CONSTITUTIONAL LAW — FIRST AMENDMENT — SECOND CIRCUIT HOLDS THAT STUDENT'S REMOVAL FROM CLASS IS NOT FIRST AMENDMENT RETALIATION WHERE MOTIVATION IS PROTECTIVE. — *Cox v. Warwick Valley Central School District*, 654 F.3d 267 (2d Cir. 2011).

The First Amendment protects citizens from state retaliation for exercising their freedom of speech, because allowing such reprisals would "threaten[] to inhibit exercise of the protected right."[1] Yet not all speech is protected by the First Amendment,[2] and not all official actions adverse to a speaker constitute retaliation.[3] These limitations are particularly relevant for students in public schools, who customarily enjoy diminished First Amendment protection for their speech.[4] Ordinarily, a speaker bringing suit for First Amendment retaliation must prove "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action."[5] Recently, in *Cox v. Warwick Valley Central School District*,[6] the Second Circuit held that a student's temporary removal from school activities in response to a disturbing essay he had written did not violate the student's First Amendment rights because the school's motivation for the removal was "protective" rather than punitive, and thus the removal failed to constitute an adverse action.[7] The court declined to decide whether the student's speech was protected by the First Amendment because its holding rendered the question moot.[8] Although the court reached the correct result, it should have first determined whether the essay was protected speech and then

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[1] Hartman v. Moore, 547 U.S. 250, 256 (2006) (quoting Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998)) (internal quotation mark omitted).

[2] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."); *see also* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (same).

[3] *See Hartman*, 547 U.S. at 256.

[4] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[5] Scott v. Coughlin, 344 F.3d 282, 287 (2d Cir. 2003) (quoting Morales v. Mackalm, 278 F.3d 126, 131 (2d Cir. 2002)) (internal quotation marks omitted). While different courts use varying terminology and formulate tests for retaliation claims in subtly different ways, the important factors are generally the same: (1) a constitutionally protected right, (2) a negative action taken against the rightholder, and (3) a substantial causal connection between the exercise of the right and the negative action. *See, e.g.*, Gorelik v. Costin, 605 F.3d 118, 123 (1st Cir. 2010); Smith v. Mosley, 532 F.3d 1270, 1276 (11th Cir. 2008); Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006); Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004).

[6] 654 F.3d 267 (2d Cir. 2011).

[7] *Id.* at 274.

[8] *Id.* at 273.

applied — if necessary — the adverse action prong in the same way as it had in previous cases. By adopting a reformulation of the usual test, the court unnecessarily modified the adverse action requirement, effectively raising the bar for proving retaliation to impossible heights. Furthermore, the important policy considerations to which the court pointed could more appropriately have been addressed in determining the First Amendment status of the speech.

In March 2007, Raphael Cox turned in an essay called "Racing Time" for his English class; the essay described what he would do if he had twenty-four hours to live.[9] The essay contained descriptions of alcohol and drug abuse, insinuations of violence, and a plan to commit suicide at the end of the twenty-four hours by "taking cyanide and shooting himself in the head in front of his friends."[10] In part because Raphael had misbehaved frequently and seriously in the past, the Warwick Valley Middle School principal removed Raphael from class to discuss the essay and "sequestered Raphael in the in-school suspension room . . . for the rest of the afternoon" while he determined whether Raphael was a threat to himself or others and whether he should be disciplined.[11] After resolving both questions in the negative, the principal sent Raphael home but reported the incident the next day to the state's Office of Children and Family Services (CFS) due to concerns regarding parental neglect.[12] A CFS representative insisted that Raphael receive a psychiatric evaluation, the results of which eventually led CFS to conclude that the principal's concerns were "unfounded."[13]

In November 2007, Raphael's parents filed suit in federal district court against the principal and the school under 42 U.S.C. § 1983,[14] alleging, inter alia, that the principal and the school had violated Raphael's First Amendment speech rights by removing him from class and by involving CFS.[15] Raphael's parents also alleged that the school had violated their substantive due process rights to custody "by making an exaggerated or false report to CFS."[16]

The district court granted summary judgment to Warwick Valley on both claims. First, despite finding "at least material factual dis-

[9] *Id.* at 270 & n.3.

[10] *Id.* at 270.

[11] *Id.* at 270–71.

[12] *Id.* at 271.

[13] *Id.*

[14] *Id.*; Cox v. Warwick Valley Cent. Sch. Dist., No. 7:07-CV-10682, 2010 WL 6501655, at *4 (S.D.N.Y. Aug. 16, 2010); *see also* 42 U.S.C. § 1983 (2006) (providing a civil cause of action for any person deprived under color of state law "of any rights, privileges, or immunities secured by the Constitution and laws").

[15] *Cox*, 654 F.3d at 271–72.

[16] *Id.* at 271. Raphael's parents additionally claimed that the school had violated Raphael's Fourth Amendment rights through repeated locker searches, but they later withdrew this claim. *See Cox*, 2010 WL 6501655, at *4, *6.

pute" regarding whether the school's responses had constituted adverse action,[17] the court held that Raphael had not suffered any First Amendment retaliation because his essay was not protected by the First Amendment.[18] The court based this holding on the standard the Supreme Court articulated in *Tinker v. Des Moines Independent Community School District*,[19] which held that student speech is protected by the First Amendment unless it "materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school."[20] Reasoning that the *Tinker* test allowed for suppression of student speech where "school officials might reasonably portend disruption from the student expression at issue"[21] and that federal courts should not "second-guess school administrators' judgment,"[22] the court found that the school officials had reasonably concluded that Raphael "presented a risk of a substantial disturbance to the school."[23]

Second, the court rejected the substantive due process claim, finding that the plaintiffs had failed to establish either that the school had deliberately made a false report to CFS or that the school had acted in an arbitrary or conscience-shocking manner.[24] The court found that the family had "failed to present evidence . . . that [the school's report to CFS] contained information that was 'not merely wrong [but] deliberately false.'"[25] In addition, the court found as a matter of law that the school's conduct "was not so egregious . . . [as] to constitute a violation of the Plaintiffs' Fourteenth Amendment substantive due process rights."[26] Raphael's parents appealed.[27]

The Second Circuit affirmed.[28] Writing for the panel, Chief Judge Jacobs[29] concluded that the school had violated neither Raphael's nor his parents' rights.[30] With respect to the parents' Fourteenth Amendment claims, the court held that the school's report to CFS was neither

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[17] *Cox*, 2010 WL 6501655, at *7.

[18] *Id.* at *9–10.

[19] 393 U.S. 503 (1969).

[20] *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted); *see Cox*, 2010 WL 6501655, at *8–9.

[21] *Cox*, 2010 WL 6501655, at *9 (quoting Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008)) (internal quotation mark omitted).

[22] *Id.*

[23] *Id.* at *10.

[24] *See id.* at *14.

[25] *Id.* at *13 (third alteration in original) (quoting Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment at 15, *Cox*, 2010 WL 6501655 (No. 7:07-CV-10682)).

[26] *Id.* at *14.

[27] *Cox*, 654 F.3d at 271.

[28] *Id.* at 276.

[29] Chief Judge Jacobs was joined by Judge Livingston and District Judge Rakoff of the Southern District of New York, sitting by designation.

[30] *Cox*, 654 F.3d at 272.

"outrageous" nor "conscience-shocking."[31] The court further reasoned that while the parents' experiences with the school and CFS "may have been stressful or even infuriating, . . . they did not result in even a temporary loss of custody, let alone a 'wholesale relinquishment of rights,'" which would have been necessary for a substantive due process violation.[32]

The Second Circuit also affirmed the district court's First Amendment retaliation result, though for explicitly "different reasons."[33] Rather than assessing whether Raphael's essay was protected speech under the first prong of the retaliation test, the court held that Raphael's claim failed the adverse action prong because "none of [the school's] actions in response to Raphael's speech constituted retaliation."[34] The court noted that "[o]utside the school context, an adverse action in a First Amendment retaliation case is 'conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'"[35] Inside schools, however, "[t]here is . . . no clear definition of 'adverse action.'"[36] The court observed that the school setting is unique because of the state's "powerful" interest in "encouraging teachers to protect students."[37] The court thus applied its own standard: because teachers and other school officials need "fair latitude" to discharge their duties to protect students, a decision to remove a student from class based on speech containing "harmful ideations" could not be considered an adverse action "absent a clear showing of intent to chill speech or punish it."[38] The court thus held that Warwick Valley's reaction to Raphael's essay, intended as a "precautionary measure" against harm to Raphael and to other students, could not constitute First Amendment retaliation.[39] The court declined to reach the issue of whether the First Amendment protected Raphael's speech.[40]

While the court was correct to note that the "special characteristics of the school environment"[41] should affect its analysis,[42] it should have

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[31] *Id.* at 276.
[32] *Id.* at 275–76 (quoting Nicholson v. Scoppetta, 344 F.3d 154, 172 (2d Cir. 2003)).
[33] *Id.* at 272.
[34] *Id.* at 273.
[35] *Id.* (quoting Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 225 (2d Cir. 2006)).
[36] *Id.*
[37] *Id.*
[38] *Id.* at 274; *see also id.* ("Although a student and his parents might perceive such removal as 'disciplinary' or 'retaliatory,' its objective purpose is protective. It affords the administrator time to make an inquiry, to figure out if there is danger, and to determine the proper response . . . .").
[39] *Id.*
[40] *Id.* at 273.
[41] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (internal quotation mark omitted).
[42] *See id.*

disposed of the case under the First Amendment protection prong for two primary reasons. First, the First Amendment protection prong already — and better — incorporates the court's policy concerns than does the adverse action prong. Second, the court's modification of the adverse action prong creates an untenable and nearly insurmountable bar for plaintiffs.

The *Cox* court could more appropriately have addressed its primary policy concern — that teachers need "fair latitude" to react to ambiguous student speech — through the first prong of the retaliation test than through the adverse action prong.[43] From the court's perspective, the "unusual deference" afforded to school decisions affecting student safety justified a strong presumption on policy grounds that the official's motivation was not adverse.[44] Yet as the district court recognized, First Amendment doctrine on student speech already allows courts to review "with deference[] schools' decisions in connection with the safety of their students even when freedom of expression is involved."[45] While *Tinker* established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[46] it also noted that schools may prohibit speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[47] Indeed, the Second Circuit itself had already held that *Tinker* — and thus the First Amendment — did not protect even remote threats of violence that could pose a reasonably foreseeable risk of such interference.[48] A "rea-

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[43] This analysis proceeds on the assumption that the Second Circuit was correct to apply the *Tinker* test as the relevant standard. *See id.* at 272–73. Even if *Tinker* did not apply, however, the alternative test available from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988), which the school board urged the district court to adopt, is even more deferential to schools. *See* Cox v. Warwick Valley Cent. Sch. Dist., No. 7:07-CV-10682, 2010 WL 6501655, at *8–9 (S.D.N.Y. Aug. 16, 2010).

[44] *See Cox*, 654 F.3d at 274 (quoting Kia P. v. McIntyre, 235 F.3d 749, 758 (2d Cir. 2000)) (internal quotation marks omitted).

[45] *Cox*, 2010 WL 6501655, at *11 (alteration in original) (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 992 (9th Cir. 2001)) (internal quotation marks omitted).

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

[47] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)); *see also* Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (noting limitations to *Tinker*'s protection of student speech); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 455 (1999) (describing *Tinker* as "very protective of student speech," yet recognizing that "[i]n more recent years . . . the Court has been much less protective of speech in school environments and much more deferential to school authorities"); Sean R. Nuttall, Note, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1293–94 (2008) (arguing that "the *Tinker* standard . . . mandates deference to the reasonable decisions of educators as to the likelihood of disruption").

[48] *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007) (holding that student's instant messenger icon "depicting and calling for the killing of his teacher" was not protected speech under *Tinker*). Also, in circumstances similar to those in *Cox*, the Ninth Circuit held that a school's emergency expulsion of an eleventh-grade student who gave a violent

sonable foreseeability" standard already provides sufficient latitude for teachers and school officials to err on the side of caution, at least to the extent acceptable to society.[49] It was simply not necessary to create a new version of the adverse action prong distinguishing between protective and punitive intent in order to address the *Cox* court's concerns. The court had a well-established doctrinal route available — which the district court followed — to reach its desired result under the First Amendment protection prong.[50]

By instead addressing deference to schools during its determination of what constitutes an adverse action,[51] the court set a nearly impossible bar for plaintiffs to clear in order to satisfy the second prong of the retaliation test. While there was no existing definition in the school context, the *Cox* court recognized that adverse actions are generally defined through a *speaker*-oriented standard, as "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights."[52] This standard, with its "heavily fact-specific, contextual" nature[53] and requirement of "more than de minimis" retaliation,[54] could guard against frivolous retaliation claims, such as that of a student who simply received a bad grade on a paper. Yet rather than relying on this existing safeguard (or the retaliation

poem to an English teacher for feedback was not a violation of the student's First Amendment rights. *See LaVine*, 257 F.3d at 989–92.

[49] *Cf.* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1118 (1996) (noting that a "reasonably foreseeable" determination boils down to a "social value judgment" because of its flexibility).

[50] The court was quite possibly motivated by "decisional minimalism," defined by Professor Cass Sunstein as "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided." Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996). *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME 3–6 (1999) (describing and defending judicial minimalism). Thus, although both the adverse action and the First Amendment protection prongs are parts of a constitutional test, the court may have believed — though, to be sure, it did not say outright — that disposing of the case through the adverse action prong was preferable to jumping into the fray of deciding which student speech acts are actually protected by the First Amendment.

While such a choice may be tempting, one compelling reason to reject it is that the exceedingly high bar the court set in the adverse action prong could allow future courts to dismiss a very substantial percentage of similar student speech cases without ever having to decide whether the speech acts in question are protected by the First Amendment in the first place. As one commentator has noted, under Sunstein's paradigm "the most effective judicial decisions are those that preempt democratic deliberation as little as possible. But it is hard to see how citizens can deliberate meaningfully about constitutional issues when [courts] refuse[] to share [their] own views about the rules of debate." Jeffrey Rosen, *Foreword to 1999 Survey of Books Relating to the Law*, 97 MICH. L. REV. 1323, 1328 (1999).

[51] *See Cox*, 654 F.3d at 274.

[52] *Id.* at 273 (quoting Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 225 (2d Cir. 2006)) (internal quotation marks omitted).

[53] *Zelnik*, 464 F.3d at 226 (quoting N.Y. State Law Officers Union v. Andreucci, 433 F.3d 320, 328 (2d Cir. 2006)).

[54] *Id.*

test's First Amendment protection prong), the *Cox* court chose to require that students make "a clear showing of retaliatory or punitive intent" to establish an adverse action in the school setting.[55] This new, *actor*-oriented standard sets an almost insurmountable bar given that, as the court noted, teachers and school officials "have multiple responsibilities" and are simultaneously "part disciplinarian, and part protector."[56]

In such an environment, and given the court's generally deferential stance, it is unclear how a student could make such a "clear showing" absent a school official's explicitly stating that a student's removal is a punitive measure.[57] For schools and school officials looking to avoid liability, the *Cox* test presents an open invitation to use protection as a pretense or as an ex post excuse for violating students' First Amendment rights, because if plaintiffs cannot make a "clear showing of intent to chill speech or punish it,"[58] courts need not consider whether the First Amendment protects the speech at all.[59] Ending the inquiry

[55] *Cox*, 654 F.3d at 274. While much of *Cox*'s policy discussion emphasized the temporary nature of Raphael's suspension, the court extended its new test by also applying the modified version of the adverse action prong to the school's reporting the parents to CFS. *See id.* This use portends wide application of the new test in the school setting.

[56] *Id.* at 273. The Second Circuit's use of these reasons to justify setting a strict bar to First Amendment actions that do not make a clear showing of retaliatory intent also suggests a tension with the Supreme Court's holding in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), that despite their *in loco parentis* roles, schools remain state actors for constitutional purposes, *see id.* at 336. A rule that establishes deference across the board may lead to de facto immunization for schools based on considerations very close to the *in loco parentis* rationale. Applying deference in evaluating individual speech acts, rather than setting bars to large sets of claims, properly allows courts to take account of schools' unique, complex roles.

[57] One unresolved issue in *Cox* is its ambiguity regarding how courts should treat mixed-motive cases, such as one in which a school official removes a student from class for both protective and punitive reasons. On the one hand, the court did not state that punitive intent need be the *sole* intent in order for the adverse action prong to be satisfied, only that a student must make a "clear showing of intent to chill speech or punish it," *Cox*, 654 F.3d at 274, which would allow mixed-motive claims. On the other hand, the court's emphasis on deference to school officials and its suggestion that the adverse action prong is not met even where "protective" removals "result in discipline," *id.*, suggest that mixed-motive cases would not fare well under this test.

[58] *Id.*

[59] The court did attempt to limit the scope of its holding to "speech exhibiting violent, disruptive, lewd, or otherwise harmful ideations." *Id.* Yet "harmful ideations" is extremely vague, and therefore manipulable, especially given the court's emphasis on deference to school determinations. Further, the court tipped its hand by using this limiting language, which appears to track established areas of speech *not protected by the First Amendment*. *See* Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (disruptive school speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (lewd speech, fighting words). Instead of attempting to import First Amendment limitations into the standard for what constitutes an adverse action, the court could have relied on the same reasoning that the district court did: that the First Amendment simply did not protect this speech. Even if students' First Amendment rights are less extensive than nonstudents', such an approach would at least ensure that the protection that *does* exist is not vitiated by students' inability to prove punitive intent.

by asking only whether an official intended to punish the student allows for even core First Amendment speech to be chilled — a serious harm irrespective of intent[60] — without meaningful opportunity for challenge.[61] Especially given that the court could have addressed its school-specific concerns in the first prong of the retaliation test, there was no reason for it to abandon the otherwise applicable speaker-oriented adverse action test in favor of an actor-oriented standard focusing on the school official's subjective motivation.[62]

While the court's deferential attitude toward the school in *Cox* is understandable, there is a crucial difference between building deference into a determination of what the First Amendment protects and using deference as a reason not to reach that determination at all. Courts should be very careful not to establish doctrinal tests that take the latter route, even in seemingly narrow circumstances. Hesitation to decide core constitutional issues may lead to tests as harmful to plaintiffs attempting to vindicate their constitutional rights as that in *Cox* may prove to be. This danger is particularly acute in *Cox* because the court's novel approach to "adverse action" in essence made the case a matter of first impression and a potentially salient precedent for other courts.

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[60] *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (describing a statute chilling speech as "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))). *See generally* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

[61] It is worth recalling that, the court's modification in *Cox* notwithstanding, establishing that an action would chill a similarly situated individual's speech is sufficient to show an "adverse action" under the Second Circuit's normal First Amendment retaliation doctrine. *See* Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 225–26 (2d Cir. 2006).

Admittedly, a finding in *Cox* that Raphael's essay was not protected by the First Amendment could possibly have led to a less protective standard. That is, if such essays are never protected, then even punitive action is acceptable; the rule under *Cox*, however, would ostensibly protect the essays against clearly punitive action (assuming that the First Amendment *does* protect them as speech). Yet the latter assumption is questionable, as the district court's finding demonstrates, *see* Cox v. Warwick Valley Cent. Sch. Dist., No. 7:07-CV-10682, 2010 WL 6501655, at *9–11 (S.D.N.Y. Aug. 16, 2010), and, perhaps more importantly, the concern that the essays could be discouraged or "chilled" diminishes markedly when the speech at hand is not protected by the First Amendment.

[62] *Compare Zelnik*, 464 F.3d at 225 (defining adverse action as "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights" (quoting Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004))), *with Cox*, 654 F.3d at 274 (finding that "temporary removal . . . is not an adverse action for purposes of the First Amendment absent a clear showing of intent to chill speech or punish it").