
A FOOT IN THE DOOR? THE UNWITTING
MOVE TOWARDS A “NEW” STUDENT
WELFARE STANDARD IN STUDENT SPEECH
AFTER *MORSE V. FREDERICK*

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TABLE OF CONTENTS

Introduction	1222
I. An Emerging New Standard?	1223
A. The “Student Welfare” Standard	1223
B. The Unwittingly Supportive Concurrence	1226
II. Is There Support for a Student Welfare Standard in <i>Tinker</i> and <i>Fraser</i> ?	1228
A. <i>Tinker</i> ’s Forgotten Prong: “Impinging on Rights of Others” as an Early Student Welfare Approach?	1228
B. Was <i>Fraser</i> ’s “Plainly Offensive Language” an Early Form of Student Welfare?	1232
III. What Have the Courts Done Since <i>Morse</i> to Indicate a Move Towards a Student Welfare Standard?	1236
Conclusion	1240

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INTRODUCTION

It has been four decades since the Supreme Court ruled that students do not leave their constitutional free speech rights at the schoolhouse door.¹ Now, there seems to be a foot not only in the schoolhouse door, but also in the proverbial door to an emerging new standard in the arena of student speech. With *Morse v. Frederick*,² the Supreme Court appeared to carve out a new leg in student speech jurisprudence premised on the notion that schools can regulate speech when student welfare is at issue.³ The Court's decision and the three concurring opinions leave many questions unanswered, including whether *Morse* articulates a new rule⁴ or

1. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

2. 127 S. Ct. 2618 (2007).

3. See discussion *infra* Part I.A.

4. See *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). The concurrence stated:

The Court is also correct in noting that *Tinker*, which permits the regulation of student speech that threatens a concrete and ‘substantial disruption,’ *does not set out the only ground* on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.

Id. (emphasis added) (citations omitted). Some courts appear to seize implicitly on Alito’s “not the only ground” language in support of a separate standard. The U.S. Courts of Appeals for the Fifth and Eleventh Circuits, for instance, along with district courts in Texas, Arizona, California, and Pennsylvania, refuse to dismiss *Morse* as a limited exception to *Tinker*. See *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771-72 (5th Cir. 2007) (relying on *Morse* to find that the expulsion of a student based on the contents of his journal, which included threats of attack on the school, was permitted because it posed an imminent danger to the student body); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (reasoning that the rationale in *Morse* applies to speech that is reasonably construed as a threat of violence in school); *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, 561 F. Supp. 2d 1078, 1091 (D. Ariz. 2008) (noting that *Morse* stands for the proposition that the *Tinker* “substantial disruption” standard is not applicable to all student free-speech cases); *Miller ex rel. Miller v. Penn Manor Sch. Dist.* 588 F. Supp. 2d 606 (E.D. Penn. 2008) (finding that *Morse* broadly allows for the restriction of speech that promotes illegal behavior or communicates the threat of violence); *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 911 (S.D. Tex. 2007) (stating that the general principles outlined in *Morse* have “broader application”); *Nguon v. Wolf*, 517 F. Supp. 2d 1177 (W.D. Wis. 2007) (citing *Morse* and *Hazelwood* in finding that groping and making out at school were not protected activities under the First Amendment). Thus, courts appear to share a new view that permits the regulation of student speech where the safety of students is at issue without recourse to *Tinker*’s “substantial disruption” test. The U.S. Court of Appeals for the Seventh Circuit, while disagreeing with the Fifth Circuit’s interpretation of the Alito concurrence as “controlling,” appears to have expanded the notion of a new student welfare standard by recognizing that the threat of harm justifying regulation is not limited to threats involving physical violence. See *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008). It is unclear whether the Seventh Circuit was actually stating an exception to the first prong of *Tinker*, but the opinion does evince a willingness to stretch the parameters of “substantial disruption” to include instances that portend harm that is not of a physical nature. The Seventh Circuit’s rationale thus appears in line with an even broader ruling in

merely an exception⁵ to the one stated in *Tinker v. Des Moines Independent Community School District*.⁶

But, whether it is one or the other matters less than whether the Court, in a fractured opinion, has begun a move (albeit unwittingly) towards a recognition that student welfare can form the basis for public schools to regulate student expression.⁷ This Article explores how the majority opinion in *Morse* and the concurrence of Justices Alito and Kennedy support the notion of a student welfare standard; how the student welfare standard finds underpinnings in both *Tinker's* forgotten prong and to a lesser extent *Bethel School District No. 403 v. Fraser*;⁸ and how the lower courts are starting to mold this new standard.

I. AN EMERGING NEW STANDARD?

A. The “Student Welfare” Standard

If you want to make a point, put it front and center. And, that is precisely what the Supreme Court did when it articulated the view that schools may regulate student expression premised on student welfare in *Morse v. Frederick*.⁹ Two paragraphs into the majority opinion, the Supreme Court wrote, “schools may take steps to *safeguard* those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”¹⁰ In choosing the word “safeguard,” the Court began carving out a new

Boim, where the Eleventh Circuit emphasized that courts should allow school officials to exercise their professional judgment to restrict student speech in order to prevent an unhealthy or unsafe learning environment. 494 F.3d at 994; *see also* John Dayton & Anne Proffitt Dupree, *Morse Code: How School Speech Takes a (“Bong”) Hit*, 233 Educ. L. Rep. (West) 503, 520 (Aug. 21, 2008) (speculating, *inter alia*, about whether the Supreme Court is “more directly recognizing school authority over types of student speech that were never protected under the Constitution, in *Tinker* or otherwise”).

5. *See Morse*, 127 S. Ct. at 2634, 2636 (Thomas, J., concurring) (stating that “[t]oday the Court creates another exception” and adds “to the patchwork of exceptions to the *Tinker* standard”).

6. 393 U.S. 503 (1969).

7. *See Nuxoll*, 523 F.3d at 674 (citing *Tinker* for support but articulating a student welfare standard flowing from *Morse* and *Fraser*); *see also Krestan*, 561 F. Supp. 2d at 1091 (stating that the U.S. Supreme Court in *Morse* “expressly rejected the notion that *Tinker* categorically applies to all student free speech, explaining that ‘the mode of analysis set forth in *Tinker* is not absolute’ and that the Supreme Court has not uniformly invoked *Tinker's* ‘substantial disruption’ analysis when resolving First Amendment student speech claims”); *Pounds*, 517 F. Supp. 2d at 911 (citing *Morse* for the proposition that justifying limits on student speech does not always require application of *Tinker's* substantial disruption standard).

8. 478 U.S. 675 (1986).

9. 127 S. Ct. at 2622.

10. *Id.* (emphasis added).

sphere for school action around student speech.¹¹ Where *Tinker*, *Hazelwood School District v. Kuhlmeier*,¹² and *Fraser* spoke to a school's ability to regulate student expression with regard to disruption, curricular control, and offensive language,¹³ in *Morse*, the Court premised its rule on none of these bases specifically, but rather it articulated the school's interest as one that involves its ability to safeguard or protect student well-being.¹⁴ This new standard is one that is being recognized by federal courts in the wake of *Morse*.¹⁵

As it struggled with this new standard in *Morse*, the Court searched not only for a framework to analyze the regulation of student speech, but also to identify what underpins the choice to regulate this speech. In other words, because no existing standard was a precise fit, the Court tried to determine what grounds—other than those articulated in the student speech trilogy—can form a basis for regulating student expression. It began the search by focusing on the broad rule of *Fraser* that schools can “determine ‘what manner of speech in the classroom or in school assembly is *inappropriate*.’”¹⁶

Turning next to its previous decision in *Vernonia School District 47J v. Acton*,¹⁷ the *Morse* Court again referenced the schools' ability to regulate constitutional rights premised on “what is appropriate for children in school”¹⁸ and “the schools' custodial and tutelary responsibility for children.”¹⁹ Linking the appropriateness question of these cases to the question of the “health and well-being of young people,”²⁰ the Court then wrote that, “[e]ven more to the point . . . deterring drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”²¹ And, as if to erase any doubt that it was indeed talking about student welfare, the Court recognized that

11. See *infra* notes 13–35 and accompanying text.

12. 484 U.S. 260 (1988).

13. See *id.* at 275–76; *Fraser*, 478 U.S. at 685–86; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

14. *Morse*, 127 S. Ct. at 2622. Moreover, the Court appears to cite the trilogy upfront to support the conclusion that the school setting is different from the public square, and therefore schools can regulate speech consistent with some other school mission—in this case the mission to safeguard students against the potential evils of illegal drug use induced by messaging advocating drug use. *Id.*

15. See, e.g., *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 912 n.4 (S.D. Tex. 2007) (emphasizing Justice Alito's assertion in *Morse* that school officials have a duty to shield students from speech that advocates activities that would endanger students).

16. *Morse*, 127 S. Ct. at 2626 (emphasis added) (quoting *Fraser*, 478 U.S. at 683).

17. 515 U.S. 646 (1995).

18. *Morse*, 127 S. Ct. at 2627 (quoting *Vernonia*, 515 U.S. at 655–56).

19. *Id.* at 2627–28 (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829–30 (2002)).

20. *Id.* at 2628.

21. *Id.* (quoting *Vernonia*, 515 U.S. at 661).

schools have a particular challenge in “protect[ing] those entrusted to their care from the dangers of drug abuse.”²²

The Court’s attempt to frame what the new standard might look like is further evidence that the Court was articulating a student welfare standard. For instance, in providing guidance beyond the clear ruling that drug messages can be regulated by schools, the Court was emphatic that danger to the student welfare must be less than abstract.²³ In the Court’s words, the danger must be “serious and palpable.”²⁴

The concurrence of Justices Alito and Kennedy in *Morse* provides more guidance on this new standard, referencing threats that are “serious, if not always immediately obvious,” present, “grave,” and even “unique threat[s] to [the] physical safety of students.”²⁵ The school’s intent must go beyond the mere intent to avoid controversy or merely offensive speech.²⁶ In fact, it is not the offensive nature of the speech, but the potential danger of the message to the student’s well-being that permits the school to regulate the pro-drug message.²⁷ As the Fifth Circuit characterized it in *Ponce v. Socorro Independent School District*,²⁸ “when a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling ‘fire’ in a crowded theater . . . and such specific threatening speech to a school or its population is unprotected by the First Amendment.”²⁹

Moreover, the *Morse* Court’s repeated use of the word “danger” in conjunction with the phrases “drug abuse” or “illegal drug use” throughout the opinion supports the notion that part of a school’s obligation is to ensure the welfare of its students.³⁰ Thus, a school’s attempt to avoid or prevent those or similar dangers by regulating student speech promoting the dangers is permissible.³¹ In this vein, the Court’s reasoning appears akin to that permitting schools to regulate constitutionally unprotected conduct. And, while *Morse* articulated its standard only in the context of drugs, its reasoning

22. *Morse*, 127 S. Ct. at 2628.

23. *Id.* at 2629 (majority opinion).

24. *Id.*

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

26. *Id.* at 2629.

27. *Id.*

28. 508 F.3d 765 (5th Cir. 2007).

29. *Id.* at 772 (citations omitted).

30. *Morse*, 127 S. Ct. at 2621, 2629; *id.* at 2638 (Alito, J., concurring).

31. See Emily Gold Waldman, *A Post-Morse Framework For Students’ Potentially Hurtful Speech (Religious And Otherwise)*, 37 J.L. & EDUC. 463, 487 (2008) (noting Alito’s opinion as critical for the holding and as limiting the holding to threats of students’ physical safety rather than allowing school’s broader authority to regulate speech that interfered with the school’s educational mission).

appears to lead logically to the conclusion that other dangers that can be shown to be “serious and palpable” may well fall within the schools’ sphere of concern such that they may regulate student speech accordingly.³²

It is precisely the ease with which *Morse* may be read to articulate a new student welfare standard beyond the factual application to the instance of drug use³³ that led two Justices to issue their own concurrence attempting to restrict the decision’s application.³⁴ But, that concurrence may have the unwitting effect of recognizing the very student welfare standard it sought to contain.

B. *The Unwittingly Supportive Concurrence*

Perhaps even more telling than the majority opinion is the Alito and Kennedy concurrence in *Morse*.³⁵ Like the majority opinion that begins with the point it most intends to stress, Alito and Kennedy’s concurrence begins with a declaration of what the majority decision does *not* mean.³⁶ The “[opinion] goes no further,” the concurrence suggested, “than to hold that a public school may restrict speech . . . advocating illegal drug use.”³⁷ But, in limiting their concurrence to drug messages (and the great ill they present for students), Alito and Kennedy accepted the premise that there is a sphere in which schools are permitted to regulate that is based on the dangers posed by conduct encouraged by particular messages.

Alito and Kennedy expressly rejected the notion that schools can regulate student speech simply because it “interferes with a school’s ‘educational mission.’”³⁸ The Justices were concerned with

32. The Court relied heavily on scientific data to conclude that the drug “problem remains serious today.” *Morse*, 127 S. Ct. at 2628. The Court also relied on congressional declarations that “part of a school’s job is educating students about the dangers of illegal drug use.” *Id.*

33. See *Zamecnik v. Indian Prairie Sch. Dist.*, No. 07-C-1586, 2007 WL 4569720 (N.D. Ill. Dec. 21, 2007). The *Zamecnik* court stated that in *Morse*

[t]wo of the opinions make clear that the only issue decided is that student speech promoting illegal drug use may be restricted and leave open whether any other speech may be restricted beyond what had previously been held in prior Supreme Court precedents. The principal opinion authored by Chief Justice Roberts (and fully joined by Justice Scalia) discusses prior Supreme Court precedents to show that they are not inconsistent with restricting speech concerning illegal drug use, not in order to narrow those precedents. *Id.* at *5.

34. *Morse*, 127 S. Ct. at 2636-38 (Alito & Kennedy, JJ., concurring).

35. The importance of the concurrence is highlighted by some courts’ characterization of Justice Alito’s concurrence as both “concurring, and controlling.” See *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007).

36. *Morse*, 127 S. Ct. at 2636 (Alito & Kennedy, JJ., concurring).

37. *Id.*

38. *Id.* at 2637.

overreaching that would ultimately squelch legitimate forms of political and social commentary,³⁹ and with what they feared may amount to “inculcation of whatever political and social views are held” by school authorities.⁴⁰ But, even as the concurrence attempted to contain the Court’s decision to illegal drug messaging, it validated the existence of a new standard premised on student welfare.⁴¹ For instance, in attempting to distinguish between political speech and physical safety, the concurrence recognized that schools can regulate speech “based on some special characteristic of the school setting.”⁴² And, in *this* case, the special characteristic “is the threat to the physical safety of students.”⁴³ Alito and Kennedy appear to have recognized that there are some instances where the potential harm to students is so severe (and, in the case of drugs, perhaps palpable and physical rather than theoretical) that schools can act to protect students absent a showing of substantial disruption.⁴⁴

At least one federal circuit court has relied on this rationale to permit the regulation of student speech, expressly finding a student welfare standard in *Morse* that extends beyond the illegal drug scenario. In *Ponce v. Socorro Independent School District*, the Fifth Circuit found that the possibility existed for “a single armed student to cause massive harm to his or her fellow students with little restraint and

39. Here, Alito may be primarily concerned with the regulation of messages that limit the ability of students to freely express religious speech. For instance, the ability to oppose controversial matters like gay rights could, in Alito’s view, be a right protected by the free exercise clause. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214-18 (3d Cir. 2001) (Alito, J.) (finding that an anti-harassment policy, which prohibited harassment on the basis of sexual orientation among other categories, was unconstitutionally overbroad and contrary to the First Amendment); see also *Ponce*, 508 F.3d at 768 (finding a purpose of the Alito concurring opinion in *Morse* to be “ensuring that political speech will remain protected within the school setting”).

40. *Morse*, 127 S. Ct. at 2637 (Alito & Kennedy, JJ., concurring).

41. Accord David Schimmel, *Morse v. Frederick: Did The Supreme Court Weaken or Strengthen Student Freedom of Speech*, 226 Educ. L. Rep. (West) 557 (Jan. 24, 2008). Schimmel wrote:

Does *Morse* allow schools to prohibit any speech that promotes illegal activity? Again, Alito’s opinion says that it does not. However, it may depend on the activity. Thus, it is not likely that *Morse* would cause any judge to hesitate upholding a school rule that punished students for advocating violence. It is unclear, however, when, if ever, non-disruptive advocacy of nonviolent civil disobedience could be prohibited under *Morse*.

Id. at 567-68.

42. *Morse*, 127 S. Ct. at 2638 (Alito & Kennedy, JJ., concurring).

43. *Id.*

44. See *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (stating that “in *Morse*, the Supreme Court broadly held” not only that “[t]he special characteristics of the school environment and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting illegal drug use” but that this “same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence”).

perhaps even less forewarning” in a Columbine-style shooting.⁴⁵ And, the court then equated the characteristics of school shootings with precisely the type of danger “the concurring opinion found compelling with respect to drug use” in *Morse*.⁴⁶

Moreover, notwithstanding the limitations that the concurrence intended to place on the *Morse* Court’s opinion, the phrase “in this case” suggests that the standard is applicable in other cases with facts that have yet to be articulated provided those facts give rise to the special characteristic of student welfare.⁴⁷ And, whereas the majority made more subtle references to a school’s obligation to protect students, the concurrence all but concluded that schools have an obligation to protect student safety including through the regulation of those messages that pose a serious threat to student safety.⁴⁸

II. IS THERE SUPPORT FOR A STUDENT WELFARE STANDARD IN *TINKER* AND *FRASER*?

A. *Tinker’s Forgotten Prong: “Impinging on Rights of Others” as an Early Student Welfare Approach?*

In the years since *Tinker*, the mainstay of many student speech cases has been its “material and substantial disruption” prong.⁴⁹ But, the often forgotten second prong of *Tinker* presents an opportunity to understand the student welfare standard of *Morse*. *Tinker’s* second prong permits schools to regulate student speech where the speech does not “impinge upon the rights of other students,”⁵⁰ as courts have now held.⁵¹ Students need safe environments in which to learn.⁵² The

45. 508 F.3d 765, 771 (5th Cir. 2007).

46. *Id.*

47. *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring).

48. *Id.* at 2638. Justice Alito wrote:

During school hours . . . parents are not present to provide protection and guidance, and students’ movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger . . . school officials must have greater authority to intervene before speech leads to violence Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious.

Id. at 2638.

49. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). *See Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972) (finding that a local ordinance was not overbroad because it was designed to prohibit activity that materially disrupts schoolwork).

50. *Tinker*, 393 U.S. at 509.

51. *See Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072, 1100 (S.D. Cal. 2007), *remanded from Harper v. Poway Unified Sch. Dist.*, 445 F.3d

degradation of such an environment is an infringement on a student's right to learn.⁵³ As a result, speech that threatens safe learning could be argued to fall within the purview of *Tinker's* second prong.

In *Harper v. Poway Unified School District*,⁵⁴ for instance, the Ninth Circuit looked to the part of *Tinker* that upholds school officials' authority to restrict student speech that "'intrudes upon . . . the rights of other students' or 'coll[ides] with the rights of other students to be secure and to be let alone.'"⁵⁵ In *Poway*, a high school student wore a shirt inscribed with the words "Homosexuality Is Shameful" during a "Day of Silence" observance in which students remained silent to show support for tolerance of homosexuality.⁵⁶ When he was suspended for violating a school policy against "hate behavior including derogatory connotations directed against sexual orientation," he sued Poway Unified School District and school officials.⁵⁷ On appeal, the Ninth Circuit found that the t-shirt's derogatory message was a psychological attack on a minority group that historically has been subject to verbal and physical abuse.⁵⁸ As a result, school officials had "a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was

1166 (9th Cir. 2006). In rejecting the plaintiff's argument that the U.S. Court of Appeals for the Ninth Circuit's reasoning was overly broad and its viewpoint discriminatory, the district court cited *Morse* as supporting the Ninth Circuit's reasoning. *Poway*, 545 F. Supp. 2d at 1100. Specifically, the court stated that *Morse's* reasoning that school officials may restrict student speech that is harmful, such as speech promoting drug use, "lends support for a finding that the speech at issue in the instant case may properly be restricted by school officials if it is considered harmful." *Id.*

52. See BELIEFS & POLICIES OF THE NATIONAL SCHOOL BOARDS ASSOCIATION Art. IV, § 2.4: Elimination of Violence and Disruptive Behavior (Nat'l Sch. Bds. Ass'n 2008), available at <http://www.nsba.org/FunctionNav/AboutNSBA/NSBAGovernance/BeliefsandPolicies.aspx> (urging "state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school and school-sponsored events").

53. *Id.* § 2.2: School Climate Assessment (recognizing "the importance of a positive school climate in raising student achievement" and urging "school boards to assess the school climate and establish goals for its improvement").

54. 445 F.3d 1166 (9th Cir. 2006), vacated as moot, 127 S. Ct. 1484 (2007).

55. *Poway*, 445 F.3d at 1177 (citing *Tinker*, 393 U.S. at 508).

56. *Id.* at 1171-73.

57. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 345 F. Supp. 2d 1096, 1111 (S.D. Cal. 2004). The district court ruled that the student stated valid legal claims that the school district had violated his First Amendment rights to free speech, free exercise of religion, and freedom from establishment of religion, but not that the school district also violated his Fourteenth Amendment rights to equal protection and due process. *Id.* at 1106-08, 1110-11, 1114. However, the court declined to issue a preliminary injunction barring the school district from enforcing its ban while the lawsuit proceeded. *Id.* at 1118-22. Chase appealed this refusal in *Poway*, 445 F.3d at 1170.

58. *Poway*, 445 F.3d at 1178-80.

injurious to gay and lesbian students and interfered with their right to learn.”⁵⁹

Interestingly, like the Court in *Morse*, the Ninth Circuit in *Poway* also sought to contain its decision in this case “to instances of derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation.”⁶⁰ And, as in *Morse*, the *Poway* court did not expressly speak about a student welfare standard. What *Poway* did was to build on the notion that schools have a legitimate interest in protecting students.⁶¹ Where that interest expressed itself in *Morse* as the protection of students against the “palpable” harms of illegal drugs, the interest expressed itself in *Poway* as the protection of students from bullying, harassment, or violence based on sexual identity.⁶²

At their core, the interests discussed in *Poway* and *Morse* are about regulating speech in order to prevent harm to students, both physical and psychological. Emily Gold Waldman, in her Eighth Annual School Law Institute article on *Tinker*’s “invasion of rights” prong, concurred that the Court in *Morse* was ultimately targeting the question of student welfare (or “safety,” as she says).⁶³ Waldman highlighted the importance of Justice Alito’s concurrence in *Morse* and noted that Justice Alito recognized the “‘special characteristic’ implicated by *Morse*: ‘the threat to the physical safety of students.’”⁶⁴ Waldman also illustrated that while “both the majority and the Alito concurrence emphasized the protection of student safety as a persuasive reason for upholding restrictions on speech advocating illegal drug use,” such speech does not compel drug use and may amount to judicial recognition that words alone can set into motion a chain of events that threatens student safety.⁶⁵

Waldman also suggested that, as courts continue to wrestle with explaining and applying *Tinker*’s “invasion of rights” prong, they should continue to strike the balance emphasized in *Morse* between protecting a student’s right to engage in political speech and other students’ right to safety.⁶⁶ This is the course that the Ninth Circuit

59. *Id.* at 1179-80.

60. *Id.* at 1183.

61. *See id.* at 1185-86 (noting a school may promote civic responsibility and tolerance).

62. *Id.*

63. Waldman, *supra* note 31, at 488.

64. *Id.* at 487.

65. *Id.* at 489.

66. *See id.* at 492 (arguing for a distinction between speech that targets a particular student and speech that “expresses a general political, social, or religious viewpoint without directly naming or speaking to particular students”).

charted in *Poway* when it held that schools may regulate speech relating “to a core characteristic of particularly vulnerable students and that may cause them significant injury,” but also noted that such regulation should not prevent traditional student speech and political expression.⁶⁷

Stanford Law School student Brian J. Bilford, in his note *Harper’s Bazaar: The Marketplace of Ideas and Hate Speech in Schools*,⁶⁸ also endorsed the Ninth Circuit’s approach.⁶⁹ While acknowledging that the holding in *Poway* “crafted an exception to free speech that runs counter to previously established First Amendment law in both its application and its rationale,” he argued that “this exception is an attempt to distinguish the school setting as one in which the freedom to espouse hate speech must be tempered because its student targets are both *captive* and *vulnerable*.”⁷⁰

Like Waldman, Justice Thomas’ concurrence in *Morse* also appeared to recognize the inherent responsibility of schools to provide for the safety of students when Thomas warned against “judicial oversight of the day-to-day affairs of public schools” and their “judgment calls” about appropriate discipline.⁷¹ He concluded that “[l]ocal school boards, not the courts, should determine what pedagogical interests are ‘legitimate’ and what rules ‘reasonably relat[e] to those interests.’”⁷² Justice Thomas’ opinion reinforced the well-established maxim that courts, lacking educational expertise, should leave the running of the day-to-day operations of schools to the experts, i.e., local boards and school officials.⁷³

A number of courts have focused on Justice Alito’s statement that the justification for restricting student speech lies in whether the speech creates a threat to the physical safety of students.⁷⁴ Some of

67. See *Poway*, 445 F.3d at 1180-83 (holding that the “rights of others” is not so limited as to be construed to apply only to the right to be physically left alone).

68. Brian J. Bilford, Note, *Harper’s Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 447 (2008).

69. See *id.* at 460-65 (noting that, in basing its *Poway* decision on *Tinker*’s “rights of others” prong, the Ninth Circuit permits viewpoint discrimination of speech relating “to a core characteristic of particularly vulnerable students,” which is a good outcome because it helps to protect the rights of minority groups).

70. *Id.* at 448-49.

71. See *Morse v. Frederick*, 127 S. Ct. 2618, 2635-36 (2007) (Thomas, J., concurring) (writing separately to suggest that *Tinker* has no basis in the First Amendment and should be abandoned).

72. *Id.* at 2636.

73. See, e.g., *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 671 (7th Cir. 2008) (acknowledging the merit of a “judicial policy of hands off (within reason) school regulation of student speech” and noting that judges have little knowledge about what constitutes an environment conducive to learning).

74. See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring) (arguing that the basis for altering First Amendment protections is the “special characteristic of the school

these courts have gone beyond threats to physical safety to include speech that threatens psychological and emotional harm to students as speech that may be regulated.⁷⁵ As the Ninth Circuit did in *Poway*, these courts base their justification for speech restrictions on *Tinker*'s second prong and find support for that reasoning in Justice Alito's concurring opinion in *Morse*.⁷⁶ Courts have exhibited an increased sensitivity to students belonging to groups traditionally thought of as vulnerable to physical and verbal attacks, such as racial and ethnic minorities, religious minorities, or gay and lesbian students.⁷⁷ But, even in those cases where a court rules against the speech restrictions imposed by a school district, such as the Seventh Circuit's decision in *Nuxoll v. Indian Prairie School District #204*,⁷⁸ courts have acknowledged the harm that derogatory comments can inflict on students.⁷⁹

B. Was Fraser's "Plainly Offensive Language" an Early Form of Student Welfare?

While *Tinker*'s second prong finds its way into *Morse*'s emerging new standard, another case in the free speech trilogy also appears to express itself in the opinion albeit in a more attenuated manner. In *Fraser*, the Court spoke of "plainly offensive" language, whereas in *Morse* the Court addressed specific external ills that presented some sort of severe and pervasive threat to students, namely, drugs.⁸⁰ What

setting" and the fact that compulsory school attendance requires students to face threats to their safety that they would not otherwise face).

75. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007) (upholding the school district's right to prohibit a student from wearing a T-shirt stating "Be Ashamed, Our School Embraced What God Has Condemned"). Absent some sort of "palpable" evidence of harm or some indicia of immediacy, Justice Alito would certainly take issue with any reliance on his concurrence in *Morse* for the proposition that the Supreme Court approves of limiting students' ability to comment on social and political issues. Nonetheless, in recognizing that "special circumstances" threatening the physical safety of students can justify the regulation of student speech Justice Alito appears to have laid an unwitting cornerstone for just such regulation.

76. See *Poway*, 445 F.3d at 1180-83 (affirming the district court's denial of the plaintiff's requested preliminary injunction but relying on *Tinker*'s "rights of others" prong rather than *Tinker*'s "substantial disruption prong," relied upon by the district court).

77. See *id.* at 1180 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955)) (noting that the Supreme Court has long recognized the effect of oppression on a child's ability to learn).

78. 523 F.3d 668 (7th Cir. 2008).

79. See *id.* at 671 (discussing the harm to students who are the targets of derogatory comments but finding that the statement "Be Happy, Not Gay" could not be characterized as derogatory).

80. Compare *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (finding that certain sexual innuendos are "plainly offensive" and schools have an interest in preventing such language from entering the public discourse), *with Morse v.*

motivates the rationale that schools have a right to insulate students from speech that is “plainly offensive?” Can the rationale of *Fraser* support the student welfare standard? The *Fraser* Court may have been alluding to an early student welfare standard when it held that “terms of debate [that are] highly offensive or highly threatening to others” may be regulated by schools.⁸¹ Of course, *Fraser* was more concerned with the idea that obscene, offensive, and “impertinent” language might erode the very “work of schools” to inculcate “habits and manners of civility.”⁸² But, when considered in conjunction with the Court’s concern that the sexual speech “was acutely insulting to teenage girl students,” and “could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality,”⁸³ there does appear to be an underlying theme around the issue of well-being that goes beyond a mere Victorian sensibility of offensiveness. In fact, modern courts are looking at sexual speech not in the context of old-fashioned social propriety, but as a matter of sexual behavior in which schools have in the words of one court, an “undeniably compelling interest in deterring students from risky sexual conduct.”⁸⁴ In addition, the specific rationale about the impact of some speech on young minds, when taken in the context of our modern understanding of the harms presented by bullying and harassment, may also be understood to address the effect “plainly offensive” utterances can have upon students’ psychological well-being.⁸⁵

Thus, while *Fraser* may be read as solely about order and propriety, the notion that schools have a responsibility to safeguard children—and particularly to attempt to develop the whole child as part of their educational mission—may find support in that underlying, yet not expressly iterated aspect of *Fraser*.⁸⁶

Frederick, 127 S. Ct. 2618, 2629 (2007) (finding the behavior encouraged by the speech, rather than the speech itself, to be offensive).

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

82. *See id.* at 681-82 (emphasizing the role of public schools in furthering democratic citizenship).

83. *Id.* at 683.

84. R.O. et al. v. Ithaca City Sch. Dist. No. 05-CV-695, at 40 (N.D.N.Y. Mar. 30, 2009) (Memorandum Decision and Order).

85. *See* Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 645, 655 (2001) (explaining that the feelings of “social isolation and loneliness” that gay students experience in the school setting are likely to result in academic underachievement and high dropout rates).

86. Perhaps this same underlying rationale undergirds Justice Thomas’ concurring opinion in *Morse* that would grant schools far greater discretion in

Not surprisingly, some courts have found support for the student welfare standard by reading *Morse* as an extension of *Fraser*. For example, the Seventh Circuit in *Nuxoll* appeared to make a link to *Fraser*'s underlying student welfare standard even though it couched its reasoning in terms of substantial disruption. This link was evident when the court stated that, “[f]rom *Morse* and *Fraser* we infer 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.”⁸⁷ Arguably, although missing the danger element, these “symptoms” have as much to do with the student welfare as with a disruption of the educational processes as understood in *Tinker*. Similarly, in *Doninger v. Niehoff*,⁸⁸ the district court read *Morse* as extending *Fraser* “to cover on-campus speech that school administrators could reasonably interpret as advocating the use of drugs, a message ‘clearly disruptive of and inconsistent with the school’s educational mission to educate students about the dangers of illegal drugs and to discourage their use.’”⁸⁹

It can also be argued that *Fraser*'s underlying student welfare rationale is connected to the educational mission of schools. And while some members of the Supreme Court have specifically rejected the “educational mission” of schools as an overly broad basis for regulating student speech,⁹⁰ a narrower version of the “educational mission” of schools centered on student safety may pass muster with some Justices.⁹¹ Schools recognize that student safety is essential to learning. Without a safe environment, schools cannot carry out the

regulating student speech on discipline. *Morse v. Frederick*, 127 S. Ct. 2618, 2635-36 (2007) (Thomas, J., concurring).

87. *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 674 (7th Cir. 2008).

88. 514 F. Supp. 2d 199 (D. Conn. 2007).

89. *Id.* at 213. *But see* *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 643 (D. N.J. 2007) (rejecting the notion that *Morse* is a subset of *Fraser* and pointing out that in *Morse* the Supreme Court expressly rejected the argument that the student’s drug references fell under *Fraser*'s “plainly offensive” standard, which the Supreme Court found “should not be read to encompass any speech that could fit under some definition of ‘offensive’”).

90. *See Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) (noting that often times the “educational mission” of schools may be set by elected or otherwise appointed officials and that such missions may include a particular religious or political theme).

91. *See Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1188-91 (C.D. Cal. 2007) (invoking *Morse* in a case involving student public displays of affection to hold that school officials may restrict student speech that is inconsistent with the school’s basic educational mission, even though the government would lack the authority to restrict similar speech outside the school environment).

mission to educate students.⁹² Thus, even though Justice Alito's concurrence in *Morse* purports to reject the "educational mission" of schools as too broad a justification for regulating student speech,⁹³ a plurality of the Court itself did recognize that under *Tinker* and its progeny there are instances when student speech must yield to the school's mission.⁹⁴ Surely derogatory speech targeting members of minority groups, identified by race, ethnicity, religion or sexual orientation not only interferes with that mission, but can also be said to infringe on the rights of students to learn in an environment free of harassment.

In this context, Justice Thomas' exhortation to return discretion over student expression and behavior to the local administrators strikes a particularly resonant note. His call to overturn *Tinker* is perhaps a "bridge too far," but his argument in favor of more local control is sound public policy, especially at a time when schools need to concentrate their efforts on raising student achievement.⁹⁵

Justice Thomas' concurrence gains further credence given that some federal courts have found a connection between the regulation of student safety and schools' ability to control the school environment. For instance, the Eleventh Circuit, in *Boim v. Fulton County School District*,⁹⁶ held that *Morse* stands for the principle that student 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."⁹⁷ As a result, the court in *Boim* concluded that "[s]hort of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school."⁹⁸ Thus, there appears to be a willingness on the part of some courts to read *Morse* and its concurrences by

92. See Del Stover, *Climate and Culture: Why Your Board Should Pay Attention to the Attitudes of Students and Staff*, AM. SCH. BOARD J., Dec. 2005, at 30, 31, available at <http://www.nsba.org/MainMenu/Governance/KeyWork/Climate-Resources/climate-and-culture.aspx> (discussing the effect of school culture on academic performance and holding that school administrators must be cognizant of the effect of negative perceptions of school safety on the learning process).

93. *Morse*, 127 S. Ct. 2618 at 2637 (Alito, J., concurring).

94. See *id.* at 2626 (majority opinion) (recognizing that *Tinker* allows regulation of speech that amounts to a "material disruption").

95. See Jim Wooten, *Choice Would Stop State School Micromanagement*, ATLANTA J. CONST., Feb. 3, 2009, at A6 (arguing that increased local control would enable school systems to spend money on different programs as necessitated by the school district's particular needs).

96. 494 F.3d 978 (11th Cir. 2007).

97. *Id.* at 983 (quoting *Scott v. Sch. Bd.*, 324 F.3d 1246, 1248 (11th Cir. 2003)).

98. *Id.* (quoting *Scott*, 324 F.3d at 1248).

Justice Alito and Justice Thomas in a way that provides a more expansive interpretation of *Tinker*. This more expansive reading would effectively include *Tinker's* second prong as a viable option for restricting speech and for including the obligation of the school to ensure student safety and well-being as part of its mission to educate students, while escaping the precise requirements of the “substantial disruption” prong. Interestingly, it may not be long before the Supreme Court itself passes on the question more directly. At oral argument recently in another school case also involving a constitutional right, many of the justices heavily explored the question of whether a student’s constitutional right against an invasive search is outweighed by the school’s need to protect the safety of its students. In the words of Justice Souter, “I would rather have [a student] embarrassed by a strip search, if we can’t find anything short of that, than to have some other [students] dead because the [drugs are] distributed at lunchtime and things go awry.”⁹⁹ At least in Justice Souter’s opinion, it would appear such a balancing act would be subject to a “reasonableness analysis” in which the observer would be the school official, the very student welfare standard expressed by the Court in *Morse*.¹⁰⁰

III. WHAT HAVE THE COURTS DONE SINCE *MORSE* TO INDICATE A MOVE TOWARDS A STUDENT WELFARE STANDARD?

Of all of the post-*Morse* student speech and expression cases citing the decision, perhaps the case most pointedly recognizing a student welfare standard in *Morse* is *Ponce v. Socorro Independent School District*. *Ponce* involved a high school student who was disciplined after school officials discovered his personal journal in which he wrote about mounting a “Columbine style” attack on the school.¹⁰¹ The student won an injunction against the school in federal district court, alleging violations of his rights under the First, Fourth, and Fourteenth Amendments and under comparable provisions in the state constitution.¹⁰² The Fifth Circuit vacated the lower court’s injunction

99. Transcript of Oral Argument at 48, *Safford Unified Sch. Dist. #1 v. Redding*, No. 08-479 (Apr. 21, 2009).

100. *Id.* at 49.

101. 508 F.3d 765, 766 (5th Cir. 2007).

102. *Ponce v. Socorro Indep. Sch. Dist.*, 432 F. Supp. 2d 682 (W.D. Tex. 2006), *vacated*, 508 F.3d 765 (5th Cir. 2007). The district court granted the plaintiff’s motion for a preliminary injunction barring the school district from (1) placing the student in the alternative education program; (2) informing third parties that he intended to commit violence; (3) discussing the contents of the journal without his consent; and (4) retaining any reference to the infraction in his school record. *Id.* at 706-07. The district court granted the injunction on First Amendment grounds. *Id.*

against the school,¹⁰³ ruling that school officials had not violated the student's right to free speech when they disciplined him his personal journal entries.¹⁰⁴ Based on the Supreme Court's ruling in *Morse*, the court concluded that such speech is not protected by the First Amendment because it "poses a direct threat to the physical safety of the school population."¹⁰⁵

In *Ponce*, the Fifth Circuit interpreted *Morse* as authorizing schools to regulate speech in order to prevent "harmful activity" and adopted the Supreme Court's view that such regulation is an "important—indeed, perhaps compelling interest."¹⁰⁶ According to *Ponce*, this regulation may be carried out "by school administrators with little further inquiry."¹⁰⁷ It thus appears that *Ponce*, at least in instances where the student speech involves severe harms as opposed to marginal ones, looked to a new standard iterated in *Morse*—a standard outside the traditional *Tinker* analysis.

The Fifth Circuit also placed great weight on Justice Alito's concurrence in *Morse*, characterizing it as "concurring and controlling."¹⁰⁸ This is significant in understanding the potential reach and application of *Morse* because the court used the Alito concurrence to set forth the rationale for why it is not necessary to employ a *Tinker* analysis in student safety cases.¹⁰⁹ According to the *Ponce* court, Justice Alito expounded on the fact that "some harms are in fact so great in the school setting," that requiring school administrators to evaluate their disruptive potential is unnecessary.¹¹⁰ *Tinker*, here, is rendered unnecessary. Thus, *Ponce* appears to hold that a *Morse* analysis enunciates a standard independent of *Tinker*—the student welfare standard.

Unlike other courts that viewed *Morse's* application as limited to situations in which the student speech or expression promotes illegal drug use, the *Ponce* court read *Morse* in a more expansive light.

at 702, 705-07. Relying on *Tinker*, the court held that "the evidence is simply insufficient to prove that Defendant acted based upon a reasonable belief that disruption would occur." *Id.* at 702.

103. *Ponce*, 508 F.3d at 766.

104. *See id.* at 772 (placing emphasis on the violent nature of the student's journal entries and noting that threatening speech does not receive First Amendment protection).

105. *Id.* at 766.

106. *Id.* at 769.

107. *Id.*

108. *Id.* at 768. *But see* *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 673 (7th Cir. 2008) (noting that Justices Alito and Kennedy concurred in the judgment but also joined the majority opinion).

109. *Ponce*, 508 F.3d at 770.

110. *Id.*

Specifically, the *Ponce* court read the majority as holding that “speech advocating drug use” is “*per se* unprotected because of the scope of the harm it potentially foments.”¹¹¹ In other words, the *Ponce* court read the majority in *Morse* as authorizing school officials to forego a *Tinker* analysis where they have a compelling interest in preventing harmful activity.¹¹²

However, the court also found ambiguity in the majority’s opinion on the grounds that it failed to “provide a detailed account of how the particular harms of a given activity add up to an interest sufficiently compelling to forego *Tinker* analysis.”¹¹³ The *Ponce* court concluded that the ambiguity in the majority’s opinion was cured when it was read in conjunction with Justice Alito’s concurrence.¹¹⁴ The court stated, “[t]he concurring opinion therefore makes explicit that which remains latent in the majority opinion: speech advocating 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 is unprotected.”¹¹⁵ Again, this reading of *Morse* is noteworthy in its irony: The very express intent of Justices Alito and Kennedy to contain the scope of the decision is now turned on its head (at least by the Fifth Circuit) and rendered the rule of the case. The Fifth Circuit clearly read *Morse* as an exception to *Tinker*, just as *Fraser* and *Kuhlmeier* are considered exceptions. It certainly did not view *Morse* as revitalizing *Tinker*’s second prong.

Unlike the Ninth Circuit in *Poway*, which confronted the psychological harm caused by derogatory speech, the harm the Fifth Circuit addressed in *Ponce* was to the physical safety of students resulting from alleged threats to commit mass killings on the scale of the Columbine assault.¹¹⁶ Nonetheless, the Fifth Circuit expanded the reach of *Morse* beyond instances where student speech is promoting illegal drug use to speech advocating harm grave enough to threaten the physical safety of students.

In April 2008, the Seventh Circuit, in *Nuxoll v. Indian Prairie School District #204*, addressed the Fifth Circuit’s interpretation of Justice

111. *Id.* at 769.

112. *Id.*

113. *Id.*

114. *Id.* at 770.

115. *Id.*

116. Compare *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007) (addressing the emotional harm caused by derogatory comments about one’s sexual orientation), with *Ponce*, 503 F.3d at 767 (discussing the threat to student safety based upon “terroristic threats” contained in a student’s notebook).

Alito's concurrence in *Morse*,¹¹⁷ flatly rejecting the *Ponce* court's characterization of Justice Alito's *Morse* opinion as "controlling."¹¹⁸ The *Nuxoll* court stated: "[t]he concurring Justices wanted to emphasize that in allowing a school to forbid student speech that encourages the use of illegal drugs the Court was not giving schools carte blanche to regulate student speech. And they were expressing their own view of the permissible scope of such regulation."¹¹⁹

But, significantly, the Seventh Circuit acknowledged that harm to students can be of a psychological nature resulting from derogatory comments about "unalterable or otherwise deeply rooted personal characteristics."¹²⁰ The court rooted its opinion in *Morse*'s recognition of the importance of psychological well-being of students when it voiced concern regarding "the *psychological* effects of drugs."¹²¹ Moreover, even though the Seventh Circuit founded its ruling on *Tinker*'s substantial disruption standard, that premise appears to be founded in an underlying student welfare notion, rather than in any real possibility of school disruption. This apparent reshaping of the definition of substantial disruption into a student welfare rationale suggests that the *Nuxoll* court agreed with the court in *Poway* that the belief of the deleterious effect on student well-being caused by certain kinds of derogatory or demeaning comments about students' innate personal traits such as sexual orientation can provide the basis for banning speech.

Meanwhile, federal district courts in Texas and Arizona have cited *Morse* for the proposition that analysis of student speech is not limited to *Tinker*'s substantial disruption standard.¹²² While courts do not

117. In *Nuxoll*, the Seventh Circuit reversed a federal district court's denial of a preliminary injunction and ordered that an Illinois school district be compelled to allow a high school student to wear a T-shirt in school bearing the legend "Be Happy, Not Gay" for a "Day of Truth" event. 523 F.3d 668, 676 (7th Cir. 2008). However, the court declined to require an injunction more broadly against the school board rule prohibiting "derogatory comments, oral or written, that refer to race, ethnicity, religion, gender, sexual orientation, or disability" or to ensure that the students could make other comments, instead focusing only on the application of the rule in this instance. *Id.* at 670. The court made clear that its ruling was strictly limited to the student's as-applied challenge to the rule and did not touch upon the challenge to the rule on its face. *Id.* at 676.

118. *Id.* at 673.

119. *Id.*

120. *Id.* at 671.

121. *Id.* at 674.

122. See *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, 561 F. Supp. 2d 1078, 1091 (D. Ariz. 2008) (noting that *Morse* stands for the proposition that the *Tinker* "substantial disruption" standard is not applicable to all student free-speech cases); *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 911 (S.D. Tex. 2007) (stating that the general principles outlined in *Morse* have "broader application"); see also *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 769–70 (5th Cir. 2007) (noting that

always rely on Justice Alito's concurring opinion as a part of their speech analyses, some do rely on his acknowledgement in *Morse* that school officials have a duty to shield students from speech that advocates activities that would endanger them.¹²³

Likewise, the Eleventh Circuit in *Boim* connected the school's need to administer with the school's right to regulate student expression leading to an "unhealthy and potentially unsafe learning environment for the children they serve."¹²⁴ Additionally, in September 2008, a district court in Pennsylvania looked to Justice Alito's concurring opinion *Morse*. In *Miller v. Penn Manor School District*,¹²⁵ the district court focused on both the majority opinion in *Morse*, which the district court read as upholding a school's authority to restrict speech that promotes illegal behavior, and Justice Alito's concurrence, which the district court read as making "clear that the threat of violence in the school setting and the safety of our schools is of the utmost importance."¹²⁶ The court concluded, based on post-*Tinker* jurisprudence, that the school district was not required to show substantial and material disruption to justify its prohibition on the student speech in question.¹²⁷

CONCLUSION

It appears that post-*Morse* student speech jurisprudence, as it is emerging in federal trial and appellate courts, is turning towards a student welfare standard, albeit in an unwitting fashion. Regarding the *Tinker* category of speech, courts are reading *Morse* as liberating them from the confines of substantial disruption analysis. And, while none of these courts have gone as far as the district court in *Poway* and adopted the Ninth Circuit's content restriction on the basis of *Tinker's* rights-of-others prong and *Morse* or expressly iterated a student welfare standard, one appears to be emerging.

Nonetheless, these circuit and district court decisions lend support for the argument that such a standard is extant in the penumbra of post-*Morse* student speech jurisprudence. *Morse*, if confined to the four corners of the majority's opinion, would at best provide an exception to *Tinker* that would be strictly limited to those situations in which a student engages in speech or expression that promotes the

the Court expressly declined to apply *Tinker's* substantial disruption standard in *Morse*).

123. *E.g. Ponce*, 508 F.3d at 769–70.

124. 494 F.3d 978, 983 (11th Cir. 2007).

125. 588 F. Supp. 2d 606 (E.D. Pa. 2008).

126. *Id.* at 623.

127. *Id.* at 625.

use of illegal drugs. But, none of the courts thus far have read *Morse* in such a limited way. Even the Seventh Circuit, which categorically rejected the Fifth Circuit's assertion that Justice Alito's concurrence in *Morse* was controlling, cited *Morse* as confirming that substantial disruption was not limited to threats of physical violence. In fact, the Seventh Circuit's willingness to go beyond the traditional *Tinker* analysis utilized by courts prior to *Morse* is an indicator of the penumbral student welfare standard that is yet to be fully and expressly articulated by the courts. And, even the Fifth and Eleventh Circuits, along with federal courts in Texas, Arizona, California, and Pennsylvania, unambiguously state that courts are not limited to *Tinker's* substantial disruption analysis in order to determine if restrictions on student speech that is neither school-sponsored (*Hazelwood*) nor lewd and offensive (*Fraser*) are justified. Thus, *Morse* appears to have unwittingly created a new standard—not yet fully expressed as such, but found amongst its fractured opinions—that is premised on the underlying notion the schools generally may regulate student speech where the student welfare is at stake.