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Anti-Harassment Provisions Revisited: No Bright-Line Rule

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ANTI-HARASSMENT PROVISIONS REVISITED: NO BRIGHT-LINE RULE

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Considerable attention in education and legal circles has focused on the Supreme Court's recent decision in *Morse v. Frederick*.[1] While this ruling answers some questions regarding students' expression rights, it provides little clarification about challenges to public school districts' policies or practices prohibiting harassing and demeaning expression. Unfortunately, the Supreme Court passed up a recent opportunity to provide guidance in this arena when it vacated the Ninth Circuit's decision in *Harper v. Poway Unified School District* without addressing the merits of the case.[2] In the absence of clear Supreme Court guidance, lower court rulings in cases challenging such anti-harassment restrictions are difficult to reconcile with each other and with student expression litigation in general. These cases are particularly sensitive because they highlight the tension between the protection of students' First Amendment rights to freely express their views, including religious views, and school authorities' duty to maintain a respectful and civil school environment. Recent legal developments have left educators unsure regarding how to balance public schools' obligations and students' rights in terms of appropriate and protected expression in public schools.

This Article revisits cases rendered since 2000 challenging school districts' anti-harassment restrictions. In Section I, the Supreme Court's rulings on students' free speech rights are briefly reviewed to provide a context regarding the governing legal principles. Section II examines two rulings of the Third Circuit as an example of how lower courts have applied

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1. 127 S. Ct. 2618 (2007).

2. 445 F.3d 1166 (9th Cir. 2006), *vacated and remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007).

Supreme Court precedent to challenges to anti-harassment policies. Sections III and IV, respectively, discuss the inconsistencies among lower court rulings across circuits regarding displays of the Confederate flag and expressions of religious beliefs that demean homosexuality. Section V addresses possible future directions of litigation in this arena and reviews the meager guidance for school authorities that can be gleaned from the cases to date.

I. CONTEXT: SUPREME COURT PRECEDENT

Since the late 1960s, the Supreme Court has rendered four decisions directly addressing public school students' free expression rights.[3] The legal principles established in these cases are briefly reviewed below because lower courts apply these principles in assessing current challenges to school districts' anti-harassment policies.

The seminal decision, *Tinker v. Des Moines Independent Community School District*,[4] marked the Supreme Court's entry into the arena of constitutional protection of students' expression rights. The Supreme Court in *Tinker* declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[5] and "may not be confined to the expression of those sentiments that are officially approved."[6] *Tinker* focused on disciplinary action against students who wore black armbands to protest the Vietnam War in violation of a school board policy that was enacted after the district's principals learned that the students

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3. *See* Morse v. Frederick, 127 S. Ct. 2618 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). The Court also has addressed student expression rights under the Federal Equal Access Act, 20 U.S.C. §§ 4071–74 (2000), and in connection with students attending state-supported institutions of higher education. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that a university could not withhold support from a student religious group seeking to use student activity funds to publish sectarian materials); Bd. of Educ. of the Westside Cmty. Sch. Dist. 66 v. Mergens, 496 U.S. 226 (1990) (rejecting an Establishment Clause challenge to the Federal Equal Access Act, which stipulates that federally assisted secondary schools with a limited forum for student groups to meet during noninstructional time cannot deny school access to noncurriculum student groups based on the religious, philosophical, or political content of their meetings).

4. 393 U.S. 503 (1969).

5. *Id.* at 506.

6. *Id.* at 511.

planned to engage in this form of passive, silent protest.[7] In holding for the students, the Court in *Tinker* ruled that students can express their private ideological views at school unless such expression threatens a "substantial disruption" of the educational process or collides with the rights of others.[8]

The Supreme Court did not deliver another student-expression decision until 1986, and this ruling, *Bethel School District No. 403 v. Fraser*,[9] narrowed the circumstances under which *Tinker* applies. In *Fraser*, the Court granted school authorities considerable discretion in curtailing expression they consider to be lewd and vulgar.[10] Reversing the courts below, the Supreme Court upheld a student's suspension for using a sexual metaphor in a nominating speech during a student government assembly.[11] The Court concluded that sexual innuendos could offend both teachers and students even though the expression did not cause a disruption.[12] Declaring that "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse,"[13] the *Fraser* majority found it "perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[14] The Court further stated that the school board is the proper body to determine what manner of student speech is appropriate in classrooms and assemblies.[15]

In 1988, only two years after rendering *Fraser*, the Supreme Court delivered its third decision, *Hazelwood School District v. Kuhlmeier*, drawing a distinction between school-sponsored and private student expression.[16] The controversy focused on a high school principal's deletion of two pages from the school newspaper because of the content of articles on divorce and teenage pregnancy and concerns that individuals

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7. *Id.* at 504.
8. *Id.* at 513–14.
9. 478 U.S. 675 (1986).
10. *Id.* at 683–86.
11. *Id.* at 677–78, 687.
12. *See id.* at 683.
13. *Id.* at 683.
14. *Id.* at 685–86.
15. *Id.* at 683.
16. 484 U.S. 260, 270–71 (1988).

could be identified in the articles.[17] Upholding the principal's actions, the Supreme Court declared "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[18] The Court rejected the assertion that the school newspaper had been established as a public forum for student expression, reasoning that school authorities must exhibit a clear intent for school activities to become a public forum.[19] Conceding that public schools at times must tolerate *private* student expression to respect constitutional guarantees, the Court emphasized that school authorities can censor student speech that represents the school.[20] The Court declared that a school does not have to condone student speech appearing to bear the school's imprimatur if it is inconsistent with the school's "'basic educational mission,' even though the government could not censor similar speech outside the school."[21]

The above trilogy of Supreme Court decisions was applied by lower courts in assessing student expression rights for almost two decades until the Court rendered its fourth decision in 2007, *Morse v. Frederick*.[22] The Court in *Morse* held that given the special circumstances in public schools, students can be disciplined for expression reasonably viewed as promoting or celebrating illegal drug use.[23] This case attracted substantial national attention and focused on a banner containing the phrase, "BONG HiTS 4 JESUS," which plaintiff Joseph Frederick and some friends unfurled across the street from their school as the Olympic torch relay passed by.[24] After Frederick refused to lower the banner, the principal confiscated it and subsequently suspended Frederick.[25] The Court declined to apply legal standards used to assess students' off-campus

17. *Id.* at 263.
18. *Id.* at 273.
19. *Id.* at 269–70.
20. *Id.* at 270–71.
21. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).
22. 127 S. Ct. 2618 (2007).
23. *Id.* at 2629.
24. *Id.* at 2622.
25. *Id.*

behavior, because the students were under the school's control when they were allowed to go outside on the public sidewalk to watch the torch relay.[26]

Reversing the Ninth Circuit's conclusion that the school could not censor non-disruptive, off-campus student speech that conveyed "a social message contrary to the one favored by the school" during a school-authorized event,[27] the Supreme Court upheld disciplinary action for display of the banner, which the principal viewed as promoting illegal drug use.[28] The majority emphasized the importance of deterring drug use by schoolchildren and concluded that Frederick's action violated the school board's policy prohibiting expression advocating use of illegal substances.[29] The Court declared that *Fraser* stands for the propositions that (1) the public school is a special environment in terms of expression rights, and (2) considerations beyond the *Tinker* disruption standard are appropriate in assessing student expression in public schools.[30] However, a majority of the justices declined to extend school authorities' discretion to allow them to curtail any student expression they find plainly offensive[31] or at odds with the school's educational mission,[32] which would allow school officials too much discretion. All of the justices agreed that students can be disciplined for promoting the use of illegal drugs, but they differed regarding whether the banner at issue actually did so.[33]

The legal principles established by the Supreme Court in

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26. *Id.* at 2624.

27. Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006).

28. *Morse*, 127 S. Ct. at 2622–23.

29. *Id.* at 2628–29.

30. *Id.* at 2626–27. All the justices agreed that the principal should not be held liable for violating clearly established law; Justice Breyer thought the decision should have focused only on this issue. *See id.* at 2641 (Breyer, J., concurring in part, dissenting in part) (stating that if the case had been decided on qualified immunity grounds, and not First Amendment grounds, the decision would have been unanimous because even the dissent agreed that the principal was not liable for damages).

31. *Id.* at 2629.

32. *Id.* at 2637 (Alito, J., joined by Kennedy, J., concurring) (Justices Alito and Kennedy emphasized that this decision does not extend to other political or social issues that may be viewed as inconsistent with the school's mission). Since the legalization of marijuana has been controversial in Alaska, perhaps if the banner had been cast as advocating a change in state law, Frederick would have prevailed.

33. *See id.* at 2646–47, 2649 (Stevens, J., joined by Ginsberg & Souter, JJ., dissenting) (arguing that the banner was a nonsensical effort to get on television and promoted nothing).

these cases govern student expression rights, but lower courts have not spoken with a single voice in interpreting and applying these standards. The principles seem particularly difficult to apply in litigation involving religious challenges to school districts' anti-harassment provisions.[34]

II. THE THIRD CIRCUIT DRAWS ATTENTION TO ANTI-HARASSMENT POLICIES

Prior to the twenty-first century, it was generally assumed that school authorities could curtail harassing student expression and that it was legitimate for public schools to enact anti-harassment policies as part of their obligation to instill basic values in students and maintain a proper environment for learning.[35] A distinction was drawn between higher education, where students are more mature and choose to enroll, and the vulnerable captive student bodies in public elementary and secondary schools. Whereas some policies restricting hate speech have been struck down in postsecondary institutions,[36] the conventional wisdom has been that public schools have greater discretion to curtail such disrespectful and hurtful expression, beyond that actionable under civil rights laws,[37] to fulfill their obligation to inculcate essential values in a democratic society.[38]

The Third Circuit attracted national attention in 2001 when it rendered its decision in *Saxe v. State College Area School District (SCASD)*, reversing the court below and striking down a Pennsylvania school district's anti-harassment policy that prohibited disrespectful expression considered a threat to the school environment and individual well-being.[39] The SCASD policy defined "harassment" as "verbal or physical conduct based on one's actual or perceived race, religion, color,

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34. *See infra* text accompanying notes 46–55 and 112–138.

35. *See* CHARLES A. BEARD, MARY R. BEARD & WILLIAM BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1960); Martha McCarthy, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J. L. & EDUC. 52 (2002).

36. *See, e.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); UWM Post Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

37. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000); *infra* text accompanying note 46.

38. McCarthy, *supra* note 35, at 55.

39. 240 F.3d 200 (3d Cir. 2001), *rev'g*, 77 F. Supp. 2d 621, 627 (M.D. Pa. 1999).

national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile, or offensive environment."[40] The policy covered unwelcome conduct offending or belittling others based on any of the above factors[41] and defined the category of "other harassment" as harassment on the basis of such things as "clothing, physical appearance, social skills, peer group, income, intellect, educational program, hobbies or values, etc.," that may substantially interfere with a student's educational performance or create "an intimidating, hostile or offensive environment."[42]

The SCASD policy was challenged by plaintiffs who feared reprisals for voicing their religious views about moral issues, including the distribution of religious literature describing the harmful effects of homosexuality.[43] The Third Circuit reversed the decision of the court below in a ruling authored by Justice Alito before his confirmation to the Supreme Court. Recognizing that "preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest" and that "speech may be more readily subject to restrictions" in schools that have a captive audience,[44] the Third Circuit nonetheless found the SCASD policy unconstitutionally overbroad.[45] The appeals court reviewed existing anti-discrimination laws and litigation in detail to refute the district court's conclusion that the anti-harassment policy simply barred expression already prohibited by legislation.[46] Instead, the Third Circuit found some

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40. *Id.* at 202 (quoting SCASD Anti-Harassment Policy, *General Statement of Policy*, para. 2 (approved Aug. 9, 1999), *included in Saxe*, 240 F.3d app. at 218–23 [hereinafter *General Statement*]).

41. *General Statement*, at para. 4.

42. SCASD Anti-Harassment Policy, *Definitions*, para. 9 (approved Aug. 9, 1999), *included in Saxe*, 240 F.3d app. at 220. The court faulted the school district for addressing what constitutes prohibited expression in separate passages of the policy, as they arguably could be interpreted as providing different definitions of the banned speech. *Saxe*, 240 F.3d at 215.

43. *See Saxe*, 240 F.3d at 203.

44. *Id.* at 209–10.

45. *Id.* at 217.

46. *See id.* at 204–06 (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)). While recognizing that individuals can challenge

expression covered by the SCASD policy to be beyond what is actionable under federal civil rights laws. The appeals court considered the policy's catch-all category, barring harassment based on "other personal characteristics," particularly troublesome and likely to encompass some protected expression.[47] Also, the court reasoned that harassing expression based on values "strikes at the heart of moral and political discourse," which is a "core concern of the First Amendment."[48]

Rejecting the assertion that harassing speech is beyond constitutional protection, the Third Circuit found no judicial precedent supporting a "categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection."[49] And even if such a contention were true, the appeals court emphasized that the SCASD policy would be struck down because its reach was broader than any anti-discrimination laws.[50]

The Third Circuit turned to First Amendment expression cases involving public school students toward the end of its opinion, acknowledging that offensive expression can be curtailed for schoolchildren that could not be restricted for adults.[51] The court reasoned that *Hazelwood* was not controlling, because the policy did not regulate school-sponsored expression.[52] Also declining to apply *Fraser*, the court appeared to confine the *Fraser* principle to a consideration of the form and manner of expression rather than its substance, even though it did recognize that under *Fraser* school districts can categorically prohibit private student expression that is lewd, vulgar, or profane.[53] But the Third Circuit stated that the unconstitutional SCASD policy

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harassment based on sex, race, color, national origin, age, and disability under federal civil rights laws, the court emphasized that when these anti-discrimination laws regulate expression based on content or viewpoint, such a "restriction is ordinarily subject to the most exacting First Amendment scrutiny." *Id.* at 207.

47. *Id.* at 210.

48. *Id.*

49. *Id.*

50. *Id.* at 214.

51. *Id.* at 212–13 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

52. *See id.* at 216.

53. *Id.*

regulated expression far broader than "*Fraser*-type speech."[54] Thus, the court reasoned that the speech at issue was governed by *Tinker*'s disruption standard, which the anti-harassment policy did not satisfy.[55]

In a subsequent decision rendered a year later, *Sypniewski v. Warren Hills Regional Board of Education*, a different panel of the Third Circuit upheld a school policy barring racial harassment.[56] Unlike the policy in *Saxe*, the contested policy in *Sypniewski* had been enacted in response to a pattern of racial incidents.[57] During the 2000-2001 school year, some high school students wore clothing displaying the Confederate flag as a symbol of their solidarity when they observed what they called "White Power Wednesday."[58] The school board had previously discussed a ban on clothing displaying the Confederate flag but declined to enact such a ban until 2001.[59] The policy adopted was one that had been upheld by the Tenth Circuit, and it banned various manifestations of racial harassment or intimidation.[60]

The Warren Hills policy was challenged as being unconstitutionally vague and overbroad on its face.[61] Rejecting these assertions, the appeals court reasoned that the policy, limited to racially provocative expression, was an appropriate nondiscriminatory response by school officials to the history of racial tensions in the school district (e.g., students observing White Power Wednesdays, writing racist graffiti on school walls, engaging in verbal racial harassment, and displaying Confederate flags).[62] The Third Circuit recognized that although public schools can regulate racially hostile conduct that is disruptive in the absence of an anti-harassment policy, such policies can be helpful in guiding student behavior.[63] The court was not persuaded that the content restriction (applying only to racially offensive content) was unconstitutional, given

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54. *Id.*

55. *Id.* at 216–17.

56. 307 F.3d 243 (3d Cir. 2002).

57. *Id.* at 246–48.

58. *Id.* at 247.

59. *Id.* at 248–49.

60. *Id.* at 249; *see also* West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000); *infra* text accompanying note 74.

61. *Sypniewski*, 307 F.3d at 252.

62. *See id.* at 260–62.

63. *Id.* at 259–60.

the well-founded fear of racial conflict in the school district.[64] The Third Circuit declared:

> Speech that disrupts education, causes disorder, or inappropriately interferes with other students' rights may be proscribed or regulated. Everyday school discipline does not depend on the necessity of a speech code. In the public school setting, the First Amendment protects the nondisruptive expression of ideas. It does not erect a shield that handicaps the proper functioning of the public schools.[65]

Even though the policies in *Sypniewski* and *Saxe* shared some language, the *Sypniewski* court found the Warren Hills policy to be sufficiently narrower than the SCASD policy and to address different circumstances.[66] However, one aspect of the Warren Hills policy was struck down. The Third Circuit ruled that speech creating "ill will" could be broadly interpreted as going beyond a link to a disruption required under *Tinker*, so school authorities were ordered to eliminate this phrase from the policy.[67] Unlike the *Saxe* appellate panel that did not offer school authorities the option of severing the overly broad provisions from the SCASD policy, the Third Circuit panel in *Sypniewski* was satisfied that the Warren Hills policy could be implemented with the one phrase eliminated.[68]

While upholding the anti-harassment policy in *Sypniewski*, the Third Circuit ruled that T-shirts with Jeff Foxworthy's redneck sayings on them did not violate the policy.[69] The school contended that the shirts abridged the racial harassment policy and the school's dress code, but there was no allegation that the shirts were indecent or lewd.[70] Thus, the Third Circuit applied the disruption standard articulated in *Tinker* and found that banning the shirts in question violated the students' rights in the absence of a disruption.[71] Although a gang-like group, "the Hicks," was associated with racist behavior, the

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64. *Id.* at 262.

65. *Id.* at 259 (citation omitted).

66. *Id.* at 261–62.

67. *Id.* at 262–66.

68. *Id.* at 263, 265–66.

69. *Id.* at 269.

70. *Id.* at 254. The pertinent part of the dress code prohibits "[c]lothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs and tobacco), or portraying racial, ethnic, or religious stereotyping." *Id.* at 250 n.6.

71. *Id.* at 254.

court concluded that the connection between the Hicks and redneck sayings was ambiguous at best.[72] Therefore, even though the anti-harassment policy was upheld, school authorities' judgment in enforcing the policy in this particular instance was overruled.[73]

III. CHALLENGES TO DISPLAYS OF THE CONFEDERATE FLAG HIGHLIGHT THE RANGE OF LOWER COURT INTERPRETATIONS OF SUPREME COURT PRECEDENT

A number of cases in addition to *Sypniewski* have focused at least in part on displays of the Confederate flag by public school students. Indeed, much of the litigation pertaining to anti-harassment policies in the past decade has addressed such displays. The Supreme Court has not accepted an appeal in any of these cases, and lower courts have differed widely in their application of Supreme Court precedent, rendering a range of opinions. These different interpretations present challenges when school districts try to implement acceptable policies.

In a 2000 decision, *West v. Derby Unified School District No. 260*, the Tenth Circuit held that a Kansas school district's anti-harassment policy met the *Tinker* standard and upheld disciplinary action against a middle school student for drawing a Confederate flag during math class in violation of the policy.[74] The school district's policy prohibited racial harassment or intimidation "by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice," including items that denote the Ku Klux Klan, White Supremacy, Black Power, Confederate flags, or articles of any hate groups, such as the Neo-Nazis.[75] The Tenth Circuit concluded that the school district had reason to believe the display of the Confederate flag could lead to racial incidents that might cause a school disruption and interfere with the rights of others.[76]

The same year that *West* was rendered, the Eleventh Circuit in *Denno v. School Board of Volusia County, Florida* rejected a student's claim that disciplinary action for displaying

72. *Id.* at 255–56.
73. *Id.* at 269.
74. 206 F.3d 1358 (10th Cir. 2000).
75. *Id.* at 1361.
76. *Id.* at 1366.

the Confederate flag warranted liability against school officials and the school board.[77] The Florida student displayed a small Confederate flag to his friends as they were discussing Civil War history during an outdoor lunch break. The assistant principal saw the flag and instructed Denno to put it away. When Denno attempted to explain the historical significance of the flag, the assistant principal ordered him to go to the administrative office and on the way informed Denno that he would be suspended from school.[78] Relying primarily on *Fraser* rather than *Tinker*, the Eleventh Circuit reasoned that a "flexible reasonableness or balancing standard" should be used to assess restrictions on student expression in such cases.[79] The court granted qualified immunity to the school officials, concluding that they did not violate clearly established law; they reasonably could believe that the display could be prohibited because Confederate flags are highly offensive to some individuals and implicate "legitimate school functions relating to civility."[80]

In a more recent decision, *Scott v. School Board of Alachua County*, the Eleventh Circuit ruled in favor of the school's ban of the Confederate flag where there were racial tensions in the school.[81] The Eleventh Circuit upheld the suspension of two students who displayed Confederate flags on school premises in defiance of the principal's instructions.[82] Among other things, the students alleged that the threat of a racial disturbance was insufficient to justify the principal's unwritten ban.[83] The court found the Confederate flag disruptive under *Tinker* but also concluded that, even in the absence of a likely disruption, school officials under *Fraser* have a duty to inculcate civil, respectful behavior and expression.[84] The court acknowledged the debate over whether the Confederate flag should be considered offensive only if intended to be so or whether the flag is "innately offensive" because "it is perceived as offensive

77. 218 F.3d 1267 (11th Cir. 2000).
78. *Id.* at 1270–71.
79. *Id.* at 1273–74.
80. *Id.* at 1274–75.
81. 324 F.3d 1246 (11th Cir. 2003).
82. *Id.* at 1247.
83. *See id.*
84. *Id.* at 1248.

by so many people."[85] Nonetheless, the appeals court concluded that school authorities are expected to ban the display of symbols of racial prejudice and to teach students with different backgrounds to interact in civil terms.[86]

In 2007, the Sixth Circuit in *D.B. ex rel. Brogdon v. Lafon* also broadly interpreted the authority of school personnel when it upheld a school district's ban on students displaying the Confederate flag.[87] The court found the potential for such displays to be disruptive, and it rejected the students' contention that the ban represented viewpoint discrimination.[88] The school district's dress code prohibits, among other things, clothing exhibiting references to illegal substances, negative slogans, or vulgarities or that would cause a disruption.[89] Although the court found "ample reason" for school authorities to anticipate a disruption from students wearing the banned symbol,[90] the court stated that evidence of such a disruption would *not* be necessary to uphold the prohibition.[91] The court declared that *Tinker* does not require substantiation of "a preexisting incident of the banned symbol evoking disruption."[92] Noteworthy is the fact that the dress code policy barred "negative slogans," a term that can be interpreted in multiple ways, but this phrase was not challenged in the case.[93]

In contrast, the same appeals court a few years earlier in *Castorina ex rel Rewt v. Madison County School Board* had struck down restrictions on displaying the Confederate flag in the absence of the threat of a disruption.[94] The Sixth Circuit reversed the lower court's grant of summary judgment to the school district in connection with the district's ban of the Confederate flag on clothing and overturned the suspension of students for violating the ban by wearing T-shirts with a country singer on the front and the Confederate flag on the

85. *Id.*
86. *Id.* at 1249.
87. 217 Fed. Appx. 518 (6th Cir. 2007).
88. *Id.* at 524.
89. *Id.* at 521.
90. *Id.* at 525.
91. *See id.* at 525.
92. *Id.*
93. *Id.* at 521.
94. 246 F.3d 536 (6th Cir. 2001).

back.[95] The principal had instructed the two students to change their shirts because they were in violation of the dress code that in part prohibits attire that has "racist implications."[96] When the students refused to comply, their parents were called and informed that if the students would go home and change their shirts, they would not be disciplined.[97] The parents supported their children's decision not to change their shirts, and after two suspensions for wearing the shirts, the students withdrew from school and were home-schooled for the remainder of the year.[98] They brought suit, and the district court dismissed the students' claims, but the appeals court reversed.[99] The Sixth Circuit reasoned that the students wore the shirts to express a viewpoint (celebrating their southern heritage and Hank Williams' birthday).[100] The court applied *Tinker* in reaching its decision, noting that the school did not produce evidence of racial tension in the school or that the plaintiffs' conduct would likely lead to violence or any other disruption.[101] Moreover, the court concluded that the school board had enforced the dress code in an uneven and viewpoint-specific manner. For example, clothing with iron crosses and venerating Malcom X had been allowed.[102] Thus, the students prevailed in establishing a violation of their free speech rights.[103]

Other courts also have ruled in favor of students' rights to display the Confederate flag, finding that prohibitions impair their free expression rights. For example, in *Bragg v. Swanson*, a West Virginia federal district court found a school's policy prohibiting the display of the Confederate flag as a symbol of racism to be unconstitutionally overbroad under the First Amendment.[104] Therefore, a student was successful in

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95. *Id.*
96. *Id.* at 538.
97. *Id.* at 539.
98. *Id.*
99. *Id.*
100. *Id.* at 539.
101. *Id.* at 544.
102. *Id.* at 540–41.
103. *Id.* at 544.
104. 371 F. Supp. 2d 814 (S.D. W. Va. 2005). The school district's policy manual did not mention the Confederate flag. However, based on a request from the faculty, coupled with the principal's negative experiences with displays of the flag at other schools, the principal drafted a dress code enforcement policy for the school. The relevant aspect of this policy stated: "Profanity, vulgarity, sexual innuendo, and racist

challenging disciplinary action for wearing the flag on a T-shirt and belt buckle. The court reasoned that display of the Confederate flag per se is not patently offensive,[105] noting that the student had a strong sense of his southern background and wore the emblems to reflect this heritage.[106] Moreover, the court recognized that the student had worn the clothing for three years without incident and that only when the new principal expanded the dress code in an enforcement policy did it become an issue.[107] Reasoning that *Tinker*'s disruption standard governed this case, the court noted that the policy was overbroad in prohibiting some attire that was not racially offensive and found no evidence of the banned attire leading to a disruption.[108] According to this court, a prohibition on displaying the Confederate flag simply because some people associate it with racism was insufficient justification.[109] Thus, the school district was ordered to expunge from the student's record any notation of disciplinary action and was enjoined from enforcing the overbroad portion of the policy barring offensive language or symbols, defined as including racist language or symbols such as the Confederate flag.[110]

The body of litigation involving challenges to student displays of the Confederate flag reflects different views across jurisdictions, and the Supreme Court has declined to clarify the governing legal principles. It appears that the courts applying *Fraser* generally rule in favor of the school authorities, whereas those applying *Tinker* tend to uphold the students' rights unless there is clear evidence of racial conflict within the school. However, as revisited in the concluding section, the circumstances that trigger each standard remain somewhat unclear.

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language and/or symbols or graphics are prohibited. This includes items displaying the Rebel [Confederate] flag, which has been used as a symbol of racism at high schools in Putnam County." *Id.* at 818.

105. *See id.* at 827.

106. *Id.* at 820.

107. *Id.* at 819–20.

108. *Id.* at 827.

109. *Id.* at 828–29.

110. *Id.* at 829.

IV. PROHIBITIONS ON DEMEANING EXPRESSION BASED ON SEXUAL ORIENTATION: DOES *TINKER*'S SECOND PRONG HAVE TEETH?

Controversies that pit free exercise and free speech rights against prohibitions on harassing and demeaning expression based on sexual orientation have proven particularly volatile. As discussed above, the Third Circuit focused attention on this topic in *Saxe* when it struck down a school district's anti-harassment policy as overbroad, ruling in favor of a student who claimed that he could not express his religious beliefs about homosexuality because of the school district's policy.[111]

More recently, an Ohio student prevailed in challenging school administrators' actions prohibiting him from wearing a shirt denigrating homosexuality, Islam, and abortion.[112] Rejecting the school administrators' assertion that the shirt was "plainly offensive" in violation of the principle articulated by the Supreme Court in *Fraser*, the federal district court reasoned that *Fraser* governs the manner and not the content of expression.[113] Applying *Tinker*'s disruption standard, the court found no interference with the educational process or evidence that the shirt might cause such a disruption in the future.[114] The court also rejected the contention that the expression interfered with the rights of others in violation of *Tinker*.[115] The court found the mere fact that some classmates might be offended to be insufficient to justify the school's prohibition on wearing the shirt.[116] The court declared that no cases had turned on *Tinker*'s second prong—allowing censorship of student expression that collides with the rights of others—as the controlling legal principle.[117] However, that

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111. Saxe v. State Coll. Area Sch. Dist. (SCASD), 240 F.3d 200, 217 (3d Cir. 2001); *see also* Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001) (granting a temporary order allowing a student to wear a sweatshirt displaying the message "Straight Pride" in the absence of any disruption).

112. Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005). The student had purchased the shirt at a church camp. The front of the shirt read: "INTOLERANT. Jesus said . . . I am the way, the truth and the life. John 14:6." The following sentences were on the back of the shirt: "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" *Id.* at 967.

113. *Id.* at 971.

114. *Id.* at 973.

115. *Id.* at 974.

116. *Id.*

117. *Id.*

assertion no longer is true.

The Ninth Circuit reached a different conclusion in 2006, marking its second significant student expression decision rendered within one month.[118] In *Harper v. Poway Unified School District*, the Ninth Circuit became the first appellate court to rely primarily on *Tinker*'s pronouncement that student expression intruding on the rights of others can be curtailed.[119] Applying this standard, the court upheld a California school district's ban on students wearing T-shirts displaying disparaging messages about homosexuality.[120] The shirt at issue included the following handwritten messages on the front or back: "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED;" "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED;" and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"[121] The school involved had a history of conflicts over issues pertaining to sexual orientation, and much of the conflict seemed to center on the Gay-Straight Alliance's annual "Day of Silence," which was intended to teach tolerance regarding sexual orientation.[122] In 2003, some students had organized a "Straight Pride Day" a week after the "Day of Silence," during which they wore shirts displaying derogatory remarks about homosexuals. The shirt that generated the lawsuit was worn by Tyler Harper during the 2004 "Day of Silence" and on the following day.[123] Even though the school district did not have a written anti-harassment policy, teachers and administrators felt that the words on the student's shirt were inflammatory.[124] Harper was given opportunities to remove the shirt, and after he refused, he was not allowed to wear the shirt on campus. He was kept in the office where he completed his work, but there was no disciplinary action taken, and his record had no indication of

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118. *See* Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006) (holding that disciplinary action against a student for displaying a banner with the phrase "BONG HiTS 4 JESUS" violated his clearly established expression rights), *rev'd*, 127 S. Ct. 2618 (2007) (upholding the disciplinary action for expression viewed as promoting illegal activity); *supra* text accompanying notes 27–28.

119. 445 F.3d 1166, 1177–78 (9th Cir. 2006), *cert. granted and judgment vacated with instructions to dismiss the appeal as moot*, 127 S. Ct. 1484 (2007).

120. *Id.* at 1178.

121. *Id.* at 1171.

122. *Id.*

123. *Id.*

124. *Id.* at 1172.

the incident.[125] Harper brought suit, the district court denied his motion for a preliminary injunction, and the Ninth Circuit agreed.[126]

The appeals court relied on the second prong of *Tinker*, finding that the derogatory statements constituted speech that "'intrude[d] upon . . . the rights of other students' or 'collide[d] with the rights of other students to be secure and to be let alone.'"[127] Indeed, the court held that "Harper's wearing of his T-shirt 'collide[d] with the rights of other students' in the most fundamental way," in that students have a right to be free from attacks at school "on the basis of a core identifying characteristic such as race, religion, or sexual orientation."[128] The court reasoned that the school was allowed to prohibit Harper's conduct, regardless of the adoption of a valid anti-harassment policy, as long as it could show that the restriction was necessary to prevent a violation of the rights of other students *or* a substantial disruption of school activities.[129] The court declared that speech can impinge on the rights of other students under *Tinker*, even though the "speaker does not directly accost individual students with his remarks,"[130] and supported the school in banning the T-shirt that was "injurious to gay and lesbian students and interfered with their right to learn."[131] The Ninth Circuit disagreed with the Third Circuit's earlier suggestion in *Saxe* that injurious slurs interfering with the rights of others cannot be barred unless they *also* are

125. *Id.*

126. *Id.* at 1173, 1192.

127. *Id.* at 1177 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). The court also rejected Harper's claim that the school's action in banning his shirt abridged his free exercise of religion and violated the Establishment Clause, Equal Protection Clause, and other protected rights. *Id.* at 1186–92.

128. *Id.* at 1178; *see also* Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. Apr. 17, 2007) (denying students' request for a preliminary injunction to allow them to wear T-shirts, buttons, or stickers bearing the phrase, "Be Happy, Not Gay," to express their opposition to homosexuality; school authorities have a legitimate pedagogical reason to promote tolerance of differences and to protect students from harassment); Governor Wentworth Reg'l Sch. Dist. v. Hendrickson, 421 F. Supp. 2d 410 (D.N.H. 2006) (upholding suspension of a gay student for wearing an arm patch with a swastika and the international "no" symbol superimposed over it, given the friction between gay students and "rednecks" in the school and administrators' need to promote safety).

129. *Harper*, 445 F.3d at 1175 n.11.

130. *Id.* at 1177–78.

131. *Id.* at 1180.

disruptive.[132]

The Ninth Circuit specifically noted that because the free speech claim was assessed based on *Tinker*, the court did not have to consider whether Harper's expression was "plainly offensive" and censorable under *Fraser*.[133] Thus, clarification of the reach of *Fraser* was sidestepped by the Ninth Circuit in *Harper* and subsequently by the Supreme Court in *Morse* as well. Indeed, the Supreme Court in *Morse* noted that "the mode of analysis employed in *Fraser* is not entirely clear,"[134] but whatever approach was used, the *Fraser* Court "certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*."[135]

In 2007, the Supreme Court granted certiorari in *Harper* but vacated the appellate court ruling with instructions for the appeal to be dismissed as moot.[136] The Court relied on precedent indicating that because the district court in *Harper* had entered a final judgment dismissing the claims, the Supreme Court could not render a decision on the merits of the case.[137] Once again, the Court has left the volatile First Amendment issues raised by anti-harassment restrictions to be clarified another day.

V. THE UNCERTAIN FUTURE OF ANTI-HARASSMENT PROVISIONS IN PUBLIC SCHOOLS

In the absence of a Supreme Court ruling pertaining to a school district's anti-harassment policy or to the application of unwritten restrictions in this regard, school authorities are left to navigate a maze of conflicting lower court rulings in their efforts to provide legal guidance to school boards in enacting policies and to educators in implementing the provisions. Only two generalizations can be offered with any confidence. First, regardless of the type of restriction—anti-harassment policy,

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132. *Id.* at 1179 n.21 (citing Saxe v. State Coll. Area Sch. Dist. (SCASD), 240 F.3d 200, 217 (3d Cir. 2001)).

133. *Id.* at 1176 n.14.

134. Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007).

135. *Id.* at 2627 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

136. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007), *on remand*, 485 F.3d 1052 (9th Cir. 2007), *appeal dismissed as moot pursuant to instructions from the Supreme Court.*

137. *Id.*

dress code, or simply a school practice—constraints on student expression that are discriminatorily applied will not survive judicial scrutiny. If school authorities allow some clothing in a banned category to be worn, but censor other items in the category, or if they treat students differently for the same expression, the aggrieved students will likely prevail.[138] Second, judicial guidance is fairly clear in situations where there have been racial incidents or evidence of racial tension in the school. Under these circumstances, courts have endorsed anti-harassment policies[139] and have upheld school authorities in disciplining students for displays of Confederate flags or other emblems associated with racial conflicts.[140]

The guidance is much less clear where the relationship to racial tension and school disruption is not apparent. Despite the Sixth Circuit's recent statement that evidence of a disruption is not *required* to prohibit Confederate flag displays,[141] in cases to date where courts have upheld prohibitions on racial harassment and racially charged symbols, a connection to racial incidents usually has been established.[142] Only the courts broadly interpreting the discretion afforded to school authorities to curtail student expression under *Fraser* seem willing to accept school authorities' restrictions on harassing expression without evidence that such displays are likely to trigger a disruption.[143]

Ambiguity surrounds whether a school district's adoption of a written anti-harassment policy affects the case outcomes. Some prohibitions on certain expression in public schools have been upheld in light of a written policy,[144] whereas other

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138. *See, e.g.*, Castorina ex rel. Rewt v. Madison County Sch. Bd., 246 F.3d 536, 541, 542, 544 (6th Cir. 2001); *supra* text accompanying note 94.

139. *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 265, 268 (3d Cir. 2002); *supra* text accompanying notes 62–64.

140. *See, e.g.*, Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003); *supra* text accompanying note 81.

141. D.B. ex rel. Brogdon v. Lafon, 217 Fed. Appx. 518, 525 (6th Cir. 2007); *supra* text accompanying notes 91.

142. *See, e.g.*, *Scott*, 324 F.3d 1246, 1249; *Sypniewski*, 307 F.3d at 247–49; West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1362 (10th Cir. 2000).

143. *See, e.g.*, Denno v. Sch. Bd. of Volusia County, Fla., 218 F.3d 1267, 1273–74 (11th Cir. 2000) (applying the "flexible reasonableness" standard drawn from *Fraser*); *supra* text accompanying note 79.

144. *See, e.g.*, *West*, 206 F.3d 1358, 1367–68 (rejecting the plaintiff's facial challenge to the school district's harassment policy by holding that the policy was not vague or overbroad); *supra* text accompanying note 74.

prohibitions have been upheld without reference to such a policy.[145] In some instances students have prevailed in expressing their views because challenged policies have been considered vague or overbroad,[146] whereas other students have successfully challenged censorship action that is not pursuant to a written anti-harassment policy.[147] Since cases are not turning on the presence or absence of a written policy—and such policies can increase legal challenges to the wording selected—some school districts might try to avoid overbreadth claims by operating without anti-harassment policies. In short, school authorities may question the wisdom of enacting an anti-harassment policy that might increase their legal vulnerability when they may be able to prohibit the targeted expression without one. However, other school authorities may prefer to enact such policies, which embody values the district is attempting to promote, to provide a useful guide for students, parents, and others involved in the school community.[148]

It is also unclear whether anti-harassment aspects of dress codes evoke less judicial scrutiny than do constraints on expression in more general anti-harassment policies; some restrictions on harassing attire in dress codes have been upheld whereas others have been invalidated.[149] Nonetheless, school authorities may decide that they can avoid controversies over harassing clothing by adopting very prescriptive dress codes or perhaps student uniforms, which are becoming increasingly

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145. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1175 n.11 (9th Cir. 2006) (deciding not to make "even a preliminary judgment as to the constitutionality" of the school's anti-harassment policy); *supra* text accompanying note 119.

146. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist. (SCASD), 240 F.3d 200, 214–15 (3d Cir. 2001); *supra* text accompanying note 39.

147. *See, e.g.*, Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005); *supra* text accompanying note 112.

148. It should be noted that half the states have enacted anti-bullying laws that prohibit certain student behavior in public schools, usually overt, repeated acts or gestures intended to harass, intimidate, ridicule, humiliate, or harm another student. *See* National Conference of State Legislatures, *School Bullying Overview*, Mar. 2007, *available at* http://www.ncsl.org/programs/educ/bullyingoverview.htm. Also, professional education associations are focusing considerable attention on technology-use policies to curtail cyberbullying. *See* Erin Uy, *Cyberbullying Boom Elicits New School Internet Guidelines*, EDUC. DAILY, Jan. 25, 2008, at 2.

149. *Compare* D. B. ex rel. Brogdon v. Lafon, 217 Fed. Appx. 518 (6th Cir. 2007), *with* Bragg v. Swanson, 371 F. Supp. 2d 814 (S.D. W. Va. 2005); *supra* text accompanying notes 87 and 104.

popular in urban districts.[150] As long as the policies are not adopted to suppress student expression, courts have upheld restrictive dress codes and student uniform requirements designed to advance legitimate educational goals, such as increasing the focus on learning, reducing the presence of gang symbols, and neutralizing socioeconomic distinctions.[151] It remains to be seen whether recent mixed results in litigation challenging anti-harassment policies will encourage school districts to mask some anti-harassment provisions in very restrictive dress codes (e.g., barring clothing with any writing or symbols).

Particularly ambiguous are the legal principles governing religious challenges to anti-harassment policies that bar demeaning expression based on sexual orientation. These controversies are especially troublesome because of the important competing interests at stake—the protection of religious expression and the protection of vulnerable minority groups from harassment. Indeed, some unusual coalitions have formed (e.g., conservative citizen groups and civil libertarians) to assert students' rights to voice their religious objections to homosexuality and to challenge school districts' anti-harassment policies that prevent such expression.[152] Countering these assertions, public schools contend that they have not only the authority, but also the duty, to promote civil behavior and expression and to protect vulnerable students from classmates' hurtful expression.[153]

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150. Debra Nussbaum, *Any Color You Like, as Long as It's Black*, N.Y. TIMES, Feb. 19, 2006, at 6.

151. *See, e.g.*, Blau v. Ft. Thomas Pub. Sch. Dist., 401 F.3d 381, 398–400 (6th Cir. 2005) (prohibiting, among other things, baggy or revealing clothing; tops and bottoms that do not overlap; visible body piercing other than ears; clothing that is distressed or has holes; flip-flop sandals or high platform shoes; pants, shorts, or skirts that are not solid navy, black, khaki, or white; tops with writing on them and logos larger than the size of a quarter, except for the school's logo; and tops that are not a solid color); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 280 (5th Cir. 2001) (requiring students to wear specific types of shirts or blouses of particular colors with blue or khaki pants, shorts, skirts, or jumpers; specifying that clothing be made of specific materials; requiring certain types of shoes; and prohibiting any clothing suggesting gang affiliation). School districts mandating student uniforms may be required to include mechanisms for requesting waivers, and make provisions for students who cannot afford to purchase the uniforms. For cases involving school uniforms, see Wilkins v. Penns Grove-Carneys Point Reg'l Sch. Dist., 123 Fed. Appx. 493 (3d Cir. 2005); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001).

152. *See* Andrew Trotter, *Justices Differ Sharply on Student Speech*, EDUC. WEEK, Mar. 28, 2007, at 20–23.

153. *See, e.g.*, Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir.

Assuming that the Supreme Court does eventually accept a *Harper*-type case, the outcome of the Court's deliberations is very difficult to predict. Justices Alito and Kennedy might side with the students asserting a right to air religious views about homosexuality, given their concurrence in the recent *Morse* decision.[154] They emphasized that they were joining the *Morse* majority in upholding the school board's disciplinary action against the student only if the Court's opinion was limited to curtailing expression that promotes illegal drugs.[155] According to these justices, student comments about "any political or social issue" cannot be censored by school authorities unless disruptive.[156] Given that Justice Alito authored the *Saxe* decision striking down an anti-harassment policy challenged as inhibiting religious speech,[157] he seems especially likely to side with those asserting a First Amendment right to air their religious views, despite such expression offending some classmates. However, Justice Kennedy's position is more difficult to predict from the opinions he has authored.[158] Justice Thomas would probably side with the school district in creating and implementing anti-harassment policies. Even though he supports greater accommodation of religion in public schools,[159] it would be difficult for him to endorse an expansion of students' expression rights, given his very strong statement in his *Morse* concurrence that public school students have no First Amendment expression rights *at all*.[160]

The positions of the other Supreme Court justices are much

2003); Denno v. Sch. Bd. of Volusia County, Fla., 218 F.3d 1267, 1273 (11th Cir. 2000); West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233 (D. Kan. 1998); *see also supra* note 148.

154. Morse v. Frederick, 127 S. Ct. 2618, 2636 (2007) (Alito, J., joined by Kennedy, J., concurring).

155. *Id.*

156. *See id.*

157. Saxe v. State Coll. Area Sch. Dist. (SCASD), 240 F.3d 200 (3d Cir. 2001); *supra* text accompanying notes 39–55.

158. Justice Kennedy wrote the majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a state law that demeaned the existence of homosexuals and their right to engage in private sexual conduct). Thus, an argument might be made that he would side with school authorities in supporting anti-harassment restrictions pertaining to sexual orientation in a *Harper*-type case.

159. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that because the school allowed some community groups to use its facilities, it had to grant access immediately after school for an evangelical religious group to hold devotional meetings targeting elementary-age students who attended the school).

160. *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

more ambiguous and will likely depend on how individual justices balance their commitments to 1) the protection of student expression, including religious expression; 2) deference to local school authorities in making decisions regarding what constitutes civil behavior and expression; and 3) instilling respect for diversity among public school students.[161] It is possible that a decision on the merits of a *Harper*-type case will not reflect the conservative and liberal justices voting in blocks as has often been evident.[162] In fact, some civil libertarians may be conflicted over whether to champion students' rights to express disparaging sentiments about homosexuality or to side with the school in protecting captive students from harassment.

It is too soon to conclude that other courts will adopt the Ninth Circuit's reliance on the second prong of *Tinker* in holding that demeaning expression based on sexual orientation unconstitutionally interferes with the rights of others. Yet, there is considerable support for such an outcome, given that public schools have an important role in cultivating the "habits and manners of civility"[163] essential in a democracy and that "schools must teach by example the shared values of a civilized social order."[164] Also, there is widespread interest in preventing student bullying because of its connection to school violence.[165] Many educators as well as legal commentators have assumed that the important obligations of public schools in instilling basic values, such as respect for others with different backgrounds and beliefs, must override students'

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161. Justices Breyer, Stevens, Souter, and Ginsburg have dissented both in cases curtailing the protection of student expression and prohibiting school districts from using race in student assignment plans. *See Morse*, 127 S. Ct. at 2638–43 (Breyer, J., concurring in part, dissenting in part); *id.* at 2647 (Stevens, J., joined by Souter, Ginsburg, JJ., dissenting) (supporting students' rights to express non-disruptive views in school and at school-sponsored events); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., joined by Stevens, Souter, Ginsburg, JJ., dissenting) (voicing support for advancing diversity in public schools).

162. *See, e.g.*, majority and dissenting opinions in *Parents Involved in Cmty. Sch.*, 127 S. Ct. 2738; *Morse*, 127 S. Ct. 2618; *see also* Linda Greenhouse, *The Kennedy Factor on the Roberts Court*, N.Y. TIMES, Dec. 31, 2006, § 4, at 2; Jeffrey Toobin, *The Talk of the Town: Five to Four*, NEW YORKER, June 25, 2007, at 35.

163. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

164. *Id.* at 683.

165. *See* ROBERT FEIN, BRYAN VOSSEKUIL, WILLIAM POLLACK, RANDY BORUM, WILLIAM MODZELESKI & MARISA REDDY, THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES (2002); *see also supra* note 148.

interests in expressing some views in public schools.[166]

Consistently, and most recently in *Morse*, the Supreme Court has considered the public school a special environment where the rights of students are not coextensive with those of adults elsewhere.[167] It might follow that a majority of the Supreme Court justices will uphold an anti-harassment provision that protects groups of students from ridicule by classmates. Yet, there are compelling First Amendment rights that also must be considered.[168]

VI. CONCLUSION

Currently, educators understandably are insecure in balancing public schools' obligations and students' rights in terms of appropriate and protected expression in public schools. The Supreme Court's prior rulings have not yielded clear legal principles to guide the lower courts in this regard. Without such guidance, the lower courts have not developed much consistency to inform school administrators as to how far they may go in setting anti-harassment standards. And the Supreme Court declined the opportunity to clarify the law in this arena in *Harper*. Thus, how to balance these important concerns in protecting students from hurtful and demeaning expression against the competing interests in encouraging students to freely express their views remains a vexing challenge, and one that the Supreme Court is not likely to resolve soon.

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166. *See* BEARD, BEARD & BEARD, *supra* note 35; McCarthy, *supra* note 35.

167. *Morse*, 127 S. Ct. at 2622; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); *Fraser*, 478 U.S. at 682; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

168. *See* Thomas E. Wheeler II, *How Far Is Too Far? Limiting Cyber-Speech by Students*, SCH. BOARD NEWS, Apr. 2008.