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A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)

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After the Supreme Court granted certiorari in *Morse v. Frederick*[1] in December of 2006, it received an unusual mix of amicus briefs in support of ACLU-represented high school senior Joseph Frederick. Frederick, who had sued his principal after being suspended for waving a banner stating "Bong Hits 4 Jesus" at an Olympic torch rally that he attended with classmates during school hours, had on his side not only the usual suspects, such as the Students Press Law Center[2] and the National Coalition Against Censorship.[3] Also supporting him were six conservatively-oriented religious advocacy groups:[4] the American Center for Law and Justice (ACLJ);[5]

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1. 127 S. Ct. 2618 (2007). The petition for a writ of certiorari was granted on December 1, 2006. *See* 127 S. Ct. 722 (2006).

2. *See* Brief for the Students Press Law Center, Feminists for Free Expression, the First Amendment Project, the Freedom to Read Foundation, and the Thomas Jefferson Center for the Protection of Free Expression as Amici Curiae Supporting Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 542417.

3. *See* Brief of the National Coalition Against Censorship and the American Booksellers Foundation for Free Expression as Amici Curiae in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550929.

4. Drawing on the work of Ira C. Lupu and Robert Tuttle, John Taylor would refer to these groups as "religionists." *See* John E. Taylor, *Why Student Religious Speech is Speech*, 110 W. VA. L. REV. 240 & n.62 (2007) (*hereinafter* Taylor, *Student Religious Speech*); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 48 (2002). Taylor describes "religionists" as a label "encompass[ing] anyone who wants aggressive protection of free exercise interests in the public schools, whether it is Douglas Laycock or the lawyers from the American Center for Law & Justice.... They wish to maximize the space for religious expression in the schools even at a cost to what others might see as Establishment Clause Values." Taylor, *Student Religious Speech,* at 240 n.62.

5. *See* Amicus Brief of the American Center for Law and Justice in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550934 (*hereinafter* "ACLJ Brief"). In its amicus brief, the American Center for Law and Justice described itself as "a not-for-profit legal and educational organization dedicated to, inter alia, the defense of free speech."

the Christian Legal Society;[6] the Alliance Defense Fund;[7] the Liberty Legal Institute;[8] Liberty Counsel,[9] and the Rutherford Institute.[10] *Morse* thus became one of the rare cares uniting the ACLU with the ACLJ.[11]

Id. at * 1. The group's website states that it "focuses on the issues that matter most to you – national security, protecting America's families, and protecting human life." *See* http://www.aclj.org/About/ (last visited May 28, 2008).

6. *See* Brief Amicus Curiae of the Christian Legal Society in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550932 (*hereinafter* "Christian Legal Society Brief"). In its amicus brief, the Christian Legal Society described itself as an "interdenominational association of Christian attorneys, law students, judges, and law professors" that "strives to preserve religious freedom in order that men and women might be free to do God's will." *Id.* at * 1. The group's website indicates its opposition to abortion and gay marriage. *See* http://www.clsnet.com (last visited May 28, 2008).

7. *See* Brief of Amicus Curiae Alliance Defense Fund Supporting Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 542418 (*hereinafter* "Alliance Defense Fund Brief"). The Alliance Defense Fund Brief stated that it was a "public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom." *Id.* at * 1. The group's website lists its three main issues as "Religious Freedom, "Sanctity of Human Life," and "Family Values." *See* http://www.alliancedefensefund.org (last visited May 28, 2008).

8. *See* Brief of the Liberty Legal Institute as Amicus Curiae in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550930 (*hereinafter* "Liberty Legal Institute Brief"). The Liberty Legal Institute described itself as a "non-profit law firm dedicated to the preservation of First Amendment rights and religious freedom." *Id.* at * 1. Its website includes a quotation from the *Dallas Morning News* describing Liberty Legal Institute as the "flip side to [the] ACLU," and describes its positions in favor of the partial-birth abortion ban upheld by the Supreme Court in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) and the Texas sodomy law beld unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* http://www.libertylegal.org (last visited May 28, 2008).

9. Liberty Counsel, founded by the dean of Liberty University School of Law, described itself in its amicus brief as a "national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life, and the traditional family." *See* Brief for Amicus Curiae Liberty Counsel in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 542416, at * 1 (*hereinafter* "Liberty Counsel Brief"); *see also* http://www.lc.org (last visited May 28, 2008).

10. See Brief of the Rutherford Institute, Amicus Curiae, in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 527496 (*hereinafter* Rutherford Brief). The Rutherford Institute described itself in its amicus brief as an "international civil liberties organization," *Id.* at * 1; its website explains that "The Rutherford Institute is a civil liberties organization that provides free legal services to people whose constitutional and human rights have been threatened or violated" http://www.rutherford.org/About/History.asp (last visited July 7, 2008). The group is particularly well-known for its representation of Paula Jones in the *Jones v. Clinton* lawsuit. *See* Neil A. Lewis, *Group Behind Paula Jones Gains Critics as Well as Fame*, N.Y. TIMES (Jan. 18, 1998) (describing the Rutherford Institute as "a kind of evangelical Christian civil liberties union").

11. *Morse* was not the first time that these groups found themselves on the same side of an issue. Although the ACLU and ACLJ (along with other like-minded groups) frequently diverge on issues including abortion, gay rights, euthanasia, and purported Establishment Clause violations, they sometimes adopt similar positions with respect to free speech and free exercise issues. For example, in 2006 the ACLU and ACLJ filed a joint friend-of-the-court brief in support of

As these religious groups made clear in their briefs, they felt no particular affinity with Frederick's banner, which he himself described as containing mere "nonsense" words designed to attract television cameras. But they were concerned that in the course of resolving the case, the Supreme Court would recognize, on broadly-worded grounds, the school's right to censor his speech, thus setting a precedent that implicitly limited other students' rights to express their religious views at school. The groups therefore urged the Supreme Court either to affirm the judgment below in Frederick's favor, dismiss the writ of certiorari as improvidently granted, or – if the Court were inclined to find in favor of the school – to reverse on very narrow grounds.[12]

These groups' concerns were not merely hypothetical. In recent years, there have been an increasing number of cases involving clashes between students seeking to express their religiously-motivated views at school and schools that have restricted such messages out of concern that they will be hurtful to other students. (In fact, the above-mentioned religious groups have represented plaintiff students in several such cases.) Thus far, such conflicts have centered around two main types of religiously-motivated student speech: speech opposing homosexuality and speech opposing abortion. In *Harper v. Poway United School District*,[13] for instance a student sued his school in 2004 after it prohibited him from wearing a T-shirt that stated "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front, and "HOMOSEXUALITY IS SHAMEFUL, Romans I:27" on the back.[14]

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plaintiffs suing under the Texas Religious Freedom Restoration Act. *See* http://www.aclutx.org/article.php?aid=391 (last visited May 28, 2008). Similarly, back in 1993, the ACLU and the ACLJ both supported the petitioners (with the ACLJ's Jay Sekulow arguing the case, and the ACLU submitting an amicus brief) in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). For further discussion of *Lamb's Chapel*, *see infra* text accompanying notes 36-42.

12. *See infra* text accompanying notes 115-122.

13. 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). The student was represented by the Alliance Defense Fund. After the Supreme Court vacated as moot the Ninth Circuit's decision affirming the district court's denial of a preliminary injunction (on grounds that the district court had subsequently dismissed the case in full on summary judgment), Harper's young sister – who was later added as a plaintiff – sought to reinstate the case and moved for reconsideration. That motion was subsequently denied. Harper v. Poway Unified Sch. Dist., Civ. No. 04-CV-1103, JAH (POR), slip op. (S.D. Ca. Feb. 12, 2008).

14. *Id.* at 1170. The notion that the school had "embraced" homosexuality referred to the fact that the school had allowed the Gay-Straight Alliance to hold a "Day of Silence" that was designed to teach tolerance of different sexual orientations. *Id.* at 1171. Harper wore the above-described T-shirt on the day following the Day of Silence. (During the Day of Silence itself, he wore a shirt that had the same message on the back and stated "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front.) *Id.*

Similarly, in the 2005 case of *Nixon v. Northern Local School District*,[15] a student sued after being prohibited from wearing a T-shirt that stated "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"[16] In 2007 alone, students brought at least four lawsuits involving similar clashes, one of which was just decided – at least at the preliminary injunction stage – by the Seventh Circuit.[17]

In *Morse* itself, the Supreme Court ultimately ruled for the school district on a narrowly-crafted rationale that did not resolve the developing split over how to approach such cases. The Court held only that schools may restrict student speech "that can reasonably be regarded as encouraging illegal drug use"[18] – a rationale that Liberty Legal Institute had, in fact, proposed in its amicus brief.[19] And the crucial concurrence authored by Justice Alito – who, as further discussed below, appears quite sympathetic to religious students' free speech claims – explicitly stated that it was joining the opinion "on the understanding that (a) it goes no further to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."[20]

15. 383 F. Supp. 2d 956 (S.D. Ohio 2005).

16. *Id.* at 967.

17. *See* Raker v. Frederick County Pub. Schs., 470 F. Supp. 2d 634 (W.D. Va. 2007) (involving student's lawsuit over being prohibited from distributing anti-abortion literature to fellow students in school); M.A.L. v. Kinsland, 2007 U.S. Dist. LEXIS 6355 (E.D. Mich. Jan. 30, 2007) (involving student's lawsuit over being prohibited from distributing anti-abortion literature and engaging in certain other activities to express his opposition to abortion, such as wearing red tape over his mouth on a designated day to symbolize that he spoke for unborn children); Zamecnik v. Indian Prairie Sch. Dist., 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. Apr. 17, 2007), rev'd, Nuxoll v. Indian Prairie Sch. Dist., 2008 U.S. App. LEXIS 8737 (7th Cir. Apr. 23, 2008) (involving students' lawsuit over being prohibited from wearing a T-shirt stating "Be Happy, Not Gay" in response to the school's "Day of Silence" intended to express tolerance of homosexuality); Morrison v. Bd. of Educ. of Boyd County, 2007 U.S. App. LEXIS 25133 (6th Cir. 2007) (involving student's lawsuit over a previous school district policy against "making stigmatizing or insulting comments regarding another student's sexual orientation," which he alleged had chilled "his responsibility as a Christian...to tell others when their conduct does not comport with his understanding of Christian morality"), *vacated*, 521 F.3d 602 (6th Cir. 2008).

18. *Morse*, 127 S. Ct. at 2622.

19. Liberty Legal Institute Brief, 2007 WL 550930 (No. 06-278), at * 14 - * 16. *See infra* text accompanying notes 122, 137.

20. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring). As discussed further below, Justice Alito's concurrence is arguably the controlling precedent. *See infra* text accompanying notes 129-130.

In the meantime, the debate over how to resolve such cases has continued to percolate among the lower courts. The dissension is particularly pronounced with regard to religious speech opposing homosexuality. While the Ninth Circuit ruled in *Harper* that the school was entitled to prohibit the student from wearing his t-shirt, it did so over an impassioned dissent, and several other courts have come out the other way in similar cases, such as the Seventh Circuit in *Nuxoll v. Indian Prairie School District*.[21]

It is not surprising that courts have failed to reach consensus on how to approach cases where one student's religious expression is potentially hurtful to other students. The now-four Supreme Court cases on student speech – *Morse*, along with the well-known trilogy of *Tinker*,[22] *Fraser*,[23] and *Hazelwood*[24] – do not provide clear answers here.

Tinker, in upholding the right of students to wear armbands in protest of the Vietnam War back in 1969, held that schools could only restrict students' expression of their opinions if that speech would either (1) "materially and substantially" disrupt the work of the school or (2) invade the rights of others.[25] But does speech like the T-shirt in *Harper* qualify as substantially disrupting school activities? Is it sufficient for the speech to disrupt the educational experience of one gay student, or is a more widespread disruption required? Alternatively, does such speech invade the rights of gay students in the school? The *Harper* majority believed that it did and rested its holding on that ground.[26] But the *Harper* dissent agreed with several other courts' interpretation of that language as referring only to those situations where the speech itself amounts to a tort or crime, such as defamation or blackmail.[27] (Indeed, *Harper* has been recognized as the first case to base its holding on *Tinker*'s "invasion of rights" justification as opposed to its "material disruption" justification, which has long been the dominant prong.[28])

21. 2008 U.S. App. LEXIS 8737 (7th Cir. Apr. 23, 2008).
22. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).
23. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
24. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
25. *Tinker*, 393 U.S. at 513.
26. *Harper*, 445 F. 3d at 1178-83.
27. *Id.* at 1198 (Kozinski, J., dissenting).
28. *See, e.g.*, Douglas D. Frederick, Casenote, *Restricting Student Speech that Invades' Others Rights: A Novel Interpretation of Student Speech Jurisprudence in* Harper v. Poway Unified School District, 29 HAWAII L. REV. 479, 493 (2007); Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. 317, 357 n.251 (2007); *Recent Case: Constitutional Law—Freedom of Speech—Ninth Circuit Upholds Public School's Prohibition of Anti-Gay T-Shirts*, 120 HARV. L. REV. 1691, 1694-95 (2007); *see also* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974

Fraser, decided by the Supreme Court in 1986, provides even cloudier guidance. There, the Court held that a school was entitled to discipline a student for giving a speech at a school assembly that used an "elaborate, graphic, and explicit sexual metaphor," noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech there" and stating that schools were entitled to restrict "offensively lewd and indecent speech."[29] But religiously-motivated speech opposing homosexuality and abortion, offensive though it may be to some, cannot be said to be lewd or to lack political content.

The Court's 1988 *Hazelwood* decision, in turn, set forth a much more lenient standard for school restrictions on *school-sponsored* student speech (such as that expressed in a school newspaper or play), holding that such speech can be restricted as long as the restriction is reasonably related to a legitimate pedagogical concern.[30] But in many circumstances, including the cases described above, the speech at issue has not been expressed through a school-sponsored vehicle. Rather, it is merely happening to occur at school, rendering *Hazelwood* inapplicable.

Finally, last year in *Morse*, the Supreme Court charted a course that avoided addressing this issue. But while *Morse*'s holding was explicitly narrow, aspects of the majority opinion and Justice Alito's concurrence do have some interesting implications for situations where students' religiously-motivated speech may be hurtful to other students.

In this Article, I weave together strands from *Tinker*, *Fraser*, and *Morse*, as well as from lower court decisions taking varying approaches to this issue, to propose a new standard for student speech that is potentially hurtful to other students. This approach encompasses, without being limited to, speech that is religiously-motivated in nature.[31] I argue that student speech that is hurtful to other students (whether religiously-

("[D]efendants point to no authority interpreting what 'invasion on the rights of others' really entails. In fact, the Court is not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school's regulation of student speech.").

29. *Fraser*, 478 U.S. at 678, 680, 685.

30. *Hazelwood*, 484 U.S. at 271.

31. My proposal thus accords with numerous scholars' arguments that courts should analyze controversies regarding religious speech by employing generally applicable speech doctrine, as opposed to developing particularized standards for religious speech. John Taylor recently made this argument in the specific context of student religious speech. *See generally* Taylor, supra note 4. Christopher Eisgruber and Lawrence Sager have made this argument with respect to religious speech and conduct as a whole, advancing a model of "Equal Liberty" within which both religiously-motivated and non-religiously-motivated behavior are placed on an equal footing through the use of broadly applicable frameworks. *See generally* Christopher L. Eisgruber and Lawrence G. Sager, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

motivated or not) should first be divided into two categories: (1) speech that identifies particular students for attack; and (2) speech, such as the message on Harper's T-shirt, that expresses a general opinion without being directed at particularly named (or otherwise identified) students.[32] Schools should receive great latitude to restrict the first category of speech, which essentially amounts to verbal bullying. By contrast, potentially hurtful speech that does not single out specific students and simply expresses a general viewpoint should be restricted only if it is likely to materially disrupt at least one other student's education (which I define as tangibly interfering with his ability to learn and succeed at school).

The Article begins by looking at the case law that emerged on this issue between 2001 – which ushered in a new era of these sorts of cases – and the *Morse* decision. In this section, I situate the rise of these cases in the larger context of disputes involving religious speech in the schools and explore what makes this particular category of cases distinct. I then turn to the Supreme Court's June 2007 *Morse* decision, teasing out its implications for student speech, religious or otherwise, that is potentially hurtful to other students. In the Article's third and final section, I articulate in more detail my proposed standard and explain why it strikes the appropriate balance among the competing interests recognized in the case law.

I. THE UNSETTLED CASE LAW ON STUDENTS' POTENTIALLY HURTFUL RELIGIOUS SPEECH

The cases involving clashes over students' potentially hurtful religious speech, thus far largely about homosexuality and abortion, represent one important category in the general rise of cases involving students' religious speech. Additional key categories include cases involving students'

32. *Cf.* Eugene Volokh, *Comment: Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (analyzing the constitutionality of workplace harassment law under Title VII and related state statutes, and concluding that restrictions on harassing speech that is directed at a particular individual are constitutional, but that restrictions on undirected speech are not).

submissions of religiously-themed writing and artwork in response to broadly-worded school assignments and projects,[33] cases involving students' attempts to distribute religious materials and items in the schools,[34] and cases involving students' formation of religious clubs.[35]

All four categories of cases have derived considerable momentum from the Supreme Court's move toward viewing schools' exclusions of religious messages as unconstitutional viewpoint-based, rather than permissible content-based, speech discrimination. A critical point in this evolution was the 1993 Supreme Court case *Lamb's Chapel v. Center Moriches Union Free School District*,[36] in which the defendant school district had adopted a policy that permitted school property to be used outside of school hours for "social, civic, or recreational uses" but not for "religious purposes."[37] A unanimous Court held that this was viewpoint rather than content discrimination, and that the district had to allow a local evangelical church to use school facilities for a film series about "traditional Christian family values."[38] The Supreme Court used similar reasoning in its 1995 decision in *Rosenberger v. Rector and Visitors of University of Virginia*,[39] in which it

33. *See, e.g.*, Busch v. Marple Newtown Sch. Dist., 2007 U.S. Dist. LEXIS 40027 (E.D. Pa. June 1, 2007); Peck v. Baldwinsville Central Sch. Dist., 426 F.3d 617, 631-633 (2d Cir. 2005); Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208 (11th Cir. 2004); Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002); C.H. v. Oliva, 195 F.3d 167, 173 (3d Cir. 1999), vacated and resolved on other grounds, 226 F.3d 198 (3d Cir. 2000); DeNooyer v. Livonia Pub. Schs., 799 F. Supp. 744 (E.D. Mich. 1992) , *aff'd*, 1993 U.S. App. 20606 (6th Cir. 1993) (summary order); Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991).

34. *See, e.g.*, Curry v. Saginaw City Sch. Dist., 2008 U.S. App. LEXIS 881 (6th Cir. 2008); M.B. v. Liverpool Cent. Sch. Dist., 487 F. Supp. 2d 117 (N.D.N.Y. 2007); Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271 (3d Cir. 2003).

35. *See, e.g.*, Truth v. Grohe, 499 F.3d 999 (9th Cir. 2007); Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996).

36. 508 U.S. 384 (1993). The ACLJ represented the petitioners in this case before the Supreme Court, and the ACLU submitted an amicus brief on their behalf.

37. *Id.* at 387. Following the Supreme Court's holding in *Widmar v. Vincent*, 454 U.S. 263 (1981), that state universities could not deny student religious groups access to facilities that were generally available to student groups, numerous public school districts, including Center Moriches, had created narrower policies that only provided access to school property for certain enumerated uses. *See The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 396, 397 & n.4 (2001).

38. *Id.* at 388. The Court explained:

> There is no suggestion from the courts below or from the District or the State that a lecture or film about childrearing and family values would not be a use for social or civic purposes otherwise permitted. . . . . The film series involved here no doubt dealt with a subject otherwise permissible under [the relevant provision], and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.

Id. at 393-94.

39. 515 U.S. 819 (1995). Here, unlike in *Lamb's Chapel*, the ACLU and ACLJ (along with the Christian Legal Society) submitted amicus briefs on opposite sides.

held that University of Virginia's policy of providing funding for certain student extracurricular groups, but not for student religious groups, amounted to unconstitutional viewpoint discrimination.[40] And in 2000, the Court extended *Lamb's Chapel* even further, holding in *Good News v. Milford Central School*[41] that once a school district had permitted school buildings to be used for social, civic, and recreational meetings, it was committing viewpoint discrimination by prohibiting an outside evangelical Christian organization from holding proselytizing meetings for elementary school students in the school cafeteria immediately after school ended.[42]

The plaintiff students in each of the four categories have heavily employed viewpoint-discrimination rhetoric in support of their claims. From the second category (submission of religiously-themed assignments), a good example is *Peck v. Baldwinsville Central School District*,[43] where the plaintiff student argued that his school had committed viewpoint discrimination when, after he handed in a poster depicting Jesus in fulfillment of an assignment to create a poster illustrating ways to help the environment, his teacher hung his poster in a way that concealed the Jesus figure.[44] An illustrative case from the third category (distribution of religious materials) is *Walz v. Egg Harbor Township*,[45]

40. *Id.* at 830-37.

41. 533 U.S. 98 (2001). Here, too, the ACLU submitted an amicus brief on the side of the defendant school, while the ACLJ (along with the Christian Legal Society, Liberty Legal Institute, and Liberty Counsel) came in on the other side. In its amicus brief, the ACLU explained that here, unlike in *Lamb's Chapel*, it believed that providing the religious group with its requested access would violate the Establishment Clause. The brief (which the ACLU jointly submitted with numerous other organizations) stated that:

> Several of the undersigned amici submitted a brief in *Lamb's Chapel* in support of the Court's holding because various factors in the case combined to ensure that a reasonable observer would not perceive the religious activity at issue to be endorsed or sponsored by the school. The overwhelming factors in this case counsels the opposite result. *Lamb's Chapel* involved use of a public school during the evening hours; this case involves access shortly before the end of the school day and immediately thereafter. The event in *Lamb's Chapel* was open to all members of the community, while the audience in this instance is limited to the school's elementary students.

Brief of Americans United for Separation of Church and State, the American Civil Liberties Union, the American Jewish Committee, the New York Civil Liberties Union, and People for the American Way Foundation in Support of the Respondent, 2001 WL 43353.

42. *Id.* at 108-112. The Court further held that, even assuming *arguendo* that avoidance of an Establishment Clause violation could justify viewpoint discrimination, there was no threat of such a violation here. *Id.* at 112-13.

43. 426 F.3d 617 (2d Cir. 2005).

44. *Id.* at 620-23, 630-31. On the strength of this argument, the plaintiff (represented by Liberty Counsel) succeeded in getting the Second Circuit to vacate the summary judgment dismissal of his case. *Id.* at 630-34.

45. 342 F.3d 271 (2003).

where the plaintiff student asserted that his school had committed viewpoint discrimination by refusing to let him distribute pencils and candy canes with religious messages at his classroom's seasonal holiday party.[46] Similarly, a good example from the fourth category (religious clubs) is *Donovan v. Punxsutawney Area School Board*,[47] in which the plaintiff student argued that her school had engaged in viewpoint discrimination by not allowing her Bible club to meet during the school "activity period."[48]

Finally, to circle back around to the first category – this Article's focus – the plaintiff in *Harper* asserted that his school's censorship of his anti-gay T-shirt amounted to impermissible viewpoint discrimination, particularly given that his school had just held a "Day of Silence" event to promote tolerance of different sexual orientations.[49] Similarly, the plaintiff in *Nuxoll* sought to wear his "Be Happy, Not Gay" T-shirt directly in response to his school's Day of Silence event.[50] On a national level, the Alliance Defense Fund – one of the Christian groups that filed an amicus brief in Joseph Frederick's support – has organized an annual "Day of Truth" event to occur shortly after the annual Day of Silence, in order to "counter the promotion of the homosexual agenda and express an opposing viewpoint from a Christian perspective."[51] Many of these confrontations are thus developing in a way that intentionally and precisely frames the viewpoint-discrimination issue for the courts.

But, the first category of cases still stands somewhat apart from the three latter categories. In these latter categories, the fundamental con-

46. The plaintiff's viewpoint discrimination argument is described in more detail in the district court opinion in the case. *See* Walz v. Egg Harbor Twp. Bd. of Educ., 187 F. Supp. 2d 232, 239-240 (D. N.J. 2002). The district court rejected it, reasoning that the class party was a vehicle for distribution of generic gifts, rather than being "designed to promote any point of view, religious, commercial, or secular." *Id.* The Third Circuit affirmed, emphasizing that the school "had prohibited the exchange of gifts with commercial, political, religious, or other undertones that promoted a specific message." *Walz*, 342 F.3d at 279.

47. 336 F.3d 211 (3d Cir. 2003).

48. *Id.* at 214. The student, represented by the Rutherford Institute, was successful in this argument. *Id.* at 214, 225-26.

49. *Harper*, 445 F.3d at 1184-1186. As discussed further below, the majority rejected this argument, while the dissent found it persuasive. *See infra* text accompanying notes 67-82.

50. *Nuxoll*, 2008 U.S. App. LEXIS 8737, at * 4.

51. *See* http://dayoftruth.org (last visited May 15, 2008). *See also* http://dayofsilence.org (last visited May 15, 2008). This year, the Day of Silence occurred on April 25, 2008 (a Friday), and the Day of Truth occurred on April 28, 2008 (the following Monday). *See also* Mark Walsh, *'Day of Silence' in Schools Brings Unity, Controversy*, EDUCATION WEEK, April 23, 2008, at 6.

cern motivating the schools' restrictions on the religious speech in question is typically fear of an Establishment Clause violation. Schools that refuse to display students' religiously-themed posters and murals in the hallways, prohibit students from distributing proselytizing materials during school hours, or decline to authorize students' religious clubs generally cite their concern that other students will perceive some level of school endorsement of the religious speech.[52] By contrast, schools prohibiting the first category of speech have been much less focused on Establishment Clause issues (which are generally less salient here), and much more concerned about complaints by other students who feel harassed.[53] As such, this particular category of clashes over student religious speech connects up not only with the other categories of cases involving students' religious speech, but also with cases involving schools' ability to restrict harassing speech by students. Such cases have become increasingly common since the Supreme Court's 1999 decision in *Davis v. Monroe County Board of Education,*[54] where the Court held that a student could sue her school under Title IX for showing deliberate indifference to severe and pervasive peer harassment.[55]

52. *See, e.g., Peck*, 426 F.3d at 622, 624, 633; *Bannon*, 387 F.3d at 1211, 1220 n. 2; *Curry*, 2008 U.S. App. LEXIS 881, at * 19; *Donovan*, 336 F.3d at 225-226.

53. *See, e.g., Harper*, 445 F.3d at 1170-73. *See infra* text accompanying notes 93-94.

54. 526 U.S. 629 (1999).

55. *Id.* at 632 (holding that a private damages action may lie under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et. seq., in cases of student-on-student harassment where the school has acted "with deliberate indifference to known acts of harassment in its programs or activities," and where the harassment at issue was "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit"). Title IX prohibits educational programs receiving federal funding from engaging in sex-based discrimination, and *Davis* arose in the context of peer sexual harassment. It built on the Supreme Court's previous holding, in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), that a school district could be held liable under Title IX when it showed deliberate indifference to known acts of teacher-student sexual harassment.

Lower courts have extended *Davis*'s reasoning to harassment cases brought under Title VI of the Civil Rights Act of 1964, which prohibits federally-funded programs from discriminating on the basis of race, color, and national origin. *See, e.g.,* Bryant v. Ind. Sch. Dist. No. I-38 of Garvin County, 334 F.3d 928, 934 (10th Cir. 2003). Some courts have also construed *Davis*'s interpretation of Title IX, particularly when taken in combination with the Equal Protection Clause, to confer protection on students who are harassed by other students on the basis of their sexual orientation. *See, e.g.,* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137-38 (9th Cir. 2003) (holding that students' lawsuit against school district for failing to act in response to peer harassment of them based on their sexual orientation could go forward because the Equal Protection clause required the school "to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in the cases of peer harassment of heterosexual students"); *see also* Riccio v. Andree, 467 F. Supp. 2d 219 (D. Conn. 2006).

Indeed, the first major case falling into this category – *Saxe v. State College Area School District*,[56] decided by the Third Circuit in 2001 – arose in direct response to a school district's anti-harassment policy. That policy, after prohibiting harassment, proceeded to define harassment as

[V]erbal or physical conduct based on one's actual perceived race, religion, color, 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.[57]

Several students challenged the policy on First Amendment grounds, stating that they were Christians who believed they had the right and the religious obligation to "speak out about the sinful nature and harmful effects of homosexuality," but that they feared being punished under the policy for doing so.[58]

The Third Circuit, in an opinion authored by then-Judge Alito, ruled in the students' favor. The *Saxe* court began by rejecting the district court's conclusion that the policy merely mirrored existing federal prohibitions and therefore must be constitutional, identifying two points of divergence. First, although federal law prohibited only discrimination based on sex, race, color, national origin, age and disability, the school district policy went further, also covering sexual orientation and "other personal characteristics" (defined as including, *inter alia*, clothing, appearance, social skills, income, and values).[59] Second, while the Supreme Court in *Davis* had defined harassment as being conduct that is "so severe, pervasive, and objectively objective, and that so undermines and detracts from the victims' educational experience, that the victim students are effectively denied equal access to an institution's resources and opportunities," the school district policy was not so limited and potentially swept in even "simple acts of teasing and name-calling."[60]

Having concluded that the policy's prohibitions extended beyond federal anti-discrimination law, the *Saxe* court went on to evaluate whether the policy's speech restrictions nonetheless passed muster under either *Tinker*, *Fraser*, or *Hazelwood* – the Supreme Court's "trilogy" of student speech

56. 240 F.3d 200 (3d Cir. 2001).
57. *Id.* at 201.
58. *Id.* at 203-04.
59. *Id.* at 210.
60. *Id.* at 210-11.

cases. The *Saxe* court easily concluded that *Fraser* and *Hazelwood* were largely inapplicable here: the policy did not "confine itself merely to vulgar or lewd speech" (*Fraser*'s focus); and it covered "far more than just *Hazelwood*-type school-sponsored speech."[61] That left *Tinker*, and the question of whether the policy could be justified either under *Tinker*'s first prong (prevention of substantial disruption of the school's work) or its second prong (prevention of the invasion of other students' rights). The *Saxe* court found that neither prong was satisfied here. As to the first prong, the court pointed out that the policy's disjunctive phrasing prohibited conduct that had the *purpose* (even if not the *effect*) of causing substantial disruption.[62] And as to the second prong, the court noted that *Tinker*'s "invasion of rights" language was unclear and that at least one court had construed it as covering only independently tortious speech, such as defamation.[63] The *Saxe* court stopped short of offering its own interpretation of the phrase, but simply stated that "[i]n any case, it is certainly not enough that the speech is merely offensive to some listener."[64] It concluded that the instant policy –prohibiting conduct that created an intimidating, hostile, or offensive environment, without specifying "any threshold showing of severity or pervasiveness" – arguably pointed in that direction.[65]

Thus, the *Saxe* court struck down the district's policy as unconstitutionally overbroad. The decision suggests, however, that had the policy been narrowed to prohibit only "verbal or physical conduct based on one's actual or perceived personal characteristics and which has the *effect* of substantially interfering with a student's educational performance or creating a school environment that is *severely or pervasively* intimidating, hostile, or offensive" (emphases added), the *Saxe* court might well have upheld it.[66]

61. *Id.* at 216.

62. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 216-217 (3d Cir. 2001).

63. *Id.* at 217.

64. *Id.*

64. *Id.*

66. Indeed, the school district has modified its anti-harassment policy along such lines. The policy now states:

> The term "harassment" as used in this Policy means verbal, written, graphic or physical conduct which does or is reasonably believed under the totality of the circumstances to (1) substantially or materially interfere with a student's or students' educational performance; and/or (2) deny any student or students the benefits or opportunities offered by the School District; and/or (3) substantially disrupt school operations or activities; and/or (4) create a hostile or abusive environment which is of such pervasiveness and severity that it materially and adversely alters the condition of student's or students' educational environment, from both an objective viewpoint and the subjective viewpoint of the student at whom the harassment is directed."

Several years later, the Ninth Circuit – in *Harper v. Poway* – adopted a far more deferential approach to school districts' speech restrictions. There, in upholding a school district's prohibition of a student's T-shirt stating "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL," the Ninth Circuit became the first court to adopt a broader interpretation of *Tinker*'s "invasion of rights" prong, and to uphold a speech restriction on that basis alone.[67] The *Harper* court stated:

> Harper's wearing of his T-shirt "collides with the rights of other students" in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core, identifying characteristic such as race, religion, or sexual orientation have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[68]

The *Harper* opinion, however, displayed some inconsistency. Its stated rationale – protecting students' right to be free from psychological attacks causing them to question their self-worth and rightful place in society – would seem applicable to all students and all such attacks. But the majority limited its holding "to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[69] It reserved judgment as to gender-based remarks.[70] And it specifically indicated that its "rights of others" rationale did *not* encompass "offensive words directed at majority groups such as Christians or whites," on grounds that there was a "difference between a historically

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See http://www.scasd.org/2497%5F75820145914/blank/lbrowse.asp?A=383&BMDRN=2000&BCOB= 0&C=47699 (last visited May 28, 2008). I further analyze *Saxe*'s discussion of the "invasion of rights" prong in Section III of this article. *See infra* text accompanying notes 175-78.

67. The *Harper* majority expressly declined to reach the question of whether *Tinker*'s "substantial disruption" prong would have justified the speech restriction. *Harper*, 445 F.3d at 1184. Nor did it discuss whether *Fraser* applied. As noted above, *see Harper* note 13, the decision was subsequently vacated as moot by the Supreme Court. In the continuing proceedings, however, the district court continued to apply the Ninth Circuit's underlying reasoning. *Harper*, Civ. No. 04-CV-1103, JAH (POR), slip op. at 9 (S.D. Ca. Feb. 12, 2008). *See infra* note 173.

68. *Id.* at 1178.

69. *Id.* at 1183.

70. *Id.* at 1183 n.28.

oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status."[71] The court further suggested that verbal attacks against majority groups would need to meet a higher threshold – namely, *Tinker's* "substantial disruption" prong or *Fraser*'s "plainly offensive" test – before schools could restrict them.[72] Apart from largely conclusory language about the general differences between majorities and minorities, however, the court did not explain why divergent standards for verbal bullying of students – depending on their race, religion, and sexual orientation – were appropriate or even legal.[73] Nor did it flesh out precisely which students fell into which categories.

The *Harper* dissent, authored by Judge Alex Kozinski, pounced on this point, asking: "In defining what is a minority – and hence protected – do we look to the national community, the state, the locality or the school? In a school that has 60 percent black students and 40 percent white students, will the school be able to ban t-shirts with anti-black racist messages but not those with anti-white racist messages, or vice versa?"[74] More fundamentally, the dissent asked, "[I]f interference with the learning process is the keystone of the new right, how come it's limited to those characteristics that are associated with minority status?"[75] The dissent further asserted that *Tinker*'s "invasion of rights" prong should be inapplicable to all such speech conflicts, reiterating the view that this prong covers only "traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail."[76] Otherwise, the dissent reasoned, "a state legislature could effectively overrule *Tinker* by granting students an affirmative right not to be offended."[77] Turning to

71. *Id.*

72. *Id.*

73. Indeed, there is a strong argument that public schools' adoption of such divergent standards would violate the Equal Protection Clause, given the Supreme Court's rejection of the notion that "benign" discrimination on the basis of protected characteristics is subject to lesser scrutiny. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2764 ("This Court has recently reiterated...that '*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny'.... Our cases clearly reject the argument that motives affect the strict scrutiny analysis") (internal citations omitted).

74. *Harper*, 445 F.3d at 1201 (Kozinski, J., dissenting).

75. *Id.*

76. *Id.* at 1198. The dissent did suggest, but seemed to retreat from, the possibility that harassment that was "so severe and pervasive as to be tantamount to conduct" could violate a student's rights. *Id.*

77. *Id.*

Tinker's alternative prong, the dissent opined that it was not satisfied here because there was insufficient evidence that Harper's T-shirt had caused or was likely to cause substantial disruption.[78] Judge Kozinski was particularly concerned about the viewpoint-discrimination issue, arguing that Harper had not "thrust his view of homosexuality into the school environment" unprompted, but had rather worn his T-shirt in response to the school's Day of Silence.[79]

The *Harper* decision provoked intense discussion, both within and outside the circuit. One Ninth Circuit judge requested a vote on whether to rehear the matter en banc, and although a majority voted against rehearing the case, further discussion ensued.[80] Dissenting from the denial of rehearing en banc, Judge Diarmuid O'Scannlain (joined by four other circuit judges) accused the panel majority of having sanctioned "blatant viewpoint discrimination,"[81] prompting Judge Stephen Reinhardt (author of the original majority opinion) to respond: "Perhaps some of us are unaware of, or have forgotten what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school."[82]

Thus, *Saxe*, the *Harper* majority, and the *Harper* dissent all agreed that *Tinker* was the most applicable precedent in analyzing school restrictions on students' potentially hurtful religious speech. But they staked out different positions as to how it applied. The *Harper* majority and dissent fell on opposite extremes, given the majority's holding that the "invasion of rights" prong was applicable here, and the dissent's contrary view that the "invasion of rights" prong was inapplicable and that the "substantial disruption" prong should be very narrowly construed. The *Saxe* court, while certainly much closer to the *Harper* dissent than the *Harper* majority, can arguably be seen as falling somewhere in between, for two reasons.

First, as to *Tinker*'s "substantial disruption" prong, the *Saxe* court stated:

78. *Id.* at 1193-94.
79. *Id.* at 1196-97.
80. Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053 (9th Cir. 2006).
81. *Id.* at 1054 (O'Scannlain, J., dissenting).
82. *Harper*, 455 F.3d at 1053.

> We agree that the [State College Area School District] Policy's first prong, which prohibits speech that would 'substantially interfere with *a* student's educational performance,' may satisfy the *Tinker* standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.[83]

This language suggests that substantial disruption of even a single student's educational experience can satisfy *Tinker*, and that a widespread disruption is not necessarily required. The *Harper* dissent did not explicitly reach this issue. But some of the dissent's language – for example, its focus on whether Harper's T-shirt had caused violence or materially disrupted classwork, and its suggestion that a Jewish student's inability to concentrate when faced with a fellow student's T-shirt stating "Hitler Had the Right Idea . . . Let's Finish the Job" would not satisfy *Tinker*'s "substantial disruption" prong – implied that in its view, a more widespread disruption was necessary.[84]

Second, the *Saxe* court did not outright reject the applicability of *Tinker*'s "invasion of rights" prong to cases involving potentially hurtful religious speech, but instead implied that this prong might be satisfied in the case of severely or pervasively harassing speech.[85] The *Harper* dissent also initially raised this possibility, but seemed skeptical about it, going on to state that "[t]he 'rights of others' language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established."[86] Thus, here too there is arguably some space between the *Saxe* court and the *Harper* dissent.

At the district court level, the courts have been far closer to *Saxe* (and the *Harper* dissent) than the *Harper* majority. In *Nixon v. Northern Local School District*,[87] for example, the court held that a school could

83. *Saxe*, 240 F.3d at 217.

84. *Harper*, 445 F.3d at 1207 ("I have sympathy for defendants' position that students in school are a captive audience and should not be forced to endure speech that they find offensive and demeaning. There is surely something to the notion that a Jewish student might not be able to devote his full attention to school activities if the fellow in the seat next to him is wearing a t-shirt with the message 'Hitler Had the Right Idea' in front and 'Let's Finish the Job!' on the back. This T-shirt may well interfere with the educational experience even if the two students never come to blows or even have words about it. . . . Perhaps the narrow exceptions of Tinker should be broadened and multiplied. Perhaps Tinker should be overruled. But that is a job for the Supreme Court, not for us.")

85. *Saxe*, 240 F.3d at 217.

86. *Harper*, 445 F.3d at 1198.

87. 383 F. Supp. 2d 965 (S.D. Ohio 2005).

not prohibit a student from wearing a T-shirt that stated "INTOLERANT. Jesus said . . . I am the way, the truth and the life. John 14:6" on the front, and "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" on the back.[88] The *Nixon* court rejected the school district's argument that the restriction was justified under *Tinker*'s "substantial disruption" prong, stating that the presence of students and staff members who were Muslims, homosexuals, and who had undergone abortions, and the fact that they might be offended by the T-shirt, fell "well short of the *Tinker* standard."[89] Similarly, the *Nixon* court rejected the school district's invocation of *Tinker*'s "invasion of rights" prong, stating that there was no evidence that the T-shirt's "silent, passive expression of opinion . . . collided with the rights of other students to be let alone."[90] The court in *Chambers v. Babbitt* reached a similar conclusion, holding unconstitutional a school's ban on a "Straight Pride" sweatshirt.[91] Likewise, in all of the cases involving religiously-motivated speech opposing abortion (an issue that has not yet reached the circuit level), the student plaintiffs have won.[92]

It is not surprising that courts have been unsettled as to exactly how to apply the Supreme Court's *Tinker-Fraser-Hazelwood* trilogy to clashes involving students' potentially hurtful religious speech. None of the three cases involved this sort of conflict. Even more importantly, all three of the cases (the last of which, *Hazelwood*, was decided in 1988) preceded the two key legal developments that have fueled these recent clashes. First, as noted above, the viewpoint-discrimination argument for challenging restrictions on religious speech gained traction over the course of the 1990s, providing momentum for students to bring these cases, starting with *Saxe* in 2001. Second, on the other side of the equation, the Supreme Court's 1999 *Davis* decision held that a student could sue her

88. *Id.* at 967, 974.

89. *Id.* at 973.

90. *Id.* at 974. The court did not make clear whether, in its view, an expression of opinion could *ever* collide with another student's right to be "let alone." *See also* Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001) (granting injunction in favor of student who sought to wear a sweatshirt stating "Straight Pride").

91. *See* Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001).

92. *See* Raker v. Frederick County Pub. Schs., 470 F. Supp. 2d 634 (W.D. Va. 2007) (granting injunction in favor of student seeking to distribute anti-abortion literature to fellow students in school); M.A.L. v. Kinsland, 2007 U.S. Dist. LEXIS 6355 (E.D. Mich. Jan. 30, 2007) (same); K.D. v. Fillmore Cent. Sch. Dist., 2005 WL 2175166 (W.D.N.Y. 2005) (enjoining school from prohibiting student from wearing T-shirt stating "ABORTION IS MURDER" on the front and "You will not silence my message. You will not mock my God. You will stop killing my generation. Rock for Life!" on the back).

school under Title IX for showing deliberate indifference to severe and pervasive peer harassment, and some states provide even broader protection.[93] This has left schools increasingly concerned about the threat of liability should they *not* take action against students' harassing conduct toward other students. The two parallel developments have been on a collision course, leaving school districts with no clear path to avoid liability when choosing how to respond to students' potentially hurtful religious speech. A perfect illustration of this double-bind is the fact that, at the very same time the Poway Unified School District was being sued by Harper over the prohibition of his "HOMOSEXUALITY IS SHAMEFUL" T-shirt, it was also being sued in a California state court by two gay former students who contended that the school had failed to protect them against other students' anti-gay harassment of them.[94]

Given the lack of clarity on the subject, advocates for both religious students and school districts have been eager for more up-to-date Supreme Court guidance. *Morse v. Frederick*, however, was not the student speech test case that all of them were hoping for. In particular, although the National School Boards Association filed an amicus brief in support of the school district urging the Supreme Court to grant certiorari on *Morse*, advocates for religious students were dismayed by that outcome, with several of them even urging the Court to dismiss the writ as improvidently granted. In this Article's next section, I turn to the way in which the amici on both sides approached *Morse*, the Supreme Court's ultimate decision in the case (consisting of no less than five separate opinions), and how that decision shakes out for the still-open question of students' potentially hurtful religious speech.

II. MORSE V. FREDERICK'S IMPLICATIONS FOR THE ISSUE

Morse v. Frederick certainly comes from a different mold than the religious speech cases described above. The dispute in *Morse* arose on January 24, 2002, when the Olympic Torch Relay passed through

93. *See, e.g.*, L.W. v. Toms River Reg'l. Schs. Bd. of Educ., 189 N.J. 381, 405-07 (N.J. 2007) (holding that a school district will be liable under the New Jersey Law Against Discrimination for "student-on-student harassment that creates a hostile educational environment when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment," and rejecting the federal "deliberate indifference" standard as being too burdensome).

94. *Harper*, 445 F.3d at 1172 n.6.

Juneau, Alaska en route to the Olympic Winter Games in Salt Lake City, Utah.[95] Along their route, the torchbearers were to proceed right past Juneau-Douglas High School.[96] The school's principal, Deborah Morse, decided to allow students and staff to temporarily leave school to watch the relay from the street.[97]

Knowing that television cameras would be on the scene to film the torch parade, high school senior Joseph Frederick brought to the rally a 14-foot banner reading "BONG HiTS 4 JESUS."[98] Just as the torchbearers and camera crews passed by, Frederick and his friends, who were standing across the street from the school, unfurled the banner.[99] Principal Morse immediately crossed the street and ordered the students to take down the banner, later explaining that she did so because she considered the banner a violation of a school policy that "prohibit[ed] any . . . public expression that . . .advocates the use of substances that are illegal to minors."[100] Frederick's friends complied, but Frederick did not.[101] Morse proceeded to confiscate the banner and suspend Frederick for 10 days.[102] Frederick then sued, alleging that the punishment had violated his First Amendment rights.[103]

Throughout the legal proceedings, Frederick denied that the speech advocated drug use – or, for that matter, anything at all. Instead, he stated that he chose his slogan to be "meaningless and funny" and to get on television.[104] (He also claimed that he had gotten the idea for the slogan from a snowboard sticker.)[105] His argument was simply that neither *Tinker*, *Fraser*, nor *Hazelwood* justified the restriction of his nonsensical banner: the banner had not caused a material disruption nor invaded other students' rights; was not offensively lewd; and was not school-sponsored. Although Frederick lost at the district court level (because the district court found the banner offensive and deemed *Fraser* appli-

95. *Morse*, 127 S. Ct. at 2622.
96. *Id.*
97. *Id.*
98. *Id.* at 2622, 2625.
99. *Id.* at 2622.
100. *Id.* at 2622-23.
101. *Morse*, 127 S. Ct at 2622.
102. *Id.*; *see also* Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006) (stating that according to Frederick, Principal Morse originally suspended him for five days, but when he quoted Thomas Jefferson to her, she doubled it).
103. *Id.* at 2623.
104. *Frederick*, 439 F.3d at 1116.
105. *See, e.g.*, Robert Barnes, *Justices to Hear Landmark Free-Speech Case*, Washington Post, Mar. 13, 2007, at A03.

cable),[106] he won a resounding victory at the Ninth Circuit, which concluded that it was so clearly established that Principal Morse's actions were unjustified under the *Tinker-Fraser-Hazelwood* framework that she was not even entitled to qualified immunity.[107]

Principal Morse and the Juneau School Board filed a petition for a writ of certiorari, arguing that there were two reasons for granting the writ: (1) addressing whether school districts were entitled to restrict student speech "advocating or making light of illegal drug use;" and (2) evaluating the Ninth Circuit's ruling that Principal Morse was not entitled to qualified immunity, which had set a precedent "deeply alarming to school administrators throughout the country."[108] Meanwhile, the National School Boards Association (NSBA) and the American Association of School Administrators (AASA), which together filed an amicus brief in support of the certiorari petition, took a broader view of the case.[109] Not only did they think *Frederick* provided the opportunity to resolve whether schools could restrict pro-drug student speech, but they also viewed the case as a potential vehicle for clarifying the entire framework for student speech restrictions – and, in so doing, resolving some of the thorny issues surrounding students' potentially hurtful religious speech.[110] Indeed, their brief explicitly cited *Harper* and *Nixon* in discussing, respectively, the need for clarity as to *Tinker*'s "invasion of rights" prong and *Fraser*'s "plainly offensive" standard.[111]

Once the Supreme Court granted certiorari, the NSBA/AASA's subsequent amicus brief strongly encouraged the Court to decide the case on broad grounds that would strengthen the schools' ability to restrict student speech. They urged the Court to hold that *Fraser* permitted schools to restrict "messages inimical to a school's core educational mission and ability to instill fundamental civic values and appropriate behavior," and that *Tinker*'s "invasion of rights" prong allowed schools to censor student speech that was "threatening or hurtful to [other students] or otherwise at

106. Frederick v. Morse, 2003 U.S. Dist. LEXIS 27270 (D. Alaska May 27, 2003).

107. *Frederick*, 439 F.3d at 1114.

108. Petition for Writ of Certiorari, Juneau Sch. Bd. v. Frederick, 2006 WL 2506659 (2006) (No. 06-278), at * 12.

109. Motion for Leave to File and Brief of Amicus Curiae National School Boards Association and American Association of School Administrators in Support of Petition for Writ of Certiorari, Juneau Sch. Bd., 2006 WL 2805329 (2006) (No. 06-278).

110. *Id.* at * 2.

111. *Id.* at * 12- * 15.

odds with the academic and citizenship-building work of the schools."[112] Making specific reference to *Harper*, the brief argued that "hurtful messages by students feeling their free speech oats at the expense of others, even if the others suffer those messages in silence, can be toxic to a school's learning environment."[113] The petitioners' own brief, while not specifically referring to speech that was "hurtful" to other students, also argued along broad lines, asserting that the *Tinker-Fraser-Hazelwood* trilogy stood "for the proposition that students have limited free speech rights balanced against the School District's right to carry out its educational mission and to maintain discipline."[114]

These proposed rationales alarmed advocates for religious students.[115] If, in the course of resolving *Morse v. Frederick*, the Supreme Court interpreted *Tinker*'s "invasion of rights" prong as allowing schools to restrict student speech that was hurtful to others, where would that leave students like David Saxe and Tyler Harper, who felt compelled to express their religiously-motivated opposition to homosexuality? By the same token, if the Supreme Court upheld Principal Morse's actions on grounds that schools could restrict student speech that was contrary to their educational mission, wouldn't that implicitly allow school districts who taught tolerance of different sexual orientations to limit anti-gay student speech?

As such, six separate conservatively-oriented religious advocacy groups – despite the incongruity of their supporting a student who had waved a 14-foot "BONG HiTS 4 JESUS" banner to get on television – submitted amicus briefs in favor of Joseph Frederick.[116] Their briefs

112. Brief of Amici Curiae National School Boards Association, American Association of School Administrators, and National Association of Secondary School Principals In Support of Petitioners, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 3.

113. *Id.* at * 21. (The brief linked this argument to *Frederick* by suggesting that the school district might have been entitled to restrict the "Bong Hits 4 Jesus" banner on grounds that it could be "interpreted as mocking Christianity's central religious figure and trivializing faith traditions." *Id.*)

114. Brief for Petitioner, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 25 - * 26.

115. For a firsthand account of this reaction and subsequent mobilization, *see* Douglas Laycock, *Paper Symposium: Speech and the Public Schools After Morse v. Frederick: High Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111 (2008). Laycock, who co-authored Liberty Legal Institute's amicus brief, writes that the briefs in the school district's support "spread great alarm among all free speech advocates who read it, including six conservative Christian groups who found themselves forced to file briefs in support of a student proclaiming 'BONG HiTS 4 JESUS.'" *Id.* at 114.

116. *See supra* notes 5-10.

largely argued along similar lines, urging the Court not to decide the case on a rationale that would limit students' rights to engage in religious speech at school. As the Liberty Legal Institute put it:

> What amicus fears most is that a loosely worded opinion, holding that students have no First Amendment right to promote drug use, will fatally undermine protection for core religious and political speech in public schools. The vague and deferential standard proposed by Petitioner and her amici invites this consequence. Any holding that Respondent's sign is unprotected must be very carefully stated to avoid sending an unintended signal that would do serious damage to the free speech rights of all students, including religious students.[117]

Taken together, these amici made four basic points. First, they argued that the school district had engaged in impermissible viewpoint discrimination, noting that had Frederick's banner communicated an *anti-drug* message, it likely would have been allowed.[118] Second, they vehemently opposed any notion that viewpoint-based restrictions were permissible whenever the student speech in question ran counter to the school's educational mission, arguing that this would open the door to widespread suppression of student views that were not "politically correct."[119] Third, they asked the Court to reject (or not reach) the argument that *Tinker*'s "invasion of rights" prong justified school restrictions on hurtful speech.[120] Finally, they urged the Court to either (a) dismiss the writ as improvidently granted (with the American Center for Law and Justice suggesting *Harper* as a better vehicle for revisiting student speech issues), (b) affirm the Ninth Circuit's judgment in favor of Frederick, or (c) reverse on the narrowest possible grounds.[121] Indeed, the Liberty Legal Institute proposed the following rationale for reversal:

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117. Liberty Legal Institute Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 5.

118. *See, e.g.*, ACLJ Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 6 - * 8; Alliance Defense Fund Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 6 - *8.

119. *See, e.g.*, Liberty Counsel Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 20 - * 2. ACLJ Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 8 - * 9.

120. *See, e.g.*, Christian Legal Society Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 4 - * 14; Alliance Defense Fund Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 14 - * 18.

121. *See, e.g.*, ACLJ Brief *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 3 - * 5; Liberty Legal Institute Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at *2, * 14 - * 15.

> If the Court wishes to reverse in this case, it could carve out an explicit exception for advocacy of the use of illegal drugs and add that explicit exception to the sexually explicit speech identified in [*Fraser*]. But it must be very clear about the basis for that exception . . . If a school can prohibit the speech at issue in this case, it is because the school has a valid rule prohibiting students from using drugs, and because Respondent's sign might be interpreted as encouraging student violations of the valid rule of conduct . . . Nothing in these reasons for restricting advocacy of student misconduct justifies restrictions on advocacy of controversial political or religious views.[122]

That suggested rationale ended up being precisely the hook on which the Supreme Court majority decided *Morse* in the school district's favor. Writing for the Court, Chief Justice Roberts announced a new standard for student speech restrictions: "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[123] In explaining that conclusion, the majority opinion began by noting that both *Fraser* and *Hazelwood* demonstrated that *Tinker's* mode of analysis – in particular, its focus on "substantial disruption" – was "not absolute."[124] These cases also confirmed that schools had broader power to restrict student speech than did the government with respect to adult speech.[125] Having laid that background, the majority went on to discuss the importance of deterring drug use, the role of peer pressure in deciding whether to take drugs, and the "particular challenge" posed by "student speech celebrating illegal drug use at a school event."[126] The majority specifically rejected the school district's argument that Frederick's banner could be considered offensive under *Fraser*, noting – in a comment that must have pleased the religious advocacy groups—that this would "stretch[] *Fraser* too far . . . . After all, much political and religious speech might be perceived as offensive to some."[127] However, the majority implicitly rejected the notion that viewpoint-based speech restrictions were inherently impermissible,

122. Liberty Legal Institute Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at *2.
123. *Morse*, 127 S. Ct. at 2622.
124. *Id.* at 2626-27.
125. *Id.*
126. *Id.* at 2628.
127. *Id.* at 2629.

expressing skepticism that "schools are required to tolerate student advocacy of illegal drug use at school events."[128]

Justice Alito joined the opinion – providing the crucial fifth vote for the disposition of the case – but wrote separately to make clear his narrow grounds for doing so.[129] Thus, as the Fifth Circuit recently noted, Justice Alito's concurrence is arguably the controlling precedent in the case.[130] The first sentence of Justice Alito's opinion made clear exactly where he stood:

> I join the opinion of the Court on the understanding that (a) 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 (b) 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.[131]

Justice Alito strongly disagreed with the school district's argument that schools could censor any student speech that interfered with their educational mission, noting that "some public schools have defined their educational missions as including the inculcation of whatever political and social views are held" by the school administrators and faculty.[132] He believed, however, that there was a "special characteristic" implicated by *Morse*: "the threat to the physical safety of students."[133] While at school, he observed, "students may be compelled on a daily basis to spend time at close quarters with other students who may do them

128. *Id.*

129. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring). Justice Kennedy joined the concurrence.

130. *See* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007) (describing Justice Alito's concurrence as the "controlling" opinion in *Morse*). *See also* Marks v. United States, 430 U.S. 188, 194 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds") (internal citation and quotation marks omitted).

To be sure, as the Seventh Circuit recently pointed out, *see* Nuxoll v. Indian Prairie Sch. Dist., 2008 U.S. App. LEXIS 8737, at * 12 - * 13, Justices Alito and Kennedy joined the majority opinion as well, and thus it is indeed a majority opinion rather than a mere plurality. Nonetheless, Justice Alito's explicit description of the narrow grounds upon which he was joining the *Morse* majority should be taken into account when applying *Morse* to future cases.

131. *Morse*, 127 S. Ct. at 2636.

132. *Id.* at 2637.

133. *Id.* at 2638.

harm."[134] Analogizing to the way that *Tinker*'s "substantial disruption" prong allows school officials to "intervene before speech leads to violence," Justice Alito reasoned that "[s]peech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious . . . illegal drug use presents a grave and in many ways unique threat to the physical safety of students."[135] Justice Alito therefore joined the Court's opinion, but concluded by reiterating that he viewed the opinion as "standing at the far reaches of what the First Amendment permits," and that he did not view it as "endors[ing] any further extension."[136]

Clearly, there was much in the majority opinion and Justice Alito's concurrence to please religious advocacy groups. The two proposed rationales that had most alarmed these groups – first, the broadening of *Fraser*'s "offensive" standard to encompass student speech that was contrary to a school's educational mission; and second, the broadening of *Tinker*'s "invasion of rights" prong to encompass student speech that was potentially hurtful to other students or otherwise contrary to the "citizenship-building work of the schools" – curried little favor with either the majority opinion or the Alito concurrence. Both of those opinions rejected the first proposed rationale (with Alito doing so explicitly, and the majority doing so implicitly). And they did not reach – or even mention – the second.

Instead, the Court ended up reversing on precisely the narrow drug-focused rationale proposed by the Liberty Legal Institute, which promptly issued a press release calling attention to that fact.[137] Moreover, the majority opinion and the Alito concurrence included language that seemed sympathetic to the free speech claims of religious students: the majority opinion explicitly mentioned religious speech when stating that *Fraser* should not be read to "encompass any speech that could fit under some definition of 'offensive,'"[138] and Justice Alito characterized *Morse*

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* Sam Hodges, *Supreme Court Rules Against "Bong Hits 4 Jesus" Student*, THE DALLAS MORNING NEWS, June 25, 2007. Laycock subsequently reflected: "In an amicus brief for the Liberty Legal Institute, my co-counsel and I said that if the Court decided to reverse, it need say no more than that the school could punish advocacy of illegal drug use. It was a rather obvious solution, and the Court could easily have thought of it without a suggestion from us. I feared that if the Court tried to state a general principle for when student speech could be suppressed, it might adopt the principle proffered in the school's brief or some other equally censorious principle. Laycock, *supra* note 115, at 112-13.

138. *Morse*, 127 S. Ct. at 2629.

as providing "no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."[139]

That said, there are four aspects of the *Morse* majority opinion and the Alito concurrence that potentially open the door for certain narrowly-drawn restrictions on students' potentially hurtful speech (religious and otherwise). First, the very fact that the Supreme Court created a new basis for restriction of student speech – rather than trying to shoehorn the case into *Tinker*, *Fraser*, or *Hazelwood*, as the Ninth Circuit had understandably done – suggests that other such bases may subsequently be recognized as well. Indeed, as the majority opinion pointed out, both *Fraser* and *Hazelwood* illustrated that "*Tinker* is not the only basis for restricting student speech."[140] *Morse*, in turn, further confirms this principle. Of course, *Morse* itself did not "endorse any further extension," as Justice Alito emphasized.[141] But a future case may nonetheless persuade at least five justices to recognize another narrow basis for restricting student speech.[142]

Second, both the majority and the Alito concurrence emphasized the protection of student safety as a persuasive reason for upholding restrictions on speech advocating illegal drug use.[143] But the speech at issue certainly did not *compel* students to take drugs and thus risk their health (*e.g.*, "Smoke pot or I'll beat you up."). Rather, the majority opinion identified two plausible pro-drug interpretations of Frederick's banner: (1) an imperative statement: "[t]ake bong hits;" or (2) a declarative observation: "[b]ong hits are a good thing."[144] Thus, to the extent that the banner urged illegal drug use, it did so through the imprecise workings of peer pressure – by suggesting to students that, as the majority opinion put it, "the norms in school . . . tolerate[d]" drug use.[145] As John Taylor has noted, neither the majority opinion nor the Alito concurrence cited any evidence that this sort of banner actually would increase student drug use.[146] Justice Stevens' dissent specifically stated that "[t]he notion

139. *Id.* at 2636 (Alito, J., concurring).

140. *Id.* at 2627.

141. *Id.* at 2638 (Alito, J., concurring).

142. For instance, Justice Breyer took no position at all on the underlying First Amendment issue in *Morse*, instead arguing that the Court should simply have resolved the case on grounds that Principal Morse was entitled to qualified immunity, because the law did not clearly prohibit her actions. *Id.* at 2640 (Breyer, J., concurring in the judgment in part and dissenting in part).

143. *Morse*, 127 S. Ct. at 2628, 2638 (Alito, J., concurring).

144. *Id.* at 2625.

145. *Id.* at 2628.

146. *See* Taylor, *supra* note 4, at 230.

that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible."[147] Nonetheless, the banner's message, in the view of the majority opinion and the Alito concurrence, sufficiently endangered students' physical safety to warrant restriction of the banner.[148]

Similarly, as I discuss further in this Article's next section, other student speech (again, religiously-motivated or not) may be so hurtful to other students that it poses a threat to their safety analogous to – if not greater than – that posed by Frederick's banner. Such speech may cause targeted students to experience distress that manifests itself in psychological and physical symptoms, encourage other students to physically harm the targeted students, or prompt the targeted students to physically strike back in ways that endanger themselves, the original aggressor, and/or other student bystanders. Indeed, as Justice Alito interestingly stated, "[e]xperience shows that schools can be places of special danger" because students have little opportunity to avoid fellow students who "may do them harm."[149]

Third, the *Morse* majority and the Alito concurrence honed in on the importance of whether the student speech at issue has some political content to it – a point previously alluded to in *Fraser*. The majority specifically quoted Frederick's claim that "the words were just nonsense meant to attract television cameras,"[150] and later returned to this issue, reiterating—in response to the dissent's concern that the majority holding would squelch student debate over drug policy issues—that "not even Frederick argues that the banner conveys any sort of political or religious message,"[151] and that "this is plainly not a case about political debate over the criminalization of drug use or possession."[152] This language suggests that the result might have been different had Frederick's banner stated "Legalize marijuana," or, at the very least, that this would have been a tougher case. Justice Alito went even further, stating that he was joining the opinion on the understanding that it would *not* permit

147. *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting).

148. *See* Nuxoll, 2008 U.S. App. LEXIS 8737, at * 14 - * 15 ("We know from *Morse* that the Supreme Court will let a school ban speech – even speech outside the school premises – that encourages the use of illegal drugs, without the school's having to prove a causal relation between the speech and drug use.").

149. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

150. *Id.* at 2624.

151. *Id.* at 2625.

152. *Id.*

restrictions on speech regarding political issues such as the legalization of marijuana.[153] This focus, as I discuss more fully in the Article's next section, suggests that the degree of real political content (as opposed to *ad hominem* personal attacks) in a student's potentially hurtful speech should be central to the analysis of whether a school can restrict it.

Finally, although the American Center for Law and Justice's amicus brief had urged the Court to rule in Frederick's favor on grounds that the school had committed viewpoint-discrimination[154] – an argument having yielded the ACLJ great success in other religious speech cases, such as *Lamb's Chapel* – that argument held little sway with the majority or the Alito concurrence. Indeed, in holding that schools could censor student speech that *advocated* illegal drug use (while, presumably, allowing student speech that opposed illegal drug use), the *Morse* Court endorsed an explicitly viewpoint-based rationale. Moreover, even the *Morse* dissent stated that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting."[155] Kristi Bowman similarly reads *Morse* as implying that, in certain circumstances, school districts can engage in limited viewpoint discrimination.[156]

These threads from *Morse* – the emphasis on the way student speech can endanger other students' safety; the focus on whether the student speech at issue has real political content; and the recognition that viewpoint-discrimination is not necessarily unconstitutional in the school setting – have important implications for the question of how courts should deal with students' potentially hurtful speech (religious and otherwise). Thus, in this Article's final section, I focus on weaving them together with key strands of *Tinker* and *Fraser* in order to propose a new standard for analyzing such clashes. I also discuss how the Seventh Circuit's recent *Nuxoll* decision – the first post-*Morse* circuit decision on this issue – largely accords with my proposed approach.

153. *Id.* at 2636 (Alito, J., concurring).

154. ACLJ Brief, *Morse*, 127 S. Ct. 2618 (No. 06-278), at * 6 - * 8.

155. *Morse*, 127 S. Ct. at 2646 (Stevens, J., dissenting). Justices Ginsburg and Souter joined the dissent.

156. *See* Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 192, 219 (2007). Bowman adds, however, that "[b]ecause *Morse* is so self-limiting, it does not clarify much in the maze of student speech law." *Id.* at 192.

III. A NEW FRAMEWORK FOR ANALYZING STUDENTS' POTENTIALLY HURTFUL SPEECH (RELIGIOUS AND OTHERWISE)

While *Morse* did not reach the issue of whether schools can restrict students' potentially hurtful speech, the aspects identified above, particularly when combined with *Tinker* and *Fraser*, shed light on how to approach the issue. In particular, *Morse*'s emphasis on the way some student speech can endanger other students' safety connects up interestingly with *Tinker*'s "invasion of rights" prong, and *Morse*'s emphasis on the degree of political content in the speech in question resonates with *Fraser*'s focus on that point.

Pulling these considerations together suggests that it is first crucial to distinguish between two types of potentially hurtful student speech, whether religiously-motivated or not: (1) speech that identifies particular students for attack; and (2) speech (such as Harper's T-shirt) that expresses a general political, social, or religious viewpoint without directly naming or speaking to particular students. *Morse*, *Tinker*, and *Fraser* all suggest that schools should receive much greater latitude to restrict the first category of potentially hurtful speech. Indeed, this distinction mirrors Justice Alito's distinction in *Morse* between student speech that advocates illegal drug use (like Frederick's banner) and student speech "that can plausibly be interpreted as commenting on any political or social issue."[157] This distinction also echoes the dividing-line proposed by Eugene Volokh in the context of Title VII workplace harassment.[158]

A. Student Speech That Identifies Particular Students For Attack

Student speech that personally attacks other students is analogous to Frederick's banner in two key ways. First, when a student makes hurtful remarks to or about a fellow student, that speech – particularly if it occurs repeatedly—has the same sort of potential (if not more) to endan-

157. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

158. *See* Volokh, *supra* note 32, at 1798 (arguing that the "directed speech/undirected speech distinction" provides "the most practical place to draw the line between harassing workplace speech that must be protected and harassing workplace speech that may be restricted"). In a draft of a new article, John Taylor has also endorsed using this dividing-line in the student speech context. *See* John E. Taylor, *Tinker and Viewpoint Discrimination*, available at SSRN: http://ssrn.com/abstract=1137909 (*hereinafter* Taylor, *Viewpoint Discrimination*), at 52.

ger student safety as does a "Bong Hits 4 Jesus" banner. To be sure, drug use poses a severe threat to student safety. But as discussed above, the link between Frederick's banner and other students' subsequent drug use was attenuated at best. By contrast, there is a clear and direct causal link between verbal bullying and subsequent student harm. One recent study unsurprisingly indicates that students subjected to name-calling or other forms of verbal victimization "feel more depressed, anxious, and lonely than students who do not view themselves as frequent targets."[159] This psychological distress, in turn, can lead to physical illnesses, such as colds, headaches, and stomach aches.[160] So too can it lead to self-destructive behaviors, such as suicidal ideation.[161] Also noteworthy is the link theorized by some experts between verbal harassment and subsequent violent behavior by the victimized students.[162]

Students' *ad hominem* verbal attacks on other students therefore implicate *Morse*'s emphasis on permitting schools to restrict student

159. *See* Adrienne Nishina, Jaana Juvonen, and Melissa R. Witkow, *Sticks and Stones May Break My Bones, but Names Will Make Me Feel Sick: The Psychosocial, Somatic, and Scholastic Consequences of Peer Harassment*, 34 JOURNAL OF CLINICAL CHILD AND ADOLESCENT PSYCHOLOGY 37, 45 (Mar. 2005). *See also* Becky Kochenderfer Ladd & Gary W. Ladd, *Variations in Peer Victimization: Relations to Children's Maladjustment*, in PEER HARASSMENT IN SCHOOL: THE PLIGHT OF THE VULNERABLE AND THE VICTIMIZED 25, 27 (Jaana Juvonen & Sandra Graham eds., 2001). ("Investigators have linked peer victimization to loneliness, depression, anxiety, low self-esteem, social problems (e.g., peer rejection, friendlessness), and school maladjustment.").

160. *See* Nishina et. al., *supra* note 159, at 46 (describing studies indicating that peer harassment increases the risk of physical illness by increasing stress hormones that suppress immune system functioning, and by activating the areas of the brain that register physical pain). The authors conclude that "students who are targets of peer harassment may be more likely to get colds or other illnesses that prevent them from going to school." *See also* Ken Rigby, *Health Consequences of Bullying and Its Prevention in Schools*, in PEER HARASSMENT IN SCHOOL: THE PLIGHT OF THE VULNERABLE AND THE VICTIMIZED 310, 316 (Jaana Juvonen & Sandra Graham eds., 2001). Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties*, 77 TEMP L. REV. 641, 646-49 (2004).

161. *See* Rigby, *supra* note 160, at 311 (stating that there is "some evidence that peer victimization is related to suicidal ideation, that is, the tendency to think about killing oneself. Such thinking is commonly a precursor to committing suicide"). Rigby adds that several cases of suicide have indeed been "attributed to the experience of repeated victimization," but that "it is difficult to validate such claims, despite the fact that suicide notes sometimes point to peer victimization as the cause"). *Id.*

162. After the 1999 Columbine massacre by Eric Harris and Dylan Klebold, for instance, many members of the Columbine High School spoke out about a climate of bullying in the school, and some suggested that this had influenced the behavior of Harris and Klebold. *See, e.g.*, Howard Pankratz, *Columbine Bulling No Myth, Panel Told*, DENVER POST, Oct. 3, 2000. In the massacre's aftermath, Colorado Governor Bill Owens signed an executive order creating the Columbine Review Commission to conduct an independent investigation of what had occurred. *See* The Report of Governor Bill Owens' Columbine Review Commission, available at http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf (last visited July 01, 2008).

speech in order to protect other students' safety, and, arguably, *Tinker*'s "invasion of rights" prong as well. Indeed, just as Justice Alito's concurrence described *Tinker*'s "'substantial disruption' standard [as] permit[ting] school officials to step in before actual violence erupts,"[163] *Morse*'s emphasis on student safety can be used as a sort of gloss on *Tinker*'s "invasion of rights" standard, allowing school officials to take action before a student suffers physical harm due to another student's verbal bullying.

Second, often such *ad hominem* speech – for example, derogatory remarks about another student's appearance, clothing, or personality – will lack any political content at all, just like Frederick's banner.[164] And even when such speech does possess some degree of political content – such as disparagement of a student for his sexual orientation or religion – the political aspect of the speech and the *ad hominem* aspect can largely be decoupled. To put it bluntly, a student can express his belief that Jesus Christ is the only path to salvation, or that homosexuality is sinful, without singling out non-Christian or gay students and telling them that

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The Commission's subsequent report noted that it heard conflicting testimony about the significance and extent of bullying at Columbine High School, with parents, students, and a teacher's aide describing significant bullying, in contrast to the testimony of the school principal and many staff members that bullying was not a problem at the school. *Id.* at 98 & n.211. The Commission concluded that while it could not "assert that bullying at Columbine High School *caused* the homicidal attack on April 20, 1999," it had received testimony that "the perpetrators had been victims of bullying at the school and had been taunted and rejected by fellow students." *Id.* at 99 & n.212. The report added:

> [M]ost students seem able to tolerate a moderate amount of bullying and taunting. But experts on school violence believe that a significant number of students are less able to tolerate bullying and peer rejection than their fellow students, particularly when that bullying becomes intimidation. These students can become seriously depressed as a consequence of harassing treatment by fellow students, which in turn can lead to an internal building-up of smoldering anger and resentment. Lethal results can ensue when that anger and resentment are set within the matrix of societal factors, for example, an entertainment industry that glorifies violence, news coverage that concentrates on sensational violence, the ready availability of weapons, and even the dissemination of Internet diagrams for the construction of explosive and incendiary devices.

Id. at 99.

163. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

164. In other words, such speech will be "low value" in nature, a classification that several commentators interpret the *Morse* court as having implicitly applied to Frederick's banner. *See* Taylor, *supra* note 4, at 228 & nn.18, 27 ("Morse creates a narrow category of low-value speech that encompasses only student advocacy of illegal drugs....Though the Court does not use the terminology of low-value speech, this is the reading on which the case makes the most sense."); Andrew Canter & Gabriel Pardo, *Notes & Comments: The Court's Missed Opportunity in Harper v. Poway*, 2008 BYU EDUC. & L.J. 125, 126 (2008) (describing *Morse v. Frederick* as presenting a "simplistic question pitting low-value speech against a high government interest"). *See also, e.g.*, Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. REV. 297 (1995).

they are going to Hell or calling them derogatory names. (Indeed, the religious speech cases described in this Article's first section, such as *Harper*, falls into the second category of expressing a viewpoint *without* targeting particular students by name for attack.) If anything, the political impact of the speech is likely to be stronger if its *ad hominem* aspect is removed. As Eugene Volokh has argued in the context of workplace harassment, "targeted offensive speech is quite unlikely to convince or edify the listener; in most cases, it is likely only to offend."[165]

Given the Supreme Court's emphasis in both *Morse* and *Fraser* on the lack of any real political content in the student speech in question, the absence (or near-absence) of such content here should likewise be significant. Also relevant is the *Fraser* Court's statement that "schools must teach by example the shared values of a civilized social order."[166] Prohibiting students from mocking and attacking each other personally, while leaving space for them to express their general political viewpoints, is consistent with that sentiment. Indeed, depending on the extent and viciousness of the personal attacks, such speech might even be considered "fighting words" that are entirely unprotected by the First Amendment.[167]

Thus, while the scope of schools' federal *liability* for failing to prevent peer harassment is limited to relatively egregious circumstances, schools

165. Volokh, *supra* note 32, at 1871-72. Volokh argues that as a result, "[d]irected speech can be suppressed with minimum impact on First Amendment interests," while the suppression of "undirected speech" in which employees "spread[] their political and social opinions to other, willing, listeners" raises grave First Amendment concerns. *Id.*

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

167. *See, e.g.,* Nuxoll, 2008 U.S. App. LEXIS 8737, at * 5 - * 6 (stating that the plaintiff "concede[d] that he could not inscribe 'homosexuals go to Hell' on his T-shirt because those are fighting words and so can be prohibited despite their expressive content and arguable theological support."). In *Chaplinsky v. New Hampshire*, the Supreme Court defined "fighting words" as "those words which by their very utterance...tend to incite an immediate breach of the peace." 315 U.S. 568, 572 (1942).

Of course, the precise boundaries of that category are blurry. *See, e.g.*, Linda Friedlieb, Comment, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 385-386 (2005) ("Ordinary fighting words are personalized insults that by definition make the listener to whom the speech is directed fight back almost instinctively . . . While the Supreme Court declared that fighting words is a 'well-defined' class of speech, whether any individual's speech constitutes unprotected fighting words rather than expression protected by the First Amendment is anything but clear. In most cases, state and local judges and law enforcement decide whether a particular expression of speech directed to a particular listener in a particular situation is sufficiently likely to provoke a breach of the peace by an ordinary listener in that situation.") In addition, even prohibitions of fighting words can sometimes raise viewpoint-discrimination concerns. *See* R.A.V. v City of St. Paul, 505 U.S. 377, 391-396 (1992); Saxe, 240 F. 3d at 207-209.

should generally be free to take action against verbal bullying and to encourage students to treat each other with personal respect. As the Third Circuit wrote in *Sypniewski v. Warren Hills Regional Board of Education*[168] (which postdated *Saxe*):

> Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully. . . Schools are generally permitted to step in and protect students from abuse.[169]

Indeed, just as *Morse* recognized the schools' authority to restrict student speech advocating illegal drug use, so too should future courts recognize – as an independent basis for speech restrictions – the schools' authority to restrict student speech that singles out other students for name-calling or other verbal abuse. In other words, schools should be able to proactively limit such personally-directed speech without fitting it into the boxes of *Tinker's* two prongs.[170] When the personally-directed speech is entirely lacking in political content (for example, mocking a student's weight), it should be automatically proscribable. And even when the personally-directed speech arguably has some degree of political content (for example, attacking a student for his religion or sexual orientation), its restriction should be presumptively constitutional, absent a factual showing that the school's primary motivation was not concern for the feelings of the targeted student. The student speaker can then obtain greater protection by recasting his message in general terms, thus shifting his speech into the second category – to which I now turn.

168. 307 F.3d 243 (3d Cir. 2002).

169. *Id.* at 264.

170. Taylor alternatively suggests that such personally-directed speech can be restricted under *Tinker*'s "invasion of rights" prong, as an infringement of the "right to be left alone." *See* Taylor, *supra* note 4, at 51 n.196 and 52. Although I agree that *Tinker*'s "invasion of rights" prong provides an important conceptual hook for the notion that such speech is unprotected, I am reluctant to state that all name-calling and other personally-directed speech necessarily rises to the level of invading the other student's *rights*. I am unpersuaded that in all such cases, an actual right is being violated. In my view, a more convincing way to think about it is to view such speech, like the advocacy of illegal drug use in *Morse*, as a carve-out from the *Tinker* standard, given its lack of political content and threat to student safety.

B. Student Speech That Expresses a General Political, Social, or Religious Viewpoint Without Singling Out a Particular Student

The harder question is presented by the second category: student speech, like Harper's "Homosexuality is shameful" T-shirt, which expresses a general political, social, or religious viewpoint that other students may find hurtful, even though the speech does not single them out by name.[171] The link between such speech and other students' physical safety is certainly still plausible here, depending on the circumstances, but it is less direct. Moreover, this type of speech generally possesses real political content to it, as in *Harper* and the various other anti-gay and pro-life speech cases described above. *Morse*'s emphasis on this factor – and, in particular, Justice Alito's suggestion that he would not support "any restriction of speech that can plausibly be interpreted as commenting on any political or social issue"[172] – points toward the presumptive unconstitutionality of restricting such speech. Thus, although *Morse* did not reach the issue, it does implicitly call into question the *Harper* majority's approach of using *Tinker*'s "invasion of rights" prong to justify restricting *all* student speech "that strikes at a core identifying characteristic of students on the basis of their membership in a minority group" with respect to race, religion, or sexual orientation.[173]

But while restrictions on this type of speech may be *presumptively* unconstitutional, that does not mean that the presumption cannot be rebutted. Here is where *Tinker*'s two alternative justifications for restricting student speech – preventing either "substantial disruption" or "invasion of the rights of others" – still have an important role to play.

171. Taylor agrees that "once we move away from speech that is directed at particular students, matters become more difficult." *Id.* at 52.

172. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

173. Had the *Harper* court limited its holding to "derogatory and injurious remarks" made directly to or about particular named students, and had it omitted the "minority group" specification, that would be fully consistent with the approach that this Article has proposed.

Interestingly, in resolving the motion for subsequent reconsideration filed by Harper's sister (who became the new plaintiff once Harper had graduated), the district court did not view *Morse* as having undercut *Harper*'s reasoning at all. Instead, the court stated that Morse had "affirm[ed] 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 educate them." *Harper*, Civ. No. 04-CV-1103, JAH (POR), slip op. at 9 (S.D. Ca. Feb. 11, 2008). As discussed throughout this article, although I agree that this is an important theme within *Morse*, *Morse* also implied that courts must balance this consideration with the need to protect other students' expression of their political views. Here, the *Harper* district court failed to give adequate attention to the latter half of the equation before reaching its conclusion.

The lingering issue, which *Morse* did not address, is where the threshold lies for satisfaction of these prongs. As described above, courts are unsettled as to whether (1) the "substantial disruption" prong can be satisfied by substantial disruption of a single student's educational experience, as opposed to a more widespread disruption; and (2) the "invasion of rights" prong can be satisfied in cases where the student speech does not fall into a traditional tort category like defamation.

Given Justice Alito's role as the deciding *Morse* vote, it is helpful to look back at his Third Circuit *Saxe* opinion for clues as to how he might answer these questions. And, indeed, *Saxe* provides some useful insights, although it leaves room for interpretation. As noted above, the *Saxe* Court essentially answered the first question in the affirmative, by stating that restrictions on speech "that would 'substantially interfere with *a* student's educational performance'" could satisfy *Tinker*'s "substantial disruption" standard.[174]

What *Saxe* left ambiguous, however, was its construction of the "invasion of rights" prong. It stated that this prong did not authorize restricting speech that was "merely offensive to some listener."[175] It then criticized the school district's anti-harassment policy for prohibiting speech that created an intimidating, hostile, or offensive environment but failing to "require any threshold showing of severity or pervasiveness."[176] This observation, however, yields several questions. First, if the relevant provision *had* required a threshold showing of severity or pervasiveness, would that have rendered it constitutional? If so, what does such a "threshold showing" entail? Must the harassment be so severe and pervasive as to effectively deprive the victim of equal access to the school's resources and opportunities – the federal standard for holding schools liable for their failure to stop peer harassment – or can the threshold for *permitting* school intervention be set somewhat lower?[177] Finally, does the necessary threshold for harassment to satisfy the "invasion of rights" prong, wherever that threshold is set, also carry over to the "substantial

174. Saxe, 240 F.3d at 217 (emphasis added).

175. *Id.*

176. *Id.*

177. On the one hand, *Saxe* clearly borrowed from *Davis* in employing the "severity and pervasiveness" language, suggesting that perhaps it envisioned the standards as being identical. On the other hand, *Saxe*'s focus on whether the policy included "*any* threshold showing of severity or pervasiveness" does not foreclose the possibility that some lower, albeit still substantial, standard could be used. Indeed, as discussed further below, I support a somewhat less stringent but still rigorous test.

disruption" prong, defining what it means for a student's educational performance to be substantially disrupted? Or can hurtful speech substantially disrupt a student's educational experience even without rising to the level of invading his rights? Conversely, can hurtful speech invade a student's rights without substantially disrupting his educational experience?

Given the type of speech that we are now considering – student speech that expresses a general political, social, or religious viewpoint that other students may find hurtful, but that does *not* personally attack them by name – these questions come into sharper focus. The last question is probably the easiest to answer. If the hurtful but non-personally-directed speech does not substantially disrupt even one other student's educational experience, it is highly unlikely that the Supreme Court – given its solicitude in *Morse* for student speech that contains political content – would interpret *Tinker*'s "invasion of rights" prong as allowing schools to restrict it.

Indeed, *Tinker*'s "substantial disruption" prong seems to be pulling the laboring oar here: it is difficult to imagine a situation where the "invasion of rights" prong would be satisfied by non-personally-directed (yet hurtful) speech without the "substantial disruption" prong being met as well. The hard questions, therefore, are the ones that probe the meaning of the "substantial disruption" test. *Morse* certainly did nothing to undermine Justice Alito's contention in *Saxe* that student speech can be restricted when it substantially disrupts *one* other student's educational performance. At the same time, its solicitude for student expression does suggest that substantial disruption itself should be defined stringently.

The most stringent definition, of course, would borrow from the federal threshold for holding schools liable for *failing* to stop student-on-student harassment, as developed by the *Davis* Court in the context of Title IX. It would state that schools can restrict non-personally-directed student speech only when that speech is "so severe, pervasive, and objectively offensive that it can be said to deprive [other students] of access to the educational opportunities or benefits provided by the school."[178]

This is a tempting solution because the argument that a student's rights are being violated is strongest here: the source of those rights can

178. *Davis*, 526 U.S. at 650 (*citing* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981)).

be found in federal legislation. Yet the notion that schools can prohibit only the speech that they *must* prohibit, and that there is no room for educational discretion below that line, is inappropriately cabined. First, it suggests that if the speech is not in some way gender-based (and is thus outside of Title IX's ambit), or analogously based on race, color, or national origin (thus falling within Title VI's ambit[179]), schools have no authority to act – even if the speech is so severely and pervasively offensive that it is depriving other students of equal access to the school's resources. It is one thing to say that schools cannot be held liable in such instances for their failures to act; it is quite another to say that they cannot act even if they want to.

Furthermore, the key interests that prompted the *Davis* Court to adopt this particularly stringent standard for school liability under Title IX are inapplicable here.

The *Davis* Court's narrow definition of actionable peer harassment, for purposes of Title IX, was designed to *protect* school districts from liability, on both textual and policy grounds. At the textual level, the *Davis* Court explained that because Title IX was Spending Clause legislation, the "clear statement" rule applied: private damages could be available only where school districts "had adequate notice that they could be liable for the conduct at issue."[180] Thus, for a school district to be held liable under Title IX for its deliberate indifference to peer harassment, the harassment had to be so egregious that it clearly violated Title IX's prohibition of denying students access to educational benefits and opportunities on the basis of their gender, thus providing the requisite notice to schools of their legal obligation to act.[181] At the policy level, the *Davis* Court emphasized that schools should retain substantial discretion in choosing how to respond to peer harassment and that "courts should refrain from second guessing the disciplinary decisions made by school administrators," adding, "we acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority."[182] The *Davis* Court thus made clear that it was adopting this narrow standard for liability in order to protect schools' flexibility and discretion in all but the most extreme cases.

179. *See supra* note 55.

180. *Id.* at 640.

181. *Id.* at 649-50 (concluding that "student-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination actionable under the statute").

182. *Id.* at 649.

Such concerns are not present when, as opposed to failing to take action against peer harassment, a school has voluntarily *chosen* to act. Indeed, they are flipped on their head. It would be a perverse distortion of *Davis* to import its narrow definition of harassment into the student speech context and to hold school districts liable for censoring any hurtful student speech that does not reach that high threshold. That approach would *increase* school districts' potential liability and *lessen* their disciplinary discretion – the precise opposite of what the *Davis* Court intended.

In my view, therefore, an appropriately robust construction of the "substantial disruption" prong is to hold that the student speech must pose a real likelihood of undermining at least one other student's ability to effectively learn and succeed in school, as measured by school attendance, grades, test scores, or similar indicia. While that approach is less stringent than the *Davis* standard – indeed, the *Davis* Court made clear that a "mere decline in grades" on the part of the victimized student would be unlikely to give that student a cognizable Title IX claim against the district[183] – it still has teeth. Schools should not be able to satisfy it by simply citing general concerns that the speech might adversely affect students, but should instead have to adduce some specific evidence that at least one particular student's educational performance is suffering, or likely to suffer, as a result of the speech. When student speech is indeed genuinely threatening another student's education in this way, schools should be able to restrict it under *Tinker*'s "substantial disruption" prong.

In *Nuxoll*, the first post-*Morse* circuit case to address the issue of student speech that is hurtful but not personally-directed, the Seventh Circuit did a good job of striking this balance. In evaluating the defendant school district's prohibition – pursuant to a school rule forbidding "derogatory comments" that "refer to race, ethnicity, religion, gender, sexual orientation, or disability" – of a T-shirt stating "Be Happy, Not Gay," the court noted that the school rule itself appeared constitutional.[184] It read *Morse,* as I do, as suggesting that "if there is reason to think that a particular type of student speech that will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school – symptoms therefore of substantial disruption – the school can

183. *Id.* at 652.

184. *Nuxoll*, 2008 U.S. App. LEXIS 8737, at * 15 - * 18.

forbid the speech."[185] It concluded that the school rule satisfied this test, by prohibiting derogatory remarks about "unalterable or otherwise deeply rooted personal characteristics about which most people, including – perhaps especially including – adolescent schoolchildren, are highly sensitive."[186] Nonetheless, the court concluded that the application of the rule to this particular T-shirt was unconstitutional, because the "Be Happy, Not Gay" slogan was only "tepidly negative" rather than truly derogatory, and there was no real showing that the T-shirt would "poison the educational atmosphere."[187]

Here, too, I agree. Although my approach would attack the question slightly differently – first, by concluding that the T-shirt was not personally directed (and thus not proscribable on that basis), and then by analyzing whether it was likely to interfere with at least one other student's ability to learn and succeed at school – it would lead to the same conclusion. By contrast, the stronger language in Harper's T-shirt – the statements that homosexuality is shameful and that God has condemned it – would trigger the same two-step inquiry, but might well lead to a different conclusion. Here, too, the T-shirt was not personally directed. But depending on the facts about particular students in Harper's school, a court might well foresee a real likelihood that Harper's T-shirt would sufficiently interfere with another student's educational performance, thus warranting its prohibition.[188]

IV. CONCLUSION

Morse does not conclusively tell us how to resolve all clashes over students' potentially hurtful speech, religious or otherwise. For a case that ostensibly seemed unrelated to these sorts of issues, however, *Morse* does at least offer some useful guidelines.

Perhaps most helpfully, *Morse* points toward a useful distinction between student speech that identifies particular students for attack, and student speech that is primarily commenting on a political, social, or

185. *Id.* at * 15.

186. *Id.* at * 6. The court added that "[s]uch comments can strike a person at the core of his being." *Id.* at * 7.

187. *Id.* at * 20 - * 21.

188. Indeed, as noted above, the *Nuxoll* Court suggested that this type of speech might even be considered unprotected "fighting words," although it did not explicitly rule on that issue. *Id.* at * 5 - * 6.

religious issue. Building on that distinction, I argue that restrictions as to the first category should generally be constitutional, just as restrictions on speech advocating illegal drug use now are under *Morse*. Restrictions as to the second category, by contrast, should trigger *Tinker*, and be presumptively unconstitutional unless there is a real likelihood of substantial disruption to at least one other student's educational performance. In further explicating and applying this "substantial disruption" standard, courts should be guided by *Morse*'s recognition that protection of students' expression of political, social, and religious opinions *and* their psychological well-being are both important interests. This, in turn, suggests that when it comes to speech like Harper's and Nuxoll's T-shirts, a carefully-drawn factual analysis that balances these considerations is the best approach.

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