AFTER *MORSE V. FREDERICK*: THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TAKES ANOTHER STEP TOWARD ABROGATING THE *TINKER* STANDARD FOR STUDENT SPEECH BY PERMITTING RESTRICTIONS ON SPEECH WHICH POSES A "SPECIAL DANGER" TO THE SCHOOL ENVIRONMENT

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I. INTRODUCTION

Schools are among the most important social institutions in our country to parents, educators, employers, and the students who are required by law to attend them.[1] One measure of the longstanding import of education is the high level of state spending on education.[2] The priority given to education by the federal government and federal spending to support elementary, secondary, and postsecondary education has grown dramatically over the past three decades.[3,4] While the right to free speech

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[1]The Massachusetts legislature enacted the first compulsory school attendance law in 1852; all fifty states and the District of Columbia have similar laws. The most recent of these laws was enacted 78 years ago. State Compulsory School Attendance Laws, http://www.infoplease.com/ipa/A0112617.html (last visited Sept. 4, 2008) (citing DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 1 (2004)).

[2]The Fiscal Survey of the States (Dec. 2007), http://www.nasbo.org/Publications/PDFs/Fiscal%20Survey%20of%20the%20States%20December%202007.pdf (last visited Sept. 4, 2008) (finding that states spend 31.9% of total revenues on education).

[3]The Secretary of Education is one of fifteen cabinet officers who serve the President. The Federal Department of Education was created in 1980 to "promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access." U.S. Department of Education, Overview, http://www.ed.gov/about/landing.jhtml?src=gu (last visited Sept. 4, 2008).

[4]In 1980, total federal spending for elementary, secondary, and postsecondary education totaled $27.1 billion, adjusted for inflation. In 2003, total federal spending for the same categories totaled $89.0 billion. The increase of more the 325% in constant dollars reflected a growth in

under the First Amendment to the United States Constitution has repeatedly been characterized as a fundamental liberty[5] safeguarded from invasion by state action,[6] the application of that right to school children has been the subject of much debate.

While at common law schoolmasters exercised parental rights to discipline student speech, the United States Supreme Court abolished the doctrine of *in loco parentis* during the late twentieth century.[7] In the *Tinker* series of cases, the Court articulated a more liberal standard, allowing students full constitutional speech liberties except where that speech materially and substantially disrupted school activities or the school's pedagogical environment.[8] During the past twenty-two years, the Court has limited the application of the protective *Tinker* standard.

Last year, the Supreme Court again chose not to apply the *Tinker* standard when faced with a student speech controversy. In *Morse v. Frederick*, the Court held that the high school principal, Morse, did not violate the student's speech rights by confiscating a banner from him bearing the phrase "BONG HiTS 4 JESUS" at a school-approved, off-campus activity.[9] After considering the importance of anti-drug policies, the Court held that a school could properly restrict student speech at any school event when the student's speech is reasonably viewed as promoting illegal drug use and could "take steps to safeguard" students "entrusted to [its] care" from speech that encourages illegal drug use due to the special danger drugs pose.[10] Four additional opinions were produced. Justice Alito in his concurrence suggested the extension of the majority's holding to

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both Department of Education and other federal programs that support education. Federal Support for Education: Fiscal Years 1980 to 2003, http://nces.ed.gov/programs/quarterly/vol_6/6_3/5_1.asp (last visited Sept. 4, 2008).

[5] While the term "civil liberty" is defined as "freedom from undue governmental interference or restraint," I use the terms "rights" and "liberties" with regard to the civil liberty of freedom of speech interchangeably throughout this Note due to the high frequency with which the United States Supreme Court and modern American usage refers to freedom of speech as a right. *See* BLACK'S LAW DICTIONARY 263 (8th ed. 2004).

[6] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[7] *See infra* Part II.A.

[8] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969); *see infra* Part II.B.

[9] 127 S. Ct. 2618, 2622, 2624 (2007); *see also infra* Part III.

[10] *Morse*, 127 S. Ct. at 2620.

messages promoting violence, based upon the same "special danger" rationale.[11]

In its first opinion addressing student speech since *Morse*, the United States Court of Appeals for the Fifth Circuit was faced with a controversy regarding student speech that threatened a violent attack on the student body.[12] The panel applied the theory Justice Alito introduced in his concurring opinion in *Morse*.[13] Based on the need to protect the captive student body and to shield school officials from litigation, the Fifth Circuit held that school administrators may restrict speech where a threat against the welfare of the students would "likely be interpreted [as a threat] by viewers [of the student's message]."[14] While the Fifth Circuit's decision has now become final, the Supreme Court would likely adopt the Fifth Circuit's interpretation of the "special danger" rule if faced with a similar case.[15]

II. BACKGROUND

A. The Common Law Approach to Student Speech

At common law, un-emancipated minors lacked most fundamental rights and liberties; they were subject, even in their physical freedom, to the control of their parents or guardians.[16] When a parent sent his child to school, he delegated his authority to the schoolmaster.[17] The schoolmaster was entitled to discipline the child concerning any act detrimental to the best interest of the school and student body.[18] American and English courts, in turn, invoked the doctrine of *in loco parentis* to justify their non-intervention when students sought redress.[19]

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[11] *Id.* at 2638 (Alito, J., concurring).

[12] *See* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007); *see also infra* Part V.

[13] *Ponce*, 508 F.3d at 769.

[14] *Id.* at 771 n.3.

[15] *See infra* Part VI.

[16] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) (upholding school district's random urinalysis requirement for participation in interscholastic athletics).

[17] Brian Jackson, Note, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1144 (1991).

[18] *See id.* at 1146; *see also* Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913).

[19] Jackson, *supra* note 17, at 1144.

During the 1960s–1980s, the United States Supreme Court abrogated the doctrine of *in loco parentis* in America's public schools. In three opinions, the Court made clear that because school teachers and administrators act in furtherance of publicly mandated educational and disciplinary policies in their dealings with students, they are deemed surrogates of the state, subject to the commands of the First, Fourth, and Fourteenth Amendments.[20] The 1985 opinion of *New Jersey v. T.L.O.* held that "school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[21] The common law doctrine of *in loco parentis* was found to be "in tension with contemporary reality."[22] Why? Because the doctrine—requiring judicial non-intervention on the theory of parental delegation—was not "consonant with [modern] compulsory education laws."[23] Under almost all circumstances, public school authorities are barred from claiming a parent's immunity under the doctrine of *in loco parentis*.[24]

The common law doctrine has survived in one context. "When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."[25] The child's teacher or administrator is empowered to exercise the degree of restraint and correction necessary to correct the

[20] New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (First Amendment); Goss v. Lopez, 419 U.S. 565 (1975) (Fourteenth Amendment)).

[21] *T.L.O.*, 469 U.S. at 336–37 (holding that school officials were subject to the Fourth Amendment in carrying out searches and other disciplinary functions).

[22] *Id.* at 336.

[23] *Id.* (citing Ingraham v. Wright, 430 U.S. 651, 662 (1977)).

[24] *Id.* at 336–37. Also consider that, in *T.L.O.*, the Court noted that administrators are "state actors for purposes of the constitutional guarantee of freedom of expression." *Id.* at 336. However, one year later the Court cited the doctrine of *in loco parentis* as at least one justification for providing school officials with authority to protect school children from exposure to sexually explicit, indecent, or lewd speech. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (citing Bd. of Educ. v. Pico, 457 U.S. 853, 871–72 (1982)). While the doctrine may not be entirely gone, its scope is clearly limited. *See generally* Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of* In Loco Parentis*: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17 (2002).

[25] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

behavior of the child or protect the child's welfare.[26] Private school authorities acting *in loco parentis* in their dealings with students are not subject to the limits of the First or Fourth Amendments.[27]

B. The Tinker *Standard and Its Progeny*

In a series of cases from 1969 to 1988, the Court articulated a reasonably well-understood standard defining the scope of school administrators' authority over a student's speech.[28] In the first case, *Tinker v. Des Moines Independent Community School District*, the Court held that a school policy prohibiting high school students from wearing black armbands as a form of protest against the Vietnam War violated the First Amendment.[29] At the outset, the Supreme Court articulated the general rule that a student does not shed his or her constitutionally guaranteed liberty of freedom of speech and expression at the schoolhouse gate.[30] Both in school and out of school, students are persons under the Constitution and are entitled to fundamental constitutional rights and liberties.[31] However, students' First Amendment rights are to be "applied in light of the special characteristics of the school environment."[32] The Court held that in order for the State, through school officials, to justify prohibition of a particular viewpoint or expression, the school must produce evidence that it was necessary to avoid material and substantial interference with school activities or the school's pedagogical environment.[33] A school official's "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[34]

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[26] *Id.* at 655 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *434, *441 (1769)); *see* 59 AM. JUR. 2D *Parent and Child* § 10 (2008).

[27] *See T.L.O.*, 469 U.S. at 336.

[28] *See* Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 633 (2002).

[29] 393 U.S. 503, 514 (1969).

[30] *Id.* at 506. *But see Vernonia*, 515 U.S. at 655–56 ("While children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school.").

[31] *Tinker*, 393 U.S. at 511.

[32] *Id.* at 506.

[33] *Id.* at 511, 514.

[34] *Id.* at 508.

In 1986, the Supreme Court issued its opinion in *Bethel School District No. 403 v. Fraser*.[35] Fraser, a student, was suspended for two days after delivering a student government nomination speech in which he referred to the candidate he supported using "an elaborate, graphic, and explicit sexual metaphor."[36] The Ninth Circuit affirmed a damage award for the student, but the Supreme Court reversed.[37] Rather than conduct the "substantial disruption" analysis articulated in *Tinker*, the Court chose to balance the student's freedom to advocate unpopular and controversial views in school against society's interest in teaching students the boundaries of acceptable behavior.[38] Accordingly, the Court upheld the school authority's disciplinary action and articulated that school authorities have restrictive authority where the student's speech or conduct at a school function is "lewd, indecent, or offensive."[39] Although profane and indecent speech by adults is generally protected,[40] the *Fraser* Court made clear that school children do not share that liberty.

The final case of the series, *Hazelwood School District v. Kuhlmeier*, stands for the proposition that a school may set high standards "for the student speech that is disseminated under its auspices . . . ."[41] In *Kuhlmeier*, student staff members of a high school newspaper sought relief at law and in equity, claiming that their First Amendment rights were violated when the school principal directed that two articles be withheld from publication due to content he considered objectionable.[42] The Court stated that a "school may, in its capacity as publisher of a school newspaper or producer

[35] 478 U.S. 675 (1986).

[36] *Id.* at 677–78.

[37] *Id.* at 679.

[38] *Id.* at 681.

[39] *Id.* at 683; *see also* Perry A. Zirkel, *The Supreme Court Speaks on Student Expression: A Revised Map*, 221 EDUC. LAW REP. 485, 486 (2007).

[40] Cohen v. California, 403 U.S. 15, 21 (1971) (reversing breach of the peace conviction of 19-year-old wearing "Fuck the Draft" jacket) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.")

[41] 484 U.S. 260, 271–72 (1988).

[42] *Id.* at 260 (considering articles objectionable because one article pertained to students' experiences with pregnancy and the other pertained to the impact of divorce on students at the school).

of a school play" refuse to "tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."[43] Educators may exercise control over the form and content of school-sponsored speech and expressive activities, such as a school play, so long as their actions are reasonably related to legitimate pedagogical concerns.[44] Through *Tinker* and subsequent cases based on its theory of school children's rights, the Court articulated a manageable standard that became an understood norm for courts and schools.[45]

III. *MORSE V. FREDERICK*

On June 25, 2007, the United States Supreme Court issued its opinion in the case of *Morse v. Frederick*.[46] In *Morse*, Joseph Frederick, a high school student, was suspended from school by the school principal for displaying a banner bearing the phrase "BONG HiTS 4 Jesus" at an off-campus, school-approved event.[47] Frederick administratively challenged his suspension on the basis that the school violated his First Amendment rights.[48] The school district superintendent responded by stating the principal had not disciplined Frederick because the principal disagreed with the content of the message, but because the banner appeared to advocate the use of illegal drugs "in the midst of fellow students, during school hours, at a school-sanctioned activity."[49]

Frederick filed suit.[50] The United States District Court granted summary judgment for the school board and Morse, finding that Principal

[43] *Id.* at 266, 271 (citing *Fraser*, 478 U.S. at 685).

[44] Miller, *supra* note 28, at 632 (quoting *Kuhlmeier*, 484 U.S. at 273).

[45] *Id.* at 663; *see also* Zirkel, *supra* note 39, at 486–87; Ronna Greff Schneider, *General Restrictions on Freedom of Speech in Schools*, 1 EDUC. L. § 2.3 n.61 (2008) (citing various federal district and appellate court decisions recognizing a three-tiered approach to student speech based on the *Tinker-Fraser-Kuhlmeier* trilogy).

[46] 127 S. Ct. 2618 (2007).

[47] *Id.* at 2622–23. Frederick displayed the banner with some friends from school along a street in front of his high school during the January 24, 2002 passing of the Olympic Torch Relay. The torch relay was to pass through Juneau, Alaska, where Frederick attended Juneau-Douglas High School, in anticipation of the 2002 Winter Olympic Games in Salt Lake City, Utah.

[48] *Id.* at 2623.

[49] *Id.*

[50] *Id.*

Morse had reasonably interpreted the banner as promoting illegal drug use, a message that directly contravened school board policies relating to drug abuse prevention.[51] The United States Court of Appeals for the Ninth Circuit reversed on the basis that the school punished Frederick without demonstrating that his speech gave rise to a risk of substantial disruption.[52]

The United States Supreme Court granted writ of certiorari and reversed.[53] The Court noted that the message on Frederick's banner, while cryptic, presented two plausible interpretations that advocated illegal drug use.[54] Frederick's only response was that the banner was meaningless and funny.[55] Justice Roberts' opinion for the Court discussed *Tinker*, *Fraser*, and *Kuhlmeier*, but noted that none of them provided the answer to the present controversy.[56] Rather than try to fit the present controversy into the past framework, the Court went in a different direction. The Court did, however, return to prior case law that took a restrictive view of school children's rights.[57] Citing the case of *Vernonia School District 47J v. Acton*, which saw the easing of restrictions on Fourth Amendment protections on student searches, the Court noted that the nature of students' rights is "what is appropriate for children in school . . . [and] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere."[58] The majority considered federal anti-drug policies and took judicial notice of recent youth drug-use studies.[59] Of particular consequence, the Court characterized a school's interest in deterring drug use by school children as "important . . . perhaps

[51] *Id.*

[52] Frederick v. Morse, 439 F.3d 1114, 1123 (9th Cir. 2006).

[53] *Morse*, 127 S. Ct. at 2624, 2629.

[54] *Id.* at 2624–25 (stating that the banner could be interpreted as encouraging students to "[take] bong hits" or, alternatively, that "bong hits [are a good thing]," or "[we take] bong hits") (citing Guiles v. Marineau, 461 F.3d 320, 328 (2d Cir. 2006)).

[55] *Id.* at 2625; *see id.* at 2649 (Stevens, J., dissenting) ("To the extent the Court independently finds that 'BONG HiTS 4 JESUS' *objectively* amounts to the advocacy of illegal drug use—in other words, that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that.").

[56] *See id.* at 2625–27.

[57] *Id.* at 2627–29.

[58] *Id.* at 2627 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 829–30 (2002)).

[59] *Id.* at 2628.

compelling."[60] In this context, "[s]tudent speech celebrating illegal drug use at a school event . . . poses a particular challenge for school officials [charged] to protect [students] from the dangers of drug abuse."[61]

The Court held that a principal could properly restrict student speech at any school event when the student's speech is reasonably viewed as promoting illegal drug use and could "take steps to safeguard" students "entrusted to [its] care" from speech that encourages illegal drug use due to the special danger drugs pose.[62] A school authority "may, consistent with the First Amendment, restrict student speech at a school event, when the speech is reasonably viewed as promoting illegal drug use."[63] Despite these seemingly straight-forward statements, the majority opinion spawned four separate opinions and was heavily criticized for its ambiguity.[64,65]

Justice Thomas believed the majority opinion advanced his belief that student speech is unprotected, but that the standard articulated by the

[60] *Id.* (quoting *Vernonia*, 515 U.S. at 661).

[61] *Id.*

[62] *Id.* at 2622.

[63] *Id.* at 2620.

[64] Criticism of the opinion's ambiguity came from groups not traditionally aligned. The Cato Institute said that "[t]he Court failed to provide any clear test for when to carve out exceptions to free speech in school" and that in its "zeal to give the government a win in the 'War on Drugs,' the Court upheld censorship of speech that posed little risk of causing drug use." Hans Bader, *BONG HiTS 4 JESUS: The First Amendment Takes a Hit*, 2006-2007 CATO SUP. CT. REV. 133, 133. Meanwhile, the National Legal Director of the American Civil Liberties Union expressed concern that, "The decision purports to be narrow, and the Court rejected the most sweeping arguments for school censorship. But because the decision is based on the Court's view about the value of speech concerning drugs, it is difficult to know what its impact will be in other cases involving unpopular speech." Press Release, Am. Civil Liberties Union, ACLU Slams Supreme Court Decision in Student Free Speech Case (June 25, 2007), *available at* http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html. Former Supreme Court nominee Robert Bork argued that Chief Justice Roberts and Justice Alito "eschewed clarity and made artificial distinctions . . . [while] damag[ing] [the Court's] integrity and competency" in order to garner the five votes needed to prevail. Robert H. Bork, *4 + 1: And the 1 is Justice Anthony Kennedy*, NAT'L REV., July 30, 2007, at 18, *available at* 2007 WLNR 13946313.

[65] Five opinions were produced in the case. Chief Justice Roberts authored the majority opinion, which was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Thomas filed a concurring opinion. Justice Alito, joined by Justice Kennedy, authored a concurring opinion. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Stevens, joined by Justices Souter and Ginsburg, penned a dissenting opinion.

majority was too uncertain.[66] Justice Thomas discussed the historical limitations on students and the strict obedience mandated by teachers.[67] He advocated that the Court should return to the historical doctrine of *in loco parentis*, preserving the rights of teachers to restrain student conduct that was contrary to the interests of the school and its educational mission.[68] "To elevate . . . impertinence to the status of constitutional protection would be farcical and would indeed be to 'surrender control of the American public school system to public school students.'"[69]

Justice Thomas questioned the continuing viability of *Tinker* in light of the many exceptions created to its standard in the forty years since it was decided.[70] "[W]e continue to distance ourselves from *Tinker* . . . . I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't."[71] Ultimately, Justice Thomas favored disposing of *Tinker* altogether and returning to the historical model.[72]

Justice Alito, joined by Justice Kennedy, set out a concurring opinion which sought to clarify his understanding of the scope of the majority opinion, but which also suggested an extension of the majority's holding to student speech promoting violence.[73] Justice Alito subscribed to the majority opinion on the understanding that it went no further than to restrict speech that a reasonable observer would interpret as advocating illegal drug use and that it provided no support for any restriction on speech that could plausibly be interpreted as commenting on any political or social issue.[74] His opinion rejected the school board's argument that it could bar student

[66] *Morse*, 127 S. Ct. at 2634 (Thomas, J., concurring).

[67] *Id.* at 2630–31 ("[I]n the earliest public schools, teachers taught, and students listened. Teachers commanded and students obeyed.").

[68] *Id.* at 2631–33.

[69] *Id.* at 2636 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

[70] *Id.* at 2634.

[71] *Id.*

[72] *Id.* at 2636.

[73] *Id.* at 2638 (Alito, J., concurring); *see also* Zirkel, *supra* note 39, at 487 ("This concurrence also seemed to suggest, by way of dicta, the likely extension of *Morse* to student messages promoting violence.").

[74] *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

speech that conflicted with its basic "educational mission" due to the likelihood of viewpoint discrimination.[75]

While recognizing that a rule allowing the public school officials to censor any student speech that interferes with the school's educational mission is too broad and subject to abuse,[76] Justice Alito stated that any alteration of the student free speech rules must be based, instead, on some "special characteristic of the school setting."[77] Specifically, that characteristic is present where there is a "threat to the physical safety of students."[78] While parents are able to protect their children outside of the school setting, school officials must have the power to act when children's welfare is threatened in school.[79] "School attendance can expose students to threats to their physical safety that they would not otherwise face . . . . Experience shows that schools can be places of special danger."[80] As such, school teachers and administrators "must have greater authority to intervene before speech leads to violence."[81] As discussed below, Justice Alito's concurrence has been used by the various courts of appeals as the basis for an expansion of school officials' power.[82]

Justice Breyer wrote an opinion concurring in part and dissenting in part. Rather than reach the First Amendment issue, he would have decided the case on the basis of the principal's qualified immunity.[83] Justice

[75] *Id.* at 2637; *see* Bader, *supra* note 64, at 150.

[76] *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring) ("The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission' . . . . This argument can easily be manipulated in dangerous ways . . . .").

[77] *Id.* at 2638 ("[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation [to the school officials] but must instead be based on some special characteristic of the school setting.").

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See infra* Part V.

[83] *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in part).

Breyer, like many of the members of the Court, appeared confused about the scope of the majority's decision.[84]

Justice Stevens, joined by Justices Souter and Ginsburg, dissented.[85] The dissenting Justices believed that the majority opinion further eroded what it saw as the "twin foundations" of *Tinker*.[86] In Justice Stevens' view, the majority rejects these principles due to the unusual importance the majority gives to protecting children from drugs.[87] Moreover, Justice Stevens characterized the majority as using an ambiguous decision to "punt" its constitutional responsibility of determining whether the student's message amounted to "proscribable advocacy" in deference to the decision of a school official.[88] Also noteworthy, the dissenting Justices stated that punishing advocacy of illegal conduct, while unconstitutional in the adult setting absent advocacy amounting to incitement to imminent lawless action, may be permitted under certain circumstances in the school setting.[89] But advocacy of drug use does not come within the "vanishingly small category of speech that can be prohibited because of its feared consequences."[90]

IV. INTERPRETATIONS OF *MORSE* BY THE COURTS OF APPEALS

Between the Court's June 25, 2007, decision in *Morse* and June 25, 2008, nearly two dozen federal courts of appeals cases have analyzed the

[84] *Id.* at 2640 ("I cannot find much guidance in today's decision. The Court makes clear that school officials may 'restrict' student speech that promotes 'illegal drug use' and that they may 'take steps' to 'safeguard' students from speech that encourages 'illegal drug use.' Beyond 'steps' that prohibit the unfurling of banners at school outings, the Court does not explain just what those 'restrict[ions]' or those 'steps' might be." (citation omitted)).

[85] *Id.* at 2643 (Stevens, J., dissenting).

[86] *Id.* at 2644–45 ("Two cardinal First Amendment principles animate both the Court's opinion in *Tinker* and Justice Harlan's dissent [in *Tinker*]. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification . . . . Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.").

[87] *Id.* at 2646.

[88] *Id.* at 2647.

[89] *Id.* at 2645 (discussing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) and *Tinker*'s material and substantial disruption standard).

[90] *Id.* at 2646.

impact of *Morse* while deciding the school speech cases before them. Because the members of the United States Supreme Court came to divergent viewpoints regarding the scope and effect of the majority's decision in *Morse*, it is not surprising that the federal courts of appeals that analyzed the decision during the first year after its issuance have reached varying interpretations of the *Morse* holding and its impact on school administrators' authority.[91]

The first two courts of appeals to address *Morse* were the Second and Eleventh Circuits. In *Wisniewski v. Board of Education of the Weedsport Central School District*, and in *Boim v. Fulton County School District*, the Second and Eleventh Circuits analyzed threats of violence to teachers.[92] In *Wisniewski*, a student sent an instant message to classmates during English class with an image depicting a pistol firing a bullet through a person's head with the message, "Kill Mr. VanderMolen."[93] Mr. VanderMolen was the students' English teacher.[94] The student was suspended for one semester, despite the fact that the student and the school psychologist considered the image a joke.[95] In *Boim*, a student wrote in her personal notebook about a dream in which she shot her math teacher.[96] Her notebook, containing a description of the dream sequence, was taken up in class,[97] and read by another teacher who reported Boim's writings to the

[91] *See, e.g.*, Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 766 (5th Cir. 2007) (regarding student's threat of a Columbine-style attack on his school); Lowery v. Euverard, 497 F.3d. 584, 584 (6th Cir. 2007) (upholding football coach's removal of players from team after coach found student athletes' petition opposing him); Boim v. Fulton County Sch. Dist., 494 F.3d 978, 978 (11th Cir. 2007) (regarding student suspended after writing about her dream to shoot a teacher); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 34 (2d Cir. 2007) (regarding punishment of an eighth grader after having an instant messaging conversation that suggested a teacher should be shot); Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 676 (7th Cir. 2008) (reversing the district court's denial of student's application for a preliminary injunction against school that forbade student from wearing t-shirt stating, "Be Happy, Not Gay").

[92] *Wisniewski*, 494 F.3d at 34; *Boim*, 494 F.3d at 983.

[93] *Boim*, 494 F.3d at 36.

[94] *Id.*

[95] *Id.* at 36–37.

[96] *Boim*, 494 F.3d at 980.

[97] *Id.* at 980–81; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995) (giving schoolteachers and coaches greater freedom to search or seize than others outside the school context.).

principal.[98] The school principal suspended and then expelled Boim.[99] Her expulsion was later overturned by the school board.[100] In both cases, the courts of appeals applied the *Tinker* analysis to determine whether the school acted appropriately.

Both courts found that *Morse* simply reaffirmed the viability of *Tinker*.[101] In *Wisniewski*, the Second Circuit panel quoted only passages from the majority opinion in *Morse* that supported the *Tinker* analysis.[102] The panel stated that the proper rule for student speech is that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"[103] The *Wisniewski* court upheld the school's action after concluding that the student's communication of the image to others would pose a clear risk of substantial disruption.[104]

The Eleventh Circuit in *Boim* reached the same conclusion.[105] According to the *Boim* court, the Supreme Court decision in *Morse* simply reaffirmed the two major propositions of *Tinker*.[106] First, a student does not forfeit her rights at the schoolhouse gate.[107] Second, a court will not interfere with a school's decision "[s]hort of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech."[108] Ultimately, the *Boim* court concluded that the school acted properly under *Tinker* and ruled in the school's favor.[109]

Other courts of appeals have reached the same conclusion. In *Lowery v. Euverard*, the Sixth Circuit addressed a suit by football players expelled

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[98] *Boim*, 494 F.3d at 981.

[99] *Id.* at 981–82.

[100] *Id.* at 982.

[101] *See id.* at 983; Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007).

[102] *Wisniewski*, 494 F.3d at 38–39.

[103] *Id.* at 38 (quoting *Morse* and *Tinker*).

[104] *Id.* at 40.

[105] *Boim*, 494 F.3d at 978.

[106] *Id.* at 983–84.

[107] *Id.* at 982 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[108] *Id.* at 983 (quoting Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1247 (11th Cir. 2003)).

[109] *Id.* at 985 (citing *Tinker* standard as the basis for decision).

from their team after circulating a petition opposing their coach.[110] Ruling for the coach, neither the majority nor the concurring opinion of this Sixth Circuit panel found that *Tinker* had been upset by *Morse*.[111]

V. *MORSE* APPLIED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In November 2007, the Fifth Circuit released its first opinion interpreting *Morse* in *Ponce v. Socorro Independent School District*.[112] Of the five courts of appeals that had addressed *Morse* at the time, the *Ponce* decision contained the most thorough analysis of the *Morse* decision. The panel attempted to define the true holding of *Morse*, to articulate the application of the *Morse* holding to non-drug related cases, and to explain the effect *Morse* had on school administrators' ability to place permissible content-based restrictions on student speech.[113]

In *Ponce*, a Texas high school student with an otherwise clean record was transferred to an alternative education program after another student told teachers that Ponce had written in his notebook about his desire to commit a Columbine-style attack at his high school.[114] Ponce claimed that the writing in his notebook was part of a larger work of fiction about a pseudo-Nazi group, but the assistant school principal considered its contents a "terroristic threat."[115] Basing his decision on the "safety and security of the students and the campus," Assistant Principal Aguirre suspended Ponce for three days and recommended that Ponce be placed in an alternative education program.[116] After losing an appeal to a school board committee, Ponce's parents placed him in a private school based on

[110] 497 F.3d. 584, 584 (6th Cir. 2007).

[111] Both of the judges signing the majority opinion and the concurring judge cited *Tinker* as the decisional law. Circuit Judge Ronald Lee Gilman stated "*Tinker* has been in force for several decades now, and the Supreme Court's recent holding in *Morse* does nothing to undercut its application . . . . [T]he Supreme Court has specifically given us one test for students . . . ." *Id*. at 601–02.

[112] 508 F.3d 765 (2007).

[113] *See generally id.*

[114] *Id*. at 766.

[115] *Id*. at 766–67.

[116] *Id*. at 767.

concerns that the school's findings would become part of his permanent record and adversely affect his ability to attend college.[117]

Ponce and his parents brought suit to enjoin the transfer and any reference to the contents of the writing or the alleged threats.[118] The district court granted a preliminary injunction and held that Ponce's writing was protected unless it "materially and substantially interfered with discipline or collided with the rights of others."[119] The district court found that the principal's statement that he based his decision upon, "the training I have received as an Administrator within the Socorro Independent School District with regard to protection and safety of students," was insufficient to punish Ponce because there was no evidence indicating that the principal was trained to recognize what constitutes terroristic threat.[120] The district court believed that his decision was "based on nothing other than mere supposition or base reaction."[121] As such, under the *Tinker* standard, the evidence presented by the school was inadequate to establish that the school had acted upon a reasonable belief that the disruption would occur.[122] The school appealed.[123]

The Fifth Circuit panel reversed the district court's decision, holding that Ponce's claim for an injunction could not possibly succeed on the merits because the school's action was permissible in light of the *Morse* decision and Alito's concurrence.[124] The panel understood *Morse* as holding that speech advocating drug use is per se unprotected because of the harm it stimulates.[125] Under the language of *Morse*, school officials can censor any speech regarding a harmful activity that may be classified as an "'important-indeed, perhaps compelling interest' . . . with little further

[117] *Id.*

[118] *Id.*

[119] Ponce v. Socorro Indep. Sch. Dist., 432 F. Supp. 2d 682, 683 (W.D. Tex. 2006), *vacated*, 508 F.3d 765 (5th Cir. 2007).

[120] *Id.* at 705.

[121] *Id.*

[122] *Ponce*, 508 F.3d at 767–68.

[123] *Id.* at 768.

[124] *Id.*

[125] *Id.* at 769.

inquiry."[126] The unanimous Fifth Circuit panel concluded that the *Morse* Court "did not provide a detailed account of how the particular harms of a given activity add up to an interest sufficiently compelling to forego *Tinker* analysis."[127] Thus, it needed to determine the extent of the *Morse* holding to non-drug cases before it could address the merits of appellant's case.

Due to the ambiguity caused by the failure of the Supreme Court to detail how and when *Tinker* may be skipped, the panel turned to Justice Alito's concurring opinion to determine what type of harms should qualify.[128] Justice Alito, the panel found, articulated the rule that student speech is unprotected where it advocates a harm that is "demonstrably grave" and that "derives that gravity from the 'special danger' to the physical safety of students arising from the school environment."[129] The panel ultimately decided that *Morse* recognizes a trend toward allowing restrictions on student speech where the speaker proposes a type of harm that is great enough for school officials to act without determining the speech's disruptive potential.[130]

Drawing on Justice Alito's opinion, the panel stated that the "heightened vulnerability of students arising from the lack of parental protection and the close proximity of students with one another makes schools places of 'special danger' to the physical safety of the student."[131] As such, school officials must have the authority necessary to intervene *before* student speech leads to violence.[132] While *Tinker*'s focus on the result of the speech "adequately determines" the limits of that authority in most cases and thereby preserves the First Amendment in public schools, *Tinker* "will not always allow school officials to respond to threats of violence appropriately."[133]

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[126] *Id.* (quoting Morse v. Frederick, 127 S. Ct. 2618, 2628 (2007)) (stating that after the *Morse* opinion, school officials may act to the extent necessary to prevent "a harmful activity that may be classified as an 'important-indeed, perhaps compelling interest.'").

[127] *Id.*

[128] *Id.* at 770 ("The concurring opinion therefore *makes explicit what remains latent* in the majority opinion.") (emphasis added).

[129] *Id.* (quoting *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring)).

[130] *Id.*

[131] *Id.* (quoting *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring)).

[132] *Id.* ("School officials must have greater authority to intervene before speech leads to violence.").

[133] *Id.*

The *Ponce* panel believed that the case before it should, like *Morse*, be decided based on the content of the message rather than *Tinker*'s result-based standard.[134] Like *Morse*'s analysis of the "perhaps compelling" harms of drug use, the Fifth Circuit held that the lack of forewarning, the recent history of systematic school shootings, and the nature of the school setting permit the school to enforce content-based restrictions on any threat of violence to the well-being of the school population.[135] While *Tinker* should "remain the prevailing norm," courts must recognize that school attendance creates a captive group, protected just by the school's limited personnel.[136] Certainly, the panel reasoned, if school administrators are permitted to prohibit speech that promotes drug use because of the unique threat to the safety of students, threats of violence to the school population as a whole must be as easily addressed.[137]

The panel found it untenable to force school officials to wait until a threat is acted upon before they are permitted to respond.[138] While schools cannot expel students just because they are "'loners,' wear black, and play video games," school administrators may treat any threat of violence against the school population, no matter its form, as unprotected speech.[139] Whether Ponce's journal was fiction or an unrealized plot, the school principal acted properly in response to a perceived danger that he believed was "serious and palpable."[140] No disruption to the school was required. "School administrators," the panel believed, "must be permitted to react . . . decisively to address a threat of physical violence against their

[134] *Id.*

[135] *Id.* at 771 ("[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis." (quoting LaVine v. Blane Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001))).

[136] *Id.* at 770.

[137] *Id.* at 771–72.

[138] *Id.* at 772.

[139] *Id.* (quoting *LaVine*, 257 F.3d at 987) (comparing threats of violence against a school to yelling fire in a crowded theater. *See* Schenck v. United States, 249 U.S. 47, 52 (1919)).

[140] *Id.* at 771 n.3 (quoting Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007)) (finding that the *Morse* analysis does not look to the student's intent but rather to the likely interpretation of the message and the possible message sent by the school official's failure to act; comparing the banner in *Morse* to the notebook in *Ponce*).

students, without worrying that they will have to face years of litigation . . . as to whether the threat posed a real risk" of a disturbance.[141]

Looking to the majority opinion in *Morse*, *Ponce* clarifies that the administrator's action is reasonable where a threat against the welfare of the students would "likely be interpreted by . . . viewers [of the student's message]"[142] and where "failing to act would send a powerful message to the students in her charge" about the dangers of the harm proposed by the student's speech.[143] Punishing speech threatening a Columbine-style attack sends a message to the student and the student body that the school administration will not tolerate threats of violence against the student body.[144] The panel opined that even the dissenting Justices would likely agree that the content-based restriction on Ponce's speech was constitutionally permissible.[145] Threatening speech can be proscribed and immediately acted upon by school officials without offending the First Amendment.

The *Ponce* court also looked to the earlier decisions in *Boim* and *Wisniewski*.[146] The panel distinguished their decision from the decisions of other circuits on the ground that a threat of violence to an individual teacher should be analyzed under *Tinker* while a violent threat against the student body as a whole, like advocating marijuana use for the whole, should be analyzed under the standard articulated by the *Morse* concurrence.[147] Because the threats in *Boim* and *Wisniewski* were "discrete in scope and directed at adults," they did not qualify for the "heightened level of harm analysis" articulated by Justice Alito in *Morse* and developed by the Fifth Circuit in *Ponce*.[148]

[141] *Id.* at 772.

[142] *Id.* at 771 n.3 (citing *Morse*, 127 S. Ct. at 2624–25).

[143] *Id.* (quoting *Morse*, 127 S. Ct. at 2629).

[144] *Id.*

[145] *Id.* at 772 n.4 ("In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor *expressly advocates that it is illegal and harmful to students*." (quoting *Morse*, 127 S. Ct. at 2644 (Stevens, J., dissenting))).

[146] *Id.* at 771.

[147] *Id.* at 771 n.2.

[148] *Id.*

VI. *PONCE* AS A REASONABLE FIRST AMENDMENT RESTRAINT ON STUDENT SPEECH: PERMITTING RESTRICTIONS ON SPEECH WHICH POSES A "SPECIAL DANGER" TO THE SCHOOL ENVIRONMENT

Since the publication of the *Ponce* decision, at least five other courts have addressed the Fifth Circuit's opinion. In *Nuxoll ex rel. Nuxoll v. Indian Prairie School District # 204*, the Court of Appeals for the Seventh Circuit, with Judge Posner writing for the majority, stated that the Fifth Circuit had gone astray by finding Justice Alito's decision controlling.[149] Because the concurring Justices were merely "expressing their own view of the permissible scope" of speech regulation, their opinions could not control.[150] The Fourth Circuit, in addressing a section 1983 action against police officers who seized weapons from a man who told an emergency hotline worker that he was suicidal and "might as well die at work," cited *Ponce* for the proposition that defendants in school threat cases, where suspended or expelled students sue, almost uniformly win where they have taken action to protect others' safety.[151] Each of the other decisions citing *Ponce* has been by a federal district court within the Fifth Circuit, discussing the *Ponce* court's application of the standard for issuing a preliminary injunction.[152]

While guessing about how the Supreme Court may rule in the future is a dicey proposition, five Justices seem positioned to support the Fifth Circuit's interpretation of the First Amendment in *Ponce*. Justice Thomas' concurring opinion, at one end, calls for a return to greater school official

[149] 523 F.3d 668, 673 (7th Cir. 2008) (In *Nuxoll*, the plaintiff argued that Justice Alito's concurrence was "controlling" but the Seventh Circuit panel stated that both the plaintiff and the Fifth Circuit were wrong. The concurring Justices merely submitted a concurrence to a five-vote majority opinion, and, as such, their opinion could not be controlling.).

[150] *Id.*

[151] Mora v. City of Gaithersburg, 519 F.3d 216, 223 (4th Cir. 2008).

[152] Sec. & Exch. Comm'n v. Amerifirst Funding, Inc., No. 3:07-CV-1188-D, 2008 WL 577226, at *1 (N.D. Tex. Mar. 4, 2008); Int'l Longshoremen's Ass'n Warehouse Workers Local 1504-8 v. S. Atl. & Gulf Coast Int'l Longshoremen's Ass'n, AFL-CIO, 543 F. Supp. 2d 662, 666–67 (S.D. Tex. Feb. 26, 2008); United States v. Cornerstone Wealth Corp., No. 3:05-CV-2147-D, 2008 WL 336384, at *2 (N.D. Tex. Feb. 5, 2008).

authority over student speech and to the historical rights of student speakers: none.[153]

Other Justices seem poised to accept the concept of a speech limitation for speech posing a "special danger" for another reason: it proposes illegal activity. At oral argument, Justice Scalia asked, "[w]hy do we have to get into the question of what the school board's policy is . . . ? [I]t must be the policy of any school to discourage breaking of the law."[154] Moments later, he added, "[w]hy can't we decide this case on that narrow enough ground, that any school whether it has expressed the policy or not, can suppress speech that advocates violation of the law?"[155]

Justice Alito's concurrence, also signed by Justice Kennedy, articulated why simply barring all speech that advocates a violation of the law is not sufficient to satisfy their concerns. These Justices expressed their support for a restriction on "speech that a reasonable observer would interpret as advocating illegal drug use" while withholding support for "any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."[156]

The *Ponce* decision, allowing school administrators to restrict speech after a threat against the welfare of the students that would "likely be interpreted by . . . viewers [of the student's message]" fits the demands of Justice Alito's concurrence and the concerns of the *Tinker* court.[157] Unlike conscientious objection, speech proposing violent action, the use of illegal drugs, or other advocacy that proposes a direct physical harm to the student body almost uniformly lack social or political value. Official response to speech advocating a "special danger" to the student body is not action taken out of a "mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint."[158] Rather, such a response

[153] Morse v. Frederick, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring) ("In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.").

[154] Transcript of Oral Argument at 12, *Morse*, 127 S. Ct. 2618 (No. 06-278).

[155] *Id.*

[156] *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

[157] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771 n.3 (5th Cir. 2007) (citing *Morse*, 127 S. Ct. at 2624–25).

[158] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) ("In order for the State in the person of school officials to justify prohibition of a particular expression of

is an action by school officials to proscribe, prevent, or remedy speech endangering a group of people required by law to be present in a confined space and unprotected by their natural guardians, their parents.

Ultimately, school officials need to be able to rely upon clear guidelines. Chief Justice Roberts addressed this matter at oral argument, indicating his belief that school administrators should not have to fear the consequences of being forced to litigate a speech issue every time they act pursuant to school policies.[159] A school official acting in good faith to ameliorate a newly discovered or advocated danger to the physical safety of the students should not have to face a decade of litigation in return for his or her concern. Student speech on topics of political or social concerns is valuable. Students whose speech is suppressed despite its political or social value will still be able to seek redress.

A well-defined "special danger" restriction on students' First Amendment liberties would allow school administrators to prevent the danger to the safety of the student body proposed by the speech and to take appropriate action with the student speaker. School administrators should be permitted to react decisively to address student speech that poses "demonstrably grave" consequences for the welfare of the school environment—speech which poses a "special danger"—and which lacks redeeming social value. Other federal courts of appeals and ultimately, the Supreme Court, should adopt the theory of the "special danger" rule from the Fifth Circuit's opinion in *Ponce*.

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.").

[159] Transcript of Oral Argument at 29–30, *Morse*, 127 S. Ct. 2618 (No. 06-278) ("[T]here's a broader issue of whether principals and teachers around the country have to fear that they're going to have to pay out of their personal pocket whenever they take actions pursuant to established board policies that they think are necessary to promote the school's educational mission.").