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# HATE SPEECH IN THE SCHOOLS: A POTENTIAL CHANGE IN DIRECTION

*Kevin W. Saunders*

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## HATE SPEECH IN THE SCHOOLS: A POTENTIAL CHANGE IN DIRECTION

*Kevin W. Saunders*\*

The law regarding free expression and students in the public schools has long been somewhat confused. An early Supreme Court vindication of student speech rights has eroded over the years. Yet, it is perhaps unclear how great the erosion has been and how much of the original recognition still stands. This has left the lower courts rather unwilling to protect school students from hate speech, at least in cases where there has not been a history of such speech leading to disruption or even violence. Only recently has there been some sign of change in that regard, with a few courts coming to recognize that the Supreme Court cases allow restrictions on student use of racist, sexist, or homophobic invective toward other students, even when such disruption and violence are lacking.

This article will argue that those recent court decisions are justified under Supreme Court precedent. The article begins, in Part I, with a discussion of the Supreme Court's treatment of school speech. The school hate speech cases in the lower courts are then considered in Part II. That treatment splits the cases into two eras, the first running from the Supreme Court's recognition of free expression rights in the schools to the first significant erosion, and the second from that erosive case to the present. In each era, the lessons drawn by the lower courts regarding hate speech are presented but are followed with the lessons it is suggested could have been drawn that would have been more protective of the targets of hate speech. Part III looks at the more recent decisions protecting students from hate speech and argues that these cases are correctly decided. Lastly, Part IV looks to the most recent Supreme Court pronouncement on student speech to argue that the lessons suggested from the earlier cases are still valid.

### I. THE SUPREME COURT'S SCHOOL SPEECH CASES

An analysis of the regulation of hate speech in the public schools must begin with *Tinker v. Des Moines Independent Community School District*.<sup>1</sup> *Tinker* grew out of a protest against the United States' involvement in Vietnam.<sup>2</sup> As a part of the protest, a number of students wore black armbands.<sup>3</sup> The district's principals had decided that such a display would be met with a demand to remove the bands and suspension for those who refused.<sup>4</sup> A number of students did refuse and challenged their penalties under the First Amendment.<sup>5</sup>

The Supreme Court began its analysis by noting that the special characteristics

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1. 393 U.S. 503 (1969).

2. *Id.* at 504.

3. *Id.*

4. *Id.*

5. *Id.*

of the schools must be taken into account in any free expression analysis, but the Court said that these rights do exist in the school context, stating “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>6</sup> It was important to the Court, in holding that the students’ rights had been violated, that the protest had been silent and passive, with no interference with the educational process or the rights of others.<sup>7</sup> There was no disruption of any class, and while there was some hostility expressed by other students outside the classroom, there were no threats of violence or actual violence.<sup>8</sup> The district may have feared disturbance, but the Court said “in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>9</sup>

The Court noted that any disagreement with the views of the majority may cause trouble or raise fear of disturbance, at least in the form of an argument.<sup>10</sup> Despite that potential outcome, it is something we must abide.<sup>11</sup> Rather,

[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.<sup>12</sup>

In that regard, the Court said “the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>13</sup>

It is interesting and important to note that the school system had allowed the wearing of other potentially message-bearing items, including campaign buttons and a German Iron Cross.<sup>14</sup> What was singled out was one particular item bearing on an issue that was in controversy throughout the country.<sup>15</sup> The school elected to support one side of an ongoing debate: support of the United States’ involvement in Vietnam could be expressed, but disagreement was barred. This use of the schools to suppress one side of a societal debate is particularly troubling.<sup>16</sup> This may be the focus of the Court’s statement that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”<sup>17</sup>

The extension of *Tinker* to prevent schools from limiting hate speech within their confines would seem unwarranted. It is argued elsewhere that the real problem raised by the action of the principals in Des Moines was this imposition of

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6. *Id.* at 506.

7. *Id.* at 508.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (“[O]ur Constitution says we must take this risk.”).

12. *Id.* at 509.

13. *Id.*

14. *Id.* at 510.

15. *Id.* at 510-11.

16. *Id.*

17. *Id.* at 511.

a favored view in an ongoing political debate.<sup>18</sup> Hurling racial expletives at another student is not participation in an ongoing political debate, even if there is such a debate over whether such limitations should be allowed. At any rate, *Tinker* seems to have been the high water mark for free speech in the schools, and later cases call into question its continuing strength.

The first such case is *Board of Education v. Pico*.<sup>19</sup> Analyzing the case is complicated by its procedural context and the lack of a majority opinion. The case may be seen as another victory for free expression rights in the schools, but its relevance is limited. The issue in *Pico* was access to books in a school library.<sup>20</sup> Conservative members of the local school board expressed concern over the presence of books in the library that they characterized as “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.”<sup>21</sup> After receiving recommendations from a committee of parents and school staff who reviewed the books in controversy for “‘educational suitability,’ ‘good taste,’ ‘relevance,’ and ‘appropriateness to age and grade level,’” the Board largely rejected the committee recommendations and ordered the removal of most of the books on their original list, reprieving one book and allowing access to a second with parental approval.<sup>22</sup>

When a group of students challenged the removal of the books, the Court found only that the complaint merited a trial.<sup>23</sup> The lower court had granted the school district summary judgment, which is allowable only if there are no genuine issues of material fact to be resolved at trial; that is, even taking the available evidence in the light most favorable to the plaintiffs, the district would be entitled to judgment.<sup>24</sup> The problem, according to the Court, was that in First Amendment cases the intent of the government is crucial, and that intent had not been probed at a trial.<sup>25</sup>

As mentioned, there was no majority opinion. A plurality of Justice Brennan, with only Justices Marshall and Stevens in complete support and with Justice Blackmun in partial support, began by recognizing that school boards must have broad discretion in managing their schools’ affairs.<sup>26</sup> The plurality accepted the position of the district that “local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’”<sup>27</sup> But, the district must exercise its discretion in harmony with the requirements of the First Amendment.<sup>28</sup>

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18. See KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 255 (2003).

19. 457 U.S. 853 (1982).

20. *Id.* at 855-56.

21. *Id.* at 857 (correction in original).

22. *Id.* at 857-58.

23. *Id.* at 872.

24. *Id.*

25. *Id.* at 873-74.

26. *Id.* at 861-62.

27. *Id.* at 864 (quoting Brief for Petitioners at 10 *Bd. Of Educ. V. Pico*, 457 US 853 (1982) (No. 80-2043), 1981 WL 390269).

28. *Id.*

The discretion of the district applies most strongly to the curriculum itself.<sup>29</sup> The board must decide what to teach, but the plurality saw the library in a different light.<sup>30</sup> Students have not only whatever right *Tinker* provides to express themselves, but also a right to receive information.<sup>31</sup> The Court stated:

Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.<sup>32</sup>

So, what limitations would the First Amendment pose to school board attempts to limit the availability of books in their libraries? In answer to that question, the plurality looked not so much to result but to motive, stating:

[School boards] rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*.<sup>33</sup>

Since the plaintiffs had alleged that the Board's decision was based on a concern that the books were "anti-American"<sup>34</sup> and contrary to the Board members' "personal values, morals and tastes," the board decision was suspect, and the complaint merited a trial.<sup>35</sup> The grant of summary judgment was vacated and the case was remanded.<sup>36</sup>

As mentioned, Justice Blackmun joined the plurality only in part. He did not rest on a view of the role of school libraries but wrote more generally of the limits on states, saying "the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."<sup>37</sup> Applying that principle to the schools, he said:

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or

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29. *Id.*

30. *Id.* at 869.

31. *Id.* at 868 ("Keyishian v. Board of Regents, 385 US 589 (1967), observed that 'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.'").

32. *Id.* at 869.

33. *Id.* at 870-71.

34. Two board members had objected to a statement in one of the books that George Washington had owned slaves. One of them said "I believe it is anti-American to present one of the nation's heroes, the first President, . . . in such a negative and obviously one-sided life." *Id.* at 873 n.25 (citation to footnote only).

35. *Id.* at 875.

36. *Id.*

37. *Id.* at 879 (Blackmun, J., concurring in part and concurring in the judgment).

social perspectives discussed in them . . . . [T]he school board must “be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” and that the board had something in mind in addition to the suppression of partisan or political views it did not share. . . . First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are “manifestly inimical to the public welfare.”<sup>38</sup>

Justice Blackmun’s position seems consistent with the view expressed above that the evil to be addressed is the political suppression of ideas.<sup>39</sup> Even then, he would allow the suppression of ideas that are not simply discomforting to the majority but that are “inimical to the public welfare.” What would fit that classification better than racial epithets?

There is still a fifth vote to be accounted for in the decision to remand. That vote came from Justice White. While he agreed that there was a factual dispute and that summary judgment had been inappropriate, he criticized the plurality for “issu[ing] a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library.”<sup>40</sup> That position certainly limits the effect of language in the plurality opinion, leaving only the conclusion that motive matters and that political motive is of special concern.

The next case, *Bethel School District No. 403 v. Fraser*,<sup>41</sup> resulted from what was characterized as a lewd speech given at a high school assembly.<sup>42</sup> Fraser, a student, gave the speech in nomination of a fellow student for a student government office.<sup>43</sup> The Court described the speech as “an elaborate, graphic, and explicit sexual metaphor.”<sup>44</sup> Fraser gave the speech after having been warned by two teachers, who knew its content, that there could be consequences.<sup>45</sup> Student reaction ran from hooting, yelling, and sexually suggestive gestures on the part of some to embarrassment on the part of others, some as young as fourteen.<sup>46</sup> Fraser

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38. *Id.* at 879-80 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)) (other internal citations omitted).

39. *See supra* note 33 and accompanying text.

40. *Pico*, 457 U.S. at 883 (White, J., concurring in the judgment).

41. 478 U.S. 675 (1986).

42. *Id.* at 677.

43. *Id.*

44. *Id.* at 677-78.

45. *Id.* at 678. In the hate speech cases to be discussed, the students, like Fraser, were warned that this speech or expression would violate school rules. Professor Emily Gold Waldman sees a difference between suppression of speech and punishment for speech. *See* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113 (2010). She argues that principles of due process require that, when punishment is imposed based on speech, the punished student should have had adequate prior notice that the speech violated school rules and that the actual punishment should be reasonable. *Id.* at 1147. Setting aside the issue of reasonableness of the punishment, which would have to be addressed on a case-by-case basis, she says that “the clearest form of such notice will occur when the school responds to a particular instance of speech, either by warning the student speaker in advance not to engage in the specific speech in question (as in *Tinker* and *Fraser*) and/or by telling the student to stop speaking.” *Id.* at 1140. That has been the situation in the cases to be discussed, where, for example, students have been told to turn a T-shirt inside out or wear something else.

46. *Fraser*, 478 U.S. at 677-78.

was suspended and removed from the list of potential graduation speakers for violating a school rule against “[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures.”<sup>47</sup>

When Fraser’s challenge to the action reached the Supreme Court, the Court decided that *Tinker* was not controlling.<sup>48</sup> The Court saw a “marked distinction between the political ‘message’ of the arm-bands in *Tinker* and the sexual content of respondent’s speech in this case.”<sup>49</sup> In *Tinker*, there had been “a nondisruptive, passive expression of a political viewpoint” that had not affected the educational process while the speech in *Fraser* disrupted a participatory exercise in student government, which could be relevant under *Tinker*.<sup>50</sup> Going beyond *Tinker*, the Court pointed to the role of the schools in inculcating the fundamental values and civility needed for democracy to flourish.<sup>51</sup> The Court noted:

These fundamental values and “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.<sup>52</sup>

This language would seem to distinguish between political speech and racist invective at least as well as it does between political speech and vulgarity.

The Court recognized that it had ruled in *Cohen v. California*<sup>53</sup> that far more offensive language than that uttered by Fraser was protected when expressed in public, but said “[i]t does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”<sup>54</sup> The Court went on to say:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the “fundamental values necessary to the maintenance of a democratic political system” disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the “work of the schools.” The determination of what manner of speech in the

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47. *Id.* at 678.

48. *Id.* at 680-81.

49. *Id.* at 680.

50. *Id.*

51. *Id.* at 681.

52. *Id.*

53. 403 U.S. 15 (1971).

54. *Fraser*, 478 U.S. at 682.



classroom or in school assembly is inappropriate properly rests with the school board.<sup>55</sup>

Again, consider how much more injurious, offensive, and threatening racist speech is compared to somewhat lewd speech, and then note that the Court allowed the suppression of such lewd speech in *Fraser*.

Turning to the most recent of this line of cases,<sup>56</sup> we come to what has become known as the “Bong Hits 4 Jesus” case.<sup>57</sup> The case, *Morse v. Frederick*,<sup>58</sup> gets its name from a banner unfurled at a high school sponsored event.<sup>59</sup> The torch relay for the 2002 Winter Olympics in Salt Lake City was to pass through Juneau, Alaska.<sup>60</sup> The principal of Juneau-Douglas High School, a school on the route of the torch, decided to make an event of the relay by allowing students and staff to leave class to line the street down which the relay would proceed.<sup>61</sup> As the torch and its accompanying camera crews passed, Frederick, a senior at the high school, and some friends unfurled a fourteen foot long banner reading “BONG HiTS 4 JESUS.”<sup>62</sup> The banner was easily seen by students and others.<sup>63</sup> The principal, Morse, crossed the street and ordered that the banner be taken down.<sup>64</sup> While his friends were compliant, Frederick refused.<sup>65</sup> The principal then took the banner, and Frederick was suspended from school.<sup>66</sup> The action was based on a belief that the banner promoted drug use, in violation of school rules—rules that applied both in school and at school sponsored events and trips.<sup>67</sup>

Frederick filed suit seeking not only a declaratory and injunctive vindication of his free speech rights but also monetary damages.<sup>68</sup> When the case reached the Supreme Court, it found that his free expression rights had not been violated.<sup>69</sup> The Court accepted, as reasonable, the principal’s belief that the sign advocated the use

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55. *Id.* at 683 (citations omitted) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

56. Most treatments of student speech would include, between *Fraser* and the case to follow, the school newspaper case, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). That case represented, however, a decision not to publish articles in a school newspaper. *Id.* at 262-64. It was non-punitive in any sense, other than not seeing one’s writing in print. There was no disciplinary action. It represents, then, simply a refusal to include certain content in a publication that could reasonably be seen as expression by the school itself. There is language in the opinion that supports the position taken here, most notably “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.” *Id.* at 266 (citation omitted). This point, however, is made elsewhere in more relevant cases.

57. Bill Mears, “Bong Hits 4 Jesus” Case limits student rights, CNN (June 25, 2007), [http://articles.cnn.com/2007-06-25/justice/free.speech\\_1\\_principal-deborah-morse-banner-case-school-policy?\\_s=PM:LAW](http://articles.cnn.com/2007-06-25/justice/free.speech_1_principal-deborah-morse-banner-case-school-policy?_s=PM:LAW).

58. 551 U.S. 393 (2007).

59. *Id.* at 396.

60. *Id.* at 397.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 398.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 399.

69. *Id.* at 400.

of marijuana.<sup>70</sup> It also distinguished this advocacy of drug use from taking a political position on the legalization of marijuana.<sup>71</sup>

Given the Court's understanding of the message, the question became whether the schools can restrict student speech in the context of a student event and, presumably, *a fortiori* in the school itself, reasonably believed to promote drug use.<sup>72</sup> The Court determined that doing so was not a violation of the First Amendment, and in doing so, it gave its most recent view of the meaning of the school speech cases.

With regard to *Tinker*, the Court found the facts there "quite stark, implicating concerns at the heart of the First Amendment."<sup>73</sup> The speech in *Tinker* was political expression the protection of which is "at the core of what the First Amendment is designed to protect."<sup>74</sup> Where the only interest on the part of the school was the prevention of the sort of discomfort that a minority political view may bring, that could not justify the suppression of student speech.<sup>75</sup>

Proceeding on to *Fraser*, the Court said the mode of analysis employed there "is not entirely clear."<sup>76</sup> While the Court

was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." . . . [T]he Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate."<sup>77</sup>

Declining to resolve completely the lack of clarity, the Court was willing to "distill . . . two basic principles":<sup>78</sup>

First, *Fraser*'s holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*.<sup>79</sup>

While the school district argued that *Fraser* should be interpreted to allow the suppression of the speech at issue because it was offensive in the sense used in *Fraser*, the Court declined.<sup>80</sup> The Court said:

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70. *Id.* at 401.

71. *See id.* at 403 ("[T]his is plainly not a case about political debate over the criminalization of drug use or possession.").

72. *Id.*

73. *Id.*

74. *Id.* (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

75. *Id.* at 403-04.

76. *Id.* at 404.

77. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680, 683 (1986)).

78. *Id.* at 404.

79. *Id.* at 404-05 (citations omitted).

80. *Id.* at 409.

We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.<sup>81</sup>

Agreeing that Frederick’s speech was offensive would have been stretching the class of speech *Fraser* allowed to be suppressed, perhaps beyond the breaking point. Racist speech, however, can be included in the *Fraser* concept with far greater ease. Such speech is easily more offensive than the sexually suggestive—but not explicit—speech in *Fraser*.

Turning to the application of the case law to the treatment of the banner,<sup>82</sup> the Court found the government interest in deterring student drug use to be important and even perhaps compelling.<sup>83</sup> This government interest has its effect on the permissibility of speech regulation in the schools. The Court noted that

*Tinker* warned that schools may not prohibit student speech because of “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here . . . extends well beyond an abstract desire to avoid controversy.<sup>84</sup>

That made it reasonable for the principal to take the actions she did.<sup>85</sup>

There was an important concurrence in *Morse*. Justice Alito, joined by Justice Kennedy, expressed their view of the majority decision, and since their votes were necessary to forming a majority, any limits expressed cannot be ignored. The two justices joined the Court’s opinion on the understanding that it addressed only illegal drug use and “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.’”<sup>86</sup> The concurrence went on to say, “I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this court.”<sup>87</sup> The concern was over argument that had been offered in the case that school officials should be allowed

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81. *Id.*

82. The Court did also briefly consider the school newspaper case, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), but, as suggested above, also thought it to be of minimal relevance. See *supra* note 56 and accompanying text. The Court viewed the newspaper case as turning on the potential for the public to believe that the content of the paper was speech by the school. *Morse*, 551 U.S. at 405. The Court said that *Kuhlmeier* did not control this case because the same inference that the expression was that of the school could not reasonably be drawn with regard to Frederick’s banner. *Id.* The Court did, however, find the case to have some limited relevance, stating that “*Kuhlmeier* acknowledged that schools may regulate some speech ‘even though the government could not censor similar speech outside the school.’ And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.” *Id.* at 405-06 (quoting *Kuhlmeier*, 484 U.S. at 266).

83. *Morse*, 551 U.S. at 408.

84. *Id.* (citations omitted).

85. *Id.* at 410.

86. *Id.* at 422 (Alito, J., concurring).

87. *Id.*

to censor any speech that interfered with the school's educational mission.<sup>88</sup> Since an educational mission could include views on political and social issues, the schools could not be allowed to censor contrary speech.<sup>89</sup> Drugs, on the other hand, were seen to be a threat to student safety—potentially as serious a threat as violence within the school—therefore, the restrictions on speech were accepted by the Court.<sup>90</sup>

## II. LOWER COURT CASES ON HATE SPEECH IN SCHOOLS FROM *TINKER* TO THE RECENT PAST

The analysis in this section will look primarily at two distinct eras, or at least what should have been two distinct eras. The first begins with *Tinker* and lasts through *Fraser*. *Pico* is not used to split that first era in two on the grounds that it says little about speech by students and serves primarily to focus *Tinker* on political speech. The second era is from *Fraser* through the present. After a discussion of those eras and an analysis of a potential change in direction in this area, the impact of *Morse* will be discussed.

### A. From *Tinker* to *Fraser*

#### 1. *Tinker* Lessons Drawn by the Lower Courts

There were not many cases considering school hate speech in the era between *Tinker* and *Fraser*, but the cases that did reach the lower courts were resolved based on the question from *Tinker* as to whether the student speech at issue “would substantially interfere with the work of the school.”<sup>91</sup> The analysis of that issue tended to be highly fact specific, with courts delving into the history of hate speech and race relations at the schools adopting the speech limitations.

*Melton v. Young*<sup>92</sup> demonstrates this reliance. The case grew out of a situation at Brainerd High School, a public school in Chattanooga, Tennessee.<sup>93</sup> The school, which had been integrated in 1966, retained its nickname “Rebel” and *Dixie* as its pep song from its pre-integration all-white days.<sup>94</sup> In 1969, continuing controversy over the use of the Confederate flag and *Dixie* led to demonstrations, disrupted classes, and other disturbances, to the point where a citywide curfew was initiated for four nights.<sup>95</sup> Police had to be called to the school, and at one point, the school was closed.<sup>96</sup>

A committee appointed to study the situation recommended that the Confederate flag no longer be used as a school symbol and that *Dixie* no longer be the school pep song, although it was recommended that the nickname “Rebel” be

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88. *Id.* at 423.

89. *Id.*

90. *Id.* at 425.

91. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

92. 465 F.2d 1332 (6th Cir. 1972).

93. *Id.* at 1333.

94. *Id.*

95. *Id.*

96. *Id.*

retained.<sup>97</sup> The school board adopted the recommendations and directed the school administration to develop a student code of conduct consistent with the recommendations.<sup>98</sup> The code prohibited the use of “provocative symbols on clothing” and said that all displays of the Confederate flag and Confederate soldiers were to be removed from the school premises.<sup>99</sup>

Melton, despite being informed of the new rules, wore a jacket with a Confederate flag on its sleeve to school.<sup>100</sup> He was asked to remove it but refused and went to class.<sup>101</sup> After complaints from both faculty and students, he was again asked to remove the jacket or told he would have to leave school.<sup>102</sup> Although he left, he came back the next day with the same jacket.<sup>103</sup> He said he was demonstrating pride in his Confederate heritage but was again told to leave and not return in the jacket.<sup>104</sup>

When Melton challenged the order as a violation of his free expression rights, the Sixth Circuit adopted the conclusion of the trial court that “[t]he Principal had every right to anticipate that a tense, racial situation continued to exist at Brainerd High School . . . and that repetition of the previous year’s disorders might reoccur if student use of the Confederate symbol was permitted to resume.”<sup>105</sup> The appellate court said that the district judge had undertaken a careful consideration of the law and the situation at the high school and was justified in concluding that

the record in the present case reflects quite clearly that there was substantial disorder at Brainerd High School throughout the 1969-70 school year, that this disorder most materially disrupted the functioning of the school, so much so that the school was in fact closed upon two occasions, that much of the controversy the previous year had centered around the use of the Confederate flag as a school symbol and that the school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September 1970.<sup>106</sup>

It was clear that the history of disturbances made the difference, establishing the real and substantial fear of disruption that *Tinker* seemed to demand.<sup>107</sup>

The Fifth Circuit, in a somewhat different procedural context, showed the same attention to the history of strife at a school in determining whether an injunction against the use of the Confederate battle flag and the name “Rebels” violated student first amendment rights. In *Augustus v. School Board*,<sup>108</sup> the court had to consider a mix of first amendment and equal protection issues. The school system was under the continuing jurisdiction of the district court to implement desegregation.<sup>109</sup> The district court had issued a permanent injunction against the

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97. *Id.*

98. *Id.* at 1333-34.

99. *See id.* at 1334 n.2.

100. *Id.* at 1334.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (quoting the district court).

106. *Id.* at 1335 (quoting the district court).

107. *See supra* notes 12-13 and accompanying text.

108. 507 F.2d 152 (5th Cir. 1975).

109. *Id.* at 154.

use of the Confederate flag because it saw the symbol and the “Rebel” name as standing in the way of establishing a unitary school system.<sup>110</sup>

There was history tying the symbol and name to disruptions. In the 1972-73 school year, which was the fourth year of any significant integration for the district, its high school experienced racial disturbances.<sup>111</sup> There were four major confrontations involving fighting between black and white students and a number of lesser disturbances.<sup>112</sup> Law enforcement officers were called to the school and remained for the year; the school was closed twice.<sup>113</sup> The court said that one source of the racial tension was the use of the Confederate symbols.<sup>114</sup> The court concluded that the injunction was not a violation of student first amendment rights, noting that student expression may be limited where that expression leads to violence and disruption.<sup>115</sup>

## 2. *The Tinker Lesson That Could Have Been Drawn*

Setting aside the fact that *Tinker* actually phrased its test in the form of a disjunction of substantial disruption or interference with the rights of others, with the second disjunct ignored until much later cases,<sup>116</sup> it is not really clear that the first disjunct should have been seen as requiring the sort of violence and physical disruption looked for by the lower courts.

An understanding of the disruption that should have been found sufficient to justify limits on student speech might have been found in *Brown v. Board of Education*.<sup>117</sup> The Court in *Brown* asked itself the simple—at least in its wording—question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?” and answered that question by stating: “We believe that it does.”<sup>118</sup> The Court said:

To separate [children in elementary and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>119</sup>

The conclusion was that educational segregation, in itself, deprives minority children of equal educational opportunity: separate but equal was an

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110. *Id.*

111. *Id.* at 155.

112. *Id.*

113. *Id.*

114. *Id.* at 155-56.

115. *Id.* at 156. The Fifth Circuit did remand the case on the issue of whether the school board could have developed, had it been given the opportunity, a solution to the problem less drastic than that in the injunction.

116. *See infra* notes 265-72 and accompanying text.

117. 347 U.S. 483 (1954).

118. *Id.* at 493.

119. *Id.* at 494.

impossibility.<sup>120</sup> Segregation implies racial inferiority, and that affects motivation to learn and retards educational and mental development.<sup>121</sup>

The issue in *Brown* was, of course, legally established segregation, rather than the sting of racist speech, but the effect may well be the same. It may even be that racist speech directed at a child in the classroom, cafeteria, or elsewhere in school could have a stronger impact on a child than finding himself or herself in a single race school, especially if the legal details of that result are not explained to the child. Many children would not have understood the law behind segregated schools and may not have suffered from the inferiority that concerned the Court, although certainly older students would have.

But, what of the child who hears hate speech in the schools and sees that it is tolerated by the school authorities? It would seem that acceptance of racist speech, if the schools do not attempt to stop it, would lead to the same belief that society has accepted a theory of racial inferiority. Perhaps someone versed in the complexities of free expression law would not draw the same conclusion, but that is a bit much to expect of an elementary or even high school student. Even with an explanation, it might well be seen as a majority protection for the assertion of minority inferiority.

It would, then, seem reasonable to conclude that hate speech has a negative impact on the educational process. It is inherently disruptive of the schools' mission. Unless *Tinker* is limited to violence and the effects of noise—and the language of the case does not seem so limited—hate speech is disruptive in the sense necessary to allow its suppression. The political speech in *Tinker* might merit protection up until the point of disruption. How else would we distinguish political distaste from interference with the educational process? But, all hate speech may be seen as disruptive, even without indication of violence. This may best be seen in the limiting case of a single minority student who is constantly subjected to racist speech. Facing such overwhelming odds, he or she may not respond with any level of violence. But, the subject of such abuse will not receive the education the school system is charged with providing. The educational process will have been disrupted in a way that should allow, under a combination of *Tinker* and *Brown*, the suppression of the speech of the other students.<sup>122</sup>

#### B. Post-Fraser

In the years following *Fraser*, the number of cases involving school limitation on hate speech grew significantly. They might also be seen to have increased in complexity. The lower courts seemed to continue their reliance on the substantial disruption aspect of *Tinker*, apparently not seeing any real change resulting from the *Fraser* decision. Some of the later cases did, at least, begin to recognize the disjunctive nature of the *Tinker* test. After examining the work of the courts in this

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120. *Id.* at 495.

121. *Id.* at 494.

122. There is an interesting symmetry here between the genesis of *Tinker* and its proposed limitation. Professor Kristi Bowman has demonstrated how *Tinker*'s disruption test grew out of the civil rights movement. See generally Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129 (2009). The suggested limitation, of course, grows out of that same movement.

era, how *Fraser* could be seen as adding authority to bar hate speech will be examined.

*1. Fraser (and leftover Tinker) Lessons Drawn by the Lower Courts*

One of the first cases<sup>123</sup> in this era at the federal appellate level was the Tenth Circuit case *West v. Derby Unified School District No. 260*.<sup>124</sup> In the Kansas school district at issue in that case, there had been a number of racial incidents.<sup>125</sup> It was in response to those incidents that the district adopted a “Racial Harassment and Intimidation” policy.<sup>126</sup> The policy prohibited racial harassment or intimidation through name calling or the use of racial slurs.<sup>127</sup> It also prohibited possession in school or at school events of written material that is “racially divisive or creates ill will or hatred.”<sup>128</sup> Among the examples given of such material was the Confederate flag.<sup>129</sup>

The incident that gave rise to the case occurred when a seventh grade student, while in mathematics class, drew a Confederate flag on a piece of paper.<sup>130</sup> When the student was suspended for three days, the student’s parents sued the district, alleging violations of the student’s constitutional rights, the most important such violation being to the student’s First Amendment rights.<sup>131</sup>

In examining the First Amendment issue, the court carefully examined the historical background for the policy.<sup>132</sup> That background included a series of

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123. There is an earlier, but still post-*Fraser*, case that is interesting primarily because it distinguished elementary from secondary school. *Baxter ex rel. Baxter v. Vigo County School Corp.*, 26 F.3d 728 (7th Cir.1994), was not an actual hate speech case. Instead, a student wore T-shirts to school bearing the legends “Unfair Grades,” “Racism” and “I Hate Lost Creek”; “Lost Creek” being the name of the student’s elementary school. *Id.* at 730. After the school prohibited the student from wearing the shirts, the court dismissed a damages suit against the school and granted the defendants immunity, both because it saw *Fraser* as casting some doubt on the vitality of *Tinker* and because it was unclear that *Tinker* should apply to elementary school. *Id.* at 738. For more on the distinction between elementary and secondary school, see *infra* notes 207-21 and accompanying text.

There is another case, roughly contemporaneous with *West*, that also raises the issue of qualified immunity. *Denno v. School Board*, 218 F.3d 1267 (11th Cir. 2000), involved the Confederate battle flag displayed by a student at a school and a Confederate flag T-shirt worn by another. Here, too, there was a suit for damages, and the court determined that a reasonable school official would not have known that *Tinker* still controlled, to the exclusion of *Fraser*. *Id.* at 1274-75. The court noted that *Fraser* had said that the “work of the schools” included inculcating fundamental values and civility, and said: “We do not believe it would be unreasonable for school officials to believe that such displays have uncivil aspects akin to those referred to in *Fraser* . . . .” *Id.* at 1274.

124. 206 F.3d 1358 (10th Cir. 2000). The court did note two other federal appellate cases involving Confederate flags. One was fairly old. See *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972). The other was quite recent but had been vacated by the panel that had issued the opinion, rehearing had been ordered, and the case was still pending. See generally *Denno*, 182 F.3d 780.

125. *West*, 206 F.3d at 1361.

126. *Id.*

127. *Id.*

128. *Id.* (emphasis omitted).

129. *Id.*

130. *Id.*

131. *Id.*

132. See *id.* at 1361-62.



verbal confrontations between black and white students at the high school.<sup>133</sup> Some of the confrontations were of a sartorial bent: some white students wore shirts with an image of the Confederate flag, and some black students wore shirts with an “X”, referring to Malcolm X.<sup>134</sup> The confrontations drew attention in the wider community, and groups such as the Aryan Nation and Ku Klux Klan took advantage of what they saw as an opportunity to begin distributing their materials.<sup>135</sup> There were additional incidents on school buses and at football games as well as a fight involving a student wearing a Confederate flag headband.<sup>136</sup> Racist and threatening graffiti also began to appear in and around the school.<sup>137</sup> It was against that background that the district policy was adopted, and the policy seemed to result in a significant decline in racial problems.<sup>138</sup>

In the court’s view, the students were well aware of the policy, and the student knew that drawing the flag was a violation.<sup>139</sup> The question was whether the drawing of the flag, in what the student saw as a “peaceful and nonthreatening” situation and in which he had no intent to harass, was protected by the First Amendment.<sup>140</sup> The court concluded that it was not.<sup>141</sup>

The court accepted that the student’s display of the flag could be considered political speech that would be protected outside the schools and repeated the *Tinker* sobriquet that “students do not ‘shed the constitutional rights to freedom of speech or expression at the schoolhouse gate.’”<sup>142</sup> On the other hand, the court recognized that a “school need not tolerate student speech that is inconsistent with its basic educational mission . . . . Thus, where school authorities reasonably believe that a student’s uncontrolled exercise of expression might ‘substantially interfere with the work of the school or impinge upon the rights of other students,’ they may forbid such expression.”<sup>143</sup> While undifferentiated fear of a disturbance was insufficient under *Tinker* to allow suppression of speech, here there was good reason to believe

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133. *Id.* at 1362.

134. *Id.*

135. *Id.*

136. *Id.* It has been noted that the kind of disruption required by even a limited view of *Tinker* need not be violent. *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008), found sufficient justification for a ban on the Confederate flag in graffiti that had disrupted classes. The court did note that “the racist graffiti was violent in character: the graffiti contained examples of the most demeaning racial slurs, accompanied by threats against the lives of African-Americans generally, an image of a noose next to that of a Confederate flag, and ‘hit lists’ containing specific students’ names.” *Id.* at 566. Where racist graffiti is accompanied by even occasional physical confrontations, it seems adequate support for a ban on the Confederate flag. See *A. M. v. Cash*, 585 F.3d 214, 226 (5th Cir. 2009).

137. *West*, 206 F.3d at 1362.

138. *Id.*

139. The court was less sure with regard to any intent to harass. The flag was shown to another white student, which would not indicate an intent to harass. The court also noted, however, that the student who drew the flag had earlier received a three day suspension for calling another student “blackie.” See *id.* at 1363.

140. *Id.*

141. *Id.*

142. *Id.* at 1365.

143. *Id.* at 1365-66 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

that the display of the Confederate flag would cause disruption and interfere with the security of other students.<sup>144</sup>

Shortly after *West*, the Third Circuit entered the arena with *Saxe v. State College Area School District*.<sup>145</sup> That case, too, was a challenge to a school system anti-harassment policy. The district's Anti-Harassment Policy provided a definition of "harassment" that would prove to be too broad.<sup>146</sup> "Harassment means verbal or physical conduct based on one's actual or 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."<sup>147</sup> "Other personal characteristics" was a broad category that included "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc."<sup>148</sup>

The policy was challenged because of a perceived effect it would have on comments regarding the sinfulness of homosexual conduct.<sup>149</sup> The court found the breadth of the policy an unacceptable limit on first amendment rights:

Insofar as the policy attempts to prevent students from making negative comments about each others' "appearance," "clothing," and "social skills," it may be brave, futile, or merely silly. But attempting to proscribe negative comments about "values," as that term is commonly used today, is something else altogether. By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse--the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment.<sup>150</sup>

This limit on comments regarding beliefs, rather than invective directed at core and unchangeable characteristics, such as race, does raise significant free expression issues.

Turning to the analysis of First Amendment rights in the schools, the court in *Saxe* began with a discussion of *Tinker*, noting that undifferentiated fear of disturbance is insufficient and that speech regulation by the schools is only permitted if the speech would be a substantial disruption of, or interference with, the educational process or the rights of other students.<sup>151</sup> The fear required by *Tinker* must be "specific and significant . . . not just some remote apprehension of disturbance."<sup>152</sup>

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144. *Id.* at 1366. For a far more recent sole reliance on the disruption aspect of *Tinker*, see *Hardwick v. Heyward*, 674 F. Supp. 2d 725 (D.S.C. 2009). There, the court cited a history of past and present hostility and tension that would reasonably have led to the conclusion that permitting Confederate flag T-shirts would result in substantial disruption of school activities. *Id.* at 736. See also *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009) (allowing a ban on Confederate flags in a school situation involving a history of race-based violence).

145. 240 F.3d 200 (3d Cir. 2001).

146. *Id.* at 202.

147. *Id.* (quoting the policy).

148. *Id.* at 203.

149. *Id.*

150. *Id.* at 210.

151. See *id.* at 211-13.

152. *Id.* at 211.

Unlike the *West* court, the *Saxe* court also discussed *Fraser* as part of a concession that “[s]ince *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption.”<sup>153</sup> The court took the *Fraser* Court’s discussion of the difference between allowing offensive speech by adults in public and not allowing Fraser’s nomination speech in school as an indication that the *Fraser* result is limited.<sup>154</sup> “According to *Fraser*, then, there is no First Amendment protection for ‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech in school.”<sup>155</sup> It also seems clear that the category of the “plainly offensive” was limited, in the court’s view, to the other categories in the quotation, despite the redundancy in the statement that such a view would cause.<sup>156</sup>

The court found the policy to violate the First Amendment, expressing a willingness to allow the suppression of student speech only if the real potential for disruption it saw as called for by *Tinker* existed or the speech was vulgar or lewd, as in *Fraser*.<sup>157</sup>

[T]he Policy does not confine itself merely to vulgar or lewd speech; rather, it reaches any speech that interferes or is intended to interfere with educational performance or that creates or is intended to create a hostile environment. While some *Fraser*-type speech may fall within this definition, the Policy’s scope is clearly broader. . . . [T]he Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. [The district] must therefore satisfy the *Tinker* test by showing that the Policy’s restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students.<sup>158</sup>

The school system policy was limited to speech that had the “purpose or effect of . . . substantially interfering with a student’s educational performance or . . . creating an intimidating, hostile or offensive environment,” yet there is the implication that the “substantial disruption or interference with the work of the school” of *Tinker* would be lacking.<sup>159</sup> It would seem that an interference with educational performance should also constitute an interference with the work of the school. The problem, however, was that “the Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so . . . . This ignores *Tinker*’s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.”<sup>160</sup> Furthermore, while the court did agree that prohibiting speech that would “substantially interfer[e] with a student’s educational performance” could satisfy *Tinker*, to include speech that “creat[es] an intimidating, hostile or offensive environment” was more problematic.<sup>161</sup> Even recognizing the other prong of the *Tinker* test, the court said

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153. *Id.* at 212.

154. *Id.* at 213.

155. *Id.*

156. *See id.* at 212-13.

157. *Id.* at 216-17.

158. *Id.* at 216.

159. *Id.* at 216-17.

160. *Id.*

161. *Id.* at 217 (internal quotation marks omitted).

that the hostile environment aspect of the school system's provision did not require the severity or pervasiveness that might be necessary to meet the *Tinker* factor of "intrud[ing] upon . . . the rights of other students."<sup>162</sup> The court stated:

Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.<sup>163</sup>

The policy in *Saxe* clearly went beyond the concerns addressed in *West*, as well as those addressed in *Tinker* and *Fraser*. By including sanctionable comments that called into question another student's values, the policy reached matters clearly within the protection of the First Amendment. Much truly political debate can be seen as calling into question the values held or expressed by the opposing party. The suppression of such speech is a violation of expression rights even in the schools, as clearly held by *Tinker*. The line between calling into question the value of accepting homosexuality and insulting another because of the other's sexual orientation may not be easy to draw, but it is an important distinction. The policy at issue in *Saxe* did not simply prohibit personal insult or the use of derogatory epithets, but it could be interpreted to extend to language that simply caused discomfort for those of a different sexual orientation. The case may not have been a true circuit split with the *West* court. It may instead be seen to result from serious differences between the policies involved.

The next federal appellate court to address the issue, coming back to racial concerns, was the Sixth Circuit in *Castorina ex rel Rewt v. Madison County School Board*.<sup>164</sup> The case arose in a Kentucky high school where two students were both suspended twice for wearing T-shirts decorated with the Confederate flag.<sup>165</sup> The principal determined that the shirts were a violation of a school dress code, which banned clothing with, among other things, any "illegal, immoral or racist implication."<sup>166</sup> There may not have been any racist intent on the part of the students.<sup>167</sup> The shirts they wore were commemorative T-shirts from a Hank Williams, Jr. concert.<sup>168</sup> The front of the shirts had an image of the musician while the back of each shirt had two Confederate flags and the legend "Southern Thunder."<sup>169</sup> The students said they had worn the shirts to honor the birthday of Hank Williams, Sr. and to express their Southern heritage.<sup>170</sup>

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162. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969)).

163. *Id.* at 217 (footnote omitted).

164. 246 F.3d 536 (6th Cir. 2001).

165. *Id.* at 538.

166. *Id.*

167. *See id.* at 539-40.

168. *Id.* at 538.

169. *Id.*

170. *Id.*

In determining whether the school could prohibit the shirt, this court too looked to *Tinker* and *Fraser*.<sup>171</sup> The court said that *Fraser* had not altered *Tinker*'s core principles "under which public school may regulate student speech."<sup>172</sup> With regard to *Fraser*, the court said that case

concerned a school's decision to discipline a student after he used "offensively lewd and indecent speech" . . . . The Court found that this was not protected speech and that the school had an interest in teaching students the boundaries of socially appropriate behavior that provided some room for a school to regulate speech which would otherwise be protected.<sup>173</sup>

It seems an odd reading of *Fraser*. The speech there did not fall into some exception to the First Amendment. Rather, the Supreme Court said that the school's interest was sufficient to allow regulation.<sup>174</sup> Treating the speech in *Fraser* as unprotected, however, allowed the court here not to consider any expansion *Fraser* may have worked on *Tinker*.<sup>175</sup>

This case does point out the difficulty that the Confederate flag may raise. It is not solely a symbol of hate, as the swastika or a burning cross may be. It is also a symbol of regional pride in the southern part of the United States. It is true that the practices of that region were, at the time the flag was officially used, as racist as they could possibly be. Nonetheless, there are other aspects to that regional pride, and an appeal to those other aspects may not be an appeal to racist sentiments. Determining the message behind the wearing or drawing of a Confederate flag may not be an easy task, and an examination of the activity within the context of any racial tensions in the school or past use of symbols may be required.<sup>176</sup>

Another example of the difficulties inherent in determining the meaning of at least some speech is shown by a Third Circuit case, *Sypniewski v. Warren Hills Regional Board of Education*.<sup>177</sup> The case arose in a school that had a history of racial hostility.<sup>178</sup> A white student had been suspended for wearing a Halloween

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171. *See id.* at 540.

172. *Id.*

173. *Id.*

174. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

175. *See Castorina*, 246 F.3d at 540. In a later part of the opinion the court provided a better distinction for *Fraser*, and one that can stand, even if *Fraser* is considered an expansion on what may be limited under *Tinker*. The court said "a clear underpinning of the Court's holding in *Fraser* was the disruptive nature of the plaintiff's nominating speech and the fact that the sanctions were not based on one particular political viewpoint." *Id.* at 542 (citing *Fraser*, 478 U.S. at 685). That may bring the facts of this case, at least as alleged by the students, more in line with *Tinker*'s concern with viewpoint discrimination.

176. This issue also arose in *Bragg v. Swanson*, 371 F. Supp. 2d 814 (W.D.W. Va. 2005). There, the court declared unconstitutional a ban on the Confederate flag. *Id.* at 828-29. It rejected the contention that the flag is per se patently offensive and noted that "there are a variety of innocent flag uses that would be silenced by the broadly worded policy. These uses, which would neither be intended, nor reasonably be conceived, to amount to the advancement or glorification of racism, would nonetheless be suppressed." *Id.* at 827. The court was also unwilling to find a disruption of the educational process, because of a lack of physical violence, even though there were a number of widely separated racist incidents. *Id.* The court also noted a problematic asymmetry in that students were not prohibited from wearing Malcolm X symbols. *Id.* at 819.

177. 307 F.3d 243 (3d Cir. 2002).

178. *See id.* at 246-49.

costume at school consisting of overalls, a straw hat, “black face” make-up, and a noose around his neck.<sup>179</sup> Students wore Confederate flag clothing, told racist jokes, and distributed racist material.<sup>180</sup> Some students “formed a ‘gang-like’ group known as ‘the Hicks,’ and observed ‘White Power Wednesdays’ by wearing Confederate flag clothing.”<sup>181</sup> On one such Wednesday, a student walked down one of the school’s main halls waving a large Confederate flag.<sup>182</sup>

The pattern of racist incidents continued throughout the year.<sup>183</sup> It affected classes as lessons were replaced by discussions of race relations.<sup>184</sup> It spilled over into the community as a white student who associated with black students was physically threatened at his home.<sup>185</sup> Racist graffiti and hostile counter-graffiti appeared on school walls.<sup>186</sup> There was also at least one interracial fight at the school.<sup>187</sup>

In response, the school system adopted a policy that barred various sorts of racial harassment as well as intimidation and expression that created racial hatred, ill will, and division, and the school provided examples of materials that would violate the policy, including the Confederate flag.<sup>188</sup> It would appear that, given the background, the policy’s limitations would stand up to scrutiny under *Tinker*. The system had a real fear of disruption and concern for the safety of its students, and the fear would seem real and substantial.

The problem, however, was the target for the suspension at issue: a Jeff Foxworthy T-shirt.<sup>189</sup> Foxworthy, a comedian, is known for his “You might be a Redneck . . .” routine, in which he recites indications that one might be a Redneck.<sup>190</sup> This shirt was headed “Top 10 reasons you might be a Redneck Sports Fan,” followed by reasons such as: “Your carpet used to be part of a football field”; “You know the Hooter’s [sic] menu by heart”; “You think the ‘Bud Bowl’ is real”; and “You wear a baseball cap to bed.”<sup>191</sup> The T-shirt hardly seems racist, especially when worn by a white student, since the humor is at the expense of Rednecks. Nevertheless, when the student refused to turn the shirt inside out, he was suspended for three days.<sup>192</sup>

When the plaintiff challenged the racial harassment policy, the Third Circuit, applying *Tinker*, said that the facts would likely support a ban on the Confederate flag, but that the flag was not at issue.<sup>193</sup> The Foxworthy T-shirt did not have the

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179. *Id.* at 247.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 248.

186. *Id.*

187. *Id.*

188. *Id.* at 249.

189. *Id.* at 249-50.

190. *Id.* at 250.

191. *Id.* at 249-50.

192. *Id.* at 251.

193. *Id.* at 254.

history of causing disruption that the flag had.<sup>194</sup> In fact, it had been worn to school before, and there had been no negative reaction.<sup>195</sup> Nonetheless, the history could have reached the shirt. To justify the ban, the school system claimed that the word “redneck” connotes racial intolerance and that the word is directly associated with hicks and hence the gang “the Hicks,” which was at the center of the racial unrest in the high school.<sup>196</sup>

The court found no basis for any claim that the Hicks ever called themselves the Rednecks, or that the word “redneck” had been used at the school to harass or intimidate.<sup>197</sup> The court also would not accept an argument that the words were sufficiently synonymous to allow an acceptable ban on “hicks” to carry over to “redneck.”<sup>198</sup> Synonymy would not suffice.<sup>199</sup> The school had over reacted by trying to limit any reference to poor or farming southerners, rather than limiting their reaction to more specific references to the school group that had been at the core of the strife.<sup>200</sup>

There was a partial concurrence and partial dissent to the majority opinion.<sup>201</sup> Judge Rosenn saw sufficient similarity between “redneck” and “hick” as to justify the ban on the Foxworthy T-shirt.<sup>202</sup> More importantly, Judge Rosenn offered a seemingly broader interpretation of the law. He looked to *Fraser*, saying:

Under such circumstances as confronted the [School Board], the Supreme Court has held that officials are not entirely helpless. Even under less disruptive and racially harassing circumstances than the [Board] confronted, the Court has recognized the highly appropriate function of public school education “to prohibit the use of vulgar and offensive terms in public discourse.” The Court upheld in that case a disciplinary rule proscribing “obscene” language and sanctions for a lewd speech by a high school student. Here, we have obscenities and much more. The Court in *Fraser* emphasized the importance of public education to prepare pupils for citizenship and the “fundamental values of habits and manners of civility essential to a democratic society [that tolerates] divergent political and religious views, [but which] also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.”<sup>203</sup>

Even if we need to tolerate such language in the adult world, Judge Rosenn saw the schools as different.<sup>204</sup> To the detriment of the schools, “the majority gives words of enmity and wickedness at heart in a children’s ambience an unjustifiable sense

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194. *Id.*

195. *Id.*

196. *Id.* at 255.

197. *Id.* at 256.

198. *Id.* at 256-57.

199. *Id.* at 257.

200. *Id.*

201. *See id.* at 269 (Rosenn, J., concurring in part and dissenting in part).

202. *Id.* at 273-74.

203. *Id.* at 272 (citations omitted) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 683 (1986)).

204. *Id.* at 275-76.

of propriety.”<sup>205</sup> For at least this judge, the difference between the schools and the public marketplace of ideas was a real difference.<sup>206</sup>

There is an interesting issue over the applicability of this line of cases, from *Tinker* right through the hate speech cases, to elementary schools. In *S.G. ex rel A.G. v. Sayreville Board of Education*,<sup>207</sup> a Kindergarten student was suspended for telling a friend “I’m going to shoot you” while playing in the school yard during recess.<sup>208</sup> Given the reasonable concerns schools have over violence, even by young children, the suspension was held not to be a violation of the student’s free expression rights.<sup>209</sup> As the court said, “where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school’s discretionary decision-making.”<sup>210</sup>

What was more interesting was what the court had to say about elementary schools. Since the court was the same Third Circuit that had found constitutional violations in *Saxe* and *Sypniewski*,<sup>211</sup> it might have seemed a good court for the plaintiff. But, the court noted that none of its cases, nor for that matter the Supreme Court cases in the area, discussed restrictions at the Kindergarten level.<sup>212</sup> The court cited a Seventh Circuit case, *Muller ex rel Muller v. Jefferson Lighthouse School*,<sup>213</sup> for the proposition that *Tinker* and its progeny are unlikely to apply to elementary schools.<sup>214</sup>

It added other quotes and citations for the proposition that elementary schools are different:

In a recent decision, this court has noted that: ‘any analysis of the students’ rights to expression on the one hand, and of schools’ need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student.’”<sup>215</sup>

The court went on: “Various cases have held that ‘[a]ge is a critical factor in student speech cases,’” quoting again the Seventh Circuit *Muller* decision, and adding another Seventh Circuit quote, “age is a relevant factor in assessing *the*

205. *Id.* at 275.

206. Even agreeing with Judge Rosenn’s view on *Fraser*, the majority may have been right in holding that the shirt should not have been banned. The reference to rednecks does not seem to be the sort of racially derogatory comment that should be limitable. The case may best be seen a warning of caution in analyzing the message thought to be racist.

207. 333 F.3d 417 (3rd Cir. 2003).

208. *Id.* at 418-19.

209. *Id.* at 423.

210. *Id.* at 422.

211. See *supra* notes 145, 177 and accompanying text.

212. *S.G. ex rel A.G.*, 333 F.3d at 422-23.

213. 98 F.3d 1530 (7th Cir. 1996).

214. *S.G. ex rel A.G.*, 333 F.3d at 423. In a non-hate speech context, in which the barred speech was supportive of acceptance and fair treatment for homosexuals, the court in *Gillman v. School Board*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) found no relevance in the fact that the speech could reach elementary school students because it was not sexual in its nature. *Id.* at 1374. But, the speech at issue was not hate speech, so this may not be a position inconsistent with the cases in text.

215. *S.G. ex rel A.G.*, 333 F.3d at 423 (quoting *Walker-Serrano v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003)).



extent of a student's free speech rights in school."<sup>216</sup> Returning to its own cases, the court cited *Walker-Serrano v. Leonard*<sup>217</sup> for its observation that "[t]he significance of age in this inquiry has called into question the appropriateness of employing the *Tinker* framework to assess the constitutionality of restrictions on the expression of elementary school students."<sup>218</sup>

The recognition that the youngest of students require more protection or somehow merit less freedom of expression is interesting. It is true that the Supreme Court has noted the particular susceptibility of young children to influences in some of its Establishment Clause jurisprudence.<sup>219</sup> Acts that might not be an establishment of religion when older students are involved may be an establishment for more impressionable younger students.<sup>220</sup> This would seem to speak not to the student as speaker but to the student as the recipient of expression.

So, why this difference? If the analysis of school hate speech would be limited to the "substantial disruption" prong of *Tinker*, the distinction would have to be based on the difference age could make with regard to that disruption. If the disruption can only be a physical disruption, younger children seem less likely to react in such a manner to speech. Particularly, if the concern is over physical violence, younger children may be less likely to resort to such acts, or at least to do serious harm. Elementary school children are simply more amenable to control by school authorities. So, if the focus is solely on physical disruption, the distinction would seem to cut the other way. The age distinction makes more sense under a broader understanding of *Tinker*. If disruption can be found in the psychological impact of speech and its harmful effects on the ability of the individual to benefit from education, then elementary school children may well need more protection than high school students.

Richard Delgado and Jean Stefancic offer an explanation for this distinction in arguing that children generally require special protection against hate speech.<sup>221</sup> They note that children may be "particularly susceptible to the wounds words can inflict."<sup>222</sup> It is through hate speech that young minorities come to hate themselves, as the authors see evidenced by stories of children trying to "scrub the color out of

216. *Id.* (quoting *Baxter ex rel Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 728 (7th Cir. 1994) (emphasis in original)).

217. 325 F.3d 412 (3d Cir. 2003).

218. *S.G. ex rel A.G.*, 333 F.3d at 423 (quoting *Walker-Serrano*, 325 F.3d at 416).

219. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

220. Even with the adoption of the neutrality test, the Court has still recognized that age may make a difference. In *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), the Court addressed the argument that its earlier decisions regarding the use of facilities in high schools and universities did not reach allowing the use of a room in an elementary school building for after school meetings by a Christian group. *See id.* at 113-19. Rather than simply saying that age now made no difference, the Court pointed out that the meetings were in a combined high school resource room and middle school special education room, rather than an elementary classroom. *Id.* at 118. The Court did not believe that even small children would perceive an endorsement under the circumstances. *Id.* In doing so, it seemed to continue to recognize a difference based on age, even if concluding that in that case the use of the room was acceptable.

221. *See* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 93-109 (2004).

222. *Id.* at 93.

their skin.”<sup>223</sup> As they point out, young children have fewer coping mechanisms.<sup>224</sup> More damaging still, they may internalize the sentiments expressed. If they internalize some sense of inferiority, that would have the impact that the Court has found to be of such great concern.<sup>225</sup>

There is a distinction between elementary and high school, and it makes sense to recognize that distinction in the context of hate speech. But if the distinction is to be recognized, it would seem to be on a broader reading of *Tinker*. The school system’s ability to limit hate speech with regard to younger children must be based on a disruption of the educational process, not a physical disruption but a psychological disruption. If psychological disruption is sufficient, that would also seem to have application at the secondary level, even if perhaps the levels of speech to be tolerated would differ.

There are other cases addressing school hate speech in the post-*Fraser* era. These cases moved away from the disturbance aspect of *Tinker* to recognize a right on the part of students to be free from hate speech. They are not discussed here but will be presented later in demonstrating the potential development of a new approach in this area.<sup>226</sup>

## 2. The Fraser Lesson That Could Have Been Drawn

*Fraser* could have been read to allow school authorities greater leeway in prohibiting hate speech. The *Fraser* Court, speaking of the use of sexual metaphor, said that the speech “[b]y glorifying male sexuality . . . was acutely insulting to teenage girl students.”<sup>227</sup> As with *Brown*, marginalization, this time of females, could be seen as having a negative impact on education. The impact of such speech, and of racist speech, does disrupt the education process and should serve as a basis, even sticking to the *Tinker* rationale, for limits on such expression in the schools. Hate speech, if anything, should be seen as more insulting, and as intentionally insulting, to its target population. If this “insult[] to teenage girl students” was sufficient to allow the restriction in *Fraser*, the greater hostility of hate speech, and the resulting stronger insult, should be seen as justifying limits.

The *Fraser* Court went on to say:

The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.<sup>228</sup>

Here, too, the Court’s language would seem to speak better to hate speech than to the speech offered by *Fraser*. Hate speech is, again, more insulting and seemingly a stronger attack not only on the sensibilities but on the character of its targets.

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223. *Id.* at 95.

224. *Id.*

225. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954).

226. See *infra* Part III.

227. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

228. *Id.* at 681.

The Court in *Fraser* went on to call the inculcation of society's values "truly the 'work of the schools.'"<sup>229</sup> Among those values are a commitment to equality and dignity.<sup>230</sup> If the schools are to inculcate these values, then it should be just as "highly appropriate [a] function of public school education" to prohibit hate speech in schools as it was to bar the "vulgar and offensive terms" in the speech in *Fraser*.<sup>231</sup> *Fraser* recognized that "schools must teach by example the shared values of a civilized social order" and that teachers and other students are role models in setting that example.<sup>232</sup> "The schools . . . may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . ."<sup>233</sup> So also should the schools be allowed to determine that "the essential lessons of civil conduct and the inculcation of the shared values of society cannot be conveyed in a school that tolerates" hate speech.<sup>234</sup> Furthermore, the Court's allowance of restrictions on speech that is "highly threatening to others" speaks far more strongly to hate speech than to sexually suggestive speech.<sup>235</sup> Whether the girls in the audience were or were not insulted, they certainly would not have felt as threatened as would the targets of hate speech.<sup>236</sup>

Returning to the issue of offensiveness, the *Morse* Court did discuss the nature of the sort of speech that could be so considered.<sup>237</sup> The school district had argued that *Fraser* should be interpreted to allow the suppression of the speech at issue because it was offensive in the sense used in *Fraser*.<sup>238</sup> The Court declined stating:

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229. *Id.* at 683 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

230. *See id.* ("[T]he 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others.").

231. *See id.*

232. *Id.* ("Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.").

233. *Id.*

234. *Id.* A limiting view of *Fraser* was expressed in *Nixon v. Northern Local School District Board of Education*, 383 F. Supp. 2d 965 (S.D. Ohio 2005). That court said that *Fraser* and its progeny "all deal with speech that is offensive because of the manner in which it is conveyed. . . . Rather than being concerned with the actual content of what is being conveyed, the *Fraser* justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed." *Id.* at 971 (footnote omitted). However, the court cites as examples not just speech containing vulgarity or sexual innuendo but also "speech that promotes suicide, drugs, alcohol, or murder." *Id.* That latter category would seem clearly content based, and its extension to racism or, in that case, homophobic speech would not seem a change in type.

A limitation of *Fraser* to vulgarity, obscenity, and profanity was also noted in *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006). The importance of this case, however, may be limited. The T-shirt that brought about the school's action involved a depiction of President George W. Bush as a chicken-hawk, a depiction that would be protected political speech, combined with references to alcohol and cocaine and suggesting the president's former abuse of those substances. *See id.* at 321. This factor may have cut the other way, perhaps coming within the scope of *Morse*.

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

236. It is true that the Court went on to discuss cases that recognize the right of the state to limit children's access to sexual material, but the more limited scope of the material used to justify the cost conclusion does not necessarily restrict the scope of the Court's determination. *See id.* at 684.

237. *See Morse v. Frederick*, 551 U.S. 393, 409 (2007).

238. *Id.*

We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.<sup>239</sup>

Agreeing that Frederick’s speech was offensive would have been stretching the class of speech *Fraser* allowed to be suppressed, perhaps beyond the breaking point. Racist speech, however, can be included in the *Fraser* concept with far greater ease. Such speech is easily more offensive than the sexually suggestive, but not explicit, speech in *Fraser*.

### III. SIGNS OF A NEW DIRECTION

This section will begin with what might seem an odd choice of material, the discussion of an opinion by the United States Court of Appeals for the Ninth Circuit that has been vacated.<sup>240</sup> Although the opinion was vacated, it sets out the arguments that the Supreme Court’s precedents allow limiting hate speech in the schools in a stronger manner than any of the opinions by other courts.<sup>241</sup> It should be pointed out that the order to vacate was not out of any stated disagreement by the Supreme Court with the analysis of the Ninth Circuit. Instead it was a procedural decision. The original opinion had been the appeal of a denial of a motion for preliminary injunction.<sup>242</sup> That denial was upheld, but by the time the case went on to the Supreme Court, the district court had come to its final resolution of the case, and the appellate opinion had become moot.<sup>243</sup> Thus, the status of the opinion may prevent it from having value as precedent, but it still has whatever intellectual strength the reader thinks it demonstrates.

The case, *Harper v. Poway Unified School District*, was a split decision, with a majority decision by Judge Reinhardt and an interesting dissent by Judge Kozinski.<sup>244</sup> It was not another Confederate flag case but involved T-shirts, in a high school, that condemned other students on the basis of their sexual orientation.<sup>245</sup>

There had been a history of conflict over issues of sexual orientation at Poway High School.<sup>246</sup> As a way to further tolerance, the school allowed a group called the Gay-Straight Alliance to hold a “Day of Silence.”<sup>247</sup> The day was not

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239. *Id.*

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

241. *See id.* at 1178.

242. *Id.* at 1173.

243. *See Harper*, 549 U.S. 1262.

244. *Harper*, 445 F.3d at 1167; *see also id.* at 1192 (Kozinski, J., dissenting).

245. *Id.* at 1171 (majority opinion).

246. *Id.*

247. *Id.* The court explained the day’s activities as follows:

On the “Day of Silence,” participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians; these students would not speak in class except through a designated representative. Some students wore black T-shirts that said “National Day of Silence” and contained a purple square with a yellow equal sign in the middle. The Gay-Straight Alliance, with the permission

uniformly well received.<sup>248</sup> There was a series of incidents, including anti-homosexual comments and altercations, with the altercations leading to suspensions.<sup>249</sup> A week after the “Day of Silence” another group of students organized a “Straight-Pride Day.”<sup>250</sup> The message of tolerance was replaced by T-shirts with comments derogatory toward homosexuals, leading to more altercations.<sup>251</sup>

The next year, a second “Day of Silence” was planned after the Gay-Straight Alliance met with the principal to seek ways to reduce tensions and possible altercations.<sup>252</sup> On the “Second Day of Silence,” the plaintiff, who believed the real purpose of the day was to promote homosexual activity, wore a T-shirt with “I Will Not Accept What God Has Condemned,” handwritten on the front and “Homosexuality Is Shameful ‘Romans 1:27’” handwritten on the back.<sup>253</sup> The next day he came to school in a T-shirt with “Be Ashamed, Our School Embraced What God Has Condemned” handwritten on the front and the same legend as on the prior day on the back.<sup>254</sup>

On that second day, a teacher noticed several students in class talking about the shirt.<sup>255</sup> Now noticing the shirt, the teacher told the plaintiff that he believed it to be inflammatory and, concerned about the prior year’s altercations, sent the plaintiff to the office for violating the school’s dress code.<sup>256</sup> The principal decided that, given the conflicts of the previous year, he would not let the student wear what he interpreted as an inflammatory T-shirt on campus.<sup>257</sup> The student was given the opportunity to remove the shirt and return to class but refused.<sup>258</sup> The student asked to be suspended, but instead the principal simply kept him in the office the rest of the day, with no suspension and no disciplinary record.<sup>259</sup>

The student filed suit alleging a number of constitutional violations under the rights to free speech and free exercise of religion, the Establishment Clause, the Equal Protection Clause, and the Due Process Clause, as well as a claim under state

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of the School, also put up several posters promoting awareness of harassment on the basis of sexual orientation.

*Id.* at 1171 n.3.

248. *Id.* at 1171.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 1171-72. School rules included a provision regarding dress, setting out examples of what was considered unacceptable, including “[c]lothing and accessories (including backpacks) that promote or portray . . . [v]iolence or hate behavior including derogatory connotations directed toward sexual identity.” *Id.* at 1203 (Kozinski, J., dissenting).

257. *Id.* at 1172 (majority opinion). The court also noted that there had been a successful law suit against the school on the part of two students who complained that the school had failed to protect them from harassment based on their sexual orientation. *Id.* at 1172 n.6 (citation to footnote only). The trial record further supported concerns about confrontations, since one of the students testified to having been called names, being shoved in the halls, having had food thrown at him, and having been spat on. *Id.*

258. *Id.* at 1172.

259. *Id.*

law.<sup>260</sup> The district court dismissed all but the speech and religion claims and with regard to those claims refused to grant a preliminary injunction against the school.<sup>261</sup> It was the plaintiff's interlocutory appeal of that denial that reached the Ninth Circuit.<sup>262</sup>

The basis for the district court's denial of the injunction, and one that the appellate court could have quite easily and simply affirmed, was that the school, under *Tinker*, had a sufficient basis to predict a substantial disruption of and interference with the educational mission.<sup>263</sup> Given the history surrounding the "Day of Silence" in the previous year and the ongoing conflict in the schools, surely *Tinker* would permit this limit on student speech. Rather than affirming on that basis, however, the Ninth Circuit based its decision on a different part of the rule derived from *Tinker*.<sup>264</sup>

The court used the second aspect of the *Tinker* test, looking to whether the speech activity the school sought to suppress "'intrudes upon . . . the rights of other students' or 'colli[des] with the rights of other students to be secure and to be let alone.'" <sup>265</sup> The court said that the wearing of the T-shirt collided with the rights of other students in a fundamental way.<sup>266</sup> The court stated:

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. . . . Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.<sup>267</sup>

The court went on to note that the impact is not only on psychological health and well-being but on educational development as well.<sup>268</sup> School administrators do not have to tolerate this, and the court concluded that the school had a right to bar

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260. *Id.* at 1173.

261. *Id.*

262. *Id.*

263. *Id.* at 1183-84.

264. *See id.* at 1177-80. The appellate court also rejected the plaintiff/appellant's claims based on the religion clauses of the First Amendment. *See id.* at 1186-91. That subject is beyond the scope of this work and will not be addressed. The topic is, however, addressed in Kristi L. Bowman, *Public School Student's Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187 (2007). Professor Bowman sees little reason to believe that the Supreme Court will resort to a free exercise analysis when it comes to in-school hate speech. *Id.* at 196-97.

265. *Harper*, 445 F.3d at 1177 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

266. *Id.* at 1778.

267. *Id.* (citation omitted).

268. *Id.* at 1179. For additional material on the impact of hate speech and on bullying in general, see, e.g., Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004); Amy Lovell, "Other Students Always Used to Say, 'Look at the Dykes'": *Protecting Students from Peer Sexual Orientation Harassment*, 86 CALIF. L. REV. 617 (1998).

the T-shirt in question on the ground that it was “injurious to gay and lesbian students and interfered with their right to learn.”<sup>269</sup>

Addressing the treatment of this prong of *Tinker* in *Saxe*, the court argued that *Saxe* had conflated the two prongs of *Tinker*.<sup>270</sup> That court had only briefly alluded to interference with the rights of others, and in the view of the *Harper* court had, “suggest[ed], perhaps inadvertently, that injurious slurs may not be prohibited unless they also cause substantial disruption.”<sup>271</sup> “That,” the *Harper* court said, “clearly is not the case. The two *Tinker* prongs are stated in the alternative.”<sup>272</sup>

The court wanted to make clear the limitations of its decision. It does not reach limitations on political debate, the sort of speech that was at issue in *Tinker*. While the court recognized that there is political disagreement over homosexual acts and rights in the United States, it noted that there had been similar disagreement over racial equality and religion.<sup>273</sup> Just as that disagreement should not require allowing students to wear shirts declaring the inferiority of racial minorities or suggesting a less than pleasant after-life for religious minorities, homosexuals should be similarly protected.<sup>274</sup> There may be a right to raise political issues, but “[i]t is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.”<sup>275</sup> More generally:

It is essential that students have the opportunity to engage in full and open political expression, both in and out of the school environment. . . . Limitations on student speech must be narrow, and applied with sensitivity and for reasons that are consistent with the fundamental First Amendment mandate. Accordingly, we limit our holding to instances of derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation.<sup>276</sup>

The court went on to address a concern raised by the dissent that the holding does not reach offensive words directed at majority groups.<sup>277</sup> In response, the court noted a difference between historically oppressed minorities and those groups that have enjoyed a privileged social, economic, and political status.<sup>278</sup> “Growing up as a member of a minority group often carries with it psychological and emotional burdens not incurred by members of the majority.”<sup>279</sup> Verbal assaults against members of majority groups may still be barred by *Tinker*, but not because of their psychological impact.<sup>280</sup> They are, the court said, more likely to be justified by *Tinker*’s concern over substantial disruption or *Fraser*’s allowance of a ban on

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269. *Harper*, 445 F.3d at 1180.

270. *Id.* at 1179-80 n.21.

271. *Id.* at 1180 n.21 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

272. *Id.*

273. *Id.* at 1181.

274. *See id.*

275. *Id.*

276. *Id.* at 1182-83.

277. *Id.* at 1183 n.28.

278. *Id.*

279. *Id.*

280. *Id.*

plainly offensive speech.<sup>281</sup> Even so, the court left open “the possibility that some verbal assaults on the core characteristics of majority high school students would merit application of the *Tinker* “intrusion upon the rights of other students” prong.<sup>282</sup>

The court also considered the objection that, since the T-shirt was worn in response to the “Day of Silence,” the ban was a form of viewpoint discrimination. The court stated:

[P]ublic schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred. . . . [B]ecause a school sponsors a “Day of Religious Tolerance,” it need not permit its students to wear T-shirts reading, “Jews Are Christ-Killers” or “All Muslims Are Evil Doers.” . . . Similarly, a school that permits a “Day of Racial Tolerance,” may restrict a student from displaying a swastika or a Confederate Flag. In sum, a school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission.<sup>283</sup>

While a response to an argument for tolerance may have to be allowed, that response may not take the *ad hominem* form that occurred here.<sup>284</sup> That response should be an argument against toleration rather than an attack on those the speaker would prefer not to tolerate.<sup>285</sup>

A dissent by Judge Kozinski argued that the school had offered no lawful justification for banning the T-shirts in question.<sup>286</sup> He did not even find a basis in *Tinker*’s concern over disruption, considering the evidence inadequate.<sup>287</sup> Evidence that in the previous year, when shirts with inflammatory messages and derogatory remarks had been worn, there were physical altercations would not do.<sup>288</sup> Judge Kozinski found it unclear from the record that the messages on the shirts were involved in the prior year’s altercations.<sup>289</sup> He also said that the record did not indicate how close the messages on last year’s shirts were to those on the plaintiff’s shirts, nor did it indicate how the shirts and other events may have interacted last year to cause the results.<sup>290</sup>

Turning to the “rights of others” language in *Tinker*, Judge Kozinski was of the view that the phrase “can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay

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281. *Id.*

282. *Id.* at 1183-84 n.28. It may be more common that the messages the majority finds objectionable are political rather than personal. For example, in *Gillman v. School Board*, 567 F.Supp. 2d 1359 (N.D. Fla. 2008), a school principal had barred clothing and buttons that advocated accepting and fairly treating homosexuals. *Id.* at 1363. While those messages seem to have been offensive to the principal’s religious views, they were political and not a personal attack on anyone. *Id.* at 1370.

283. *Harper*, 445 F.3d at 1185-86 (citations omitted).

284. *See id.* at 1186.

285. *See id.*

286. *Id.* at 1192 (Kozinski, J., dissenting).

287. *Id.* at 1193-96.

288. *Id.* at 1194-95.

289. *Id.* at 1195.

290. *Id.*



with the First Amendment is well established.”<sup>291</sup> He disputed the majority’s conclusion that the shirts violated the rights of others by disparaging their homosexual status to the extent that they interfere with the right to partake in the educational process.<sup>292</sup>

What may be most interesting, however, about the dissent are the comments expressing some concern about the state of the law. Looking at the two most relevant Supreme Court cases, Judge Kozinski said:

Reconciling *Tinker* and *Fraser* is no easy task. The Supreme Court majority in *Fraser* seems to have been influenced by the indecorousness of Fraser’s comments, which referred to a fellow student in terms that could be understood as a thinly-veiled phallic metaphor. The curious thing, though, is that Fraser used no dirty words, so his speech could only have been offensive on account of the ideas he conveyed—the ideas embodied in his elaborate double-entendre. So construed, however, *Fraser* swallows up *Tinker*, by suggesting that some ideas can be excluded from the high school environment, even if they don’t meet the *Tinker* standard.<sup>293</sup>

That is the position argued for here in the discussion of *Fraser*.<sup>294</sup> It was not an argument that *Fraser* has swallowed up *Tinker*, but that *Tinker* may be limited to cases in which the school suppresses one side of a real political debate in the adult community.<sup>295</sup> In *Harper*, the T-shirts were not a part of the political debate but invective against students on one side. *Fraser* also allows the limitation of certain language that is broad enough to include that offered here. It does not suggest that certain ideas may be excluded, but certain language may be. *Fraser* could express his belief that his candidate was the best for the office, but his sexual metaphor was out of bounds. *Harper* could argue that society should not value tolerance, but that was not an excuse for using insults.<sup>296</sup>

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291. *Id.* at 1198.

292. *Id.*

293. *Id.* at 1193 n.1 (citation omitted) (citation to footnote only).

294. *See supra* Part II.B.2.

295. *See supra* Part II.B.2.

296. *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168 (D. Mass. 2007), provides a recent example of the sort of reaction that should be protected. A couple of students, believing that the faculty, administration, and other students were prejudiced against conservatives and conservative views and that a forum for conservative views was lacking at the school, formed the Hudson High School Conservative Club. *Id.* at 172. They found a faculty sponsor and were formally recognized. *Id.* They also affiliated with the national organization High School Conservative Clubs of America (“HSCCA”). *Id.* The school was “one of only eleven pilot schools selected to participate in the ‘First Amendment Schools’ program, a national initiative designed to transform the way in which schools teach the rights and responsibilities of democratic citizenship.” *Id.* The principal seemed receptive and told the students that he was pleased that they were getting politically involved. *Id.*

The problem arose when the students put up ten posters advertising their first meeting. *Id.* at 173. The posters included the web address of the HSCCA. *Id.* A faculty member checked the web site and found links to video footage of beheadings by Islamist terrorists. *Id.* There was a warning by the link that the material available there was extremely graphic. *Id.* The posters were removed, and the assistant principal explained the reasons to the students. *Id.* He said that the HSCCA was anti-gay and promoted violence, and that the web site had links to the beheadings. *Id.* He also said that

many of the teachers were offended by the content of the HSCCA website such as (1) calls to take down the rainbow (gay rights) flag and put up the American flag, (2) the website’s support for the Second Amendment, (3) the inclusion of a “12-Step Liberal

Also of interest is Judge Kozinski's conclusion, in which he shows that he recognizes the concerns of the school authorities and of the majority. It is worth setting out at length:

I acknowledge that the school authorities here found themselves in a difficult situation and, in light of the circumstances, acted well . . . .

I also 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 school authorities should have greater latitude to control student speech than allowed them by Justice Fortas's Vietnam-era opinion in *Tinker*. . . . 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. While I sympathize with my colleagues' effort to tinker with the law in this area, I am not convinced we have the authority to do so, which is why I must respectfully dissent.<sup>297</sup>

Judge Kozinski seems to have been unable to accept that there may have been a legal basis for the majority's results, while agreeing that perhaps that result ought to be the law.

While the court's analysis was based on *Tinker*, an analysis based on *Fraser* would certainly come to the same result as the majority view in *Harper*.<sup>298</sup> The

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Recovery Program," and (4) its position in favor of abolishing the national education association ("NEA").

*Id.* at 174.

If that had been the basis for removing the posters, then it would have reached political speech that should be protected. Instead, the school relied on the violent nature of the accessible videos. *Id.* at 177. The court rejected that basis, noting that the web sites would be accessed outside of school and only by those choosing to do so—the site had been blocked on the school's computer, but that had not been challenged. *Id.* at 177-78. It also noted the *Harper* decision and said that if, after the vacation of the opinion, had it been good law, it still would not have applied, since that opinion addressed only material that was derogatory or injurious to minorities. *Id.* at 179. The court ruled that the students had a right to put up the posters with the URL of the HSCCA. *Id.* at 180.

The point is that the comments about the rainbow flag were political commentary. They were not personal attacks on gay students but were instead directed against the political agenda symbolized by that flag. The system seemed to know that it could not rely on the grounds presented by the assistant principal. Further, the court did not discuss any concerns over these comments being an attack on homosexual students, even when it discussed *Harper*'s application to the videos. *Id.* at 179-80.

297. *Harper*, 445 F.3d at 1207 (Kozinski, J., dissenting) (citations omitted).

298. In *DePinto v. Bayonne Board of Education*, 514 F. Supp. 2d 633 (D.N.J. 2007), the court suggested at least the potential for this approach. The case involved students who were protesting the imposition of a school uniform rule at their elementary school. *Id.* at 636. They wore buttons with what appeared to be a photo of members of the Hitler Youth with a slashed red circle and the legend "No School Uniforms." *Id.* The photo did not contain any visible swastikas, and the people in the photo were not engaged in the Nazi salute, but it seems that it was uncontested that those depicted were Hitler Youth. *Id.* The district sent home letters to the students' parents saying that the background image was objectionable to many of the school district's citizens and that their attorney had told them that the buttons did not constitute free speech. *Id.*

*Harper* majority's expression of the concerns, and even some of the concern expressed by the dissent, could hardly be improved upon. Under either approach, there is the recognition that students may be sufficiently impacted as to allow limits on hate speech. It may be sufficient to affect the rights of the target students to receive an education, and it would seem that it would come within the *Fraser* concerns over schools teaching civility. Either way, minorities would be protected from hate speech in the schools.

The use of *Fraser* in this context, rather than the *Harper* court's use of *Tinker*, gains support from the Eleventh Circuit's opinion in *Scott v. School Board*.<sup>299</sup> The issue was, once again, a student suspension for displaying the Confederate flag.<sup>300</sup> The Eleventh Circuit held that the ban was not a violation of the student's free expression rights and did so without laying out a basis of a showing of real concern over material and substantial disruption.<sup>301</sup> The court noted that the freedom of expression "stands against the unique backdrop of a public school."<sup>302</sup> While students do not lose their First Amendment freedoms at the school house door, "those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an *unhealthy* and potentially unsafe learning environment for the children they serve."<sup>303</sup> An unhealthy environment, as distinguished from an unsafe environment, does not seem to require the fear of a substantial disturbance that *Tinker* may be seen to envision. Psychological impact may well be sufficient.

Rather than supply its own analysis, the court adopted the reasoning of the district judge. The district judge recognized, in addition to the authority to limit appreciably disruptive speech, that

from *Fraser*, even if disruption is not immediately likely, school officials are

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Once the school district got to court, it found out that the attorney was wrong, and the court issued a preliminary injunction against the ban on the buttons. *Id.* at 650. Given the political nature of the message, it seems the correct decision. The buttons expressed disagreement with a school policy, clearly a valid political issue in the community. They were not supportive of Nazis but instead suggested that the imposition of uniforms would be the sort of regimentation on which the Nazi regime was built.

The school system had failed to recognize that subtlety and argued that, under *Fraser*, the photo was lewd, vulgar, indecent or plainly offensive. *Id.* at 640. The court disagreed but said:

This Court does not, and need not, address the more difficult case of a student who wears or displays obvious symbols of hate or racial divisiveness. If the student in this case had displayed a swastika, a confederate flag, or a burning cross, then this Court's analysis would differ greatly. While it is unclear whether this Court would so find under *Tinker* or *Fraser* (it is eminently more likely that such a symbol would create a disturbance under *Tinker*), this Court believes that such a display would likely be "plainly offensive" under *Fraser*; however, the resolution of that dispute is not before this Court.

*Id.* at 644 n.7 (citation to footnote only). Thus, at least this court would seem to take the position that the sort of analysis the Ninth Circuit's vacated opinion applied under its view of *Tinker* could be applied under *Fraser* instead. It would not seem that the symbols of Nazism could be unique in this regard, and presumably the court would extend that potential analysis to hate speech more generally.

299. 324 F.3d 1246 (11th Cir. 2003).

300. *Id.* at 1247.

301. *Id.* at 1249.

302. *Id.* at 1247.

303. *Id.* (emphasis added).

charged with the duty to “inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government.” To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption.<sup>304</sup>

Recognizing that *Fraser* allows the restriction of vulgar and offensive words, the court determined that the real issue was whether the display of the Confederate flag was vulgar and offensive.<sup>305</sup> That issue is the subject of debate. For some, as the court recognized, the flag is a historical symbol that conveys certain philosophical and political views revolving not around slavery but around states’ rights.<sup>306</sup> To others, it is nothing more than a symbol of racism. The court said that even the terms of the debate,

[w]ords like “symbol”, “heritage”, “racism”, “power”, “slavery”, and “white supremacy” are highly emotionally charged and reveal that for many, perhaps most, this is not merely an intellectual discourse. Real feelings—strong feelings—are involved. It is not only constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues, it is their duty to do so.<sup>307</sup>

The court said that a part of the school’s mission is to teach its students to engage each other in civil terms, not in words that are highly offensive to others.<sup>308</sup> Where a symbol is so associated with racism that it will provoke ill will and hatred, the school may take action.<sup>309</sup>

Just one more case shows that more courts seem to be coming to recognize this right of school authorities to protect their minority students from derogatory comments. In *Zamecnik v. Indian Prairie School District No. 204 Board of Education*,<sup>310</sup> the court considered another case growing out of a “Day of Silence.” The day had been celebrated at the high school for several years, sponsored by the Gay/Straight Alliance.<sup>311</sup> Some of the students wore labels indicating their participation and remained silent during the day, except when required to speak in class or to a member of the staff.<sup>312</sup> Some of the students and staff wore shirts bearing the message “Be Who You Are.”<sup>313</sup>

304. *Id.* at 1248 (citation omitted).

305. *Id.* at 1248-49.

306. *Id.*

307. *Id.* at 1249. The Eleventh Circuit quoted this language in its 2006 decision *White v. Nich*, No. 05-15064, 2006 WL 1594213, at \*2. This case again concerned a challenge to a ban on clothing bearing a Confederate flag. *Id.* at \*1. The court said the student speech can be restricted on the basis of either *Tinker* or, even in the absence of showing a likely disruption, on the basis of the school system’s responsibility to develop good citizenship, found in *Fraser*. *Id.*

308. *Scott v. School Bd.*, 324 F.3d 1246, 1249 (11th Cir. 2003).

309. *Id.* Interestingly, having set out such a *Fraser* based rationale, the court then added that there had been a history of racial tension and fights. *Id.* Thus, the court said, the ban could be justified under *Fraser* or *Tinker*. *Id.*

310. 619 F. Supp. 2d 517 (N.D. Ill. 2007), *rev’d sub nom.* *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir., 2008).

311. *Id.* at 520.

312. *Id.*

313. *Id.*

The legal issue arose when a student group wanted to hold a “Day of Truth” the day after the “Day of Silence.”<sup>314</sup> The school agreed that they could do so on the same basis as the previous day.<sup>315</sup> They could remain silent and could display pins, shirts, and the like with a message of “Be Happy, Be Straight” or “Straight Alliance.”<sup>316</sup> A student who professed religious beliefs against homosexuality went beyond these messages and wore a T-shirt that had “My Day Of Silence, Straight Alliance” on the front and “Be Happy, Not Gay” on the back.<sup>317</sup> School officials made the student black out the “Not Gay” portion of the message.<sup>318</sup> The case went to court seeking damages for that action and an injunction against future similar actions.<sup>319</sup>

The court found no violation of the student’s constitutional rights.<sup>320</sup> The court said “school officials may prohibit a public high school student from displaying negative statements about a category of persons, including homosexuals, that are inconsistent with the school’s educational goal of promoting tolerance.”<sup>321</sup> The court distinguished the message displayed from the message “Be Happy, Be Straight.” The latter was said to be a positive statement about being straight, not a directly negative comment about being gay.<sup>322</sup> If school officials had prevented that positive statement, as alleged, there would have been a violation.<sup>323</sup> “Since, on the previous day students were permitted to display messages supporting being homosexual, the next day’s suppression of a message supporting being heterosexual should be understood as viewpoint discrimination . . . .”<sup>324</sup>

The trial court’s denial of an injunction was appealed to the Seventh Circuit as *Nuxoll ex rel. Nuxoll v. Indian Prairie School District*,<sup>325</sup> and the appellate court, with Judge Posner writing, ruled that the injunction should have been granted.<sup>326</sup> Interestingly, however, the disagreement between the courts was over application,

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314. *Id.* This was by no means the first case raising the issue of straight pride messages. In *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001), a student wore a straight pride sweatshirt to which some of the students took offense. *Id.* at 1069. There was some evidence of “gay-bashing,” but, it was unclear to the court if the principal could establish a reasonable likelihood of a substantial disruption. *Id.* at 1072. The issue is a bit confused, because while there had been a number of fights, they appear to revolve around issues of race, rather than sexual orientation. *Id.*

315. *Zamecnik*, 619 F. Supp. 2d at 520.

316. *Id.*

317. *Id.* at 526.

318. *Id.*

319. *Id.* at 521.

320. *Id.* at 527. The court did indicate that, if the school had prevented her from replacing “NOT GAY” with “BE STRAIGHT,” that that would be a violation. *Id.* at 528. The facts on that issue seemed unclear.

321. *Id.* at 527. Indeed, where the message is particularly strong, a school system could face liability for failure to act. *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (9th Cir. 2003), allowed a suit by homosexual students to proceed, finding that there might be sufficient evidence for a jury to conclude that the school had been deliberately indifferent to student-to-student anti-homosexual harassment. *Id.* at 1135.

322. *Zamecnik*, 619 F. Supp. 2d at 527.

323. *Id.* at 528.

324. *Id.*

325. 523 F.3d 668 (7th Cir. 2008).

326. *Id.* at 676.

rather than theory.<sup>327</sup> As to application, the Seventh Circuit noted that the expression “Be Happy, Not Gay” could be seen as a play on words since “gay” is not only a word indicating homosexual orientation but also a synonym of “happy.”<sup>328</sup> The court also concluded that the comment might not even be seen as derogatory since it really said no more than the “Be Happy, Be Straight” shirt that the school would allow.<sup>329</sup> While there may be a strong nonpropositional difference between two sentences seemingly making the same point, the “Be Happy, Not Gay” shirt was not seen as an offensive way to say the same thing as a “Be Happy, Be Straight” shirt.<sup>330</sup> In this court’s view, “Be Happy, Not Gay” “is only tepidly negative; ‘derogatory’ or ‘demeaning’ seems too strong a characterization.”<sup>331</sup> It was, at any rate, seen as “highly speculative” that the shirt in question would “poison the educational atmosphere.”<sup>332</sup>

The plaintiff’s success on appeal was only partial. The Seventh Circuit refused to enjoin more generally the enforcement of the school’s rule, and much of the court’s analysis in that regard agreed with the position taken by the district court and espoused here.<sup>333</sup> The Seventh Circuit sided with the right of the schools to place some limits on student speech that stretched beyond the lewd speech of *Fraser* or the drug oriented speech of *Morse*.<sup>334</sup> The court stated:

A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense. The contribution that kids can make to the marketplace in ideas and opinions is modest and a school’s countervailing interest in protecting its students from offensive speech by their classmates is undeniable. Granted, because 18-year-olds can now vote, high-school students should not be “raised in an intellectual bubble,” . . . which would be the effect of forbidding all discussion of public issues by such students. But Neuqua Valley High School has not tried to do that. It has prohibited only (1) *derogatory* comments on (2) unalterable or otherwise deeply rooted personal characteristics about which most people, including--perhaps especially including--adolescent schoolchildren, are highly sensitive. People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being.<sup>335</sup>

The court recognized that there was evidence that at least suggested that “adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school’s expectations.”<sup>336</sup> And, in a statement that is very important for the

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327. *See id.* at 675-76.

328. *Id.* at 675.

329. *Id.*

330. *Id.* at 676.

331. *Id.*

332. *Id.*

333. *Id.* at 675.

334. *Id.* at 674.

335. *Id.* at 671 (citation omitted).

336. *Id.* (citing David M. Huebner et al., *Experiences of Harassment, Discrimination, and Physical Violence Among Young Gay and Bisexual Men*, 94 AM. J. PUB. HEALTH 1200, 1200-01 (2004);

position argued for here, the court said “[m]utual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning.”<sup>337</sup>

Bringing Supreme Court case law to bear, the court noted the need for a realistic fear of a substantial disruption before the school can limit student speech; but the court said that concern is not limited to avoiding violence.<sup>338</sup> That was not, after all, the concern in either *Fraser* or *Morse*. The Seventh Circuit’s reading of those cases led to the conclusion that “if there is reason to think that a particular type of student speech 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 forbid the speech.”<sup>339</sup> While the application of the rule to the shirt at issue may have been flawed, the rule itself “seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way. . . . The list of protected characteristics in the rule appears to cover the full spectrum of highly sensitive personal-identity characteristics.”<sup>340</sup>

#### IV. THE IMPACT OF *MORSE*

It seems clear that *Morse* should be read to allow restrictions of student speech when the speech presents some danger to student welfare. Justice Alito, in his necessary concurrence, showed concern over the dangers found in drug use.<sup>341</sup> While he would not allow the suppression of all speech that interfered with the educational mission of the school, fearing that such a standard would allow the schools to suppress political and social views contrary to those they considered part of the educational mission, drugs presented a danger.<sup>342</sup>

If Justice Alito’s concurrence is intended only to state that *Morse* does not represent a wide-spread broadening of authority on the part of schools to limit student speech beyond that in *Tinker* and its progeny, adding only a category for speech that is dangerous to students, it must still be remembered that those cases should be seen to support the suppression of hate speech. Further, the dangers on which Justice Alito relied might be argued to include psychological and emotional harm,<sup>343</sup> which is, after all, a significant portion of the danger to be found in drug use.

Professor Emily Gold Waldman has examined hateful or hurtful student

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MICHAEL BOCHENEK & A. WIDNEY BROWN, HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 1-3 (2001), available at <http://www.hrw.org/reports/2001/uslgbt/toc.htm>; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 37 (Jodi Lipson ed., 2001), available at <http://www.aauw.org/learn/research/upload/hostilehallways.pdf>).

337. *Id.* at 672.

338. *Id.* at 674.

339. *Id.*

340. *Id.* (citation omitted).

341. *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring).

342. *Id.* at 423-25.

343. See Francisco M. Negron, Jr., *A Foot in the Door? The Unwitting Move Towards a “New” Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1231-32 (2009) (noting that some courts have gone beyond physical danger to include this sort of harm).

speech in a post-*Morse* world.<sup>344</sup> She divides such speech into two categories, distinguishing between speech that identifies and attacks particular students and speech expressing political, social, or religious viewpoints, without such a particularized focus, and says that the Supreme Court cases indicate that the first category should still potentially be subject to regulation.<sup>345</sup> The distinction clearly comports with Justice Alito's distinction between the banner in *Morse* and political speech. Waldman argues that speech that attacks students is similar to the "Bong Hits 4 Jesus" banner in that both endanger student safety.<sup>346</sup> While she suggests that any link between the banner and drug use was weak, "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.' This psychological distress . . . can lead to physical illnesses . . . suicidal ideation" and "violent behavior by victimized students."<sup>347</sup>

Expanding on this distinction between speech that attacks and political speech, she says:

[S]uch *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. 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 could 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 they are going to Hell or calling them derogatory names.<sup>348</sup>

She also notes that this distinction is consistent with the statement in *Fraser* that it is a proper function of schools to teach shared values and civility and seems to agree with the arguments presented<sup>349</sup> that limits on hate speech are consistent with *Fraser*.<sup>350</sup>

Waldman goes on, however, to include a statement such as "homosexuality is shameful" as expressing a general political, social or religious view with real political content.<sup>351</sup> Under that concession, a restriction would be justified only if it presented a substantial disruption or invasion of the rights of others. She notes that

[the] 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.<sup>352</sup>

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344. See Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463 (2008).

345. *Id.* at 492.

346. *Id.* at 492-93.

347. *Id.* at 493.

348. *Id.* at 494-95 (citation omitted).

349. See *supra* Part II.B.2.

350. Waldman, *supra* note 344, at 495.

351. *Id.* at 497.

352. *Id.* at 498.



On the first issue, Waldman draws guidance from Judge Alito's opinion in *Saxe*, contending that the disruption of even one student's education provides sufficient justification for limiting student speech.<sup>353</sup> On the second issue, she argues that the school's ability to step in should not be limited to situations in which they *must* intervene.<sup>354</sup> She seems, then, to see little change resulting from *Morse*, so long as the speech involved is properly analyzed.<sup>355</sup>

Mark Cordes has also examined the impact of *Morse*.<sup>356</sup> He sees no significant erosion in student speech rights and finds, in Justice Alito's concurrence, a distinction between speech that is at the core of the First Amendment and that deserving less protection.<sup>357</sup> Political speech, clearly core speech, can be suppressed only with a particularly strong showing.<sup>358</sup> With regard to hate speech, Cordes says

[then] Judge Alito's analysis [in *Saxe*] strongly suggests that even derogatory and negative speech that might comment on characteristics of a group identity is protected to the extent it involves core religions or religious speech, or involves commentary on social issues . . . . [However,] particularly severe or pervasive speech might not be protected . . . .<sup>359</sup>

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353. See *id.* at 499.

354. See *id.* at 500.

355. Waldman argues that the court in *Nuxoll*, a post-*Morse* case, struck the right balance:

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 forbid the speech." 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." 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."

*Id.* at 501-502 (footnotes omitted). While Waldman agrees with the court's conclusion, she says she would take a slightly different approach, first asking whether the attack was personally directed and then looking to interference. *Id.* at 502. For a discussion of *Nuxoll*, see *supra* notes 325-40 and accompanying text.

Rather than concluding that the shirt was not personally directed, it might simply be argued that the shirt was not an attack. That really seems to be the *Nuxoll* court's conclusion. If Waldman is suggesting that the shirt would actually have to name an individual student to be a personal attack, that would seem too restrictive. If the shirt had been more strongly worded, the court would have allowed the restriction. It was simply too "tepid" to qualify for sanction.

356. See Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL RTS. J. 657 (2009).

357. See *id.* at 672-74.

358. See *id.* at 673-75.

359. *Id.* at 709. Professor Cordes is critical of the decision by the Sixth Circuit in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000). Cordes, *supra* note 356, at 702. That pre-*Morse* case invoked destructive values as a basis for regulation, combined with a broad reading of *Fraser*. The case was brought when a high school student was not allowed to wear a Marilyn Manson T-shirt to school. *Boroff*, 220 F.3d at 467. The principal said that the lines in Manson's songs that might be seen as advocating suicide or promoting drugs and Manson's pro-drug persona were contrary to the school's mission of establishing core values of human dignity, self-respect and responsibility. *Id.* at 470. The court said that "where Boroff's T-shirts contain symbols and words that promote values that are so

Perhaps, again, that should come down to a distinction between stating a belief that homosexual activity is sinful and comments derogatory toward those of a homosexual orientation. The first is religious or political, while the second is purely derogatory.<sup>360</sup>

The Alito concurrence in *Morse* should not be seen as working any real change to the position derived from *Tinker* and *Fraser*. It was, after all, Justice Alito's purpose in writing his concurrence to emphasize that he did "not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court."<sup>361</sup> The arguments herein have been directed toward demonstrating that limitations on hate speech may be justified by the very holdings of the Court that Justice Alito wants to emphasize have not been expanded. Furthermore, his assertion that there are not "necessarily" any grounds for expanding restrictions beyond those already recognized falls short of saying that there can be no such grounds.

## V. CONCLUSION

It may be that, either under analysis based on *Fraser* or on the second prong of *Tinker*, the nation is coming to the realization that school children need to be protected from hate speech. Children may be coming to receive the protection they need in school to thrive. Only in an atmosphere in which their dignity and equality are recognized can children obtain the sort of education to which they are entitled. Speech that impugns that dignity and equality, speech that is degrading on the basis of their race, ethnicity, gender, or sexual orientation ought to be limited by the school authorities. The schools are left with only two choices: They allow the

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patently contrary to the school's educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts." *Id.* at 470.

Cordes said that to the extent that the opinion suggests that a school can ban a T-shirt simply because it promotes values that run contrary to the educational mission of the school, it is inconsistent with *Morse*. Cordes, *supra* note 356, at 702. He does say, however, that the speech involved was not core speech and that, in fact, the lyrics of some Marilyn Manson songs could be held to present a danger. *Id.* He states:

If the shirts are reasonably understood to represent the lyrics, they can arguably be banned, not because the messages are a contrary to a school's educational mission of promoting human dignity and respect for others, but because the message reflected in many of the group's lyrics pose a very real threat to schools.

*Id.*

360. Michael Kent Curtis discusses this distinction and finds it lacking in appeal. See Michael Kent Curtis, *Be Careful What You Wish for: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431 (2009). Curtis states:

Some religious students, of course, insist that they are not denouncing people. They say they are denouncing sexual acts between people of the same sex—a sinful choice, not a status. But for those of us who see sexual orientation as akin to race, homosexuality and heterosexuality are simply part of a person's identity. From this perspective, "hate the sin, but love the sinner" is akin to "love the black person, hate the blackness."

*Id.* at 484. But, it seems a reasonable distinction. While there is no distinction between being black and, at least in the relevant sense, blackness, there is a distinction between one's sexual orientation and one's activities. An assertion that God demands premarital sexual abstinence is not an attack on heterosexuality, and an assertion that sodomy is sinful may not be an attack on homosexuality. If the student is drawing this distinction in the message on the T-shirt, it may not be hate speech.

361. *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring).

speech and may be seen to agree with its content by children too young to understand the intricacies of constitutional law; or, they ban the speech and are seen by those children as supportive of the right of all groups to obtain an education in a setting of dignity and equality.