13 and accompanying text.

371. *See supra* Part II.