Unraveling *Tinker*: The Seventh Circuit Leaves Student Speech Hanging by a Thread

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UNRAVELING TINKER: THE SEVENTH CIRCUIT LEAVES STUDENT SPEECH HANGING BY A THREAD

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INTRODUCTION

In 1969, the Supreme Court placed a premium on First Amendment protection in the school when high school students protested the Vietnam War by wearing black armbands.1 In Tinker v. Des Moines Independent Community School District, the Court held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and allowed students to display their anti-Vietnam beliefs on their sleeves in spite of objection by the school district.2 Tinker has served as the bedrock case for First

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2 393 U.S. at 506.
Amendment regulation of student speech in holding that a school cannot prohibit student speech unless it “materially and substantially disrupt[s] the work and discipline of school” (the “substantial disruption” standard) or “collide[s] with the rights of others” (the “rights of others” standard).

However, the Supreme Court has chipped away at its pro-student holding since *Tinker* by allowing school officials to prohibit student speech where it is lewd or vulgar, school-sponsored, or advocates illegal drug use. In its most recent case, *Morse v. Frederick*, the Supreme Court held that a school could prohibit speech that is reasonably regarded as encouraging illegal drug use. At the same time, the *Morse* majority left an ambiguity of whether political speech, such as speech supporting the legalization of illegal drugs, could be prohibited by its ruling. In an effort to limit the effect of the majority’s ambiguity, Justice Alito concurred to clarify that the majority opinion created another exception to *Tinker* for speech promoting illegal drug use and should not be read as support for restricting speech that commented on a political or social issue.

On April 23, 2008, the Seventh Circuit rejected Justice Alito’s concurrence and applied *Morse* to political speech in *Nuxoll ex rel.*
Nuxoll v. Indian Prairie School District No. 204.\textsuperscript{11} Nuxoll involved a student protest to the “Day of Silence,” a day promoted by the Gay, Lesbian, and Straight Education Network every April that advocates tolerance of others with a focus on tolerance of homosexuality.\textsuperscript{12} In April 2006, Heidi Zamecnik wore a t-shirt displaying the slogan “Be Happy, Not Gay” in counterprotest to the “Day of Silence.”\textsuperscript{13} School officials at Necqua Valley High School in Naperville, Illinois, made Zamecnik cross out the words “Not Gay;” subsequently, Zamecnik and freshman Alexander Nuxoll filed a lawsuit to enjoin the school from prohibiting the t-shirt.\textsuperscript{14} When faced with this case, the district court denied the request for a preliminary injunction relying on the Rights of Others standard from \textit{Tinker}.\textsuperscript{15}

In an opinion written by Judge Posner, the Seventh Circuit reversed the case relying on the substantial disruption standard in \textit{Tinker}.\textsuperscript{16} The Seventh Circuit granted Nuxoll’s preliminary injunction to wear the t-shirt, which appeared to be a victory for the student speakers.\textsuperscript{17} However, the victory was fleeting as the majority adopted a new definition of Substantial Disruption that will allow schools to restrict vast amounts of speech in the future.\textsuperscript{18} Although \textit{Morse} dealt with speech promoting illegal drug use, the Seventh Circuit applied the case when faced with the political message “Be Happy, Not Gay.”\textsuperscript{19} The Seventh Circuit used \textit{Morse} for the proposition that a Substantial Disruption includes the \textit{psychological} effects that one student’s speech would have on other students as well as the actual

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{11} 523 F.3d 668, 674 (7th Cir. 2008).
\item\textsuperscript{12} \textit{Id}. at 670.
\item\textsuperscript{13} Zamecnik \textit{ex. rel.} Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., 2007 WL 1141597, at *2 (N.D. Ill. 2007).
\item\textsuperscript{14} \textit{Id}.
\item\textsuperscript{15} \textit{Id}. at *11.
\item\textsuperscript{16} See \textit{Nuxoll}, 523 F.3d at 676.
\item\textsuperscript{17} Eugene Volokh, High School Student Speech and “Be Happy, Not Gay” T-Shirt, http://volokh.com/posts/1209077493.shtml (last visited Nov. 6, 2008).
\item\textsuperscript{18} \textit{Id}.
\item\textsuperscript{19} \textit{Nuxoll}, 523 F.3d at 674.
\end{enumerate}
\end{footnotesize}
disorder the speech creates in the school environment.\textsuperscript{20} Thus, the Seventh Circuit held that a Substantial Disruption occurs if there is reason to believe that a type of student speech “will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”\textsuperscript{21}

First, this Note delves into why First Amendment jurisprudence regarding student speech on school grounds is a murky area of constitutional law. Then this Note discusses the reasoning behind the Seventh Circuit’s expansion of the “substantial disruption” standard. This Note argues that the Seventh Circuit’s definition of “substantial disruption” is contrary to Supreme Court precedent. This Note also opines that the Seventh Circuit’s opinion will allow schools to prohibit a broad range of speech and will quiet student speakers throughout the circuit.

Part I discusses the evolution of the Supreme Court student speech cases, beginning with \textit{Tinker}. Part II explores the confusion among lower courts when dealing with student speech cases by contrasting the approaches of two lower courts that addressed t-shirts with slogans similar to “Be Happy, Not Gay.” Part III goes over the underlying facts, the district court opinion, and the Seventh Circuit’s opinion in \textit{Nuxoll}. Part IV evaluates the Seventh Circuit’s analysis in \textit{Nuxoll} in light of Supreme Court precedent and opinions from other lower courts in addition to considering how \textit{Nuxoll} will affect future student speech cases.

\textbf{I. THE EVOLUTION OF FIRST AMENDMENT RIGHTS IN THE SCHOOL SYSTEM THROUGH THE UNITED STATES SUPREME COURT JURISPRUDENCE}

There have been four major decisions that have shaped Supreme Court jurisprudence on a school’s regulation of student speech, beginning with \textit{Tinker v. Des Moines Independent Community School}

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} (emphasis added).
\item \textsuperscript{21} \textit{Id.} (emphasis added).
\end{itemize}
**Tinker** was the first case where the Court protected actual student expression in public schools. The Court made it clear in **Tinker** that students do not surrender their First Amendment rights when they enter a classroom. Over the next 40 years, the Supreme Court narrowed the student-centered holding in **Tinker**, allowing school authorities to restrict student speech where the speech was vulgar or lewd, was school-sponsored, or advocated the consumption of illegal drugs.

### A. Tinker v. Des Moines Independent Community School District

In 1965, a group of students wore black armbands to their school in protest of the Vietnam War. The school district learned of the protest and adopted a policy prohibiting the armbands. The students were all sent home from school and suspended until they came back without the armbands. Subsequently, two of the students filed suit against their school district seeking an injunction.

In **Tinker**, the Court recognized that neither teachers nor students shed their First Amendment rights to freedom of speech and expression at the schoolhouse gate. The Court also created two

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23 Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1536 (7th Cir. 1996); see also W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (U.S. 1943), (The Supreme Court first recognizing the free speech interests of public school students in holding that a compulsory flag salute exercise was an unconstitutional coercion of belief).

24 *Tinker*, 393 U.S. at 506.

25 See *Fraser*, 478 U.S. at 685.

26 See *Hazelwood*, 484 U.S. at 273.

27 See *Morse*, 127 S. Ct. at 2629.

28 *Tinker*, 393 U.S. at 504.

29 Id.

30 Id.

31 Id.

32 Id. at 506.
standards to determine whether a school may prohibit student speech in holding that student expression may not be restricted unless it “materially and substantially disrupt[s] the work and discipline of school” (the “substantial disruption” standard) or “collid[es] with the rights of others” (the “rights of others” standard). The Court found that the school’s prohibition of the armbands was unconstitutional, as the school authorities had no reason to believe that the wearing of the armbands would substantially interfere with the school environment or intrude on other students’ rights.

The Court proclaimed that school officials could not discipline the students for “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” The Court also found it significant that the school district barred only one viewpoint. The school district adopted a policy against wearing black armbands only but did not prohibit any other symbols of political or controversial significance. Thus, the Court held that the prohibition of one opinion alone was unconstitutional without evidence that it was necessary to avoid substantial interference with schoolwork or discipline.

33 Id. at 513.
34 Id. at 509. Lower courts generally apply the substantial disruption” standard and rarely apply the “rights of others” standard. Melinda Cupps Dickler, The Morse Quartet: Student Speech and the First Amendment, 53 LOY. L. REV. 355, 363-64 (2007).
35 Tinker, 393 U.S. at 508.
36 Id. at 511. See also Abby Marie Mollen, Comment, In Defense of the “Hazardous Freedom” of Controversial Student Speech, 102 NW. U. L. REV. 1501, 1511-12 (2008) (exploring how courts have long disagreed about whether Tinker prohibits viewpoint discrimination). This issue was also a major difference between the majority and the concurrence in Nuxoll. See discussion infra Part III.C.
37 Tinker, 393 U.S. at 510.
38 Id. at 511. The Supreme Court also noted that schools should not be “enclaves of totalitarianism” and allow only beliefs the school chooses to communicate. Id. Rather, a school should be a “marketplace of ideas” which fosters learning and understanding through a “multitude of tongues.” Id.
Justice Black’s dissent in *Tinker* may have been instructive to the Supreme Court when faced with future student speech cases. Justice Black warned that the majority’s holding would allow students to defy teachers in the name of free speech. He felt that the *Tinker* opinion would induce the school to “surrender control of the American public school system to public school students.”

### B. Lewd and Vulgar Speech: Bethel School District No. 403 v. Fraser

In 1986, the Court placed a check on student speech by allowing a school to restrict vulgar and lewd speech in *Bethel School District No. 403 v. Fraser*. The Court found that a school district acted within its authority in suspending a student who gave a speech at an assembly that contained an “elaborate, graphic, and explicit sexual metaphor.” The Court held that the First Amendment did not prohibit school officials from regulating lewd or offensive speech where it “would undermine the school’s basic educational mission.” The Court recognized that “the constitutional rights of students in the public school are not automatically coextensive with the rights of adults in other settings.” The majority’s deference towards the school district was readily apparent when it cited Justice Black’s dissent in *Tinker* for

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40 *Tinker*, 393 U.S. at 525 (Black, J., dissenting).

41 *Id.* at 526.


43 *Id.* at 678, 685. The speech opened with the line “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.” *Id.* at 687 (Brennan, J., concurring).

44 *Id.* at 685 (majority opinion).

45 *Id.* at 682. The Court based this statement in part on *N.J. v. T.L.O.*, 469 U.S. 325 (1985), which held that a school needs reasonable suspicion, and not probable cause, to search a student. *Id.*
the proposition that the Constitution does not compel schools to surrender control to their students.\textsuperscript{46}

The \textit{Fraser} decision seemed to create an exception to \textit{Tinker} when the student speech was vulgar, lewd, or highly offensive.\textsuperscript{47} The Court noted a “marked distinction” between the political viewpoint addressed in \textit{Tinker} and the sexual content in the student’s speech.\textsuperscript{48} The Court noted that schools had a compelling interest in prohibiting vulgar and lewd speech because of its role of teaching students “the boundaries of socially appropriate behavior”\textsuperscript{49} and because the speech could be potentially damaging to a young audience.\textsuperscript{50} Furthermore, the Court overruled the Ninth Circuit, which relied on the \textit{Tinker} substantial disruption standard when finding that there was no evidence on the record that the speech caused a substantial disruption.\textsuperscript{51}


Two years later, the Court again allowed school authorities to prohibit speech in \textit{Hazelwood School District v. Kuhlmeier}.\textsuperscript{52} In \textit{Hazelwood}, the Court ruled it constitutional for a school district to forbid articles about teen pregnancy and divorce from appearing in the school newspaper.\textsuperscript{53} The Court stressed that the school was entitled to great control over student expression that may be attributed to the school, such as a school newspaper or play.\textsuperscript{54} The Court found a

\begin{itemize}
  \item \textsuperscript{46} \textit{Id.} at 686.
  \item \textsuperscript{47} \textit{Id.} at 685.
  \item \textsuperscript{48} \textit{See id.} at 680; \textit{see also id.} at 685 (“Unlike the sanctions imposed on the students wearing armbands in \textit{Tinker}, the penalties imposed in this case were unrelated to any political viewpoint.”).
  \item \textsuperscript{49} \textit{Id.} at 681.
  \item \textsuperscript{50} \textit{See id.} at 683 (stating that the speech was “insulting to teenage girl students” and could be “seriously damaging to its less mature audience”).
  \item \textsuperscript{51} \textit{Id.} at 679.
  \item \textsuperscript{52} 484 U.S. 260, 274 (1988).
  \item \textsuperscript{53} \textit{Id.} at 264.
  \item \textsuperscript{54} \textit{Id.} at 271.
\end{itemize}
distinction between a student’s personal expression as in *Tinker* and speech that might be “reasonably perceiv[ed] to bear the imprimatur of the school.”\footnote{Id.} The Court granted school authorities greater control in prohibiting school-sponsored speech than other student expression governed under *Tinker*’s “substantial disruption” standard.\footnote{Id. at 272. The Court found that *Tinker* addressed the “educators’ ability to silence a student’s personal expression that happened to occur on the school premises,” while *Hazelwood* concerned that “educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” \textit{Id.} \textit{at 273.}} Thus, the Court held that a school may restrict school-sponsored speech “so long as [its] actions are reasonably related to legitimate pedagogical concerns.”\footnote{Id. at 273.}

The Supreme Court appeared to create a clear exception to *Tinker* for speech that was school-sponsored.\footnote{See \textit{id.} at 272-73 (“Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).} Like *Fraser*, the Court again overruled the appellate court’s application of the “substantial disruption” standard.\footnote{Id. at 265. The lower court found there was no evidence that the censored articles would have materially disrupted the school environment. \textit{Id.}} Also, the majority in *Hazelwood* seemed to acknowledge that *Fraser* was a distinct exception to *Tinker*, rather than an application of the case.\footnote{Id. at 272 n.4.} The dissent in *Hazelwood* asserted that *Fraser* was analyzed under *Tinker*.\footnote{Id. at 281 (Brennan, J. dissenting).} The majority responded to the dissent in a footnote, stating that the decision in *Fraser* rested on the vulgar, lewd, and plainly offensive character of the speech delivered at the school assembly rather than on any propensity of the

\footnote{\textit{Id.}}
speech to “‘materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others.’”

D. Speech that Advocates Illegal Drug Use: Morse v. Frederick

The Supreme Court continued to tear away students’ rights to free speech in Morse v. Frederick. In the 2007 case, the school district did not violate a student’s constitutional rights by prohibiting him from displaying a “BONG HiTS 4 JESUS” banner at a school-sponsored event where students watched the Olympic torch relay come through Alaska. The student conceded that the words meant nothing and were just “nonsense meant to attract television cameras.” Nonetheless, the Court decided to rule on the case and held that a school may restrict speech that advocates the consumption of illegal drugs.

In reaching its decision, the Court focused on the dangers of illicit drug use and found that deterring drug use by school children was a compelling interest. The Court stated that “[s]chool years are the time when physical, psychological, and addictive effects of drugs are most severe. . .” Furthermore, the effects of drugs were not only felt

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62 Id. at 272 n.4 (majority opinion) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).
64 Id.
65 Id. at 2624 (quoting the district court case, Frederick v. Morse, 439 F.3d 1114, 1117-18 (9th Cir. 2006)). Two law students argued that the Supreme Court only took this case because of its popularity as the “Bong Hits” case. Andrew Canter & Gabriel Pardo, Notes & Comments, The Court’s Missed Opportunity in Harper v. Poway, 2008 BYU EDUC. & L.J. 125, 125 (2008). These students argued that a more useful decision would have been to address a case like Harper. Id.
66 Morse, 127 S. Ct. at 2624. The Supreme Court found it reasonable that Principal Morse thought the banner could be perceived as promoting illegal drug use. Id.
67 Id. at 2629.
68 Id. at 2628.
by the drug users, but the entire educational process was disrupted.\(^70\) Thus, the Court found that the school could prohibit speech that encouraged drug use.\(^71\) In doing so, the Court reversed the Ninth Circuit’s finding that the school district did not demonstrate that the speech gave rise to a “substantial disruption.”\(^72\)

*Morse* appeared to set *Fraser* and *Hazelwood* out as exceptions to the *Tinker*.\(^73\) *Fraser* and *Hazelwood* proved that the analysis in *Tinker* was not “the only basis for restricting student speech.”\(^74\) The Court noted that the mode of analysis in *Fraser* was “not entirely clear,” but it certainly did not apply the “substantial disruption” standard in reaching its holding.\(^75\) Furthermore, *Hazelwood* was not controlling because no one would reasonably believe that the “BONG HiTS” banner bore the school’s imprimatur.\(^76\)

Justice Alito, in a concurrence with Justice Kennedy, joined the majority but wrote separately to clarify some of the majority’s ambiguities.\(^77\) Justice Alito concurred in the opinion on the understanding that the case added a third exception to *Tinker*, along with *Fraser* and *Hazelwood*.\(^78\) He explained that the majority opinion in *Morse* went “no further than to hold that a public school may restrict speech that a reasonable observer would interpret as

\(^{70}\) *Id.*  
\(^{71}\) *Id.* at 2629.  
\(^{72}\) *Id.* at 2623.  
\(^{73}\) *Id.* at 2626.  
\(^{74}\) *Id.* at 2627.  
\(^{75}\) *See id.* (referencing footnote four in *Hazelwood* where the Court disagreed with the proposition that there was no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser* and noting that the holding in *Fraser* was not based on any showing of substantial disruption).  
\(^{76}\) *Id.*  
\(^{77}\) *Id.* at 2636 (Alito, J., concurring)  
\(^{78}\) *See id.* at 2637 (“In addition to *Tinker*, [Morse] allows the restriction of speech advocating illegal drug use;” [Fraser] “permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program;” and [Hazelwood] “allows a school to regulate what is in essence the school’s own speech.”).
advocating illegal drug use.” He asserted that the case “provide[d] no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.” He also opined that any argument for foregoing a Tinker analysis must be based on a special characteristic of school, and the characteristic that was relevant in Morse was the threat of the physical safety of the students. In his opinion, the Morse majority should not be read to permit the censorship of any speech that interferes with a school’s educational mission because that argument “can easily be manipulated in dangerous ways.”

As evidenced by Supreme Court case law, the scale that was once tipped in Tinker to favor student speech has gradually reverted towards school authorities. Further, there is controversy on whether these four cases should be read as a collective whole or as each case governing its own distinct area of speech. The struggle to reconcile these four Supreme Court cases is apparent when reading lower court opinions across various jurisdictions. This problem is especially prevalent when lower courts deal with speech that is anti-homosexual because courts are reluctant to liken anti-homosexual speech to the

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79 Id. at 2636.  
80 Id.  
81 Id. at 2638.  
82 Id. at 2637.  
83 Mollen, supra note 36, at 1510 (noting that, when read “together, Fraser, Hazelwood, and Morse confirm that students in fact do leave some of their First Amendment rights at the schoolhouse gate.”).  
84 See id. at 1510-11. When the Court ruled in Morse, it did not resolve the confusion on interpreting Tinker, Fraser, and Hazelwood. Id. at 1510. Instead the Court “added additional uncertainty to the scope of students’ free speech rights.” Id.  
political speech in *Tinker*. Section II explores how two lower court opinions approached Supreme Court precedent when faced with anti-homosexual speech. Then, Section III analyzes the Seventh Circuit’s approach to anti-homosexual speech in *Nuxoll*.

**II. TINKERING AROUND: HOW TWO COURTS APPROACHED STUDENT SPEECH THAT WAS ANTI-HOMOSEXUAL**

Before reviewing the Seventh Circuit’s approach in *Nuxoll*, this Note considers two possible approaches that the Seventh Circuit could have adopted. The two courts each dealt with similar anti-homosexual t-shirts. Each court interpreted Supreme Court precedent differently, which illustrates the uncertainty that courts face in this murky area of First Amendment jurisprudence.

**A. Nixon v. Northern Local School District Board of Education**

The District Court for the Southern District of Ohio relied on *Tinker*’s “substantial disruption” standard when it addressed a t-shirt that opposed homosexuality, Islam, and abortion in *Nixon v. Northern Local School District Board of Education*. The 2005 case dealt with a black t-shirt with white lettering that read “INTOLERANT” and “Jesus said...I am the way, the truth and the life. John 14:6” on the front and “Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!” on the back.

In its opinion, the *Nixon* court found that *Tinker, Fraser, and Hazelwood* were a trilogy that carved out three categories of student
speech. Hazelwood governed school-sponsored speech, Fraser governed vulgar, lewd, obscene, and plainly offensive speech, and Tinker governed speech that fell in neither category. The t-shirt was a potentially offensive political viewpoint and not vulgar or lewd under Fraser’s speech exception. The message on the t-shirt also fell outside of Hazelwood because it was not school-sponsored.

Thus, Tinker was the only standard that governed Nixon’s t-shirt. The court held that there was no evidence of any history of violence or disorder that would prohibit the t-shirt under the “substantial disruption” standard. The Nixon court took a narrow reading of the “rights of others” standard from Tinker and found that the invasion of the rights of others referred to the right to be secure and let alone. A silent, passive t-shirt did not collide with the rights of other students to be left alone.

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92 Id. at 969.
93 Id. (citing Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442 (5th Cir. 2001) and S.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 421-22 (3rd Cir. 2003)).
94 See id. at 969-971. The court noted that Fraser was applicable to Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000), which found that a school could prohibit a Marilyn Manson t-shirt because Marilyn Manson sings about suicide, murder, and drugs and to Smith v. Mount Pleasant Public Schools, 285 F. Supp. 2d 987 (E.D. Mich. 2003), which held that a student’s comments referring to sexual activity of school administrators could be prohibited under Fraser. Id. at 970-71. Fraser was not applicable to potentially offensive political viewpoints, such as a George Bush “International Terrorist” t-shirt in Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847 (E.D. Mich. 2003) or a Confederate flag t-shirt in Bragg v. Swanson, 371 F. Supp. 2d 814 (W.D.W. Va. 2005). Id. at 971.
95 Id. at 969.
96 Id. at 971.
97 Id. at 973.
98 Id. at 974.
99 Id.
B. Harper v. Poway Unified School District

Most courts completely overlook the “rights of others” standard from Tinker. However, the Ninth Circuit in Harper v. Poway Unified School District relied on a broad reading of the standard in a case with nearly identical facts to Nuxoll. In 2006, Tyler Chase Harper donned a t-shirt to protest the “Day of Silence” which read “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” on the front and “HOMOSEXUALITY IS SHAMEFUL, ‘Romans 1:27’” on the back.

In reaching its holding, a divided Ninth Circuit first construed Supreme Court precedent as governing “three distinct areas of student speech.” Fraser governed vulgar and lewd speech; Hazelwood governed school-sponsored speech; and Tinker governed all other speech. The court decided Harper’s claim fit under Tinker; however, the Ninth Circuit did not analyze the case under the “substantial disruption” standard. Instead the court made its decision under the rarely used “rights of others” standard.

The Ninth Circuit’s analysis concluded that Harper’s t-shirt infringed upon other students in the most fundamental way by denying

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101 445 F.3d 1166, 1178 (9th Cir. 2006), reh’g en banc denied, 455 F.3d 1052 (9th Cir. 2006), vacated as moot, 127 S. Ct. 1484 (2007).
102 Id. at 1171.
103 Id. at 1176-1177 (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)).
104 Id.
105 See id. at 1177 nn.14-15.
106 Id. at 1177.
107 See id. at 1178; see also id. at 1178 n.18 (rejecting the notion that the right to be left alone from Tinker is limited to assault, defamation, invasion of privacy, extortion, blackmail, or any other tort).
the right to “‘be secure and to be left alone.’”\textsuperscript{108} In reaching its holding, the Ninth Circuit found that students have a right to be free from “physical assaults,” and the court even took judicial notice that “psychological attacks” can cause a blow to a youth’s self-esteem.\textsuperscript{109} The court then used several studies to support granting judicial notice that gay students are harmed by derogatory messages, like Harper’s t-shirt, because they are harmful to the students’ health, welfare, educational performance, and ultimate potential for success in life.\textsuperscript{110} Finally, the\textit{Harper} majority limited its application of the “rights of others” standard to “derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation.”\textsuperscript{111}

Even though the court recognized that\textit{Tinker, Fraser,} and\textit{Hazelwood} governed different areas of student speech, the Ninth Circuit blended the holdings of the three cases when it determined that the school’s prohibition of the t-shirt was not viewpoint discrimination.\textsuperscript{112} The Ninth Circuit used language from those three cases when it asserted that a school may “permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.”\textsuperscript{113}

\begin{flushleft}
\textsuperscript{108} \textit{Id.} at 1178 (quoting \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 1179.
\textsuperscript{111} \textit{Id.} at 1183.
\textsuperscript{112} \textit{Id.} at 1185.
\textsuperscript{113} \textit{Id.} The court found that a school may prohibit some speech under \textit{Tinker} even if the consequence is viewpoint discrimination. \textit{Id.} To support its proposition, the court referred to language from \textit{Hazelwood} that asserted that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission . . . even though the government could not censor similar speech outside the school” and to language from \textit{Fraser} which stated that part of a school’s “basic educational mission” is the inculcation of “fundamental values of habits and manners of civility essential to a democratic society.” \textit{Id.}
\end{flushleft}
After ruling that the “rights of others” standard was violated, the Ninth Circuit explicitly reserved judgment on whether Harper’s t-shirt would cause a “substantial disruption.”114 Furthermore, it is unclear whether the “rights of others” standard has any muster in future student speech cases.115 The dissent opined that much of the majority’s approach was “entirely a judicial creation.”116 The issue remains up-in-the-air because the Ninth Circuit denied a rehearing en banc.117 The case was granted a writ of certiorari; however, the Supreme Court dismissed the case as moot because Harper graduated from high school.118

Nonetheless, the district court in Nuxoll still used the factually similar opinion for its persuasive authority and adopted the “rights of others” standard as well.119 Then the Seventh Circuit took an even different approach than Nixon and Harper in Nuxoll.120 The Seventh Circuit’s approach in Nuxoll is discussed in Section III of this Note.

114 Id. at 1184. The district court found that the testimony from school employees who claimed the t-shirt caused tense conversations and altercations between students was not enough evidence that the t-shirt would cause a substantial disruption. Id. at 1184, 1185.
115 See, e.g., Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672 (7th Cir. 2008).
116 Harper, 445 F.3d at 1201 (Kozinski, J., dissenting).
117 See Harper v. Poway Unified Sch. Dist., 455 F.3d 1052 (9th Cir. 2006).
118 See Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007); see also Etter, supra note 100, at 1352 (arguing that the decision to vacate the case meant that the Supreme Court disagreed with the Ninth Circuit’s “rights of others” interpretation).
120 See Nuxoll, 523 F.3d. at 674.
III. A NOVEL APPROACH IN *NUXOLL EX REL. NUXOLL V. INDIAN PRAIRIE SCHOOL DISTRICT NO. 204*

A. Factual Background

The “Day of Silence” was created by the Gay, Lesbian, and Straight Education Network as an annual event to draw attention to the harassment of homosexuals.\(^{121}\) Some students observe the day by remaining silent in class, and some teachers will not call on them as part of observance of the day.\(^{122}\) Other students and faculty members support the cause by wearing t-shirts with slogans that neither support homosexuality nor criticize heterosexuality, such as “Be Who You Are.”\(^{123}\) In response to the “Day of Silence,” the Alliance Defense Fund (“ADF”) created an event the day after called the “Day of Truth.”\(^{124}\) The ADF promotes their event by wearing t-shirts that read “day of truth” on the front and “The Truth cannot be silenced” on the back.\(^{125}\)

Starting in 2003, a student organization named the Gay/Straight Alliance sponsored the “Day of Silence” each year at Necqua Valley High School in Naperville, Illinois.\(^{126}\) On the 2006 “Day of Truth,” Heidi Zamecnik, a student opposed to homosexuality, remained silent and wore a t-shirt that read “My Day of Silence, Straight Alliance” on

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\(^{121}\) *Zamecnik*, 2007 WL 1141597, at *1. Although the Seventh Circuit referenced homosexuals alone, the “Day of Silence” website also states that the day is intended to raise awareness to the harassment of lesbian, gay, bisexual, and transgender individuals. Gay, Lesbian and Straight Education Network, Day of Silence, http://www.dayofsilence.org/ (last visited Nov. 10, 2008).

\(^{122}\) *Zamecnik*, 2007 WL 1141597, at *1.

\(^{123}\) *Id.*


\(^{125}\) *Zamecnik*, 2007 WL 1141597, at *1.

\(^{126}\) *Id.*
the front and “Be Happy, Not Gay” on the back.\footnote{Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 670 (7th Cir. 2008).} School officials required Zamecnik to cross off the “Not Gay.”\footnote{Zamecnik, 2007 WL 1141597, at *2.}

In March 2007, Zamecnik and freshman student Alexander Nuxoll filed a lawsuit through their parents to obtain a preliminary injunction against their school district to remain silent on the “Day of Truth” and to wear shirts, buttons, or stickers containing the message “Be Happy, Not Gay.”\footnote{Id. at *6.} The only issue in front of the District Court for the Northern District of Illinois was the constitutionality of the censorship of the slogan “Be Happy, Not Gay” because the school district stipulated that it would allow the Plaintiffs to remain silent in protest to the “Day of Silence.”\footnote{Id. at *2, *6.} The parties agreed to withhold discovery and to stipulate the facts in order to expedite the decision before the 2007 “Day of Silence.”\footnote{Id. at *2.}

The school district supported its ban of the “Be Happy, Not Gay” slogan on its policy prohibiting derogatory comments against other students.\footnote{Nuxoll, 523 F.3d at 670.} Specifically, the school’s policy forbade oral or written “derogatory comments” made on school grounds “that refer[red] to race, ethnicity, religion, gender, sexual orientation, or disability.”\footnote{Id.} The school deemed “Be Happy, Not Gay” as a derogatory comment that referred to a particular sexual orientation.\footnote{Id.} The school would prohibit a shirt that had “Not Gay” or any negative phrase about homosexuality.\footnote{Zamecnik, 2007 WL 1141597, at *6.} However, the school would allow a t-shirt that
displayed a positive statement, such as “Be Happy, Be Straight” or “Straight Alliance.”

B. The District Court Opinion in Zamecnik ex rel. Zamecnik v. Indian Prairie School District No. 204 Board of Education

Similarly to Harper, the district court relied on the Tinker “rights of others” standard when it denied Zamecnik and Nuxoll’s request for a preliminary injunction. Through Seventh Circuit precedent and Harper, the district court found that the Seventh Circuit would likely rule that the high school’s interest in protecting its students would permit the restriction of the t-shirt.

The Seventh Circuit had not yet ruled on a question of restricting speech that was derogatory to a category of students. However, the district court predicted that the Seventh Circuit would include pedagogical concerns as well as the school’s educational mission in formulating a holding, which was consistent with Harper’s use of the “rights of others” standard. The district court recognized that Harper did not limit considerations of a school’s “pedagogical interests” or “basic educational mission” to situations involving vulgar or lewd speech like Fraser or school-sponsored speech like Hazelwood. Rather, Harper used the holdings in Fraser and Hazelwood to support the notion that a school does not have to tolerate any speech that is inconsistent with its basic educational mission. Under this rationale, Harper noted that a public school may engage in some viewpoint discrimination, such as permitting discussions of

136 Id. at *2.
137 Id. at *11.
138 Id.
139 Id. at *10.
140 Id.
141 See id. at *8-9 (quoting Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1185-86 (9th Cir. 2006)).
142 Id.
tolerance and equality without allowing time for speech espousing intolerance or hatred.\textsuperscript{143}

To support its outcome, the district court noted that the Seventh Circuit had taken a school’s pedagogical interests into consideration even if the speech was not school-sponsored.\textsuperscript{144} Thus, the district court believed that the Seventh Circuit would find that promoting tolerance among students and protecting gay students from harassment was a legitimate pedagogical concern that would allow the school to restrict speech expressing negative statements about homosexuality.\textsuperscript{145} The court stated that “Be Happy, Not Gay” was less disparaging than the t-shirts at issue in \textit{Harper} or \textit{Nixon}.\textsuperscript{146} Nonetheless, the district court concluded that the t-shirt was a derogatory statement that could do significant harm to gay youth.\textsuperscript{147}

In 2007, neither of the Plaintiffs wore a t-shirt that contained “Be Happy, Not Gay” or tried to protest the “Day of Silence” for fear of being punished.\textsuperscript{148} Heidi Zamecnik graduated high school, thus she lacked the standing to further pursue the case.\textsuperscript{149} Still Alexander

\begin{footnotesize}
\begin{itemize}
\item 143 Id.
\item 144 See id. at *10. The district court was referring to three Seventh Circuit cases where the student speech was not school-sponsored, yet the majority applied \textit{Hazelwood}’s language that “a school need not tolerate speech that is contrary to its . . . educational mission.” Id. The three cases were \textit{Muller v. Jefferson Lighthouse School}, 98 F.3d 1530 (7th Cir. 1996) (involving an elementary school that prohibited students from distributing religious literature); \textit{Brandt v. Board of Education of Chicago}, 480 F.3d 460 (7th Cir. 2007) (concerning a school’s refusal to allow eighth graders to wear t-shirts worn in protest to the official class shirt); and \textit{Gernetzke v. Kenosha Unified School District No. 1}, 274 F.3d 464 (7th Cir. 2001) (regarding a high school’s decision to forbid a cross to be painted on a school mural). Id.
\item 145 Id.
\item 146 Id.
\item 147 Id. at *11.
\item 148 Nuxoll \textit{ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204}, 523 F.3d 668, 670 (7th Cir. 2008).
\item 149 Id.
\end{itemize}
\end{footnotesize}
Nuxoll and the ADF continued to pursue the appeal in time for the 2008 “Day of Silence.”

C. The Seventh Circuit Opinion

On appeal, the school urged the Seventh Circuit to uphold the district court’s decision and its reliance on Harper. The school argued that Tinker, Fraser, Hazelwood, and Morse should be read as an “interrelated framework for addressing the appropriateness of school actions” rather than “four narrow, unrelated exceptions to the notion of unbridled student speech.” In addition, the school cited other Seventh Circuit opinions as consistent with the district court’s acknowledgement that the Seventh Circuit takes a school’s pedagogical interests and its educational mission into consideration absent a Hazelwood school-sponsored set of facts. The school’s argument was bolstered by the amici curiae briefs of the Illinois Association of School Boards, Inc. and the Illinois Association of School Administrators.

On the other side, Nuxoll argued for an approach like Nixon by reading the Supreme Court cases as a four-part framework. Nuxoll asserted that the slogan “Be Happy, Not Gay” must be governed by

150 See Transcript of Opinion at 1, Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 670 (7th Cir. 2008) (No. 08-1050) (The opinion was released in transcript form because Nuxoll sought “a preliminary injunction to enable him to engage in an activity scheduled for April 28.”).
151 Brief of the Defendants-Appellees at 26, Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668 (7th Cir. 2008) (No. 08-1050).
152 Id. at 15-16.
153 See id. at 29 (referring to Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996); Brandt v. Bd. of Ed. of Chi., 480 F.3d 460 (7th Cir. 2007); Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001)).
154 See Brief of Amici Curiae of Illinois Association of School Boards, Inc., et al., for Affirmance of Decision Below at 3, Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668 (7th Cir. 2008) (No. 08-1050) (The brief argued that Tinker, Fraser, Hazelwood, and Morse are not an “‘either/or.’”).
155 Brief of Plaintiff-Appellant at 15, Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668 (7th Cir. 2008) (No. 08-1050).
Tinker only as it is “non-vulgar, private student speech unrelated to drugs.”\footnote{See id. at 16-17; see also id. at 9 (“Political speech by students must be allowed in high schools unless it is drug related, vulgar, materially disruptive, or tortuously infringes with the rights of others . . . Expressing the statement ‘Be Happy, Not Gay’ does not violate any of these standards.”).} Nuxoll asserted that the school had not provided evidence that the t-shirt would bring a “substantial disruption.”\footnote{Id. at 26.} Nuxoll rejected the district court’s interpretation of the “rights of others” standard from Tinker alleging that the standard referred to a “substantive and verifiable right,” not a right to be free from critical or negative speech.\footnote{Id. at 28-29.} The American Civil Liberties Union of Illinois filed a brief of \textit{amicus curiae} supporting neither party, but advocated that Fraser, Hazelwood, and Morse should be read as exceptions to Tinker.\footnote{Brief of Amicus Curiae for American Civil Liberties Union of Illinois in Support of Neither Party at 7-8, Nuxoll \textit{ex rel.} Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668 (7th Cir. 2008) (No. 08-1050). The ACLU relied in part on Justice Alito’s concurrence in Morse in making this determination. \textit{Id.}}

The Seventh Circuit, led by Judge Posner, reversed the case in favor of Nuxoll.\footnote{Nuxoll \textit{ex rel.} Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 676 (7th Cir. 2008).} The result of Nuxoll seemed to be a victory for both parties.\footnote{Eugene Volokh, \textit{High School Student Speech and “Be Happy, Not Gay” T-Shirt}, The Volokh Conspiracy, April 24, 2008, http://volokh.com/posts/1209077493.shtml (last visited November 6, 2008).} Nuxoll was allowed to display his “Be Happy, Not Gay” t-shirt in counterprotest to the “Day of Silence.”\footnote{Id.} At the same time, the Seventh Circuit adopted a definition of “substantial disruption” that will have a farther reach for school administrators to restrict student speech.\footnote{Id.} Judge Rovner concurred in the judgment, but would not have needed to expand upon the “substantial disruption” definition to reach her conclusion.\footnote{Nuxoll, 523 F.3d at 676-77 (Rovner, J., concurring).}
To start its opinion, the majority acknowledged that Nuxoll could not make any negative comments about other students that constituted “fighting words” because they are outside the protection of the First Amendment. Nuxoll conceded at oral argument that he could not wear a shirt that read, “homosexuals go to Hell,” because they are fighting words.

The majority used Nuxoll’s concession about “fighting words” as a jumping-off point to weigh the interests of student speech versus the harm that can be caused by too much free speech in the school environment. The majority found that the contribution that students can make to the public debate was “modest,” whereas the school’s countervailing interest in protecting students from offensive speech was “undeniable.” The majority recognized that a “heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense.” Moreover, the court said that high school students cannot be raised in an “‘intellectual bubble’” absent discussion of important public issues.

On the other hand, the Seventh Circuit noted the dangers in allowing too much free speech, especially of the “wounding” kind. The majority supported its conclusion with studies that teens who are subject to teasing and harassment find it difficult to concentrate and to exceed in school. The court asserted that the problems that troubled schools are having, including high drop-out rates, will not be

165 Id. at 670 (majority opinion) (citing Chaplinsky v. N.H., 315 U.S. 568, 572-73 (1942)).
166 Id. at 671; but see id. at 678 n.3 (Rovner, J., concurring) (Judge Rovner asserted that this was not the position taken by Nuxoll and that Nuxoll conceded that his speech was governed by Tinker and not Chaplinsky.).
167 Id. at 671 (majority opinion).
168 Id.
169 Id.
170 Id. (quoting Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).
171 Id.
172 Id.
alleviated by “First Amendment free-for-alls.” Further, the majority opined that school administrators are in the better position to regulate student speech, as “judges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere conducive to learning.”

The majority then found that the school’s policy prohibiting derogatory comments took into account those two interests. The school’s policy did not halt open discussion by the students, rather it forbade only those disparaging against “unalterable or otherwise deeply rooted personal characteristics” about which most people, including students, were highly sensitive. In the majority’s opinion, these types of derogatory comments can “strike a person at the core of his being.” After weighing the competing interests, the majority went on to analyze the merits of the preliminary injunction under Supreme Court precedent.

1. A Möbius Strip: The Seventh Circuit’s Interpretation of Tinker

Unlike Harper and the district court in Zamecnik, the Seventh Circuit refused to adopt the “rights of others” standard from Tinker. The Seventh Circuit limited the “rights of others” standard to the invasion of a legal right by another student and found that there is no legal right to prevent criticism of a student’s beliefs or lifestyle. After determining that the “rights of others” standard was inapplicable, the Seventh Circuit turned its attention to Nuxoll’s

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173 Id. at 672.
174 Id. at 671.
175 Id.
176 Id.
177 Id.
178 Id.
179 See id. at 677 n.1 (Rovner, J., concurring).
180 Id. at 672 (majority opinion).

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argument that Justice Alito’s concurrence was controlling in Morse.182 Although Justice Alito and Justice Kennedy were necessary votes in the five Justice majority, the Seventh Circuit found that the concurrence was not controlling because the Justices joined the majority in Morse.183 In doing so, the court rejected Justice Alito’s limitation that Morse had no bearing on political speech.184

Then the Seventh Circuit considered the permissible scope of the “substantial disruption” standard.185 The majority found that Tinker was distinguishable from the facts in Nuxoll because the school in Tinker had engaged in viewpoint discrimination by forbidding only black armbands protesting Vietnam and not expression that was pro-Vietnam.186 The school district’s policy in Nuxoll was viewpoint neutral because it prohibited all derogatory comments, not just comments about heterosexuality or homosexuality.187 Because of the difference in the two cases, the majority determined that it should not use Tinker alone to determine the scope of the “substantial disruption” standard.188 Instead, the court relied on Fraser and Morse as well in making its holding.189 The majority first deduced from Morse and Fraser that a “substantial disruption” did not have to be a concern that serious consequences will ensue.190 Rather the school only needs to

182 Id.
183 Id. at 673.
184 Id.
185 Id. The court noted the school districts were given a “pretty free hand” in prohibiting speech at elementary schools or with speech not protected by the First Amendment. Id. In those scenarios, a school could prohibit student speech absent a showing of a “substantial disruption” or interference with the school environment. Id. Where those situations were missing, the Seventh Circuit found that the “substantial disruption” standard still was not absolute. Id.
186 Id.
187 Id.
188 Id. at 674.
189 Id.
190 Id.

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allege facts that would reasonably lead school officials to forecast a “substantial disruption.”

Applying Tinker, Fraser, and Morse, the Seventh Circuit next adopted a more expansive definition of “substantial disruption.” Specifically, the Seventh Circuit found that the concerns in Fraser and Morse were not a fear of violence. Fraser had looked to the state’s interests in protecting students from lewd and vulgar speech and the effect that the speech could have on young students. The court also found it relevant that Morse considered the psychological effects that drugs have on students. Using these cases, the Seventh Circuit inferred that a “substantial disruption” was not only a fear of violence, but it included any speech that would lead to “a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”

The Seventh Circuit then ruled that the school’s policy against derogatory language “appear[ed] to satisfy the test.” The policy appeared to maintain a school environment conducive to learning and covered the spectrum of “highly sensitive identity characteristics.” The majority also found that the derogatory comment policy did not constitute viewpoint discrimination as Nuxoll could advocate heterosexuality on religious grounds. The court conceded that this policy would not wash if applied to adults, if extended to students outside of school, or if “derogatory comments” were overextended to the sensitive. However, the Seventh Circuit asserted that in the unique school environment, “school authorities have a protective

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191 Id.
192 Id.
193 Id.
194 Id.
195 Id. (emphasis added).
196 Id. (emphasis added).
197 Id.
198 Id.
199 Id.
200 Id.
relationship and responsibility to all the students.”\(^{201}\) Thus, Nuxoll was not entitled to a preliminary injunction against the policy.\(^{202}\)

Despite ruling in favor of the school district’s policy, the Seventh Circuit took the middle ground when it ruled that “Be Happy, Not Gay” was only “tepidly negative” and not in violation of the school’s policy.\(^{203}\) The majority stated that “Be Happy, Drink Pepsi” would not be disparaging to Coke.\(^{204}\) Once the majority realized that its Pepsi-Coke analysis “missed the mark” on the facts in Nuxoll, it found that the phrase “Be Happy, Not Gay” was not demeaning or derogatory to other students.\(^{205}\) The phrase would not “poison the educational atmosphere” or cause incident in the classrooms.\(^{206}\)

The close of the opinion foreshadowed that Nuxoll would continue to challenge the Seventh Circuit’s narrow ruling.\(^{207}\) The majority called for the district court to strike a balance between a student’s right to campaign against sexual orientation and the school’s interest in maintaining a school environment where students are not distracted by debates over sexual identity.\(^{208}\)

2. Judge Rovner Weighs in on her Brothers\(^{209}\)

Although Judge Rovner concurred in the judgment, she expressed her dismay at the majority’s analysis under \textit{Tinker}.\(^{210}\) She compared the majority’s portrayal of \textit{Tinker} to a Möbius strip, a geometrical

\(^{201}\) Id. at 674-75.
\(^{202}\) Id. at 675.
\(^{203}\) Id. at 676.
\(^{204}\) Id. at 675.
\(^{205}\) Id. at 675-76.
\(^{206}\) Id. at 676.
\(^{207}\) Id.
\(^{208}\) Id.
\(^{209}\) Judge Rovner referred to Judge Posner and Judge Kanne as her brothers three times in her concurrence. See id. at 677, 678, 679 (Rovner, J., concurring).
\(^{210}\) Id. at 676.
shape that twists 180° to form a continuous one-sided surface. Judge Rovner opined that *Tinker* was not a viewpoint case because the Supreme Court never mentioned whether the school allowed speech or expressions favorable to the U.S. involvement in the Vietnam War. Rather *Tinker* was a case about subject matter discrimination, and Judge Rovner would not limit *Tinker* to a situation where a school banned all discussion of a particular subject.

Judge Rovner also disagreed with the majority’s interpretation of Supreme Court precedent. First, she opposed the majority’s use of *Hazelwood* reasoning in a case that did not involve school-sponsored speech. Although the majority never mentioned the *Hazelwood* case, she opined that the majority “expend[ed] much ink trying to strike a balance between the interests of free speech and ordered learning, a discussion which sound[ed] remarkably similar to the rule of *Hazelwood*.” Second, Judge Rovner diverged from the majority’s expansion of the “substantial disruption” definition. Judge Rovner opined that this case was a simple “substantial disruption” case, and Nuxoll should have prevailed under the standard delineated in *Tinker*. She would not have applied *Fraser* or *Morse* in ruling for Nuxoll. She would have ruled that the school district did not provide sufficient evidence that reasonably would have led school authorities to forecast a substantial disruption, and there was not evidence of substantial disruption when Heidi Zamecnik wore the t-shirt two years prior.

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211 *Id.* at 676 n.1.
212 *Id.* at 677.
213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.* at 676, 677.
218 *Id.*
219 *Id.*
220 *Id.* at 677.
In addition, Judge Rovner did not like the majority’s characterization of Nuxoll’s t-shirt as only “tepidly negative.” Judge Rovner found that the t-shirt was “clearly intended to derogate homosexuals.” Nonetheless, the t-shirt slogan was not the kind of speech that materially and substantially interfered with school activities. Finally, Judge Rovner advocated the value of speech among high school students and called for the judiciary to protect open debate in schools.

IV. EVALUATION OF NUXOLL: WHY THE SEVENTH CIRCUIT’S APPROACH WAS NOT SO “HAPPY”

Although the Seventh Circuit reversed the district court’s decision for Alexander Nuxoll, the case seemed to be a success for the school district. Through its majority opinion, the Seventh Circuit adopted a very broad definition of “substantial disruption” that will allow school officials to restrict a wide range of student speech in future cases. The effects of this decision will likely quiet the voices of student speakers in the Seventh Circuit.

221 Id. at 678.
222 Id. at 679. Judge Rovner cited to Nuxoll’s brief, where he criticized homosexual behavior. Id. She also found that teenagers today commonly use the expression “gay” as a negative term, such as “that sweater is so gay.” Id.
223 Id.
224 Id. at 680.
225 Volokh, supra note 161.
226 Id.
227 See Logan v. Gary Cmty. Sch. Corp., 2008 WL 4411518, at *5 (N.D. Ind. 2008) (Referring to Nuxoll, the court stated that “[t]he Seventh Circuit has shown its reluctance to interfere with school officials’ rules in running a local school.”).
A. The Seventh Circuit Should Have Followed Justice Alito’s Concurrence in Morse v. Frederick

In its ruling in Nuxoll, the Seventh Circuit ignored Justice Alito’s concurrence and instead only focused on the majority in Morse.\(^{228}\) The Seventh Circuit found that Justice Alito’s concurrence was not controlling; rather Justice Alito “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.”\(^{229}\) In ignoring Justice Alito’s concurrence, the Seventh Circuit extended the majority’s reasoning for restricting illegal drug use to prohibiting political speech protected under Tinker.\(^{230}\)

In his concurrence in Morse, Justice Alito, joined by Justice Kennedy, wrote to make the limitations of Morse clear.\(^{231}\) Justice Alito made two distinct points about the majority’s decision:

(a) [I]t goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issues such as the wisdom of the war on drugs or legalizing marijuana for medicinal use.\(^{232}\)

Justice Alito further explained that the majority opinion rejected any argument that public schools could censor speech on the basis that it interferes with its educational mission.\(^{233}\) The concurrence also

\(^{228}\) Nuxoll, 523 F.3d at 673.
\(^{229}\) Id.
\(^{231}\) Id.
\(^{232}\) Id. (emphasis added) (internal citation and quotation marks omitted).
\(^{233}\) Id. at 2637.
made it explicitly clear that the decision in Morse was at “the far reaches of what the First Amendment permits.”234

In ignoring Justice Alito’s concurrence, the Seventh Circuit failed to appreciate its significance to the majority opinion in Morse.235 When determining the value of a concurrence that joins the majority opinion, lower courts should consider whether the Justice’s vote was numerically necessary.236 The willingness of the majority to accommodate is often directly proportional to the number of votes supporting the majority’s result.237 When a vote is numerically necessary, such as the fifth vote, the willingness to accommodate is at its peak.238 On the other hand, the majority’s willingness to accommodate is unnecessary when a majority vote has already been procured.239

In Morse, there is a strong argument that Justice Alito’s concurrence should be read in conjunction with the majority opinion.240 Justice Alito and Justice Kennedy were the crucial fourth and fifth votes to the five Justice majority.241 And contrary to the case cited by the majority in Nuxoll,242 Justice Alito did not write his

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234 Id. at 2638 (emphasis added).
235 See Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007) (The Fifth Circuit found that Justice Alito’s opinion was “controlling.”).
236 Igor Kirman, Note, Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions, 95 COLUM. L. REV. 2083, 2105 (1995) (assuming that Justice Alito’s concurrence is considered a simple concurrence.).
237 Id. at 2106.
238 Id.
239 Id.
240 See Eugene Volokh, What Did Morse v. Frederick Do to the Free Speech Rights of Students Enrolled in K-12 Schools, The Volokh Conspiracy, June 26, 2007, http://volokh.com/posts/1182830987.shtml (last visited November 30, 2008) (proposing that “Justice Alito’s opinion, as the narrowest grounds offered by any of the Justices whose votes were necessary for the majority, thus seems to offer the controlling legal rule.”).
242 See McKevitt v. Pallasch, 339 F.3d 530, 531-32 (7th Cir. 2003). The Seventh Circuit, led by Judge Posner, expressed doubt that Justice Powell’s
concurrency to extend the majority opinion past its scope. He wrote separately to make it clear that he joined the majority on the understanding that Morse was at the “far reaches of what the First Amendment permits.”

In rejecting Justice Alito’s concurrence, the Seventh Circuit has given Morse a broader range. Not only did the Seventh Circuit apply Morse to political speech, the Seventh Circuit also ignored Justice Alito’s restriction that the reason for foregoing a Tinker analysis in Morse was because there was a threat to the physical safety of children. Instead the Seventh Circuit locked in on language from the majority opinion referencing the psychological harms caused by illegal drugs. Using this line from Morse, the Seventh Circuit asserted, “Imagine the psychological effects if the plaintiff wore a T-shirt on which was written ‘blacks have lower IQs than whites’ or ‘a woman’s place is in the home.’” In finding that psychological effects of speech can play into a Tinker analysis, the Seventh Circuit abandoned the rationale from Tinker that suppressing speech in the school environment requires more than a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular concurrence in Branzburg v. Hayes, 408 U.S. 665 (1972), was controlling even though he was the crucial vote to the majority opinion. Id.

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

Id.; see also Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007). Justice Alito’s “concurring opinion appear[ed] to have two primary purposes: providing specificity to the rule announced by the majority opinion, and, relatedly, ensuring that political speech will remain protected within the school setting.” Id.

Volokh, supra note 161.

Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008) (emphasis added); see also Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 625 (E.D. Pa. 2008) The court relied on Justice Alito’s concurrence in Morse to hold that school administrators did not have to demonstrate a substantial disruption where student’s t-shirt conveyed a message of “force, violence, and violation of the law in the form of illegal vigilante behavior.” Id.

Nuxoll, 523 F.3d at 674 (emphasis added).

Id.
viewpoint.”249 And if other courts follow this approach of looking at psychological effects of student speech unrelated to drugs, it could give Morse a very long reach.250 For example, this type of reasoning would arguably give the courts in Nuxoll and Harper ample justification for restricting any political speech that could be perceived as potentially hateful.251

B. The Seventh Circuit Should Not Have Inferred from Fraser and Morse When Defining “Substantial Disruption”

Instead of adhering to the Tinker definition of the “substantial disruption” standard, the Seventh Circuit used Fraser and Morse to redefine a “substantial disruption.”252 Tinker defined a “substantial disruption” as a finding that student speech would “materially and substantially disrupt the work and discipline of school.”253 The Seventh Circuit’s interpretation of the “substantial disruption” standard arguably extends farther than Tinker would have ever allowed.254

In Nuxoll, the Seventh Circuit inferred from Fraser and Morse that a “substantial disruption” could be included in a particular type of speech that would lead to “a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”255 Specifically, the Seventh Circuit relied on how both cases took into

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251 Id.
252 Nuxoll, 523 F.3d at 674.
253 Tinker, 393 U.S. at 513.
254 Nuxoll, 523 F.3d at 674; see also Volokh, supra note 161 (noting that “[T]he majority would tolerate a wide range of broad, vague, and viewpoint-based restrictions on student speech.”).
255 Nuxoll, 523 F.3d at 674.
account something more than a disorder or disturbance. Fraser examined how a vulgar, sexually charged speech could seriously damage an audience on the verge of sexuality. Morse was fearful of the physical, psychological, and addictive effects that illegal drugs have on youth. The Seventh Circuit used these concerns to conclude that a school could prohibit student speech absent an actual disorder or disturbance.

One problem with the Seventh Circuit’s expansion of the “substantial disruption” standard is that neither Fraser nor Morse relied on the “substantial disruption” standard in reaching their holdings. The Supreme Court noted in Morse that the mode of analysis in Fraser was unclear, but it certainly did not conduct the “substantial disruption” analysis prescribed by Tinker. The Court bypassed the “substantial disruption” standard in Fraser because of the school district’s compelling interest in protecting minors from lewd and offensive language. The Supreme Court found that a school district should be able to restrict vulgar language because it could be confusing and potentially damaging to youth on the verge of sexuality. Significantly, the Court also noted the “marked distinction” between the political speech in Tinker and the sexual content in the student’s speech.

The Supreme Court in Morse did not apply the “substantial disruption” standard because it found that preventing illegal drug use

256 Id.
258 Morse v. Frederick, 127 S. Ct. 2618, 2628 (2007).
259 Nuxoll, 523 F.3d at 674.
260 See Fraser, 478 U.S. at 685 and Morse, 127 S. Ct. at 2629; see also Dickler, supra note 34, at 373 (asserting that the “substantial disruption” test was eschewed in Fraser, Hazelwood, and Morse).
261 Morse, 127 S. Ct. at 2627. Although the Supreme Court has set Fraser out as an exception to Tinker, it “has not clarified the debate on what that exception is.” DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 638 n.1 (D. N.J. 2007).
262 Fraser, 478 U.S. at 684.
263 Id. at 683.
264 Id. at 680.
among youth was a compelling interest that should forego a \textit{Tinker} analysis.\footnote{265 \textit{Morse}, 127 S. Ct. at 2629.} Morse recognized that deterring drug use was an important interest because of the dangers of the physical, psychological, and addictive effects of drugs are most severe during youth.\footnote{266 \textit{id.} at 2628 (quoting \textit{Veronica Sch. Dist. 47J v. Acton}, 515 U.S. 646, 661-62 (1995)).} The Supreme Court classified the danger of illicit drug use as far more serious and palpable than \textit{Tinker}’s concern that schools may not restrict speech because of “‘a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.’”\footnote{267 \textit{id.} at 2629 (quoting \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 509 (1969)).} Morse represented the school’s right to ban speech that advocated the use of illegal drugs, which was an independent exception from the \textit{Tinker} “substantial disruption” standard.\footnote{268 \textit{id.} at 2637 (Alito, J., concurring).}

Another problem with the Seventh Circuit’s analysis in \textit{Nuxoll} is that it appears that a majority of the Justices in the Supreme Court would not apply \textit{Morse} to the definition of “substantial disruption.”\footnote{269 \textit{See id.} at 2637, 2634 (Thomas, J., concurring), 2646 (Stevens, J., dissenting).} As discussed, Justices Alito and Kennedy joined the majority on the understanding that \textit{Morse} had no bearing on political speech protected by \textit{Tinker}.\footnote{270 \textit{Id.} at 2636 (Alito, J., concurring).} Those Justices would permit the regulation of lewd or vulgar speech under \textit{Fraser}, school-sponsored speech under \textit{Hazelwood}, and speech that advocated illegal drug use under \textit{Morse}.\footnote{271 \textit{Id.} at 2637. Justice Alito also wrote the majority opinion in \textit{Saxe v. State College Area School District}, 240 F.3d 200, 214 (3d Cir. 2001), where he asserted that \textit{Fraser} allowed a school to regulate lewd and vulgar speech, \textit{Hazelwood} allowed the prohibition of school-sponsored speech, and \textit{Tinker} governed all other speech.} Any other speech would be regulated under \textit{Tinker}.\footnote{272 \textit{Morse}, 127 S. Ct. at 2637 (Alito, J., concurring).}

\footnotesize{265 \textit{Morse}, 127 S. Ct. at 2629.}\footnotesize{266 \textit{id.} at 2628 (quoting \textit{Veronica Sch. Dist. 47J v. Acton}, 515 U.S. 646, 661-62 (1995)).}\footnotesize{267 \textit{id.} at 2629 (quoting \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 509 (1969)).}\footnotesize{268 \textit{id.} at 2637 (Alito, J., concurring).}\footnotesize{269 \textit{See id.} at 2637, 2634 (Thomas, J., concurring), 2646 (Stevens, J., dissenting).}\footnotesize{270 \textit{Id.} at 2636 (Alito, J., concurring).}\footnotesize{271 \textit{Id.} at 2637. Justice Alito also wrote the majority opinion in \textit{Saxe v. State College Area School District}, 240 F.3d 200, 214 (3d Cir. 2001), where he asserted that \textit{Fraser} allowed a school to regulate lewd and vulgar speech, \textit{Hazelwood} allowed the prohibition of school-sponsored speech, and \textit{Tinker} governed all other speech.}\footnotesize{272 \textit{Morse}, 127 S. Ct. at 2637 (Alito, J., concurring).}
In Justice Thomas’s concurrence, he also found that Morse created a new exception to Tinker, along with Fraser and Hazelwood.\textsuperscript{273} It also appeared as though Justices Stevens, Souter, and Ginsburg considered Morse to be another exception to Tinker in their dissent.\textsuperscript{274} The dissent recognized that the majority “carv[ed] out” pro-drug speech from the protection of the First Amendment.\textsuperscript{275} Thus, if these five Justices were to align (at a minimum), they would make a majority of the Court reading Morse as an exception to Tinker and most likely disagreeing with the Seventh Circuit’s application of Morse.\textsuperscript{276}

The Seventh Circuit should have remained true to Tinker’s definition of “substantial disruption” when dealing with “Be Happy, Not Gay,” a passive, political message.\textsuperscript{277} If the Seventh Circuit had done so, it would have reached its holding easily, as Judge Rovner did in her concurrence.\textsuperscript{278} The Seventh Circuit should have found that the school district had no evidence that would forecast a material or substantial interference with the work or discipline of school and that there was no disruption two years earlier.\textsuperscript{279} The Seventh Circuit should have reversed the case in favor of Alexander Nuxoll without confusing “substantial disruption” by including Fraser and Morse in its definition.\textsuperscript{280}
CONCLUSION

At the end of the Nuxoll decision, Judge Posner predicted that this lawsuit would continue. Judge Posner predicted that this lawsuit would continue. Alexander Nuxoll will want to wear more controversial t-shirts in attempt to push the boundaries of his First Amendment rights. And Nuxoll will not be alone in his attempts to see how far he can stretch his free speech rights at school. It is likely that there will be more students testing the outer limits of First Amendment jurisprudence. With more student speech cases, comes more confusion among lower courts. This confusion is clearly illustrated when comparing the vastly different approaches taken to similar student speech challenges in Nuxoll, Zamecnik, Harper, and Nixon.

Perhaps these four opinions illustrate that Judge Posner was right when he said that judges are incompetent to tell school administrators how to run schools in a way that is conducive to learning. Maybe the problems that American school districts are facing will not be solved by “First Amendment free-for-alls.” Or maybe Judge Rovner was correct when she asserted the need for the judiciary to intervene in student speech cases in order to prevent schools from stifling young minds. Perhaps courts should protect open debate on controversial topics, and the school should only step in when the speech becomes substantially disruptive.

Either way, the Supreme Court should see Judge Posner’s foreshadow at the end of Nuxoll as a call for the Court to clarify this murky area of the law. That way, courts will know how to proceed in future student speech cases, and there will be no more opinions that can be compared to a Möbius strip.

281 Id. at 676 (majority opinion).
282 Id.
283 Id. at 671.
284 Id. at 672.
286 Id. at 680.