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Morse v. Frederick: Tinkering with School Speech: Can Five Years of Inconsistent Interpretation Yield a Hybrid Content—Effects-Based Approach to School Speech as a Tool for the Prevention of School Violence?

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I. INTRODUCTION

Ever since free public education became a core part of the American childhood experience, courts have been faced with the reality that educating children involves so much more than matters of curriculum. Because a large portion of a child's time is spent at school, schools have become full-fledged societies unto themselves. By fostering multifaceted relationships and by joining many unique cultures and values, the school microcosm provides a particularly apt host to most of the difficulties inherent in any broader society. Among these difficulties is how to handle student speech that may be less than desirable, antisocial in nature, or outright violent in content.

During the past five years, several dozen school shootings have occurred in the United States, many with fatalities.[1] In response, school administrators have wrestled with an increasing number of school speech incidents centering on violent-themed student expression, appearing in writings, drawings, and clothing. In 2007, the Supreme Court held in *Morse v. Frederick*[2] that schools may constitutionally regulate student speech deemed to promote use of illegal drugs. The holding was originally thought to be quite narrow in its scope, but lower courts have recognized the severe danger of continued school violence and have seized upon *Morse*—transforming its holding into a sweeping permission slip that allows school administrators to regulate student speech simply because it may indicate students' violent intentions or even negative feelings

1. *List of School Shootings*, SCHOOLSHOOTING.ORG, http://web.archive.org/web/20100412080400/http://www.schoolshooting.org/attacks (last visited Aug. 27, 2012).

2. 551 U.S. 393 (2007).

toward certain people.[3]

School discipline has become a significant topic of national interest in recent years, attracting the attention of federal public health officials. Studies presented by the Centers for Disease Control and Prevention, for example, show that students, parents, administrators, and elected officials share a common concern over school violence.[4] That concern has resulted in the emergence of numerous school-violence-prevention organizations, committees, and programs nationwide. Alexander Volokh and Lisa Snell note that the primary disciplinary issues in public schools in 1940 included talking out of turn, chewing gum, cutting in line, running in the hall, making noise, dressing inappropriately, and littering.[5] In 1990, by contrast, researchers found that those seemingly quaint problems of yesteryear had yielded to drug and alcohol abuse, suicide, teen pregnancy, rape, robbery, and assault.[6]

Various policies have been developed by school districts to reduce violence-related issues in school. Some of these policies have been directed toward various forms of student expression. One of the most well-known examples is the recent emergence of restrictive dress codes. Though they certainly stifle student expression by limiting messages worn as part of one's clothing, these dress codes have had only an arguable impact on decreasing violence.[7]

The recent school shooting in Chardon, Ohio,[8] with multiple fatalities, has provided a sadly tangible reminder that the legacy of Columbine is not ancient history, but rather a current danger to students throughout the country. It is against this backdrop of violent acts that courts have had to consider the application of First Amendment rights to student speech or expression.

3. *See infra* Part III.B.

4. Ctrs. for Disease Control & Prevention, *Youth Violence: Facts at a Glance 2010*, CDC.GOV, http://www.cdc.gov/ViolencePrevention/pdf/YV-DataSheet-a.pdf (last visited Sept. 26, 2012).

5. ALEXANDER VOLOKH & LISA SNELL, SCHOOL VIOLENCE PREVENTION: STRATEGIES TO KEEP SCHOOLS SAFE (1998), *available at* http://reason.org/files/60b57eac352e529771bfa27d7d736d3f.pdf.

6. *Id.*

7. Kathleen L. Paliokas, *Challenges Facing Our Schools: Four Policy Perspectives: Dress Codes as a Means of Reducing Violence in Public Schools*, INST. FOR EDUC. STUDIES, http://www.edstudies.net/files/active/0/resources-challenges.html (last visited Sept. 26, 2012).

8. Jess Bidgood & Sabrina Tavernise, *School Shooting in Ohio Leaves 1 Dead and 4 Wounded*, N.Y. TIMES (Feb. 27, 2012), http://www.nytimes.com/2012/02/28/us/fatal-school-shooting-in-chardon-ohio-suspect-is-arrested.html?_r=2.

Five years ago, the Supreme Court issued its opinion in the most recent landmark case related to school speech, *Morse v. Frederick*.[9] *Morse* carved out a new content-based category of speech that can be constitutionally regulated by school administrators. The Court held that schools may regulate speech that can be reasonably interpreted as promoting illegal drug use.[10] This opinion, however, was qualified by a concurrence by two Justices—one of whom was the deciding vote—which purports to limit the holding to apply *only* to speech that occurs at school and that can be reasonably interpreted as promoting illegal drug use. The concurrence also asserted that speech related to political or social issues, including the war on drugs, cannot be constitutionally restricted.[11]

Despite this seemingly narrow holding, lower courts have since relied upon *Morse* to restrict non-drug-use-promoting speech that may be interpreted as having the possibility of leading to physical harm, based upon a school administrator's analysis of the content of the speech. If *Morse*'s holding continues to open the door wider to more restrictions on school speech, the question should be asked: can *Morse*'s content-based test be applied so as to cover more than drug-promoting speech without doing severe violence to the First Amendment?

Part II.A of this Comment first reviews pre-*Morse* constitutional restrictions on school speech based upon the three-part canon of landmark school-speech cases: *Tinker v. Des Moines Independent Community School District*,[12] *Bethel School District No. 403 v. Fraser*,[13] and *Hazelwood School District v. Kuhlmeier*.[14] Part II.B then explains how *Morse* has added to the constitutional school-speech doctrine. Part III discusses the actual interpretation and application of *Morse* by lower courts in the past half-decade since the decision, particularly demonstrating how federal circuit courts, federal district courts, and state courts are split in their readings of the scope of *Morse*'s holding. Part IV suggests that the *Morse* holding—while possibly being seen as a threat to traditionally protected areas of speech—if construed moderately, can be a useful tool for school administrators without significantly altering the

9. 551 U.S. 393 (2007).
10. *Id.* at 409–10.
11. *Id.* at 422 (Alito, J., concurring).
12. 393 U.S. 503 (1969).
13. 478 U.S. 675 (1986).
14. 484 U.S. 260 (1988).

state of school speech jurisprudence going forward. Specifically, administrators can look to *Morse* for guidance in dealing with instances of school speech that can be interpreted as promoting violence or otherwise negatively impacting significant areas of concern in modern schools. In so doing, administrators can interpret *Morse*'s content-based speech exception through a lens of an effects-based test,[15] without harming students' legitimate speech interests. Finally, this Comment suggests that courts, in their application of *Morse*, must heed the concurrence's caveat as to political speech and focus on protecting the rights of other students as *Tinker* explicitly allows.[16]

II. SCHOOL SPEECH BACKGROUND

A. The Traditional School Speech Canon

In 1969, amidst the contentious two-decade-long Vietnam conflict, the Court considered whether school administrators could ban students from wearing black armbands as a silent but visible protest of U.S. involvement in the war in Southeast Asia. As the Court famously noted in *Tinker*, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[17] Accordingly, the Court established the gold standard of school speech jurisprudence: namely, that the First Amendment, through the Fourteenth Amendment, required that, "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[18] Quoting Justice Brennan from an earlier case, the *Tinker* Court continued:

> "[V]igilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends

15. Similar to how the Court in *Fraser*, 478 U.S. at 675, applied the decades-old lewdness-and-obscenity standard to the new area of school speech, the classic fighting-words exception to the First Amendment could likewise be applied in a school context without contravening accepted First Amendment protections and exclusions.

16. *Tinker*, 393 U.S. at 508.

17. *Id.* at 506.

18. *Id.* at 509.

> upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[19]

With this appreciation for an ideal school culture that promotes the free exchange of ideas between students, the Court rejected any notion that the purpose of schools is to train students to be homogenous automatons, all engaged in assimilating and regurgitating an officially sanctioned viewpoint.

The *Tinker* Court, therefore, adopted an *effects*-based test. The *Tinker* test focused on what the speech itself might provoke in the midst of a great and emotional controversy. This is in contrast to a *content*-based test, which would look solely to the actual speech itself, irrespective of how it is perceived, received, or interpreted by an audience.[20] The Court held that the school administrators must demonstrate with sufficient evidence that their restrictions were "necessary to avoid material and substantial interference with schoolwork or discipline"[21] or the rights of other students[22] in order to pass the constitutionality test. In the 1986 decision of *Bethel School District No. 403 v. Fraser*,[23] the Court clarified that the First Amendment, through the Fourteenth Amendment, allows for a hybrid content–effects test to be applied when regulating school speech. That is, a school's interest in maintaining an atmosphere free of disruptive behavior allows an effects-based analysis to be applied to the content of speech if such speech is lewd or indecent. In *Fraser*, school administrators disciplined a student for violating an anti-obscenity rule when, during a school-sponsored assembly, he gave a nomination speech filled with "elaborate, graphic, and explicit sexual metaphor[s]"[24] that were thinly veiled, if at all, in the cloak of supposedly extolling the

19. *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (alteration in original) (citations omitted)).

20. Purely content-based regulation of generally protected areas of speech (e.g., speech that is not obscene or does not involve fighting words) is analyzed under strict scrutiny and is presumptively unconstitutional. *See* Boos v. Barry, 485 U.S. 312 (1988); Carey v. Brown, 447 U.S. 455 (1980). *Morse* purports to answer how content-based regulations on speech may be applied in the school context, a setting in which speech rights differ from those protected by general First Amendment jurisprudence, as this Comment discusses throughout.

21. *Tinker*, 393 U.S. at 511.

22. *Id.* at 508.

23. 478 U.S. 675 (1986).

24. *Id.* at 678.

virtues of a student government candidate. Given the long-accepted conclusion that the First Amendment does not explicitly protect vulgar or lewd speech,[25] the *Fraser* Court duly noted that the First Amendment admits of only very limited content restrictions. But the premise for such restrictions is that lewd or indecent speech occurring in a school-sponsored forum is deemed not to be an "essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [such speech] is clearly outweighed by the social interest in order and morality."[26] Thus, despite the extensive ban on content restrictions, "it was perfectly appropriate for the school to disassociate itself [from the speech] to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education"[27] because a school's primary concern is carrying out its "basic educational mission."[28] In coming to this conclusion, the Court emphasized that the negative effects of the student's speech were many. In particular, the Court noted that in the presence of an audience including children as young as fourteen years old, some students "graphically simulated the sexual act[s]" described by the speaker; other students expressed embarrassment or bewilderment. And, the next day, one teacher had to forgo teaching her lesson "in order to discuss the speech with [her] class."[29] Thus, as applied, *Fraser* demonstrates that the Court was still weighing the validity of school speech restrictions primarily against the effects of student speech.[30]

The final case in the traditional school speech canon further refined the doctrine, again applying an effects-based test and extending *Fraser*'s interest in allowing schools to regulate certain speech in school-sponsored contexts. In 1988, in the case of *Hazelwood School District v. Kuhlmeier*,[31] the Court held that if speech can reasonably be viewed as bearing the school's imprimatur, it may be regulated by the school where

25. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

26. *Fraser*, 478 U.S. at 685 (quoting Chaplinsky, 315 U.S. at 572).

27. *Id.* at 685–86.

28. *Id.* at 685.

29. *Id.* at 678.

30. Both *Tinker* and *Fraser* foreshadow the Court's decision in *Morse*, which was based on the anticipated effects of the speech at issue.

31. 484 U.S. 260 (1988).

such speech is connected to "lessons [an] activity is designed to teach."[32] In *Kuhlmeier*, two student-written articles intended for publication in the school-sponsored student newspaper were rejected for publication by the principal. One article, detailing the experiences of three pregnant students, was rejected on concerns that the article would undermine the anonymity and privacy of the pregnant students and their loved ones, in addition to concerns about the potentially negative effects of "frank talk" regarding sexual experiences and birth control.[33] The principal, whose responsibilities included reviewing student-written material, deemed these articles "inappropriate [for] a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters."[34] The principal also objected to another article, which dealt with the impact of divorce on students at the school, again based on student and family privacy concerns and "matter[s] of journalistic fairness."[35]

The Court held that the principal was reasonable in his decision not to allow publication of the articles "under the circumstances as he understood them," which included a conclusion that the student writers had "not sufficiently mastered those portions of the . . . curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . . , and 'the legal, moral, and ethical restrictions imposed upon journalists within [a] school community.'"[36] The Court went on to hold that where "expressive activities . . . might reasonably [be] perceive[d] to bear the imprimatur of the school,"[37] educators are entitled to exercise control to the extent necessary to ensure that less mature audiences are not exposed to inappropriate material and to further ensure that such expression is not "erroneously attributed" as being an official view of the school.[38] The Court noted that this is a flexible standard which can take into account

32. *Id.* at 271.

33. *Id.* at 274.

34. *Id.* at 274–75.

35. *Id.* at 275.

36. *Id.* at 276.

37. The Court noted that such would be the case where "activities may fairly be characterized as part of the school curriculum" regardless of whether they "occur in a traditional classroom setting." *Id.* at 271. In other words, "so long as [the activities] are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences," they will be considered part of the school curriculum. *Id.*

38. *Id.*

the emotional maturity of the students[39] but that schools must nevertheless retain the right to "refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'"[40]

Thus, when the effects of school speech include the impression (or reality) of school-sponsorship as well as concerns about the speech's impact on legitimate pedagogical goals, school administrators are to be given extensive latitude in their regulation of such expression.

B. Enter Morse

Against this backdrop, the school speech canon expanded in 2007 to include a fourth major case: *Morse v. Frederick*.[41] In 2002, Joseph Frederick and several friends held a large homemade banner bearing the cryptic phrase "BONG HiTS 4 JESUS" while watching the Olympic Torch Relay pass their high school in Juneau, Alaska.[42] Frederick admitted to having no substantive purpose in displaying the banner: he simply wanted to get on television and figured a banner with a nonsense slogan would attract the attention of television cameras.[43] He succeeded in getting in front of the cameras as well as attracting the attention of his school principal, Deborah Morse, who promptly required him to take down the banner.[44] As a result of the incident, Frederick was suspended from school.[45] He then sued Morse and the school district for violation of his First Amendment rights.[46]

The *Morse* Court first concluded that because the speech occurred "at school," its analysis should be governed by school speech law rather than traditional First Amendment guidelines.[47] The Court emphasized that the students had displayed the banner in the midst of fellow students and that this event took place during school hours while the students

39. *Id.* at 272.
40. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
41. 551 U.S. 393 (2007).
42. *Id.* at 397.
43. *Id.* at 397, 399, 401.
44. *Id.* at 398.
45. *Id.*
46. *Id.* at 399.
47. *Id.* at 401.

were on supervised release from classes;[48] In essence, for legal purposes, the students were on a field trip across the street from the school.[49] Once it determined that this case fell within the ambit of school speech jurisprudence, the Court then held that school administrators could constitutionally forbid the display of the arguably nonsensical banner.[50] The basis for prohibiting Frederick's banner was that its message could reasonably be construed as promoting illegal drug use among students.[51] In explaining what seemed to be a departure from *Tinker*, the Court clarified that "the mode of analysis set forth in *Tinker* is not absolute" (due to exceptions that were permitted in *Fraser* and *Kuhlmeier*).[52] That is, an exception to *Tinker* could be justified by the "important—indeed, perhaps compelling interest" of preventing drug abuse by schoolchildren.[53] For further support of this new content-based (but effects-considering) rule, the Court drew an analogy between the *Fraser* decision and the facts in *Morse*, noting that the "mode of analysis" in *Fraser* was less than entirely clear and that the *Fraser* Court certainly had considered the content of the speech in question. Thus, the *Morse* Court drew distinctions between the banner, protected political speech (the children's armbands in *Tinker*), and the sexually graphic remarks offered by the young Mr. Fraser in his school assembly.[54]

It has been argued that even though the *Morse* Court created a new exception to *Tinker* based on speech that advocates drug use, it failed to correctly apply this new standard to the actual facts in *Morse*, because Frederick's banner plausibly could have been considered political in nature.[55] Commentators argue that this distinction should have provided Frederick's speech with greater protection, because political speech is widely considered the most protected class of speech under the First Amendment.[56] Justice Stevens himself noted, in his *Morse* dissent, that

48. *Id.*

49. *Id.* at 400–01.

50. *Id.* at 403.

51. *Id.* at 401.

52. *Id.* at 405.

53. *Id.* at 407 (citation omitted) (internal quotation marks omitted).

54. *Id.*

55. Kellie A. Cairns, Morse v. Frederick: *Evaluating a Supreme Hit to Students' First Amendment Rights*, 29 PACE L. REV. 151, 167 (2008).

56. *Id. See also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the

"[t]he Court's opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska."[57] Indeed, the Court in *Tinker*, the landmark school speech case, dealt with students engaged in clearly political speech and fiercely guarded their right to do so.[58] Nevertheless, As Part III of this Comment will demonstrate,[59] other courts' considerations of student speech have ignored the potentially political nature of some incidents of speech in adopting a *Morse*-like analysis. For present purposes, however, at least one court, relying on *Morse* for guidance, has lent credence to the argument that that separating out the "political" content of multifaceted speech for special protection is secondary to considering the potential effects such speech can have on the student body. In thus looking past the political characteristics student speech, it seems that *Morse* could potentially be construed to allow schools to ignore that distinction altogether and simply ban words that might be interpreted as promoting drug use, so

opinion or perspective of the speaker is the rationale for the restriction."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06, 508 (1969).

57. *Morse*, 551 U.S. at 445 n.8 (Stevens, J., dissenting). Alaskans have decriminalized marijuana (by a state supreme court ruling), recriminalized it, decriminalized it for medicinal purposes, and, in 2000, considered and rejected (by a 59% to 41% vote) a very broad cannabis decriminalization and amnesty ballot measure. Following the rejection of that measure, and contemporaneous to Frederick's display of the "Bong Hits" banner, an initiative posing a simpler question of marijuana decriminalization was going through the steps to be certified for the 2004 general election ballot. Against this factual background of intense public interest in marijuana laws in Alaska, it is not unreasonable to suggest that this political undercurrent in some way shaped or was at least implicated in the message of Frederick's banner or its perception by people who viewed it. Based on a plausible interpretation of the banner as having a political message, commentators have argued that the long-running statewide debate about marijuana legalization certainly should have been considered by the Court as a context within which to evaluate the speech and that *Morse* has gone too far by now permitting viewpoint discrimination. While it is beyond the scope of this footnote to more than briefly mention the see-saw state of marijuana laws in Alaska, the purpose of this brief review is to highlight a possible interpretation that, as Justice Stevens stated in his dissent in *Morse*, intense local interest in a subject should be considered as to the possible political meaning of a student's speech activities. *Id.*

58. *Tinker*, 393 U.S. at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

59. *See infra* Part III.

long as a court correctly applies an effects-based analysis.

Based in part on some concerns about potentially eroding the right to political speech in schools—especially concerning current and contentious issues—the opinions of the Justices on the *Morse* Court were by no means completely unified. In the 5–4 decision, two of the Justices in the majority—Justice Alito, joined by Justice Kennedy—stated in a concurring opinion:

> [We] join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[60]

It is worth noting that Justice Alito based his support for the new rule on the theory that schools "can be places of special danger" and that drugs pose a "serious" threat to students' physical safety.[61]

Justice Alito also expressed the opinion that there are not necessarily any grounds for regulation of drug-related speech "that are not already recognized" by the Court's previous holdings, including *Tinker*, *Fraser*, and *Kuhlmeier*.[62]

Without Justices Alito's and Kennedy's limited support, including Justice Alito's deciding vote, the majority would have been a distinct minority, one of whose members (Justice Thomas) joined the majority explicitly for the opportunity to contribute to the erosion of *Tinker*, and who—perhaps radically—argued that the *Morse* case should have been seized as an opportunity to completely overrule *Tinker*.[63] Dissenting in *Morse*, Justices Stevens, Souter, and Ginsburg, contend that the Court did "serious violence to the First Amendment" based only on an "oblique reference to drugs," arguing that "[t]he First Amendment demands more, indeed, much more."[64]

60. *Morse*, 551 U.S. at 422 (Alito, J., concurring).
61. *Id.* at 424–25.
62. *Id.* at 422–23.
63. *Id.* at 421 (Thomas, J., concurring).
64. *Id.* at 434–35 (Stevens, J., dissenting).

III. DECODING *MORSE*

It has been argued that application of this new content-based-exception standard is in the process of swallowing up *Tinker*.[65] Several cases over the years since *Morse* indicate that courts are now willing to use the decision in *Morse* to give greater deference to school administrators.[66] The previous constitutional bases for allowing administrators to regulate school speech included a concern for actual school goals such as discipline and others' rights,[67] interest in maintaining an educational environment free of disruptive behavior,[68] and the pursuit of legitimate pedagogical concerns.[69] Courts since *Morse* have determined that deference to school authorities can now be given based on something wider—but how much wider varies from court to court.

Lower courts are sharply divided over the breadth of the *Morse* holding, with much of the confusion ensuing shortly after the issuance of the *Morse* opinion. For example, among those reading *Morse* narrowly, the federal district court in New Jersey applied the standard very strictly in 2007, having read *Morse* not to change the *Tinker* standard of analysis, but rather to have created a new exception to *Tinker*.[70] In 2011, the Third Circuit concluded that *Morse* applied solely to drug-related speech occurring at school when it affirmed the western Pennsylvania federal district court's similar holding in 2007.[71] Additionally, a 2007 Sixth Circuit concurring opinion, *Lowery v. Euverard*,[72] read *Morse* narrowly and quickly dismissed it as not controlling. The case at hand was non-drug-related and involved student disruptions to a high school football team.[73] The concurring circuit judge read *Morse* as not having "overrule[d] or otherwise alter[ed] *Tinker*."[74]

Conversely, a significant number of courts have interpreted *Morse* to

65. *See* Piotr Banasiak, Morse v. Frederick*: Why Content-Based Exceptions, Deference, and Confusion Are Swallowing* Tinker, 39 SETON HALL L. REV. 1059 (2009).

66. *See* discussion *infra* Part III.B.

67. *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

68. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

69. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1987).

70. DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 639 (D.N.J. 2007).

71. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc).

72. 497 F.3d 584, 601 (6th Cir. 2007) (Gilman, J., concurring).

73. *Id.* at 585–86 (majority opinion).

74. *Id*. at 601 (Gilman, J., concurring).

allow for a new class of exceptions to school speech based on the need to take threats of school violence seriously in a post-Columbine world[75] or on the basis of protecting students from psychological harm[76]. One thing is clear, even if *Morse* is not: there is widespread disagreement on what *Morse* means and how it should be applied, or even to which school speech cases it should be applied.

A. Narrow Readings of Morse

The narrowest application of *Morse* is that it allows school administrators to ban student speech that occurs at school and that can be reasonably interpreted to promote drug use among students.[77]

In *DePinto v. Bayonne Board of Education*,[78] the U.S. District Court for the District of New Jersey held, shortly after *Morse* entered the scene, that *Morse* did not change the "basic framework, or the applicable analyses,"[79] where the three recognized varieties of school speech are concerned, namely, "(1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories."[80] Because the district court saw *Morse* as not modifying the accepted types of analysis, it recognized *Morse* as a new entrant into the school-speech canon, but did not consider the *Morse* holding broad enough to apply to the facts in *DePinto*, which concerned fifth-grade students who, as a protest of their school's uniform policy, distributed and wore buttons featuring photographs of the Hitler Youth in uniform.[81] Relying on precedent from the Third Circuit, the *DePinto* court noted that *Tinker* required a "specific and significant fear of disruption, not just some remote apprehension of a disturbance."[82] The district court also noted that *Morse* refused to consider Frederick's banner under the *Fraser* "plainly offensive" standard.[83] In recognizing

75. *See* discussion *infra* Part III.B.1.
76. *See* discussion *infra* Part III.B.2.
77. Morse v. Frederick, 551 U.S. 393, 403 (2007).
78. 514 F. Supp. 2d 633 (D.N.J. 2007).
79. *Id.* at 639.
80. *Id.* (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)).
81. *Id.* at 636.
82. *Id.* at 637 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001)).
83. *Id.* at 640 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

the limits of "plainly offensive" as understood by *Morse*, and by applying the *Tinker* standard, the court allowed the children to wear the buttons to school, finding that the school administration had failed to demonstrate that the buttons comparing school uniforms to Hitler Youth had either interfered with the work of the school, caused a disruption or substantial fear thereof, interfered with school discipline, or infringed on the rights of other students.[84]

Further support for a narrow reading of *Morse* came when the Third Circuit affirmed a district court's holding that *Morse* applies only to drug-related speech in a school context.[85] In *Layshock v. Hermitage School District*, the Third Circuit considered the case of a high school senior who had used a computer at his grandmother's home to create a fake MySpace profile about his school principal.[86] While the parody profile boasted of the principal's affinity for drugs, including steroids, marijuana, "pills," and alcohol,[87] the court noted that *Morse* held only that the First Amendment does not prevent school administrators from "restrict[ing] student speech *at a school event*, when that speech is reasonably viewed as promoting illegal drug use,"[88] and stated, therefore, that "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[89] Having dispensed with *Morse* as a means of dealing with the demeaning speech about the principal, the Third Circuit instead analyzed the facts under other precedent that disallowed punishment simply because the offensive speech reached into the school, though it had not happened at school.[90]

Similarly, a concurring opinion in the case of *Lowery v. Euverard*, cited Justice Alito's concurrence in *Morse*, stating that the then-new *Morse* ruling did not hold that there were "necessarily any grounds for such regulation that are not already recognized in the holdings of [the]

84. *Id.* at 650.
85. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc).
86. *Id.* at 207–08.
87. *Id.* at 208.
88. *Id.* at 216 (quoting Morse v. Frederick, 551 U.S. 393, 403 (2007)).
89. *Id.*
90. *Id.* at 216–19.

Court."[91] The same opinion further noted that "the Supreme Court recently had an opportunity to overrule or otherwise alter *Tinker*, but explicitly declined to do so in a way that would affect the outcome" in the non-drug-related case in *Lowery*.[92]

B. Broad Readings of Morse

Both *DePinto* and *Layshock* stand, in their respective jurisdictions, for the proposition that *Morse* is to be read narrowly. Specifically, they held that *Morse* either did not alter the classic standard from *Tinker* or did not extend to drug-related speech that occurs anywhere other than "at school" as that term has been defined.[93] As this section will describe, other courts, have taken a broader view of *Morse*, particularly as applied to speech that plausibly can be viewed as either menacing or as a serious threat of violence or other harm to school personnel or students.[94] The Court's opinion in *Morse* refers to the danger of students using drugs being "far more serious and palpable" than the "discomfort and unpleasantness" that *Tinker* mentioned as associated with the expression of unpopular views.[95] As part of its justification for the new rule, *Morse* also referred to myriad congressional and school board policies nationwide that either prohibit drugs in schools or require curricula designed to combat drug usage.[96] The suggestion is that new, developing problems in schools can and should be addressed by school administrators, who can look to the courts for support in dealing with these problems. Taking a cue from the Court on how new exceptions to *Tinker* can be created, a number of lower courts have followed suit and relied upon the *Morse* decision to permit regulation of speech related to threats of specific acts of physical violence, violent acts that are illegal, and speech that may possibly be psychologically harmful to students.

91. Lowery v. Euverard, 497 F.3d 584, 603 (6th Cir. 2007) (Gilman, J., concurring) (quoting Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring)).

92. *Id*. at 601.

93. *See* Depinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 639–40 (D.N.J. 2007); *see also* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 n.3 (3d Cir. 2011).

95. Morse v. Frederick, 551 U.S. 393, 408 (2007).

96. *Id*.

1. Speech that threatens physical violence or harm

In *Boim v. Fulton County School District*, the Eleventh Circuit considered the case of a high school student who was expelled from school after a teacher confiscated her notebook.[97] The notebook's contents consisted of the student's written thoughts about what she claimed was a daydream in which she brought a gun to school and shot her math teacher.[98] With school officials concerned that the description of the violent act was actually a plan disguised as a dream, the student was suspended and ultimately expelled from school on the basis of school rules against threats of harm to others.[99] Rejecting the student's argument that the notes about her dream were protected speech under the First Amendment, the court referred to *Morse* for support.[100] Noting that "[t]he special characteristics of the school environment and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use,'" the court determined that the "same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence."[101]

As support for this expanded reading of *Morse*, the court's opinion recited a list of several school shootings that had occurred within close proximity of the concerned high school and within a time frame of only several years.[102]

The court further compared the student's violent notes to yelling "fire" in a crowded theater or knowingly making false comments about the presence of a bomb on an aircraft, both of which are examples of speech for which there is no First Amendment protection.[103] As in those examples, the student created an "appreciable risk" of disruption that

97. Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 980 (11th Cir. 2007).

98. *Id.* at 980–81.

99. *Id.* at 981–82.

100. *Id.* at 984.

101. *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 408 (2007)).

102. *Id.* at 983–84. It might be concluded from this that courts are willing to take local conditions, history, and feelings into consideration when deciding tough cases of school speech. As this Comment suggests in the next part, the ability to rely on *Morse* to support anti-violence school speech policies is the primary benefit to be derived from that holding, and this interpretation has the potential to help prevent incidents of school violence in the future when potential incidents of violence are precipitated by hints such as notes or other writings by students or a state of heightened vigilance based on general local conditions such as past violence.

103. *Id*. at 984.

goes beyond "mere speculation or paranoia."[104] By bringing the notebook to school, where there was a "certainty" of it being seen by others, the student gave administrators sufficient reason to act in an appropriate manner, as the interest in a school free of gun violence was significantly greater than the *Tinker* test of avoiding "discomfort and unpleasantness" related to a particular viewpoint.[105] Consequently, the school was justified in its actions to punish the student.[106]

Having seen the purportedly narrow *Morse* holding expanded to include palpable, written threats of immediate violence, we turn now to a similar view expressed by the Fifth Circuit. The Fifth Circuit looked directly to *Morse* for guidance in deciding *Ponce v. Socorro Independent School District* and found support for extending the breadth of the *Morse* holding.[107] In *Ponce*, the court was tasked with deciding the case of a high school sophomore in Texas who had been disciplined and placed in a special education program after showing several classmates an "extended notebook diary, written in the first-person perspective."[108] The student had written about a leading group of pseudo-Nazi students operating in his school and other schools throughout his district.[109] The notebook contained the author's plans to command his group "'to brutally injure two homosexuals and seven colored' people" and to harm "another student by setting his house on fire and 'brutally murder[ing]' his dog."[110] The notebook also contained plans for a "[C]olumbine shooting" at the author's school or a "coordinated 'shooting at all the [district's] schools at the same time.'"[111] The student also wrote that he felt his anger had gotten the best of him and that he was soon to reach the point where he would lose all control.[112] He also gave a specific date on which the shootings would occur.[113]

As did the Eleventh Circuit in *Boim*, the Fifth Circuit referred to several well-known school shooting incidents and stated that "recent

104. *Id*. at 985.

105. *Id.*; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

106. *Id*.

107. 508 F.3d 765, 768 (5th Cir. 2007).

108. *Id*. at 766.

109. *Id.*

110. *Id.* (alteration in original).

111. *Id*. (alteration in original).

112. *Id.*

113. *Id*.

history demonstrates that threats of an attack on a school and its students *must* be taken seriously."[114] The court reasoned that if *Morse* could find in favor of regulating speech where it concerns harm that might come from students using illegal drugs, "it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole."[115]

The *Ponce* court suggests that Justice Alito's concurring opinion in *Morse* should control, citing two primary purposes in the concurrence: "providing specificity to the rule announced by the majority opinion, and, relatedly, ensuring that political speech will remain protected within the school setting."[116] Rather than reading Justice Alito's opinion as narrowing the scope of *Morse*, the Fifth Circuit read it as providing greater clarity to the majority and providing the most specific reasoning for the holding in *Morse*.[117] The Fifth Circuit was particularly persuaded by Justice Alito's statement that:

> The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.[118]

Presuming that the Supreme Court's goal in *Morse* was to allow school administrators to regulate speech that might threaten the physical safety of students, the court declared that speech is unprotected by the First Amendment when it advocates "demonstrably grave" harms that derive their gravity from the "special danger" discussed by Justice

114. *Id*. at 771.

115. *Id*. at 772.

116. *Id*. at 768.

117. *Id.* at 769–70.

118. *Id*. at 770 (quoting Morse v. Frederick, 551 U.S. 393, 422 (2007)).

Alito.[119] As did *Boim*, the *Ponce* court compared the specific threats contained in the student's writing to the axiomatic yelling of "fire" in a crowded theater and found the student's threats to be far worse. The court held that where threats of physical violence to students are found to exist, school administrators must be able to "react quickly and decisively."[120]

Several lower courts, and even some outside the Fifth Circuit, have cited *Ponce*. For example, the Commonwealth Court of Pennsylvania looked to *Ponce* when an eighth-grade student prepared several lists containing dozens of classmates' names under titles such as "People to Kill!" and "People I Need to Kill."[121]

Additionally, the Southern District of New York looked to *Ponce* for support when it ruled in the case of a third-grade student who had completed many drawings and writing assignments expressing a desire to kill other students through various violent and gruesome means and who had wished that he could "[b]low up the school with the teachers in it."[122]

It is not only K-12 education that has been affected. A west Texas federal district court cited *Ponce* when it found in favor of allowing regulation of similar speech in a public community college environment.[123] In the Texas case, a female student wrote that "[s]tudents do not throw toilet paper into trees or soap up windows anymore. They pull weapons out of backpacks."[124] She went on to say that she herself was capable of employing an "outrageous display of force" to obtain relief from a professor who was perceived as stifling her views in the classroom,[125] and that the she was willing to "shoot [the professor] dead" if she could do so without being prosecuted for murder.[126]

The relatively frequent need for courts to deal with matters regarding

119. *Id*.

120. *Id*. at 772.

121. *See* Jones v. Gateway Sch. Dist., 2010 Pa. Commw. Unpub. LEXIS 133, at *2 (Pa. Commw. Ct. Mar. 26, 2010).

122. *See* Cuff v. Valley Cent. Sch. Dist., 714 F. Supp. 2d 462, 465 (S.D.N.Y. 2010).

123. O'Neal v. Alamo Cmty. Coll. Dist., 2010 U.S. Dist. LEXIS 6637, at *39–*40, *44 (W.D. Tex. Jan. 27, 2010).

124. *Id*. at *4.

125. *Id*.

126. *Id*. at *5.

student speech featuring violence with such great specificity would suggest that the *Boim* and *Ponce* courts were aware of recent incidents and considered the possibility of copycat acts of violence by students who could be influenced by what they hear about to plan or carry out extremely dangerous acts. It is certainly understandable why courts would read *Morse* in a way that could facilitate preventative measures.

But *Morse* has also been employed to restrict less specific student speech where violent messages are at issue but do not include particular threats toward a school or its students. In 2008, in *Miller v. Penn Manor School District*,[127] the court concluded that "a substantial interest resides in public schools to discourage violence both in the school setting as well as in the community at large as part of the district's overall educational mission."[128] Miller was a ninth-grade student who had been disciplined for wearing a t-shirt featuring images of an automatic handgun on the front and back and the words "Special Issue–Resident–Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner–No Bag Limit" on the back.[129] Miller argued that his speech was political in nature and, additionally, was a legitimate expression of support for his uncle, who had bought him the shirt and was, at that time, stationed in Iraq with the U.S. Army.[130] As in *Morse*, the court chose to disregard the possibly political connotations of the speech and evaluated the speech based on its effect on other students.[131] Whatever Miller's motive may have been (political, emotional, or otherwise), a teacher acted on a complaint from another student who was made uncomfortable by the shirt.[132] After the teacher expressed her concerns to Miller that the shirt could be "frightening" to other students because of past incidents of gun violence in schools and that the "shirt's message promoted the hunting and killing of human beings,"[133] she met with the principal to

127. 588 F. Supp. 2d 606 (E.D. Pa. 2008).

128. *Id*. at 627.

129. *Id*. at 611.

130. *Id.* at 618.

131. *Id.* at 625. Recall that while Frederick never argued that his "BONG HiTS" banner was political speech, Justice Alito's concurring opinion in *Morse* considered the possible political interpretation important enough to mention. Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring). Here, in *Miller*, the court chooses to disregard not only the possible interpretation of the shirt as a political message but also the explicit argument of the plaintiff that his speech is protected due to its political nature. *Miller*, 588 F. Supp.2d at 625.

132. *Miller*, 588 F. Supp. 2d at 611.

133. *Id*.

discuss the shirt.[134] Miller was eventually disciplined by school administrators for violating a school policy related to his wearing of the shirt, on the basis that the shirt promoted violence.[135]

The court applied *Morse* by noting that it is not the motive of the speaker (here, the wearer) that matters as much as the interpretation of the message by others.[136] Mr. Frederick's non-political, non-drug-promoting intentions with his "BONG HiTS" banner (recall that he only wanted to get attention from television cameras and that he had no real message he was trying to communicate) could not overcome the Court's conclusion that the principal in *Morse* was reasonable in concluding that the banner's slogan promoted the use of illegal drugs.[137] Similarly, in *Miller*, the classmate, teacher, and principal were justified by the court in interpreting the terrorist-hunting t-shirt as fearful, uncomfortable, and promoting the illegal vigilante killing of human beings.[138] The court noted that the "motive does not dismiss as meaningless" a message that is inappropriate for the school environment.[139] These cases demonstrate that, rather than focusing on an actor's motivation, courts are primarily interested in the content or effects of the actor's speech activities. This is important in that explicitly violent speech that a student claims is merely a fictional writing may still be regulated despite the claimed fictional nature of the material.

The *Miller* court said, "The impact of violence in schools is so great that it now has equal importance as the issue of illegal drug use in schools."[140] Citing the same paragraph of Justice Alito's concurrence as *Ponce*, the court concluded that "speech that promotes illegal behavior" may be regulated and that the threat of violence and safety concerns in our schools are of the "utmost importance."[141]

2. Speech that may cause nonphysical harm

Morse has been relied on to find support for schools regulating specific threats of violence, frightening imagery, and speech promoting

134. *Id.*
135. *Id.* at 612.
136. *Id.* at 625.
137. Morse v. Frederick, 551 U.S. 393, 422 (2007).
138. *Miller*, 588 F. Supp. 2d at 625.
139. *Id*.
140. *Id*. at 617.
141. *Id*. at 623.

illegal behavior. The position that there is a legitimate right to student speech that threatens physical harm to students (school shootings) or encourages physically violent and clearly illegal behavior ("hunting" humans) probably does not have significant support. But the bounds of *Morse* have even been read as flexible enough to extend to potential psychological harm to students due to the expressions of other students.

In 2008, the Southern District of California looked to *Morse* in light of a Ninth Circuit decision rendered two years earlier, in which the issue was a student's t-shirt bearing the message "'Homosexuality is shameful. Romans 1:27' on the front and 'Be ashamed. Our school has embraced what God has condemned' on the back."[142] In 2006—pre-*Morse*—in *Harper v. Poway Unified School District*,[143] the Ninth Circuit had held that school administrators could regulate the wearing of such clothing "based on the harm it might cause to homosexual students due to its demeaning nature."[144] In denying the student's motion to reconsider the prior grant of summary judgment in favor of the school district, the district court in 2008 reasoned that the Ninth Circuit's holding was still constitutional in light of the then very recent *Morse* opinion. The district court said,

> [A] school's interest in protecting homosexual students from harassment is a legitimate pedagogical concern that allows a school to restrict speech expressing damaging statements about sexual orientation and limiting students to expressing their views in a positive manner. There is no doubt in this Court's mind that the phrase "Homosexuality is shameful" is disparaging of, and emotionally and psychologically damaging to, homosexual students and students in the midst of developing their sexual orientation in a ninth through twelfth grade, public school setting.[145]

The court opined that *Morse* stands for the proposition that "school officials have a duty to protect students, as young as fourteen and fifteen years of age, from degrading acts or expressions that promote injury to the student's physical, emotional or psychological well-being and development which, in turn, adversely impacts the school's mission to

142. Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1095 (S.D. Cal. 2008), *aff'd in part, vacated in part*, 318 F. App'x 540 (9th Cir. 2009).

143. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

144. *Harper*, 545 F. Supp. 2d at 1101 (citing *Harper*, 445 F.3d at 1180–81).

145. *Id.*

educate them."[146]

Another expansionist reading of *Morse* is from the Seventh Circuit, *Nuxoll ex rel. Nuxoll v. Indian Prairie District*.[147] The court here looked into the reasons why *Morse* allows prohibition of drug-related speech in schools and determined that one of the motivating factors was the psychological harm that comes by doing drugs.[148] The student speech at issue in *Nuxoll* was a t-shirt worn by a student, which read "Be Happy, Not Gay."[149] The court invites the reader of its opinion to "[i]magine the psychological effects if the plaintiff wore a T-shirt on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home.'"[150] *Nuxoll* looks to *Morse* and *Fraser* and infers that if a particular sort of student speech can lead to a decline in student test scores, increased truancy, or "other symptoms of a sick school," a school may consider such effects to be a "substantial disruption" which would justify banning that type of student speech.[151] The challenged policy prohibited students from using any "derogatory comments . . . that *refer* to race, ethnicity, religion, gender, sexual orientation, or disability."[152] In seeking to protect students from harmful words dealing with "highly sensitive personal identity characteristics," the court reasoned that the school was merely doing its part to maintain civility and an environment in which student learning could flourish.[153] And pointing again to *Morse* and *Fraser*, the court noted that effects-based analyses have led to the censoring of student speech that promotes other effects aside from violence.[154] The court further reasoned that *Morse* and *Fraser* do not require a causal link between the speech at issue and the sort of harmful behavior the school seeks to prevent.[155] The court noted that the purpose of children going to school is to receive academic instruction from adult faculty, "rather than to practice attacking each other with wounding words, and [that] school authorities have a protective relationship and

146. *Id.*
147. 523 F.3d 668 (7th Cir. 2008).
148. *Id.* at 674.
149. *Id.* at 670.
150. *Id*. at 674.
151. *Id*.
152. *Id*. (emphasis added).
153. *Id*.
154. *Id.*
155. *Id*.

responsibility to all the students."[156] Accordingly, the court opined that the school rule banning derogatory remarks on the aforementioned bases satisfies the relevant legal tests.[157] With such varying degrees of uncomfortable speech being regulated under these new readings of *Morse*, school administrators have not been able to look to a single accepted standard over the last five years.

IV. DEVISING A CONSISTENT STANDARD

From the sampling of cases cited above, it is surely clear that there is no nationwide consensus on how to address school speech in a post-*Morse* world. The Supreme Court has not heard any other student-speech cases since *Morse*, leaving interpretation of the new standard to the appellate circuits and the states. With half a decade of case law under its belt now, *Morse* seems more mysterious than ever before. Justice Thomas, in his concurrence in *Morse*, stated that the Court's decisions over the years (including *Morse*) are best summarized by stating that "students have a right to speak in schools except when they do not."[158] Justice Thomas joined the Court's opinion and wrote a separate concurrence for the purpose of chipping away at the *Tinker* analysis, arguing that the Constitution does not contain any protections for school speech at all.[159] But we need not go quite to that extreme to appropriately deal with controversial student speech in a post-Columbine world. At the same time, it would be unwieldy and unwise to expect the schools to step in and hand down official disciplinary action every time another student's feelings were hurt by something said, written, or worn. So how should schools manage speech issues?

As a starting point, political speech must be held sacred and inviolate, for certain. *Tinker* suggested this,[160] and Justices Alito's and Kennedy's concurrence in *Morse* agreed.[161] A functional democratic society requires that its voters be able to understand multiple sides to

156. *Id.* at 675.

157. *Id.* at 674–75. While the school's policy against derogatory speech was found to be acceptable, in part because of *Morse* and *Fraser*, the circuit court held that the school had not demonstrated that the student's "Be Happy, Not Gay" t-shirt had actually crossed into territory regulated by that rule. *Id.* at 676.

158. Morse v. Frederick, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).

159. *Id.* at 419.

160. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969).

161. *Morse*, 551 U.S. at 422 (Alito, J., concurring).

political issues. The obvious way to ensure this happens is for people to gain exposure to various viewpoints through a variety of forums. Many high school seniors are constitutionally eligible to vote,[162] and it would seem untenable that such students should be expected to vote intelligently if they are not able to learn about current political issues prior to walking into the polling booth. High school civics and government classes teach students that participation in the democratic process is a celebrated virtue of the American civic experience. But how can students be expected to participate without being equipped with the knowledge to do so? Lively and informed debate is surely a necessary component of the political participation of high school students and other young adults. It is not unreasonable to expect that cafeteria and hallway conversations, research papers, classroom debates, school newspapers, and other in-school opportunities to engage in discussion will continue to be the primary means by which students gain understanding of everything from popular culture to politics. The ability of students to share their political opinions and civilly debate the issues must remain protected; else, schools are in danger of turning into little more than indoctrination centers for the political party or administration in power at any given time. Indeed, Justice Alito seemed to recognize this danger:

> The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.[163]

To ensure that children are not simply herded into the same mindset promoted by overly politicized "educational missions," any proposed standard must not infringe on students' rights to express political viewpoints. Attempts to regulate school speech must not be limited to allowing only that school speech which agrees with administrators or their "educational mission." Justice Stevens, in his dissent in *Morse*, expressed great concern that political speech in schools should receive the most protection:

> Even in high school, a rule that permits only one point of view to be

162. U.S. CONST. amend. XXVI.

163. *Morse*, 551 U.S. at 423 (Alito, J., concurring).

> expressed is less likely to produce correct answers than the open discussion of countervailing views. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment.[164]

Therefore, a workable proposal would limit *Morse*'s application in a way that allows for a full range of expression by students, limited only as follows:

- *Tinker*'s exception for material and substantial disruption to the school;
- *Fraser*'s exception for lewd and indecent speech, which also may have the effect of causing a disruption to the educational environment;
- *Kuhlmeier*'s exception for speech that bears the imprimatur of the school;
- *Morse*'s exception for speech that leads to violence or other serious harm to students, based on Justice Alito's concerns that "schools can be places of special danger" and that "due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence"[165]; and lastly,
- Where the speech involves something other than the promotion of illegal drugs, an interpretation of the questionable speech in light of the defining characteristics of "fighting words." The fighting words doctrine has been recognized by the Court since 1942 and has been described as stating that there is no First Amendment protection for speech that uses words "directed at individuals so as to 'by their very utterance inflict injury.'"[166]

Whether we consider the terrorist hunting t-shirt, the third-grade pictures of blowing up the school, the pseudo-Nazi students who want to kill minorities, or the supposed daydream about the student shooting her math teacher, all of these examples of student speech would meet the full definition of "fighting words," in that they contain "no essential part of

164. *Id*. at 448 (Stevens, J., dissenting) (citations omitted).

165. *Id*. at 424–25 (Alito, J., concurring).

166. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 432 (1992) (Stevens, J., concurring).

any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[167] Over the past seven decades, the fighting-words standard has worked outside of the school context to allow for freedom of expression in public forums while, at the same time, permitting regulation of speech that can reasonably be expected to either promote violence or incite a violent reaction from its target.

Attire, including t-shirts, is a popular medium for expression[168] and seems frequently to be the star of constitutional speech litigation, as this Comment has shown. Looking then at possible applications of the proposed rule, t-shirt slogans that seek to influence public attitudes regarding sexuality ("Be Happy, Not Gay" or "Being Gay is Being Happy") would probably be permissible, but speech that attacks or purposely belittles individuals who are homosexual (e.g., "Gays are going to hell") or Christian (e.g., "Homophobes are going to hell") would likely not pass the test for allowable school speech. Similarly, a student who wears a t-shirt critical of religion (e.g., "There is no god and Darwin is his prophet" or "Thank God I'm an Atheist") or critical of a certain industry (e.g., "Save the Trees") would be protected, whilst a student wearing a t-shirt calling for violence against others (e.g., "Christians should be crucified" or "Loggers should be sawed down") would properly invite school disciplinary action.[169]

As another example, student speech such as the buttons comparing school uniforms to the Hitler Youth would find no basis for being banned, as it is clearly targeted toward an administrative policy, and it is not likely that any individual seeing the button would feel as if they were being personally singled out for hateful speech. But students wearing buttons suggesting that a revival of the Hitler Youth would be good for their school could certainly be censured under the proposed rule, given the anti-social and thinly veiled violent meaning that will easily be inferred by any reader of such a button.

In each of the potential scenarios described above, the difference

167. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

168. The legitimacy of First Amendment protection for speech through one's attire was tested in *Cohen v. California*, 403 U.S. 15 (1971), which found that a jacket bearing a message that was crudely derisive of the military draft was permissible speech.

169. The slogans envisioned in these example shirts either have been invented by this author for illustrative purposes or have been seen by the author on existing bumper stickers or shirts.

may at first seem subtle. A hybrid content–effects test, as *Morse* permits, allows for the interpretation of the words and a consideration of what effects a reasonable interpretation may have on others. There is little likelihood that an individual who disagrees with the allowable shirt will see it as a personally targeted offense and therefore feel the need to be fearful or defensive. However, the disallowed shirt would clearly give the targeted individual cause to fear that the wearer might legitimately want to see the targeted person harmed and could provoke the targeted individual's instinct to defend him- or herself from the possibility of violence. In the context of student writings, a diary containing specific plans to shoot a teacher or blow up a school would obviously cause the targeted persons to fear for their safety, while not advancing any ideological point at all on behalf of the author of the violent material. On the other hand, a student's fictional story about a revolutionary force that fights against the government to achieve its political goals would probably not meet the test for what would be banned under a *Morse*-style rule tempered by the fighting words analysis.

The primary advantage of the proposed rule is to interpret the current four-part Supreme Court canon on school speech in such a way that all legitimately useful school speech is protected, while still allowing for suppression of speech that either threatens actual violence or which could reasonably be expected to result in violence or harm to others. It is true that the proposed rule may not perfectly fit every conceivable case that could arise, yet it hews to solid free-speech principles. The scope of the proposed rule is broad enough to be useful to school administrators, yet not overly broad so as to fail to provide students notice of what sorts of speech could clearly be prohibited. As an example, application of the proposed rule would allow school administrators to take action not only when violent acts of a general nature are promoted (such as shootings or bombings), but also when speech is bullying toward an individual hearer of the speech. Kevin Jennings, the U.S. Department of Education's Safe Schools Czar, has stated, "When . . . harassment [is] based on sex or race or ability, we can intervene. But on other issues, there actually is no national policy or no national law."[170] Combining the analysis of content with the reasonably expected effects on the hearer, a policy such as the

170. Jim Dubreuil & Eamon McNiff, *Bullied to Death in America's Schools*, ABC NEWS (Oct. 15, 2010), http://abcnews.go.com/2020/TheLaw/school-bullying-epidemic-turning-deadly/story?id=11880841.

one proposed would allow schools to take greater action in response to the severest forms of school bullying even when the student does not fit into a protected class. With bullying a prominent subject at present, having attracted attention from most state legislatures and the U.S. Department of Education,[171] the proposed policy would be another legal tool that could provide support for administrators and families dealing with severe issues of bullying in their schools.

The primary disadvantage of the proposed rule is that certain types of offensive speech would obviously be permitted. But such is the case with free speech outside of schools as well. In a nation where the First Amendment protects video depictions of animal cruelty[172] and funeral protesters carrying signs with such antisocial messages as "God Hates Fags" and "Thank God for Dead Soldiers,"[173] some level of offensive speech will continue to exist in schools as well. This is a necessary byproduct of any free society's protection of speech. Where the contents of speech are clearly offensive but the plausible effects non-existent or non-serious in nature, certain speech that schools may wish to regulate would actually find protection. For example, the wearer of the "Be Happy, Not Gay" t-shirt found Seventh Circuit support, even though the policy by which the school sought to regulate the shirt was also held to be acceptable. Speech using words that are ambiguous or varied in meaning might fall through a similar "crack" under the proposed rule. The Court has long recognized that "the fact that society may find speech offensive is not a sufficient reason for suppressing it."[174] Even given an audience comprised primarily of minors, the principle remains that students cannot be shielded from everything that might be offensive. This disadvantage is offset, however, by the fact that *Fraser* and *Kuhlmeier* created reasonable limits that allow schools to shield younger students from material that could be interpreted as inappropriate. Thus, the danger of schools not being able to regulate "the worst of the worst" is quite slim.

171. *See generally* STOPBULLYING.GOV, http://www.stopbullying.gov (last visited Nov. 16, 2012). *See* VICTORIA STUART-CASSEL ET AL., U.S. DEPT. OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES (2011), *available at* http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf.

172. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

173. Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).

174. FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

V. CONCLUSION

The state of school speech following *Morse* has become something of a trap for the unwary school administrator and students alike. With varying degrees of interpretation given to the holding in *Morse*, depending on the state, district court, or federal circuit, school administrators cannot fashion the sort of comprehensive school speech policy that will best meet the needs of their school without quite possibly running afoul of one of the various limits imposed on the reading of *Morse*.

On its face, *Morse* permits schools to limit speech that might reasonably be expected to promote illegal drug use among students. But with multiple lower courts giving *Morse* expansionist readings that allow schools to regulate speech that can either promote real violence, theoretical violence, psychological harm, behaviors that might lead to lower test scores, and a host of other harms, a clear rule is needed to allow students the freedom to speak their minds and grow in their ability to be responsible members of society. As communities become more pluralistic and the range of opinions held by students continues to diversify, legitimate speech must be protected. Likewise, as school violence continues to be a serious problem nationwide, school administrators must be afforded the tools to suppress student speech that can reasonably be expected to lead to violent behavior. The rule proposed in this Comment offers administrators the required flexibility to meet problems head on while likewise offering students the required freedom to learn, think, share, and grow in their understanding of varying viewpoints, even where those viewpoints may be controversial. This proposed rule thus helps fulfill the very purpose of education: to expand students' minds, to broaden their range of experiences, and to maximize their exposure to new concepts that propel them ever forward.

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