A LESS HAZARDOUS FREEDOM?
CRITIQUING THE STUDENT WELFARE STANDARD FOR POTENTIALLY HARMFUL STUDENT SPEECH

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"These are my principles, and if you don’t like them, I have others." – Groucho Marx

INTRODUCTION

When word of his plan leaked out, a group of angry teens confronted high school sophomore Chris Eckhardt after gym class, yelling that if he carried out his antiwar protest, “[Y]ou’ll find our fists in your face and our foot up your ass.” The high school’s coaches opposed him, saying that they would not be responsible for anything that might happen to him. Undaunted by the threats, Chris exercised his right to free speech the following day at school. Reaction was quick, and hostile. The captain of the school’s football team grabbed Chris and attempted to rip the antiwar symbol off his jacket, and a brief scuffle ensued. Upon learning that Chris was on his way to the principal’s office, the football player let him go, ominously warning him that if the protest continued, he’d come looking for him later. While Chris waited outside the office to see the principal, several students passed by, telling him “you’re dead” and making other angry comments. One administrator informed him he was “too young to have opinions,” and that if he was suspended, he should look for another school since he would not be welcomed back. Chris was suspended for his protest, and his family soon began receiving letters from people opposing
his speech, like an anonymous postcard warning, “[I]t looks like your [sic] going to have a Harvey Lee Oswald [sic] on your hands.”\textsuperscript{10}

What sort of speech did young Chris Eckhardt engage in that would provoke such anger, hostility, and violence? He wore a simple black armband, intended to protest the then escalating war in Vietnam.\textsuperscript{11} Along with fellow protestors John and Mary Beth Tinker, Chris Eckhardt filed suit against the school district, and \textit{Tinker v. Des Moines Independent Community School District} was decided by the Supreme Court in 1969.\textsuperscript{12} Holding in favor of the students, the Court established a new test for student speech rights, declaring that schools cannot restrict student speech rights unless the speech caused or could reasonably cause substantial disruption of the school.\textsuperscript{13} \textit{Tinker} is one of the grand statements of principle that were the hallmark of the Warren Court, giving voice to our national ideals of equality, free speech, religious liberty, procedural fairness, and human dignity.\textsuperscript{14} In the Court’s words,

\begin{quote}
Any variation from the majority’s opinion may inspire fear . . . [b]ut our Constitution says we must take that risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.\textsuperscript{15}
\end{quote}

The educational environment has changed radically in the four decades since the \textit{Tinker} protest. Schoolyard scuffles too often escalate into stabbings and gunfire, as societal forces such as dysfunctional families, child abuse and neglect, media violence, and substance abuse adversely impact the climate of our schools.\textsuperscript{16} While violence was never a stranger to public school students, the tragedy of Columbine in Colorado, and the rash of copycat shootings that followed,

\begin{thebibliography}{9}
\bibitem{12} Id. at 504.
\bibitem{13} See id. at 514. \textit{See also infra} Subsection I.A.1 (discussing facts and holding of \textit{Tinker}).
\bibitem{15} \textit{Tinker}, 393 U.S. at 508-09 (internal citations omitted).
\end{thebibliography}
reflect a shift from individual violence to seemingly random mass shootings. Violence is not the only danger facing today’s students, who must also contend with expressions of prejudice, harassment, and intolerance, which may inflict long-lasting psychological harm. One study found that 50-75% of high school students experienced or witnessed harassment related to being gay, unintelligent, or disabled; the most dramatic increases in levels of verbal harassment between middle school and high school were in the areas of religion, race, and gender.

Perceiving these dangers, courts are responding by moving away from Tinker’s bold protection of the “hazardous freedom” of student First Amendment rights, and moving toward a student welfare standard, permitting restrictions on student speech if the speech threatens student welfare. Morse v. Frederick, the Court’s most recent student speech decision, illustrates just how entrenched this student welfare standard has become. Judges and administrators alike are increasingly coming to believe the substantial disruption standard is unsuited for the increasingly violent reality of modern schools. In light of the perils facing students, and the nearly Sisy-

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17 Id. at 1-2 (observing that the school shootings of the 1990’s were qualitatively different in terms of the number killed and injured per episode, the randomness by which the victims were selected, the careful planning involved, and the use of shootings as an instrument in settling scores for real or imagined grievances).
19 Id. at 16-17.
20 See Francisco M. Negron, Jr., A Foot in the Door? The Unwitting Move Towards a “New” Student Welfare Standard in Student Speech After Morse v. Frederick, 58 Am. U. L. Rev. 1221 (2009). See also Clay Calvert, Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing, 58 Am. U. L. Rev. 1167, 1169 (2009) (“[L]ower courts post-Morse are sidestepping Tinker’s traditional and rigorous substantial-and-material disruption standard and substituting, in its place, the Supreme Court’s ruling in Morse to automatically squealch student speech that allegedly threatens violence.”).
22 See discussion infra Subsection I.C.1.
23 See Ponce v. Socorro Ind. Sch. Dist., 508 F.3d 765, 770 (5th Cir. 2007) (“Tinker will not always allow school officials to respond to threats of violence appropriately.”); Jay Braiman, Note, A New Case, an Old Problem, a Teacher’s Perspective, The Constitutional Rights of Public School Students, 74 Brook. L. Rev. 439, 441 (2009) (“[I]t is time to overturn Tinker and adopt a new standard for determining the rights and obligations of minor students and adult educators with respect to one another while they are in school.”).
phean task facing judges in protecting students’ rights while also ensuring their safety, it is hardly surprising that the student welfare standard has gained traction.\(^{24}\)

However, the student welfare standard is not without significant drawbacks. By requiring judges to balance potential harms to students that are difficult to predict and quantify, the standard gives rise to judicial inconsistency in its application.\(^{25}\) This standard, a stark departure from our national emphasis on the primacy of constitutional rights, could lead to potentially more severe harm to students and society than the harms caused by threatening and emotionally hurtful speech.\(^{26}\) Ironically, it may also increase the very dangers to student safety and well-being that it aims to ameliorate.\(^{27}\)

If *Tinker* was decided today, it is not inconceivable that Chris Echkardt’s speech might be suppressed, with the hallway scuffle found disruptive or likely to incite violence.\(^{28}\) The *Morse* Court, with its demonstrated willingness to restrict speech disrupting the educational mission of schools or posing a danger to student safety, may well disagree with the *Tinker* Court’s strong support for student speech rights.\(^{29}\) Nevertheless, a judicially inconsistent student welfare standard, which severely curtails the rights of students without a corresponding increase in student safety, is a poor alternative to the substantial disruption standard, which has proven capable of addressing the perils attendant to student freedom of speech in a balanced, consistent manner.\(^{30}\)

\(^{24}\) See infra Subsection I.C.2 (examining decisions influenced by the student welfare standard following *Morse*).

\(^{25}\) See discussion infra Part II.

\(^{26}\) See discussion infra Part II.

\(^{27}\) See discussion infra Part III.

\(^{28}\) See infra Subsection I.C.1 (noting concerns raised by Justices Roberts, Alito, Kennedy, and Thomas in *Morse* about *Tinker*'s ability to prevent harm to students).

\(^{29}\) See discussion infra Subsection I.C.1. The potential for violence was not lost on the Court in *Tinker*. In a footnote to its decision, the Court observed that a student had died in Vietnam and that the school feared a protest could escalate out of control. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 n.3 (1969). The Court explicitly addressed the issue of violence, stating, “Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.” *Id.* at 508.

\(^{30}\) See infra Parts II, III (comparing the rationale and efficacy of the two standards).
The substantial disruption test, fashioned in one of the most turbulent times in recent history, is as applicable to the modern reality of the educational environment as it was at its conception.\textsuperscript{31}

Part I of this Note discusses the judicial paradigm shift from protecting student free speech rights to protecting student welfare, as evidenced by recent court decisions. Part II examines the underlying rationale of the student welfare standard and the likely consequences of its implementation. Part III explores the standard’s ability to address potential harms to student welfare, and possible alternative approaches to protecting the interests of students.

I. FROM STUDENT SPEECH RIGHTS TO STUDENT WELFARE: A JUDICIAL PARADIGM SHIFT

Francisco Negron, Jr., who first postulated the emergence of a student welfare standard, observed that the move toward its adoption has been incremental, spurred by Supreme Court decisions following \textit{Tinker}.\textsuperscript{32} Although the Court affirmed \textit{Tinker} in its subsequent decisions,\textsuperscript{33} each has chipped away at the substantial disruption standard by carving out exceptions to it and ruling in favor of administrators and against students.\textsuperscript{34} While \textit{Tinker} is still influential, especially in cases closely approximating its facts, the Court’s propensity to create exceptions to the substantial disruption standard raises the possibility that the standard may soon be subsumed entirely, swallowed up by the exceptions.\textsuperscript{35}

A. Slouching Towards Student Welfare

Asked about the impact of \textit{Tinker}, plaintiff Chris Eckhardt replied, “What George [Washington] . . . did for white males in 1776, what Abraham Lincoln did . . . for African-American males, and what the women’s suffrage movement in the 1920s did for women, the \textit{Tinker} case

\begin{footnotesize}
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\textsuperscript{31} See \textit{generally} Calvert, supra note 20, at 1190-91 (discussing how \textit{Tinker} can continue to be a bulwark against student-imposed censorship).
\textsuperscript{32} See Negron, supra note 20, at 1223-40 (tracing the evolution of the student welfare standard in Supreme Court and lower court decisions).
\textsuperscript{34} See Calvert, supra note 20, at 1173.
\textsuperscript{35} See Calvert, supra note 20, at 1190-91.
\end{footnotesize}
did for children in America.”

It has been lauded as “Roe v. Wade” for public school students,” and “the biggest case for public schools and public school students ever.”

But Tinker’s influence is diminishing, as the Court’s decisions move toward a student welfare standard where administrators could censor student speech has the mere potential to inflict physical or emotional harm. This gradual paradigm shift is best illustrated by examining the Court’s student speech decisions from Tinker to Morse.

1. Tinker and the Substantial Disruption Standard

In December of 1965, 275,000 American troops were deployed in Vietnam. A group of adults and students opposed to the Vietnam War gathered at the Eckhardt home, and there conceived a plan to wear black armbands during the holiday season to express their opposition and their support for a truce. Chris Eckhardt wore his armband to Roosevelt High School, and thirteen-year-old Mary Beth Tinker wore hers to junior high, on December 16, with fifteen-year-old John Tinker wearing his to school the following day. The three were suspended until they would return without their armbands, which they refused to do until after the holidays. The students sought an injunction against the school, alleging the suspensions violated their free speech rights.

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37 410 U.S. 113 (1973) (extending abortion rights to women under the due process clause of the Fourteenth Amendment).

38 See Negron, supra note 20, at 1236-41; Calvert, supra note 20, at 1173-84.


42 Id.

43 Id.

44 Id. Their complaint was dismissed by the district court, but affirmed on appeal by without opinion by the Eighth Circuit. Id. at 504-05.
The Court held the school district violated the students’ constitutionally protected free speech rights.\textsuperscript{45} Students, the Court declared in its landmark holding, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{46} The ability to freely express ideas, if done “without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others,” creates a “marketplace of ideas” in the classroom, upon which “[t]he Nation’s future depends.”\textsuperscript{47} The Court concluded that the students’ silent, passive speech was not sufficient to lead school authorities to forecast substantial disruption of, or material interference with, school activities, and neither caused disorder nor interfered with the rights of others.\textsuperscript{48}

The \textit{Tinker} decision is consistent with the Warren Court’s other First Amendment decisions. Two decisions from later that same year embody a similar commitment to the expressive rights of individuals, even when the speech is offensive, unpleasant, or potentially threatening. The Court protected political speech where an individual threatened to shoot a public official for rhetorical effect in \textit{Watts v. United States}, distinguishing such “political hyperbole” from a true threat of violence.\textsuperscript{49} Watts, an eighteen-year-old protesting the war in Vietnam, had stated that, if made to carry a gun, “the first man I want to get in my sights is L.B.J.”\textsuperscript{50} In \textit{Brandenburg v. Ohio}, the Court reversed the conviction of a Ku Klux Klan leader who advocated violence to accomplish the Klan’s political goals.\textsuperscript{51} In so doing, the Court distinguished inciting lawless action

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 514.
\item \textsuperscript{46} \textit{Id.} at 505.
\item \textsuperscript{47} \textit{Id.} at 512-13 (internal quotations omitted).
\item \textsuperscript{48} \textit{Id.} at 508, 514.
\item \textsuperscript{49} 394 U.S. 705, 708 (1969).
\item \textsuperscript{50} \textit{Id.} at 706. The Court’s decision emphasized our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” \textit{Id.} at 708 (quoting \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 270 (1964)).
\item \textsuperscript{51} 395 U.S. 444, 444-45 (1969).
\end{itemize}
from “mere advocacy,” with the former proscribed and the latter protected.\textsuperscript{52} These two decisions reflected the Warren Court’s keen awareness of the dangers speech can pose to public safety, but expressed a willingness to tolerate some risk to the public welfare rather than unduly restrict First Amendment rights.\textsuperscript{53} Unless speech posed a likely and imminent harm, the Court viewed it as deserving protection.\textsuperscript{54}

Considered in context, \textit{Tinker}’s substantial disruption test can be seen as the Warren Court’s attempt at striking a balance between training students as citizens by nurturing a respect for the Constitution, fostering debate on social issues, and promoting a secure and orderly educational environment.\textsuperscript{55} The test the Court fashioned is consistent with \textit{Watts} and \textit{Brandenburg}, sharing their requirements of likeliness and imminence, and their underlying belief that societal welfare is best served by adhering to constitutional principles despite the inherent dangers result-

\textsuperscript{52} \textit{Id.} at 447 (“[C]onstitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

\textsuperscript{53} As the Court stated in \textit{Watts}, “The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.” 394 U.S. 705, 707 (1969). It nevertheless concluded that “a statute . . . such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” \textit{Id.} Similarly, in \textit{Brandenburg}, the Court protected speech in which the speaker threatened “revengance” [sic] if “our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race” and advocated that “the nigger should be returned to Africa, the Jew returned to Israel.” 395 U.S. 444, 446-47 (1969).

\textsuperscript{54} \textit{See Brandenburg}, 395 U.S. at 448-49 (objecting to the indictment for not distinguishing between advocacy and the incitement to imminent lawless action); \textit{Watts}, 394 U.S. at 708 (stating that the expressly conditional nature of the threat and the context surrounding its delivery did not support construing the speech as a true threat).

\textsuperscript{55} \textit{See Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 508 (1969). As the Court declared, “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes.” \textit{Id.} at 507 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)). It further stated that “personal intercommunication among the students . . . is an important part of the educational process,” and that “Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.” \textit{Id.} at 512-13.
ing from free speech and open debate.\textsuperscript{56} In this respect, the Warren Court’s decision in \textit{Tinker} may be seen as extending similar speech protections to students as those afforded to adults.\textsuperscript{57}

2. Fraser, Hazelwood, and the Boundaries of Student Speech

\textit{Tinker} may well be the high-water mark for student speech, as the three subsequent Supreme Court decisions on student speech rights have carved out exceptions to student speech rights and held in favor of school administrators.\textsuperscript{58} In \textit{Bethel School District No. 403 v. Fraser}, the Court permitted suppression of lewd, vulgar, or indecent speech without requiring a showing of substantial disruption.\textsuperscript{59} The Court stated that public education “must inculcate the habits and manners of civility,” and that “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.”\textsuperscript{60} It held in favor of the school administration, believing Fraser’s innuendo-laden speech, which he delivered at a high school assembly to students as young as fourteen, was lewd, vulgar, and inconsistent with the fundamental values of public school education.\textsuperscript{61}

On the heels of \textit{Fraser}, the Court created an additional exception for school-sponsored activities, holding in \textit{Hazelwood School District v. Kuhlmeier} that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legiti-

\textsuperscript{56} See id. at 514.
\textsuperscript{57} The Court did, however, recognize that First Amendment rights of students must be applied “in light of the special characteristics of the school environment.” \textit{Id.} at 506.
\textsuperscript{58} See Calvert, supra note 20, at 1173 (“The most obvious indicator of \textit{Tinker}’s decline is that, in each of the three subsequent Supreme Court decisions involving student expression rights, the Court chose: (1) not to apply \textit{Tinker}, (2) to carve out fact-specific exceptions to \textit{Tinker}, and (3) to rule in favor of school officials and against students.”).
\textsuperscript{59} 478 U.S. 675, 685-86 (1986).
\textsuperscript{60} \textit{Id.} at 681.
\textsuperscript{61} \textit{Id.} at 677-78, 685-86. The speech described a student government candidate as being “firm in his pants” and stated he “will go to the very end—even to the climax, for each and every one of you.” \textit{Id.} at 687 (Blackmun, J., dissenting).
mate pedagogical concerns.” The Court distinguished this case from *Tinker*, stating that while *Tinker* concerned students’ personal expression on-campus, this case concerned school-sponsored activities such as newspapers and theatrical productions. Here too, the Court held that the *Tinker* standard did not apply, indicating *Tinker*'s disruption test is not the exclusive means of evaluating student speech.

Perhaps it was natural that, after such a bold declaration of support for student First Amendment rights, the Court would feel the need to draw boundaries expressing the limits of student rights. In *Fraser* and *Hazelwood*, the Court expressed schools’ educational mission in terms of inculcating civility, a marked shift from the Warren Court’s focus on encouraging open discourse and fostering debate among students. Educators interpreted these decisions as bolstering school employees’ ability to determine whether speech is appropriate, believing the Court would support both affirmative and restrictive actions to inculcate fundamental values. Although the Court in *Fraser* and *Hazelwood* expressed support for *Tinker* and the principles it rep-

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62 484 U.S. 260, 273. The Court upheld the school’s authority to censor articles in a high school newspaper. *Id.* at 263-64, 273.

63 *Id.* at 270-71. In *Hazelwood*, school administrators exercised editorial control of a student newspaper, created as part of a journalism class, objecting to articles on school pregnancy and on the impact of divorce. *Id.* at 263-64.

64 See *id.* at 273 (“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).

65 See *Hudson*, supra note 36. Notably, the majority opinion in both cases cites Justice Black’s dissent in *Tinker*, which states that shouting, profanity, and violent expression should not be protected. See *Hazelwood*, 484 U.S. at 271 n.4; *Fraser*, 478 U.S. at 686.

66 See Thomas Eveslage, *The Federal Courts and Educational Policy: Paternalism, Political Correctness and Student Expression*, Assoc. for Educ. in Journalism & Mass Commc’ns Convention Presentation 19-23 (Aug. 5-8, 1992) (on file with author). Eveslage states that the Court “shifted the First Amendment focus from the individual applying societal values to the authorities instilling institutional values . . . a perspective that reshapes the judiciary’s view of the mission of public school education.” *Id.* at 19.

67 See *id.* at 22-23.
resented, commentators feared that the differing conceptions of the role of public education could give rise to lower courts deciding cases in a confusing, and even conflicting manner.69

B. Harmful Student Speech Prior to Morse v. Frederick

*Morse v. Frederick*, in which the Court upheld a student’s suspension for speech it viewed as drug advocacy, was a watershed case for the student welfare standard.70 However, even before *Morse*, federal and state court decisions show that fears of confusing and contradictory jurisprudence were not baseless.71 Taking their cues from the Supreme Court, judges began to allow administrators increasing freedom to suppress potentially harmful speech, using *Tinker*’s substantial disruption standard in ways the Court had never conceived.72

1. Student Threats Under Tinker and Watts

As envisioned by the Warren Court, speech that potentially threatened student welfare could be suppressed under *Tinker* if it would foreseeably cause substantial disruption, or qualifies as a true threat under *Watts*.73 Speech rises to the level of a true threat if a reasonable speaker would foresee that listeners would interpret the speech as a serious expression of intent to in-

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68 See Hazelwood, 484 U.S. at 266; Fraser, 478 U.S. at 680.
69 See Loucas Petronicolos, Tinker, Fraser and Hazelwood: Which Educational Policies are Truly “Educational”? Annual Meeting of the Am. Educ. Research Ass’n Presentation, 7 (Apr. 8-12, 1996) (on file with author) (predicting that the ambiguity of Fraser and Hazelwood may be a source of school policy disputes owing to four factors: (1) differing notions about the ends and means of public education; (2) the potentially broad applicability of Fraser and Hazelwood over educational disputes; (3) the introduction of legislation to ease tensions caused by (1) and (2); and (4) federal and state courts resolving new disputes that pose confusing questions); see also Eveslage, supra note 66, at 25 (speculating whether Fraser and Hazelwood will result in less judicial interference in school affairs, or simply refined the lines of administrator control over student speech, and questioning whether the discrepancy in judicial perspectives will have a positive or negative effect on campuses).
70 See Negron, supra note 20, at 1223 (arguing that the Court put the student welfare standard “front and center,” articulating the view that schools may regulate student expression to safeguard student welfare).
71 See infra Subsection I.C.2 (discussing courts’ varied approaches to threatening and emotionally harmful student speech).
72 See Calvert, supra note 20, at 1173-1185 (asserting that lower courts are misusing Tinker in attempting to restrict student speech on the internet and provide students with emotional tranquility).
flict harm. Applying this standard, courts consider the factual context of the speech, including the recipients’ and listeners’ reactions to the speech, whether the alleged threat was conditional, the manner of its communication, past conduct of the speaker, and whether the recipient had reason to suspect the speaker had a propensity toward violence. The requisite intent is intent to communicate the threat, rather than intent to inflict harm. However, even a doubtful threat may still provide reasonable grounds to forecast disruption and suppress the speech under Tinker. Taken together, the true threat and substantial disruption standards allow schools to confront most speech posing potential harm to student safety.

Lovell v. Poway Unified School District, in which a high school student threatened to shoot her guidance counselor if not allowed to change her course schedule, is an example of a speech found to be a true threat. The Ninth Circuit determined that a reasonable person would have foreseen that this would be interpreted as a serious expression of intent to harm, considering its unambiguous, immediate nature and the circumstances surrounding its utterance. Threatening speech could also be restricted under substantial disruption, as in LaVine v. Blaine School District. In that case, a student submitted a poem reading, in part, “As I approached, the classroom door, I drew my gun and, threw open the door, Bang, Bang, Bang. When it all was

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74 United States v. Hanna, 293 F.3d 1080, 1087 (9th Cir. 2002).
75 See id.
76 United States v. Orozco-Santillan, 903 F.3d 1262, FN 4 (9th Cir. 1990), overruled in part on other grounds by United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002).
77 See Fortson, supra note 73, at 5.
78 Id. (“This two-part test casts a net wide enough to allow schools adequate means to snare and confront most of the student speech that poses a potential danger to the school environment.”). However, Fortson asserts that Tinker does not successfully confront the danger of mass school shootings and advocates judicial deference to school administrators. Id. at 9.
79 90 F.3d 367, 369, 373 (9th Cir. 1996). In a footnote in this opinion, the court cited an earlier opinion by Justice Breyer, in which he observed that “the problem of guns in and around school is widespread and extremely serious,” and pointed to statistics indicating that four percent of high school students occasionally carry a gun to school. Id. at 372, n.4 (citing United States v. Lopez, 514 U.S. 549, 619 (1996) (Breyer, J., dissenting)). Breyer’s observations appear prescient in light of the rash of school shootings which would soon follow.
80 Id. at 372.
81 257 F.3d 981, 990 (9th Cir. 2001) (concluding the totality of the circumstances surrounding a student’s violent poem were sufficient to allow the administrators to reasonably forecast substantial disruption).
over, 28 were, dead, and all I remember, was not feeling, any remorse [sic], for I felt, I was, cleansing my soul.”

The court reasoned that although the student’s graphic poem did not threaten immediate harm to a specific individual, the administration’s awareness of both the student’s suicidal thoughts and alleged stalking of his girlfriend was sufficient to justify a forecast of disruption. The court emphasized that it was the combination of these, rather than the poem in isolation, that justified expelling the student.

The tragedy at Columbine High School in April 1999, in which two students killed twelve students and a teacher and injured nearly two dozen more before committing suicide, shocked the national conscience. A rash of school shootings followed, including one involving a six-year-old gunman killing a classmate. The visceral impact of the shootings and the resulting national attention on the problem of school violence increased judges’ willingness to allow schools greater ability to discipline students for potentially threatening expression.

Cases from the period immediately following Columbine demonstrate courts’ heightened concern for student welfare. *J.S. v. Bethlehem Area School District*, decided by the Supreme Court of Pennsylvania in 2002, is one such example. The Court acknowledged that “the horrific events at Columbine High School, Colorado remain fresh in the country’s mind,” but found a

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82 Id. at 983. The poem continued, “I quickly, turned and ran, as the bell rang, all I could hear, were screams, screams of friends, screams of co workers, and just plain, screams of sheer [sic] horror, as the students, found their, slain classmates,” and concluded by depicting its author’s suicide. Id. at 983-84.

83 Id. at 989-90.

84 Id. at 990 (“Taken together and given the backdrop of actual school shootings, we hold that these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities.”). It has been suggested that the court erred by considering the characteristics of the speaker in concluding the forecast of disruption reasonable, arguing that the speaker’s past behavior has no relevance in determining whether a particular speech is disruptive. See Fortson, *supra* note 73, at 8.


88 807 A.2d 847 (Pa. 2002).
student’s website listing reasons why a teacher should die and soliciting $20 “to help pay for the hitman” was intended as humor rather than an expression of intent to harm the teacher. 89 It did, however, find the emotional and physical injury suffered by the teacher sufficient evidence of disruption. 90 What sets the Bethlehem decision apart from previous decisions is its use of Tinker to restrict off-campus speech. 91 The Court stated that while the students personally accessing the material was a key factor in its holding, merely targeting the material so that it could be accessible from school grounds may be sufficient to consider the speech on-campus under Tinker. 92 In Doe v. Pulaski County Special School District, the Eighth Circuit also restricted off-campus student speech, holding that an eighth grade student’s letter describing his wish to rape and kill his ex-girlfriend was a true threat. 93 The court stated that, in the wake of Columbine, any reasonable school official would have taken action based on the letter’s violent content. 94 A vigorous dissent argued that the speech lacked both the imminence and intent to communicate required of a true threat, as it was written a year earlier, taken from the student without permission, and brought to school by a friend. 95

89 Id. at 851, 860.
90 Id. at 869. The teacher took a medical leave of absence for the remainder of the school year, suffering from stress, anxiety, loss of sleep, and short-term memory loss. Id. at 852.
91 See id. at 865 (“We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”). Although the student did access the website at school, it was created at his home. Id. at 856.
92 Id. at 865.
93 306 F.3d 616, 619, 625-27 (8th Cir. 2002). The court reasoned that the subject of the letter, who was shown the letter when another student brought it to school, could reasonably have perceived it as an expression of intent to harm her. Id. at 625-26.
94 Id. at 626 n.4.
95 Id. at 627-30 (Heaney, J., dissenting). The Pulaski dissent is not alone in expressing its concern for the imminence and intent to communicate requirements for potentially threatening student speech. See Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 617-18 (5th Cir. 2004) (holding that a student’s sketch of a school under siege by men with guns was not a true threat, as it was not specific to any individual and was not communicated until it was inadvertently brought to school two years later, and that the time lapse between the speech and its being brought to campus did not support a reasonable forecast of disruption).
2. Substantial Disruption and Psychological Harm

Concurrent with the increasing emphasis on school safety was an increasing concern for the psychologically harmful effects of student speech.\textsuperscript{96} In this context too, judges varied in their application of the substantial disruption standard in attempting to address threats to student welfare. Two district court decisions illustrate the more traditional application of the substantial disruption standard. In \textit{Chambers v. Babbit}, a Minnesota court held that a student’s “Straight Pride” sweatshirt could not be banned because it was offensive without evidence supporting a forecast of disruption.\textsuperscript{97} In its decision, the court took pains to note the strong potential for ridicule and violence facing lesbian, gay, bisexual, and transgender (“LGBT”) students, and speculated that the prevalence of anti-gay comments in schools are a key contributor to higher depression and suicide rates.\textsuperscript{98} However, the court went on to state that its duty to uphold constitutional principles must take precedence, and that promoting safety and tolerance in the educational environment is a role for which the community is better suited than the court.\textsuperscript{99}

In \textit{Nixon v. Northern Local School District Board of Education}, an Ohio district court took a more calloused view, enjoining a middle school from regulating a student’s shirt bearing the message, “Homosexuality is a sin! Islam is a lie! Abortion is murder!”\textsuperscript{100} The court opined that while students who were Muslim, homosexual, or have had abortions could find the message offensive, such offense falls short of \textit{Tinker}’s standard for reasonably forecasting substantial dis-

\textsuperscript{96} See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) (“Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.”), \textit{vacated as moot}, 549 U.S. 1262 (2007).

\textsuperscript{97} 145 F. Supp. 2d 1068, 1071-72 (D. Minn. 2001). The defendants presented evidence of previous disruption due to the wearing of confederate symbols, but the court did not believe there was a sufficient nexus between a racial incident and the threat of disruption relating to issues of sexuality. \textit{Id.} Allegations of “gay-bashing” in the form of “taking sides” in a heated discussion and an instance car vandalism were proffered, but the court found them lacking in specificity. \textit{Id.} at 1072.

\textsuperscript{98} \textit{Id.} at 1073.

\textsuperscript{99} \textit{Id.} at 1073-74.

\textsuperscript{100} 383 F. Supp. 2d 965, 967, 973 (S.D. Ohio 2005).
ruption. In this court’s opinion, permitting the student to wear his shirt to school would result in only minimal harm to other students.

In a particularly controversial decision, the case of Harper v. Poway Unified School District saw the Ninth Circuit holding that administrators may prohibit students from speech expressing opposition to homosexuality. The case arose from a student’s shirt, which bore the handwritten message, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” on the front, and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27’” on the back. The court read Tinker as permitting censoring the speech without the need to establish a reasonable forecast of substantial disruption, holding that derogatory and injurious remarks about race, religion, and sexual orientation are not constitutionally protected. In holding for the school administration, the court emphasized that demeaning LGBT youth is detrimental to their psychological well-being, and to the school environment generally. The Supreme Court vacated Harper on mootness grounds, suggesting the Court took issue with the Ninth Circuit’s unique use of Tinker in suppressing the speech. While Harper has not wanted for criticism,

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101 Id. at 973.
102 Id. at 974.
104 Id. at 1171.
105 Id. at 1182-84. The court explained, “Harper’s wearing of his T-shirt 'colli[des] with the rights of other students' in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic . . . have a right to be free from such attacks while on school campuses.” Id. at 1178 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
106 Id. at 1178-79. The court specifically exempted college-age students from its holding, echoing the Supreme Court’s concern for the age of the speech’s audience in Fraser. Id. at 1183.
108 A representative of the Alliance Defense Fund, which brought the case on Harper’s behalf, explained, “The Supreme Court could have simply denied cert in this case, but it did not. . . . I think it is a fair conclusion to say that the justices reached out to eliminate a poorly-reasoned Ninth Circuit decision with the opportunity offered to them by the school district’s suggestion of mootness.” Supreme Court Vacates Ninth Circuit Opinion in Harper, ALLIANCE ALERT (Mar. 5, 2007, 12:00 AM), http://www.allianceleart.org/2007/03/05/supreme-court-vacates-ninth-circuit-opinion-in-harper/.
109 See Calvert, supra note 20, at 1182-85 (quoting critical commentary, and concluding the Ninth Circuit “abused and misused Tinker” to allow viewpoint-based discrimination in core political speech).
it is significant in that it predates *Morse* and shares the *Morse* Court’s belief that protecting the welfare of students may outweigh their free speech rights.  

C. Taking Center Stage: Student Welfare and *Morse v. Frederick*

If *Fraser* and *Hazelwood* show the Supreme Court gradually moving toward a student welfare standard, *Morse v. Frederick* shows the Court with its collective foot on the accelerator.  

In *Morse*, the Court focused on the dangers of the educational environment and educators’ duty to safeguard students from harm, and elucidated a rationale for placing the safety of students above their freedom of speech.  

Following its lead, courts nationwide have used *Morse* to further curb students’ First Amendment rights in the interest of protecting their welfare, both by broadening their interpretation of what constitutes substantial disruption, and by using *Morse* as an independent basis for restriction.  

1. *The Morse Decision*

High school senior Joseph Frederick likely never imagined that his sophomoric grab for attention would land him before the Supreme Court.  

Frederick and some friends, observing with their classmates the Olympic torch pass by on its way to the 2002 Winter Olympics in Salt Lake City, unrolled a fourteen-foot banner bearing the words “BONG HiTS 4 JESUS” as the torch went by.  

When Frederick refused to take down the banner, he was suspended for eight...
days. In the resulting lawsuit, the Ninth Circuit held that the school administration failed to show a risk of substantial disruption.

Holding in favor of the school, a divided Supreme Court opted not to apply the substantial disruption standard. In the majority opinion, Chief Justice Roberts noted that the banner advocated illegal drug use, and that Frederick expressed no political motive for his speech. He then turned to the dangers of drug abuse, which he described as “more serious and palpable” than the undifferentiated fear and apprehension of the administrators in Tinker. The opinion stated 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.” Failing to act would have sent a powerful message that the school was not serious in its message warning of the dangers of illegal drugs.

Justice Alito’s concurring opinion, joined by Justice Kennedy, described schools as “places of special danger” where students are forced to “spend time at close quarters with other students who may do them harm.” The opinion further stated:

In most settings, the First Amendment strongly limits the government’s ability to suppress speech on the ground that it presents a threat of violence. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, Tinker’s “substantial disruption” standard permits school officials to step in before actual violence erupts. Speech advocating illegal drug use poses a threat to student

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116 Id. at 398. Frederick claimed he was initially suspended for five days, which the principal increased when he quoted Thomas Jefferson to her. Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006), rev’d sub nom. Morse v. Frederick, 551 U.S. 393 (2007). He also stated that the assistant principal told him that the Bill of Rights does not exist in schools and does not apply until after graduation. Id. The principal disputed both claims. Id.

117 Morse, 551 U.S. at 399-400. The Court did observe that the event was a school activity, and therefore school speech precedents applied. Id. at 400-01.

118 Id. at 410.

119 Id. at 402-03.

120 Id. at 408. The opinion further stated, “The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.” Id. at 408-09.

121 Id. at 408 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

122 Id. at 410.

123 Id. at 424 (Alito, J., concurring).
safety that is just as serious, if not always as immediately obvious. . . . I therefore conclude that the public schools may ban speech advocating illegal drug use.124

He did, however, take pains to note that he agreed with the majority provided the decision would be limited to restricting drug advocacy, and not used to limit speech commenting on political or social issues.125 In his article describing the student welfare standard, Negron noted that in their concurrence, “Alito and Kennedy appear to have recognized that there are some instances where the potential harm to students is so severe . . . that schools can act to protect students absent a showing of substantial disruption.”126

Concurring with the judgment, Justice Thomas took the opportunity to call for Tinker to be overturned.127 He advocated giving administrators broad authority under the in loco parentis doctrine, describing substantial disruption standard as a malleable standard under which the judiciary has usurped the traditional role of local school districts.128 Despite his displeasure with the Court’s “patchwork of exceptions” to Tinker, Thomas agreed with the majority in holding against Frederick, intending to erode Tinker’s constitutional protection of student speech rights.129

Justice Stevens’s dissent, joined by Justices Souter and Ginsburg, looked to Brandenburg, noting the distinction between “mere advocacy” of illegal action and “incitement to imminent lawless action.”130 Although willing to consider a relaxed imminence requirement for schools,

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124 Id. at 425 (internal citations omitted).
125 Id. at 422. In Alito’s view, further exceptions to Tinker could result in “inculcation of whatever political and social views are held” by administrators. Id. at 423. Negron speculates that Alito may have been concerned with regulation of messages limiting ability to express religious speech, such as opposition to gay rights. Negron, supra note 20, at 1227 n.39.
126 Negron, supra note 20, at 1227. He further described the concurrence as being “unwittingly supportive” of the student welfare standard. Id. at 1226.
127 Morse, 551 U.S. at 410 (Thomas, J., concurring).
128 Id. at 419-21.
129 Id. at 422.
130 Id. at 436 (Stevens, J., dissenting).
the dissenters still required more than undisruptive advocacy. As Frederick’s conduct was unlikely to provoke an increase in drug use among students, the dissenters would not prohibit it absent a showing of substantial disruption. Even if restricting drug advocacy would reduce teen drug use, which the dissenters questioned, “carving out pro-drug speech for uniquely harsh treatment . . . is inimical to the values protected by the First Amendment.” The majority’s rule in Morse, they argued, would extend to a great swath of conduct of an indefinite characterization, and leave too much discretion in the hands of administrators.

The Morse decision, strongly emphasizing the need to safeguard and protect students, articulates the bedrock principle of the student welfare standard, that student speech may be restricted if the speech poses a significant risk of harm. Observing this paradigm shift, one commentator feared that “Tinker would be relegated to an exception for political speech,” while another suggested that, notwithstanding the Alito concurrence, Morse could easily be applied beyond drug advocacy. Although a narrow reading of Morse might constrain its application to drug advocacy, a more expansive reading, emphasizing the educational mission of schools over the expressive rights of students, would strip Tinker of much of its protective pow-

131 Id. at 439.
132 Id. at 438-39, 444. See also supra text accompanying note 56 (discussing imminence in the context of student speech).
133 Morse, 551 U.S. at 438-39.
134 Id. at 440-41.
135 See id. at 397 (majority opinion) (“[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”).
136 See Negron, supra note 20, at 1223-24; see also See Joseph N. Novell, Note, Student Free Speech After Morse v. Frederick, 54 WAYNE L. REV. 1847, 1860-61 (2008) (arguing that the Morse decision advocates viewpoint discrimination, prohibited by the Court in Tinker, in allowing schools to discriminate against speech based on disagreement with student’s viewpoint, rather than on the subject matter of the speech).
137 See Novell, supra note 136, at 1865. See also Calvert, supra note 20, at 1175 (“Tinker, in essence, has become the back-up rule for student speech cases. It is applied only if the facts before a court fall outside the framework of sexually lewd and offensive expression (Bethel), school-sponsored expression (Kuhlmeier), or expression that advocates illegal drug use (Morse).”).
er.\textsuperscript{139} It was further suggested that the standard in \textit{Morse} may be inconsistently applied by lower courts,\textsuperscript{140} a concern which would prove to be justified in light of subsequent decisions.\textsuperscript{141}

2. \textit{Student Welfare After Morse}

Looking to cases following \textit{Morse}, it appears that courts are embracing the student welfare rationale, broadening the reach of administrators in restricting student speech which may potentially cause physical or emotional harm.\textsuperscript{142} A number of courts have implemented the student welfare standard by using its emphasis on safety to support holding administrators’ forecasts of disruption reasonable.\textsuperscript{143} A few have taken a further step toward the student welfare standard, relying on \textit{Morse} directly to suppress speech which may pose a threat to students.\textsuperscript{144}

\textit{Boim v. Fulton County School District} is of the former category.\textsuperscript{145} In \textit{Boim}, the Eleventh Circuit opined that a student’s description of a “dream” of shooting a teacher she disliked, written in a notebook which she did not intend to disseminate, might reasonably have been perceived as a true threat.\textsuperscript{146} However, it rested its decision on the risk of disruption if students were made aware of it, citing disruption that occurred at another school after a student brought a gun onto campus.\textsuperscript{147} Although the decision did not explicitly reference \textit{Morse}, the court shared its concern for student welfare, stating that “there . . . is no First Amendment right allowing a student to


\textsuperscript{140} See \textit{id.} at 638-39.

\textsuperscript{141} See infra Section I.C.2 (discussing cases applying \textit{Morse} to threatening and emotionally harmful student speech).

\textsuperscript{142} See Negron, \textit{supra} note 20, at 1236-40; Calvert, \textit{supra} note 20, at 1175-85.

\textsuperscript{143} See, \textit{e.g.}, Boim v. Fulton County Sch. Dist., 494 F.3d 978 (11th Cir. 2007); Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).


\textsuperscript{145} 494 F.3d 978 (11th Cir. 2007).

\textsuperscript{146} \textit{Id.} at 980-81, 985.

\textsuperscript{147} \textit{Id.} at 985. The court was also influenced in its holding by an earlier school shooting an hour away from the school in \textit{Boim}, and by a student’s arrest on a concealed weapon charge at a neighboring school. \textit{Id.} at 984. It cited Wikipedia, a user-edited online encyclopedia, as stating that ten well-known, student-perpetrated shootings occurred in the eight years prior to the instant case. \textit{Id.} at 983.
knowingly make comments . . . that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day.”148

An eighth-grade student’s online instant messenger icon was the subject of Wisniewski v. Board of Education of the Weedsport Central School District.149 The icon, a small stick figure of a pistol firing a bullet into a person’s head and the text “Kill Mr. VanderMolten,” his English teacher, was also found disruptive under Tinker.150 The court relied on Pulanski to support its holding that “[t]he potentially threatening content of the icon and the extensive distribution of it,” to fifteen students over three weeks, all of which occurred off-campus, created a foreseeable risk of substantial disruption.151 Ironically, Tinker’s disruption standard, fashioned to protect student rights on-campus, was here used to limit student speech occurring off-campus.152 Wisniewski has now come to stand for the proposition that if school officials can reasonably perceive speech as a threat, then the speech can be restricted regardless of the speaker’s intent or ability to carry out the threat, as any threat of violence is inherently disruptive to the school environment.153

One of the most widely discussed cases addressing student welfare is Nuxoll v. Indian Prairie School District #204.154 In Nuxoll, a student participated in a “Day of Truth,” in opposition to a “Day of Silence” organized by the school’s Gay/Straight Alliance club to draw attention

148 Id. at 984.
149 494 F.3d 34, 35-36 (2d Cir. 2007).
150 Id. at 36, 40. The student was suspended for a semester, even though the police investigator and an independent psychologist informed the administration that the student intended the icon as a joke and posed no real threat to the teacher. Id. at 36-37.
151 Id. at 38-39.
152 See Calvert, supra note 20, at 1177. The icon was created from the student’s home computer. Wisniewski, 494 F.3d at 36.
153 See Cuff v. Valley Cent. Sch. Dist., 559 F.Supp.2d 415 (S.D.N.Y. 2008). Cuff, a fifth grade student, submitted an assignment stating he wished to “blow up the school and all the teachers in it.” Id. at 417. The court relied heavily on Wisniewski in holding for the school administrators, and cited Morse in support of determining the appropriateness of suppressing speech based on its interpretation by administrators rather than the intent of the speaker. Id. at 421-23. See also Mardis v. Hannibal Pub. Sch. Dist. #6, 684 F. Supp. 2d 1114, 1118 (E.D. Mo. 2010) (citing Wisniewski to establish that school speech restrictions apply to cases where threatening communications off school grounds adversely affected the classroom).
154 523 F.3d 668 (7th Cir. 2008).
to harassment of LGBT students.\textsuperscript{155} His counter-protest took the form of a t-shirt displaying the words “My Day of Silence, Straight Alliance” on the front, and “Be Happy, Not Gay” on the back.\textsuperscript{156} The school objected, arguing that “Be Happy, Not Gay” is a derogatory comment based on sexual orientation.\textsuperscript{157} Although holding in favor of the student, Judge Posner’s majority opinion demonstrates the student welfare balancing test in action.\textsuperscript{158} Posner described the school’s “undeniable” interest in protecting students from offensive speech, balancing this against the “modest” contribution of students to the marketplace of ideas.\textsuperscript{159} From \textit{Morse} and \textit{Fraser}, he inferred that if student speech could reasonably lead to lowered test scores, increased truancy, or other symptoms of a sick school, the school could reasonably prohibit the speech.\textsuperscript{160} He further noted the \textit{Morse} Court’s concern with the psychological effects of drugs, and drew a comparison to the psychological effects the speech at issue.\textsuperscript{161} However, in holding for the student, Posner stated that it was highly speculative that the plaintiff’s speech would provoke such incidents.\textsuperscript{162} This modified view of the substantial disruption standard suggests that Posner shared with the court in \textit{Harper} the belief that harm resulting from derogatory or demeaning comments could justify censoring speech.\textsuperscript{163}
The Fifth Circuit case of Ponce v. Socorro Independent School District is the leading case relying on Morse as independent grounds to suppress threatening student expression without proving substantial disruption. In Ponce, a high school sophomore’s diary detailed plans to create a racist group on campus, assault minority and homosexual students, and commit mass shootings at schools in the district. Although the student maintained it was a work of fiction, and there was no evidence of substantial disruption, the court held that the speech was not protected because it directly threatened the safety of the student population. In so doing, it relied heavily on Justice Alito’s concurrence in Morse, stating that speech advocating a demonstrably serious harm to student safety can be regulated on the basis of its violent content. The court explained, “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.”

While no other appellate court has adopted such an expansive view of Morse, one federal district court took this rationale one step further. Miller v. Penn Manor School District involved a high school student disciplined for wearing a t-shirt bearing the words “Volunteer Homeland Security,” “Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit,” and “Gun Owner-No Bag Limit” superimposed over an image of a handgun. While the student contended his message was political, the court viewed the shirt as advocating violence

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opinion, Posner posed hypothetical examples of shirts bearing the words, “blacks have lower IQs than whites” or “a woman’s place is in the home” as psychologically harmful speech. Nuxoll, 523 F.3d at 674.

164 508 F.3d 765 (5th Cir. 2007).
165 Id. at 766.
166 Id. at 766-67.
167 Id. at 769-71. The court further stated that the dissenting justices in Morse would likely agree the content of the speech was unprotected. Id. at 772 n.4.
168 Id. at 772. This is especially noteworthy in light of Justice Douglas’ observation in Brandenburg, stating, “The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre,” and emphasized that government should not restrict speech that only advocates unlawful action. Brandenburg v. Ohio, 395 U.S. 444, 456-57 (1969) (Douglas, J., concurring).
170 Miller claimed the shirt expressed support for the federal “Rewards for Justice” program and for the troops in Iraq. Id. at 626.
and illegal vigilante behavior.\(^{171}\) It concluded that, “[b]ased upon Morse, speech that promotes illegal behavior may also be restricted,” and that no demonstration of substantial disruption was required.\(^{172}\) This is arguably the most extreme example of applying the student welfare standard to restrict student speech, as it is unlikely that the shirt could reasonably be construed as a true threat under Watts, incitement to lawless action under Brandenburg, or substantial disruption under Tinker.\(^{173}\)

II. STUDENT WELFARE: ITS RATIONALE, APPLICATION, AND CONSEQUENCES

In bringing the student welfare standard to the forefront, the Morse decision may have opened up a Pandora’s box, allowing courts to restrict speech that might arguably cause physical or emotional harm. It is therefore imperative to examine how the standard is to be applied, and consider the likely results of its application. A closer investigation reveals serious problems inherent to the student welfare standard, and raises a number of troubling consequences which may follow from its widespread adoption.\(^{174}\)

A. Student Welfare as a Decision Principle

Comparing the student welfare standard to its predecessor, it becomes apparent that the standard differs both in its underlying rationale, and in the decision making calculus it requires of judges.\(^{175}\) Based on a differing conception of the role of education, and requiring a judicial balancing test that is both subjective and difficult to quantify, the student welfare standard has a propensity toward judicial inconsistency.\(^{176}\) This is a fundamental flaw with the student welfare

\(^{171}\) Id. at 625.
\(^{172}\) Id. at 623, 625. The court found support in the Alito concurrence’s emphasis on the importance of school safety when confronted with threats of violence. Id. at 623.
\(^{173}\) The Miller court’s strong reliance on Morse is also interesting, in that Justice Alito’s concurrence attempted to prevent lower courts from expanding the rationale in Morse to circumstances beyond drug use. See Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring).
\(^{174}\) See discussion infra Sections II.A, II.B.
\(^{175}\) See discussion infra Section II.A.
\(^{176}\) See discussion infra Section II.B.
standard, and the unwelcome consequences of such inconsistency should preclude courts from adopting it as a decision principle.  

1. Student Welfare, Liberty and the Role of Education

As Justice Blackmun once observed, “Education is perhaps the most important function of government, and government has a heightened obligation to safeguard students who attend school.” Few would disagree with this observation. Indeed, it is a fundamental principle of American liberalism that “[e]very adult should be able to make as many effective decisions without fear or favor about as many aspects of her or his life as is compatible with the freedom of every other adult.” The very purpose of our constitutional system is to protect our natural rights to life, liberty, and the pursuit of happiness. Education plays an undeniably crucial role in fostering a society of well-informed and self-directed adults necessary for preserving American democracy. Blackmun wisely considered safety a prerequisite to successful education, as an unsafe or hostile learning environment adversely affects the effectiveness of the teaching process.

The need for a safe and positive learning environment is a foundational tenet of the student welfare standard. This was the focus of attention in Morse, as the Court repeatedly reit-
erated the danger of illegal drug abuse, and the need to safeguard our students from this threat to their physical safety. It is not without reason that courts since *Morse* have allowed increasingly broad restrictions on speech rights in the interest of safety, arguing that the potential harm to students jeopardizes the educational mission of the school.

However, to affirm the preeminence of student safety over student speech rights is to overlook a fundamental truth about the relationship between education and liberty. Education on its own cannot develop morality and knowledge. Morality requires the ability to choose a course of action, and education avails little without the freedom to accept or reject what we are told, and to hear and consider a variety of conflicting opinions. Promoting students’ First Amendment rights furthers students’ conceptual development, increases opportunities for students to experience the positive power of the law, and instills in them the respect for human dignity interwoven throughout the constitutional framework. The Warren Court recognized this in *Tinker*, when it declared:

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

The right to free speech exists to keep the tendency of majorities toward oppressing minorities in check, prohibiting the majority from forcibly silencing an unpopular minority. One cannot expect children to fully appreciate the value of free speech from mere study without the

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185 See *supra* Subsection I.C.2 (describing subsequent decisions and their reasoning).
186 See Shklar, *supra* note 179, at 27 (discussing the relationship between morality, education, and liberty, and asserting that morality and knowledge can develop only in a free and open society).
187 *Id.*
190 See Parent, *supra* note 180, at 69. See also THE FEDERALIST NO. 10 (James Madison) (describing tyranny of the majority over an unpopular minority as “the violence of faction,” and Madison’s belief that the Constitution would prevent its occurrence).
ability to practice it.\textsuperscript{191} While such practice gives rise to the possibility of disruption or infringement on the rights of others,\textsuperscript{192} when students’ expressive rights are consistently subsumed by the educational interests of the state, students may conclude that expressive rights (and, by inference, rights generally) are not inherently valuable.\textsuperscript{193} It takes little imagination to envision the chilling effect on speech that would result from such practices, as students may self-censor out of fear of reprisal and discipline rather than actively engage in the debate on controversial topics involving deeply held beliefs.\textsuperscript{194}

2. Student Welfare and the Balance of Harms

The Morse Court provided little guidance as to how judges should weigh the value of rights or the interests of the speaker under the student welfare standard. While the Court stopped short of declaring that preventing harm to students is a necessary and sufficient reason to allow restrictions on student speech rights, it did suggest that student welfare can be an important, sometimes compelling reason in support of allowing schools to censor speech it considered harmful.\textsuperscript{195} This may be a plausible rationale for supporting student speech restrictions, but this in itself is of little practical utility in shaping judicial policy.\textsuperscript{196} Putting forward the student welfare rationale without supplying guidance as to when to apply it, the Court left open what level of risk it would consider reasonable.\textsuperscript{197} The Court likewise overlooked how to address speech

\textsuperscript{192} Id.
\textsuperscript{193} See Petronicolos, supra note 69, at 11. \textit{But see} Braiman, supra note 23, at 452-457 (arguing that a constitutional test emphasizing students’ right to self-expression allows students to use the First Amendment as a sword rather than against administrators, and places an unreasonable burden on school personnel).
\textsuperscript{195} See Negron, supra note 20, at 1234-35.
\textsuperscript{196} See FEINBERG, supra note 188, at 30 (explaining that using harm prevention for determining the limits of coercion requires using supplementary principles, and a ranking and balancing of the interests at stake).
\textsuperscript{197} See id.
whose harm might be considered “accumulative,” in that single occurrences may be harmless up to a threshold, but general performance of similar speech would be detrimental. While \textit{Morse} described balancing of the governmental interest in preventing harm to students against the expressive right of the speaker, this greatly oversimplifies the actual balancing test involved. What is actually required is a complex, multi-variable balancing, a ranking of interests to determine how to minimize social harms according to the facts of each particular case.

For example, Ashley may have a religious or personal interest in declaring her opposition to homosexuality. Brian, a homosexual student, has an interest in not incurring psychological harm resulting from Ashley’s speech. Allowing Ashley’s speech may result in some psychological harm to Brian. Brian’s interest can be protected only by restricting Ashley’s interest motivating her speech, which concurrently restricts her interest in free speech generally. It is impossible to prevent harm to both, as to protect one is to cause or allow injury to the other. The question then becomes how to measure whose is the greater harm. Judges could conceivably weigh interests in terms of their importance to the possessor, the degree to which they are reinforced by other public and private interests, or their inherent moral quality. Perhaps the most obvious consideration is the probability of the harm’s occurrence. In this example, the harm to Ashley is certain to occur if her speech is restricted, although the value of Ashley’s free

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\item \textit{198} See id. at 30 & n.4. A blanket prohibition of speech where harm is accumulative “would necessarily ban harmless and beneficial, as well as harmful, actions.” \textit{Id.} at 30 n.1. An example of accumulatively harmful speech and its blanket prohibition can be seen in \textit{Morse}, where the student’s banner was harmless in itself, but repeated similar occurrences could arguably contribute to an increase in drug use.
\item \textit{199} \textit{See Morse v. Frederick}, 551 U.S. 393, 408 (2007).
\item \textit{200} Two leading organizational theorists believe the tendency to oversimplify information and take decision-making shortcuts to be the main problem inherent in many decision-making biases. \textit{See} JOHN A. WAGNER III & JOHN R. HOLLENBECK, ORGANIZATIONAL BEHAVIOR 74 (2010).
\item \textit{201} See FEINBERG, \textit{supra} note 188, at 30.
\item \textit{202} See id. at 31, from which this example is adapted.
\item \textit{203} See id.
\item \textit{204} See \textit{id.} at 32.
\item \textit{205} The extent to which Ashley’s interest has been restricted is also a relevant consideration in balancing. \textit{See id.} at 35.
\end{itemize}
}
speech interest generally is not easily measured. The harm to Ashley must be balanced against the potential harm to Brian, giving judges the unenviable task of speculating as to the uncertain nature of the speech’s psychological impact on Brian.\textsuperscript{206} One can imagine plaintiffs and defendants calling a parade of psychological professionals as expert witnesses in an attempt to quantify this elusive variable.

Judges must further consider the role of precedent, and the impact their decisions will have not only on Ashley and Brian as individuals, but as a class of all similar students, and consider the impact of their decision on a range of future hypothetical cases.\textsuperscript{207} If a court today restricts Ashley’s interest in speaking against homosexuality, a court tomorrow could restrict fellow student Christopher’s ability to oppose obesity, arguing that obesity can be an innate characteristic of individuals and that his speech could inflict similar psychological damage. Deborah might be prevented from stating her religious belief that sex before marriage is sinful, as her expression could cause hurtful feelings of anger, shame, guilt, or resentment on the part of sexually active students. Edward may be strongly pro-life, and wish to express his opinion about this important and divisive social issue, but his t-shirt bearing the words “abortion is murder” would likely be emotionally wounding for high school classmates who have had abortions. Francine may wish to declaim from the controversial bestselling book The Bell Curve for a school project, but the authors’ research supporting a link between race and intelligence could easily be construed as detrimental to African-American listeners.\textsuperscript{208} If enshrined as a decision principle, the student welfare standard could suppress expression of all these ideas, and many more.

\textsuperscript{206} See WESSLER, supra note 18, at 30-41 (discussing potential emotionally harmful effects of words of prejudice, including fear, anger, denial, retaliation, secondary victimization, loss of spirit, loss of education, and loss of health).


It appears that the balancing test the student welfare standard requires judges to perform is considerably more complex than that required under the substantial disruption standard. The substantial disruption test accords priority to students’ speech rights, which cannot be suppressed unless the speech caused or would reasonably lead to substantial disruption of the school environment.\textsuperscript{209} Forty years of judicial precedent helps clarify what qualifies as a reasonable forecast of substantial disruption,\textsuperscript{210} significantly increasing the likelihood that cases involving similar facts will be similarly decided.\textsuperscript{211} Speech of a threatening nature may add an additional judicial assessment: whether a reasonable person would foresee that the speech would be perceived as a serious expression of intent to inflict harm.\textsuperscript{212} This true threat analysis from \textit{Watts} involves the oft-applied reasonable person standard,\textsuperscript{213} and adds only slight complexity to the decision-making calculus.\textsuperscript{214}

The student welfare test, by comparison, is more amorphous, requiring a more complicated balancing of interests which may be difficult, if not impossible, to measure without speculation.\textsuperscript{215} While certain speech has the potential to inflict physical or psychological damage, experts have difficulty predicting the specific impact that speech will have, citing a range of possible emotional responses including fear, anger, denial, retaliation, secondary victimization, loss of

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\item See \textit{supra} Subsection I.A.1 (discussing the substantial disruption standard elucidated in \textit{Tinker}).
\item See Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243, 257 (3d Cir. 2002) (requiring a nexus of similarity between the speech at issue and previous disruptive events).
\item See generally EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION 86-111 (2009) (studying the role of analogical perception in legal reasoning, and concluding that, while policy preferences influence whether decision makers view facts of a case as analogous to previous cases where the similarity is ambiguous, when facts are similar, decision makers regardless of policy preferences will use analogical reasoning to judge cases similarly).
\item See \textit{supra} text accompanying notes 73-76 (discussing student speech under \textit{Tinker} and \textit{Watts}).
\item The reasonable person standard is so widely utilized as to have become a norm in judicial decision making. See generally BRAMAN, \textit{supra} note 211, at 25-29 (discussing the process of socialization and internalization of such norms by the legal community, and their role in the legal reasoning).
\item This is not to say that reasonable minds could not disagree in its application. There is still potential for disagreement as to what constitutes disruption, and what level of disruption qualifies as substantial. See Calvert, \textit{supra} note 20, at 1188.
\item See \textit{supra} text accompanying notes 201-06 (discussing the challenges of balancing interests under the student welfare standard).
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spirit, and loss of education. The value of the speaker’s rights to express opinions may be viewed differently, depending on the topic of the speech, manner of its delivery, and context in which it is delivered. The harm to students’ liberty interests may also be difficult to ascertain. While restricting the expressive rights of young people may communicate a message that rights generally lack inherent value, the degree that restricting one particular instance of speech will impress this message in the mind of an individual student is unclear. The student welfare standard’s balancing test is rife with speculation, requiring judges to act as soothsayers in predicting uncertain outcomes, and quantify variables which cannot be measured with specificity. It stands to reason that the resulting mental gymnastics will increase the likelihood of judges weighing interests differently given similar facts, and thus reaching different conclusions.

B. Student Welfare and Judicial Inconsistency

Recent cases applying the student welfare standard confirms the standard’s propensity to yield inconsistent judgments. This can be readily observed in cases involving both potentially threatening and emotionally damaging student speech. If left unchecked, such inconsistency damages the legitimacy of the judicial system and decreases its ability to deter socially undesirable action. It also sends a message to impressionable young people, that their rights are not valuable and deserving of protection, which may lead them to conclude that the rights of others may be disregarded or abused.

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216 See WESSLER, supra note 18, at 30-42.
217 See infra Subsections II.B.1, II.B.2 (analyzing cases of threatening and emotionally harmful speech that reveal differences in judicial interest balancing).
218 See generally FEINBERG, supra note 188, at 35-43 (discussing methods of assigning value to liberty interests).
219 See infra text accompanying notes 291-94.
220 Feinberg suggests that young persons’ liberty interests may be stronger than those of adults, as they are necessary to character development in shaping ideals, aptitudes, and preferences. FEINBERG, supra note 188, at 41.
221 See discussion infra Subsections II.B.1, II.B.2 (discussing the student welfare standard in emotionally harmful and threatening student speech cases).
222 See discussion infra Subsection II.B.3 (discussing the likely consequences of judicial inconsistency).
223 See infra text accompanying notes 291-94.
1. *Emotionally Harmful Speech*

The decisions in *Nuxoll* and *Harper*, both addressing the psychological impacts of student speech opposing homosexuality, are prime examples of similar cases yielding dissimilar results under the student welfare standard.\(^{224}\) Both deviated from the traditional substantial disruption approach in favor of student welfare harm-balancing,\(^ {225}\) and accorded little weight to the students’ free speech interest,\(^ {226}\) yet Nuxoll’s speech was protected while Harper’s was censored.\(^ {227}\) The courts disagreed as to the message delivered, with Posner viewing “Be Happy, Not Gay” as “only tepidly negative,”\(^ {228}\) while the Ninth Circuit believed “HOMOSEXUALITY IS SHAMEFUL” to be as harmful to gay students as a message reading “Negroes: Go Back To Africa” would be for African-Americans.\(^ {229}\) The courts also differed as to whether evidence pointing to a greater risk of poor academic performance for LGBT teens was “well established” or only “suggestive.”\(^ {230}\) The decisions suggest that the courts’ differing view of the nature of the speech and the likelihood of the harm it posed resulted in their divergent holdings.

These two cases stand in sharp contrast to the earlier cases of *Chambers* and *Nixon*, in which similar shirts were held to be merely offensive, and therefore could not be censored with-

\(^{224}\) See supra notes 103-10, 154-63 and accompanying text. In both cases, the students’ messages were delivered for religious reasons, and displayed on shirts worn in response to a “Day of Silence” event to advocate tolerance for LGBT students. See *Nuxoll* v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 670 (7th Cir. 2008); *Harper* v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171-72 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007).

\(^{225}\) See supra notes 163-64 and accompanying text.

\(^{226}\) See *Nuxoll*, 523 F.3d at 671-72; *Harper*, 445 F.3d at 1182-83. Posner opined that “uninhibited high-school student hallway debate over sexuality - whether carried out in the form of dueling T-shirts, dueling banners, dueling pamphlets, annotated Bibles, or soapbox oratory” is not “an essential preparation for the exercise of the franchise.” *Nuxoll*, 523 F.3d at 672. The court in *Harper*, relying on *Tinker*’s “rights of others” prong, focused almost exclusively on the rights of LGBT students. See *Harper*, 445 F.3d at 1177-1183. The diminished weight given to the student’s speech in *Harper* is particularly notable in light of its political nature, especially in California where the speech took place. See Calvert, supra note 20, at 1184.

\(^{227}\) See supra notes 103-10, 154-63 and accompanying text (discussing facts and holdings of both cases).

\(^{228}\) *Nuxoll*, 523 F.3d at 676.

\(^{229}\) *Harper*, 445 F.3d at 1180.

\(^{230}\) *Nuxoll*, 523 F.3d at 671; *Harper*, 445 F.3d at 1170.
out a showing of substantial disruption. In *Chambers* and *Nixon*, the judges weighed only the disruptive potential of the speech. The judges in *Nuxoll* and *Harper* considered evidence as to the impact derogatory comments about innate characteristics may have on students, the probability that speech would result in harm, and the free speech and liberty interests of the speakers. In these cases, applying the student welfare standard necessitated that both courts evaluate and draw conclusions from the literature surrounding the emotional impacts of speech, a task best left to experts in the field. While judges are, by virtue of their education, better suited to weighing rights interests, even here there is potential for disagreement. Considering the complexity and subjectivity of the interest balancing required under the student welfare standard, the differing outcomes in these cases are unsurprising.

2. Inconsistent Approaches to Threats of Violence

The student welfare standard poses similar challenges to achieving judicial consistency for speech which may threaten violence. In *Boim*, the student had no intention of disseminating the written narrative of a “dream” of shooting one of her teachers. The court asserted that the risk of disruption was not speculative, based on disruptive events that occurred in another school.

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231 The student’s shirt in Chambers displayed the words “Straight Pride,” while the shirt in Nixon bore the legend, “Homosexuality is a sin! Islam is a lie! Abortion is murder!” See supra text accompanying notes 97-102 (stating the facts and holdings of both cases).
232 See supra notes 97, 101 and accompanying text.
233 See supra notes 105-06, 159-62 and accompanying text.
234 See Nuxoll, 523 F.3d at 671; Harper, 445 F.3d at 1170.
235 See BRAMAN, supra note 211, at 25-28 (describing the process of socialization and internalization in legal education, and the role of judges in deciding constitutional questions). This was not lost on the court in *Chambers*, which concluded its opinion by suggesting, “[I]t is now the responsibility of the parties and all members of the Woodbury community to resolve these issues within their community, rather than the Court, if the best interests of all students and children in Woodbury are to be served.” Chambers v. Babbitt, 145 F.Supp.2d 1068 (D. Minn. 2001).
236 See supra Subsection II.A.2 (discussing the inherent difficulty of harm balancing under the student welfare standard).
237 Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 980 (11th Cir. 2007). See also supra text accompanying note 146. The poem was located behind a divider in the multi-subject notebook. Boim, 494 F.3d at 980.
after a student there threatened to bring a weapon onto campus. Tellingly, the decision suggests that the speech might reasonably have been perceived as a true threat, even though the student lacked the requisite intent to communicate the speech.

Compare *Boim* to the earlier true threat cases of *Lovell* and *LaVine*. In *Lovell*, the student threatened to shoot her guidance counselor if not given a schedule change, which the court found to be a true threat due to its specific and unequivocal nature. In *LaVine*, where a student’s poem described a school shooting from the shooter’s perspective, the court held the school’s forecast of disruption reasonable. The *LaVine* court considered the totality of the circumstances, including the student’s suicidal ideations, discipline problems, and troubled personal life. The reasoning in *Lovell* and *LaVine* thus appears consistent with the true threat and substantial disruption principles as established in *Tinker* and *Watts*. *Boim*, on the other hand, extends school censorship to speech that the speaker did not knowingly or intentionally communicate, and which had only a tenuous connection to prior disruptive events. The opinion suggests that the general climate of school violence led the court to conclude that the student’s lack of intent to disseminate her speech was “immaterial.”

*Boim* is hardly unique in broadening administrators’ censorship powers for speech which potentially threatens violence. In *Pulaski*, the Eighth Circuit concluding a student’s angry letter about raping and killing his ex-girlfriend was a true threat, even though it was written a year be-

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238 See supra note 147 and accompanying text.
239 Boim, 484 F.3d at 985 (“[W]ithout doubt, Rachel's first-person narrative could reasonably be construed as a threat of physical violence against her sixth-period math teacher.”).
240 See supra notes 79-84 and accompanying text (discussing facts and holdings of *Lovell* and *LaVine*).
241 See supra text accompanying notes 79-80.
242 See supra text accompanying notes 81-82.
243 See supra text accompanying notes 83-84.
244 See supra Subsection I.A.1 (discussing *Tinker*, *Watts*, the Warren Court’s approach to freedom of speech issues).
245 See supra notes 146-47 and accompanying text.
246 Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 983-85 (11th Cir. 2007). The court further stated that the possibility of the student returning to school the next day and murdering the teacher necessitated immediate action on the part of the administration. Id. at 984.
fore it was brought to school without the student’s knowledge. The Supreme Court of Pennsylvania held in Bethlehem that a school could discipline a student for creating a website listing reasons for killing a teacher, although the website was intended for humorous rather than malicious purposes. The Second Circuit, citing both Pulaski and Bethlehem for support, held in Wisniewski that a tiny stick-figure icon on an instant messenger program posed a risk of substantial disruption, although it was never viewed on campus. These decisions, expanding the definition of substantial disruption and true threat to cover speech outside the classroom, onto the internet, and without the knowledge or intent of the speaker, create a pastiche of jurisprudence which erodes constitutional protections the Warren Court sought to ensure in Tinker. By minimizing the importance of context and past behavior when considered against the gravity of the potential harm and the interest of schools in preventing violence, the student welfare standard may come to resemble not a balancing test, but a blanket ban on potentially threatening student speech.

Nowhere is the student welfare standard more fully embraced than in Ponce, the Fifth Circuit’s extension of Morse into the realm of speech advocating violence. The Fifth Circuit eschewed the substantial disruption test, believing it does not always allow administrators to react appropriately to threats of violence. In holding for the school, the court looked instead to

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247 See supra text accompanying notes 93-95 (discussing case facts, holding, and dissent).
248 See supra notes 88-92 and accompanying text (discussing case facts and holding).
249 See supra notes 149-152 and accompanying text (discussing case facts and holding).
250 See Calvert, supra note 20, at 1173-85 (citing recent cases indicative of Tinker’s decline and abuse in cyberspace and in regard to protecting the emotional tranquility of students, and discussing their impact on student speech rights).
251 It has been argued that such a blanket ban may be beneficial. See Braiman, supra note 23, at 474 (“No positive purpose will be served by allowing young people to believe they can direct antisocial ideas at their teachers and schools with complete impunity, even online.”).
252 See supra notes 164-68 and accompanying text (discussing case facts and holding).
253 See Ponce v. Socorro Ind. Sch. Dist., 508 F.3d 765, 770 (5th Cir. 2007). The court is not alone in its reasoning. One commentator suggests that the true threat/substantial disruption analysis may overlook internal or psychological reactions of students which may be harmful or impair the educational mission of schools, but prove difficult to assess. See Wright, supra note 191, at 704-06.
the harm prevention rationale of Morse, reasoning that since violence is at least as harmful to students as drug abuse, speech threatening or advocating violence should similarly be restricted.\textsuperscript{254} The Ponce decision provides some insight into how the court balanced the interests at stake, affording great weight to the magnitude of the harm if a school shooting were to occur.\textsuperscript{255}

What the Fifth Circuit’s decision failed to mention was that, while the school principal claimed the notebook constituted a danger to the student body, the student was returned to class for the remainder of the day after its confiscation.\textsuperscript{256} The trial court saw this as evidencing a lack of imminence to any threat the speech may have posed.\textsuperscript{257} The Fifth Circuit also did not address the surrounding context of the speech, a factor considered by the trial court.\textsuperscript{258} Context and imminence, both important to evaluate threatening speech under Tinker and Watts, appear to have been set aside entirely.\textsuperscript{259} The student’s speech was suppressed solely on the possibility of harm,\textsuperscript{260} despite a marked lack of evidence that such harm was likely to occur. The Ponce court went so far as to endorse granting administrators the ability to censor speech without regard to the actual risk of disturbance,\textsuperscript{261} implying that even a slight danger to student welfare may outweigh a student’s free speech rights.

\textsuperscript{254} Ponce, 508 F.3d 765, 770-72.
\textsuperscript{255} Id. at 771-72. The court further stated that the captive environment and the difficulty of identifying warning signs prior to a mass shooting justified its holding. Id. at 771.
\textsuperscript{256} See Ponce v. Socorro Ind. Sch. Dist., 432 F. Supp. 2d 682, 695 (W.D. Tex. 2006), vacated, 508 F.3d 765 (5th Cir. 2007).
\textsuperscript{257} Id. at 695-96.
\textsuperscript{258} See id. at 697 (discussing the student’s explanation of the notebook as a dramatic monologue, behavior after being returned to class after its discovery, and lack of disciplinary record).
\textsuperscript{259} See Ponce, 508 F.3d at 771-72 (stating that the lack of forewarning in school shootings and the grave nature of the harm support a blanket restriction on student speech threatening physical violence); see also supra text accompanying note 56 (discussing the role of imminence under Tinker and Watts).
\textsuperscript{260} See Ponce, 508 F.3d at 772.
\textsuperscript{261} See id. (stating that administrators must be permitted to act against threats of violence “without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance.”).
One common thread woven through these decisions and used to justify increasing speech restrictions is the great magnitude of the threats facing students today. The statistics bear witness to the grim reality of how pervasive school violence has become. Over 100,000 students bring weapons to school each day, and forty students are killed or wounded with these weapons annually. Twenty-two percent of students are afraid to use school bathrooms, fearing assault or victimization. Each year, more than 6,000 teachers are threatened, and 200 injured, by students on school grounds. In the 2007-08 school year, forty-nine percent of schools reported at least one student threat of physical attack without a weapon, and nine percent of schools reported one or more such threats with a weapon. These dangers are all too real, and the sheer scope and magnitude of the problem calls out for action.

But what sort of action is called for? Do these alarming figures justify censoring a student’s t-shirt purporting to be a “Terrorist Hunting Permit?” Yes, they do, at least according to a federal district court in Miller. Fifteen-year-old Donald Miller argued that his shirt, given as a gift by an uncle stationed in Iraq, was a political message in support of the War on Terror. The judge disagreed, viewing it as encouraging illegal vigilante behavior. In holding against the student, the judge relied on the student safety interest expressed in Morse, and the danger school shootings pose to students.

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262 See supra Subsection I.C.2 (discussing threatening student speech cases post-Morse).
264 Id.
265 Id.
266 INSTITUTE FOR EDUCATIONAL STUDIES, CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS 3 (2009) [hereinafter IES REPORT].
267 See supra text accompanying note 169 (discussing facts in Miller).
268 See supra notes 169-72 and accompanying text (discussing facts and holding in Miller).
270 See supra text accompanying note 171.
271 Miller, 588 F. Supp. 2d at 625; see also note 172 and accompanying text (discussing the rationale expressed in Miller).
This same reasoning could be used to censor a great variety of legitimate student speech. Numerous famous quotations, such as Thomas Jefferson’s “The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants,”272 or Malcolm X’s exhortation, ”Be peaceful, be courteous, obey the law, respect everyone; but if someone puts his hand on you, send him to the cemetery,”273 might be prohibited by this same rationale. Speech supporting or encouraging “unlawful” demonstrations could similarly be suppressed as advocating unlawful action. Reflecting on the powerful impact young people had on the civil rights movement in the 1950s and ‘60s, the high school and junior high students actively involved in NAACP youth councils and student-led boycotts, should encourage restraint in adopting a standard that might restrict speech of this nature.274 The deleterious impact of overbroad restriction of student speech rights in the name of student safety is not only harmful to the student whose rights are restricted, but may also impair the ability of young people generally to make positive societal contributions and participate in discussions of national importance.

It may seem difficult to imagine judges succumbing to the allure of such overbroad restrictions. Yet the Columbine tragedy is a prime example of how subjective bias can supplant reasoned analysis in judicial decision making.275 It is well-documented that certain events can have such a powerful, visceral impact that they become ingrained in our national consciousness.

275 See Newcombe, supra note 87, at 450-52 (describing Columbine as an availability heuristic based on fear, and its impact on judicial decision making).
and influence our reasoning process.\textsuperscript{276} The ease of recalling vivid and shocking imagery produces an availability bias, a tendency in decision makers to exaggerate the magnitude and likelihood of the risk of future events.\textsuperscript{277} Fear of another school shooting may cause both administrators and judges to miscalculate the risk of harmful incidents, leading to errors of extremes, with excessive controls on small risks and insufficient controls on larger ones that are less readily brought to mind.\textsuperscript{278} The impact of prominent national tragedies on judicial decision making may affect emotionally harmful speech cases as well. For example, it is possible that Posner would have upheld the school’s censorship of the “HOMOSEXUALITY IS SHAMEFUL” t-shirt had \textit{Nuxoll} been decided in the wake of the tragic suicides of five homosexual teens in September, 2010, and the resulting media attention on the discrimination and harassment LGBT students face.\textsuperscript{279} This is not to suggest that judges should be blind to the consequences of speech or to the impact of current events. Rather, they should be cognizant of the potential to incorrectly assess risks and likely outcomes.\textsuperscript{280} The varying decisions reached by applying the more subjective student welfare balancing test suggest it may be more vulnerable to risk miscalculation than the more concrete standard of substantial disruption.

\textbf{3. The Importance of Judicial Consistency}

It is precisely this vulnerability, this propensity to produce inconsistent judgments, that makes the student welfare standard unworkable. To better illustrate this problem, suppose that

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  \item \textsuperscript{276} See \textit{WAGNER \\& HOLLENBECK, supra} note 200, at 63 (discussing the availability bias in decision making associated with death, illness, and disasters, and the resulting propensity to overestimate the number of deaths that might result from related future events).
  \item \textsuperscript{277} \textit{Id}.
  \item \textsuperscript{278} Newcombe, \textit{supra} note 87, at 451. Newcombe argues that the \textit{Morse} Court both demonstrated and exacerbated this bias by emphasizing the “special danger” of the educational environment. \textit{Id} at 429.
  \item \textsuperscript{279} In September, 2010, the tragic suicides of five gay teens focused national attention on LGBT issues on school campuses and spurred discussion on ways to reduce bullying, harassment, and discrimination. See Jeremy Hubbard, \textit{Fifth Gay Teen Suicide in Three Weeks Sparks Debate}, ABC NEWS (Oct. 3, 2010), http://abcnews.go.com/US/gay-teen-suicide-sparks-debate/story?id=11788128&page=2.
  \item \textsuperscript{280} Dr. Hollenbeck states, “Availability bias will surely affect juries as it does individuals. The only way to minimize it is counter it with data about how rare certain events really are, sometimes accompanied by visual aids.” E-mail from John R. Hollenbeck to author (Jan. 20, 2011, 15:36 EST) (on file with author).
\end{itemize}
an earlier case, decided under the substantial disruption standard, wrongly held in favor of the
student, while a subsequent and relevantly similar case, decided using the student welfare stand-
ard, yielded in a correct judgment for the school. It is tempting to conclude that the new standard
is therefore preferable to the old. However, this overlooks the possibility that the existence of
two conflicting decisions may introduce a new wrong, a “comparative wrong” of the two cases
being decided differently, that may even be more significant than the wrong of the earlier being
decided incorrectly.\footnote{See Nozick, supra note 207, at 125.}

Judges are not free to act in accordance with their personal preferences, but are expected
to be neutral arbiters.\footnote{See id. at 122; Braman, supra note 211, at 13.} Judicial neutrality and the ability to separate reason from personal bias
legitimizes judicial lawmaking in America’s constitutional system.\footnote{See Braman, supra note 211, at 13. More precisely, it is the perception of judicial neutrality which legitimizes judicial lawmaking. Much research has been done indicating that personal preferences play a significant role in judicial decision making. See id. at 13-40 (summarizing studies). The problem with the comparative wrong discussed herein is that the influence of subjective opinion is more readily observed.} Indeed, a primary role of
principles in judicial decision-making is to constrain judges from deciding on the basis of their
own individual views and preferences.\footnote{See Nozick, supra note 207, at 122.} When similar cases involving a fundamental right are
decided differently, it calls into question the ability of courts to correctly interpret and apply con-
stitutional principles, as one decision must be incorrect.\footnote{This is a logical result from Aristotle’s principle of non-contradiction, which states that opposite assertions are not both true at the same time. See Aristotle on Non-contradiction, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 26, 2011), http://plato.stanford.edu/entries/aristotle-noncontradiction/#1 (last visited Feb. 22, 2011).} It may also suggest that courts are not
free from subjective bias, which would undermine the societal perception of judicial legiti-

\footnote{See generally Braman, supra note 211, at 23-29 (describing formalistic judicial constraints of text, intent, and precedent as minimizing personal bias, differentiating judges from other governmental decision makers).}
legal ramifications of their actions, and thus undermines the deterrence value of judicial law in dissuading undesirable conduct.\textsuperscript{287}

Considering \textit{Nuxoll, Harper}, and the issue of emotionally wounding speech from this perspective, students who believe homosexuality is morally offensive have a legitimate concern that their opinions on an important social issue may be squelched, with no clear indication as to the boundaries of permissible expression.\textsuperscript{288} Homosexual acts are condemned in many religious traditions, including Judaism, Christianity, Islam, Sikhism, and Mormonism,\textsuperscript{289} and such blanket censorship would affect a great number of students, who have an interest in participating in the discussion. These students, not permitted to experience their First Amendment rights in the school setting, may adopt a cynicism toward constitutional rights and toward the courts charged with protecting them.\textsuperscript{290} Such cynicism is inimical to the goal of ensuring that every individual is treated equally under the law. To realize a society where the law deals justice to all, irrespective of gender, race, ethnicity, or sexual orientation, individuals must come to believe that the rights of others matter, and that the legal system will protect those rights fairly and impartially.\textsuperscript{291} This includes the right to voice unpopular or controversial opinions, for what civil rights movement was not unpopular and controversial in its incipient stage?\textsuperscript{292} Courts have an undeniable interest in protecting minorities, including LGBT students, from being harmed, and ensuring that all students can learn in a safe and supportive environment. Yet in its zeal to protect minorities,

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\item \textsuperscript{287} See Nozick, \textit{supra} note 207, at 122.
\item \textsuperscript{288} See Calvert, \textit{supra} note 20, at 1183-84.
\item \textsuperscript{290} See Eveslage, \textit{supra} note 66, at 26.
\item \textsuperscript{292} The women’s rights movement, for example, was unpopular at the time of its inception. See Bonnie Eisenberg & Mary Ruthsdotter, \textit{Living the Legacy: The Women’s Rights Movement 1848-1998}, NATIONAL WOMEN’S HISTORY PROJECT (1998) http://www.legacy98.org/move-hist.html (chronicling the history of the women’s rights movement).
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courts may inadvertently be encouraging students as a whole to believe their own First Amendment rights have little meaning.\textsuperscript{293} Widespread adoption of the student welfare standard may well run counter to the goal of broad societal acceptance and respect for the civil rights, as students who do not appreciate the value of their own rights are unlikely to respect the rights of others. This is precisely what the High Court feared in \textit{Tinker} when it emphasized the vital importance of protecting students’ constitutional freedoms, and warned that failing to do so would be to teach young people that the nation’s most important principles are “mere platitudes.”\textsuperscript{294}

The harm thus created is compounded by the student welfare standard’s lack of fixed boundaries for protected student speech. Because of the difficulties in quantifying the interests involved, neither students nor administrators will be able to effectively predict with specificity what speech is protected and what is not.\textsuperscript{295} Unclear or inconsistent expectations and punitive practices have been identified as important yet often overlooked systemic variables contributing to the development of antisocial behavior in young people.\textsuperscript{296} If school discipline is to have a positive effect on school safety, administrators must be able to clearly define problem behaviors and their consequences for students and staff members.\textsuperscript{297} By failing to set limits on administrators, the student welfare standard may actually serve to engender feelings of frustration, neglect, and disengagement from the educational process, increasing the future potential for undesirable behavior.\textsuperscript{298}

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\textsuperscript{293} See generally Richards, supra note 291, at 100 (discussing the possibility of majoritarian complacency about the scope of human rights, and the capacity of the judiciary to commit errors in the understanding and elaboration of enduring constitutional principles).
\textsuperscript{295} See Eveslage, supra note 66, at 26.
\textsuperscript{296} SPRAGUE & WALKER, supra note 16, at 60. Antisocial behavior can be understood as “the consistent violation of social norms by at-risk individuals across a range of settings.” \textit{Id.} at 87.
\textsuperscript{297} See \textit{id.} at 63.
\textsuperscript{298} See Eveslage, supra note 66, at 26 (describing the adverse consequences to students of unclear and inconsistent behavioral standards).
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The societal costs of the student welfare standard may be greater still. Protecting the collective welfare of students at the expense of individual rights could ultimately lead to an erosion of rights-based individualism, threatening the very concept of democratic individuality. The more attenuated society becomes from our rights-based individualist ideals, the greater the danger of descending the slippery slope toward an oppressive society. Disempowered, disenfranchised young may people become cynical, embittered adults, incapable and indifferent to preserving our national values. Violent and harmful student speech is a matter of serious concern, and serious concerns provide the greatest temptation for policymakers to curb individual rights, but the answer is not to balance these rights away. For judges to succumb to this temptation, emphasizing student protections without respecting the primacy of individual rights is dangerous indeed, for one political theorist wisely observed, “The priority of the good over the right is the priority of the wrong over the right.”

III. STUDENT WELFARE AND STUDENT SAFETY

Having examined the deeply troubling ramifications of the student welfare standard, one lingering question remains: would its adoption effectively ameliorate, or at least diminish, the problem of threatening and emotionally wounding speech in our nation’s schools? While it is unlikely that any judicial standard can fully safeguard students, it is also doubtful that increasing

299 See George Kateb, Democratic Individuality and the Meaning of Rights, in Liberalism and the Moral Life 183, 202 (Nancy L. Rosenblum, ed., 1989) (arguing that emphasizing social rights over individual rights denatures rights generally, which are indispensable to democratic society).
300 See id. Kateb identifies anti-individualist ideals as having the capacity to make people more barbarous, infantile, and idolatrous, while emphasizing tendencies toward war, systematic cruelty, religious zeal, bigotry, nationalism, xenophobia, and fascism. Id. But see Mary Ann Glendon, Rights Talk 14 (1991) (“Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lean toward consensus, accommodation, or at least the discovery of common ground. . . . In its neglect of civil virtue, it undermines the principal seedbeds of civic and personal virtue.”).
301 See Leviton, supra note 188, at 69.
302 Id. at 69. In fact, it is often when potential harms are greatest that the need to protect constitutional rights is highest, and the dangers resulting from loss of those rights most severe. Id.
303 See Kateb, supra note 299, at 202.
judicial deference to administrators will actually improve their safety and welfare.\textsuperscript{304} An integrative approach to student safety would better address the problem, with courts serving to protect the constitutional rights of students while providing administrators with the authority to maintain order and discipline in schools.\textsuperscript{305}

A. The Questionable Efficacy of School Disciplinary Practices

Many voices have suggested that it is high time to abandon \textit{Tinker}’s substantial disruption standard.\textsuperscript{306} Justice Thomas denigrated the \textit{Tinker} framework and its exceptions, saying that, in essence, the Court has declared that “students have a right to speak in schools except when they don’t,” and he encouraged lifting judicial restrictions on administrators’ ability to set rules and enforce punishments.\textsuperscript{307} The National School Boards Association (NSBA) enthusiastically declared its support for the student welfare standard, asserting it would increase student safety.\textsuperscript{308}

However, it is hardly a foregone conclusion that adopting the student welfare standard would successfully address the problem of harmful speech. Increasing administrators’ rulemaking and punishment ability with regard to harmful speech might even have the opposite effect intended.\textsuperscript{309} Suspending a student does not prevent access to the school, nor does it prevent the

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\textsuperscript{304} See discussion \textit{infra} Section III.A.
\textsuperscript{305} See discussion \textit{infra} Section III.B.
\textsuperscript{306} See Brainman, \textit{supra} note 23, at 441 (“[I]t is time to overturn \textit{Tinker} and adopt a new standard for determining the rights and obligations of minor students and adult educators with respect to one another while they are in school.”); Calvert, \textit{supra} note 20, at 1171 (calling Justice Thomas’ concurrence in \textit{Morse} and the Fifth Circuit’s decision in \textit{Ponce} a “one-two punch” against \textit{Tinker}).
\textsuperscript{307} Morse v. Frederick, 551 U.S. 393, 418-19 (2007) (Thomas, J, concurring). In Thomas’s view, students should not be afforded the right to free speech in public schools. \textit{Id.}
\textsuperscript{308} Commenting on Negron’s article positing the existence of a student welfare standard, the NSBA weblog stated, “If this trend continues, school districts will be better able to keep students safe from potentially dangerous expression. Now that’s a trend [we] can get behind!” \textit{A Step Towards a Student Welfare Standard}, NATIONAL SCHOOL BOARDS ASSOCIATION BOARDBUZZ (July 7, 2009), http://boardbuzz.nsba.org/blog/2009/07/a-step-towards-a-student-welfare-standard. This is unsurprising, as Negron is General Counsel and Associate Executive Director of the NSBA. \textit{See} Negron, \textit{supra} note 20, at 1221.
\textsuperscript{309} See Wright, \textit{supra} note 191, at 699-700 (discussing the ineffectual and potentially detrimental role of administrative action in \textit{Ponce} and \textit{LaVine}).
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student from harming classmates and teachers off-campus.\textsuperscript{310} Even transferring the student may not dissuade him or her from action; in fact, the increased hostility and resentment incurred may actually make violence more likely.\textsuperscript{311} As one commentator observed, “If Ponce were intent on committing violence, he is unlikely to have been deterred by punishment for truancy from his new school,” and his transfer would only shift the threat to another student body.\textsuperscript{312}

Punishment practices may appear effective in the short term, but evidence suggests that use of such practices without a fair system of discipline increases aggression and antisocial behavior.\textsuperscript{313} School policies restricting the speech rights of the student body as a whole, and punishing students for violation, reinforce the message that every student is the source of the problem of school violence and harassment.\textsuperscript{314} Administrators must tread carefully lest their actions breed resentment and cause students to feel disillusioned and disempowered in the academic setting.\textsuperscript{315} If adolescents are not allowed an opportunity to vent their frustration through speech, which may sometimes be perceived as threatening or offensive, their frustrations may reach a breaking point, producing cynicism, increasingly morbid fantasy, and spiteful, insecure behavior.\textsuperscript{316} Since administrators’ disciplinary practices have the potential to worsen the very problems they intend to solve, their actions should be subjected to careful scrutiny.\textsuperscript{317} Judges rightly take an interest in students’ safety and well-being, but their concern should not take the form of constant deference to administrators’ judgments, lest the students’ education suffer, and the resulting consequences offset any doubtful benefit.

\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} Id.
\textsuperscript{313} See SPRAGUE & WALKER, supra note 16, at 61.
\textsuperscript{314} See WESSLER, supra note 18, at 80.
\textsuperscript{315} See id. (emphasizing the importance of schools and parents forming partnerships to address the conditions which foster threatening and offensive behavior).
\textsuperscript{316} See Levitron, supra note 188, at 60.
\textsuperscript{317} See SPRAGUE & WALKER, supra note 16, at 61.
B. Toward an Integrated Strategy for Safe and Successful Schools

The problems the student welfare standard creates in judicial consistency, and the resulting erosion of student expressive rights, should deter courts from adopting it. However, it must be emphasized that protecting student expressive rights is of little value to students killed in school shootings or cowering in terror in the hallways. Legal and political philosopher Jeremy Waldron wisely observed, “If one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person’s life that make it possible for him to enjoy that liberty.”318 With this in mind, how then should courts act to protect students from harm?

Fair school policies and appropriate disciplinary measures are certainly a component of a successful strategy.319 Equally important is the role of administrators in creating an environment of respect, civility, and open communication on the part of school administrators.320 When students feel listened to, they are more motivated to learn, and a collaborative strategy would thus have a positive effect on the success of the educational process.321 Ultimately, managing the problem of threatening and emotionally harmful requires a multifaceted, integrative strategy, bringing together students, administrators, and the local community, and applying a range of programs and actions at all levels.322 Such a strategy could include providing curriculum and instruction for teachers and students, positive behavioral intervention and modification programs, effective counseling and social work, individual mentoring of at-risk youth, positive recreational and leisure activities for students, student involvement in student conduct problems, and pro-
grams to support a sense of community and social integration within the student body. The majority of schools are already working toward this goal, with over 92% of public schools implementing at least one of these strategies, and most employing some combination.

Changing the climate of our schools is essential to promoting prosocial behavior, a task which largely falls on the shoulders of school administrators. Instead of attempting to remove the hazards attendant to free speech, courts can best serve the interests of all parties by bringing balance to the relationship between students and administrators, facilitating an atmosphere of cooperation and respect necessary to preventing violence and threatening behavior. Protecting the vital constitutional rights of students, ensuring that discipline policies are fairly enforced, and affirming administrators’ ability to maintain order in the classroom are the roles the judiciary is best suited to fulfill.

The Warren Court recognized that the potential for argument, disturbance, unpleasantness, and offensiveness is a cost which must be borne in order to protect the free speech rights so necessary to the health of American democracy. Applying the substantial disruption standard to student speech jurisprudence may not prevent school shootings, or heal the pain, sadness, and loss experienced by the victims’ classmates. Nor will it heal the pain felt by LGBT students when confronted with speech that wounds deeply, and stirs up feelings of anger, frustration, or bitterness. What it does, and does well, is protect the speech rights of students of all stripes.

323 IES REPORT, supra note 266, at 14.
324 Id.
325 See SPRAGUE & WALKER, supra note 16, at 62. Administrators have a number of resources at their disposal to aid them in this task, including student-administrator partnership initiatives such as Ribbon of Promise and SAVE (Students Against Violence Everywhere), both nationally known organizations which have proven effective in reducing school violence. See id. at 11.
326 See Levitron, supra note 188, at 74 (asserting that an environment of mutual respect, understanding, and collaboration between students and administrators is required to address problems facing students in public schools).
328 See supra text accompanying notes 263-66 (observing the high rate of violent incidents in schools).
329 See supra note 206 (discussing the impact of emotionally wounding speech).
A student welfare standard will likely have no better results in protecting safety, while curtailing the rights of all students, including members of minority groups, for whom such rights are crucial in preventing their marginalization or oppression.\textsuperscript{330}

CONCLUSION

Justice Black, whose dissent in \textit{Tinker} accused the majority of compelling school administrators to surrender control to students,\textsuperscript{331} received an ominous letter after the decision was rendered.\textsuperscript{332} It stated in part, “You don’t have to worry about the laws breaking down. We are organizing a secret club to bring criminals to justise [sic]. We won’t dress any different but will FIX all trouble makers in our school. Everyone knows we are helpless but we know different.”\textsuperscript{333} From the moment Chris Eckhardt and his friends first contemplated donning their black arm-bands, to the aftermath of the \textit{Tinker} decision, the specter of violence was never far removed.\textsuperscript{334} Freedom of speech carries with it the potential to injure others, just as it carries the potential to incite a violent response. It also carries power to create widespread social change, both in institutional structures and individual attitudes.\textsuperscript{335} To limit the hazards associated with freedom of speech by applying a standard which unduly restricts student expressive rights is to limit the very attributes that make free speech so necessary and desirable, inflicting a greater harm to students than the harm posed by threatening and emotionally wounding student speech.

Reflecting on \textit{Tinker}, Justice Stevens observed that the school district’s fear that Chris Eckardt’s armband might start an argument or disturbance was well founded.\textsuperscript{336} Yet the social

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\item[\textsuperscript{330}] See supra text accompanying notes 290-94 (discussing the importance of student speech rights in the educational context).
\item[\textsuperscript{331}] \textit{Tinker}, 393 U.S. at 526 (Black, J., dissenting).
\item[\textsuperscript{332}] Johnson, supra note 2, at 489.
\item[\textsuperscript{333}] Id.
\item[\textsuperscript{334}] See \textit{id.} at 477-78, 489.
\item[\textsuperscript{335}] See supra text accompanying note 274 (observing the impact of student speech on the civil rights movement).
\item[\textsuperscript{336}] Morse v. Frederick, 551 U.S. 393, 447 (2007) (Stevens, J., dissenting).
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impact of students’ antiwar speech is undeniable, as a minority viewpoint in 1965 would engulf the nation the decade’s end, and students played a key role in swaying public opinion against the Vietnam War.\textsuperscript{337} Over 58,000 Americans died in Vietnam;\textsuperscript{338} who can say that number would not be 100,000 or more, had Chris Eckhardt and others not given voice to their opinions? Student speech may indeed have tragic consequences on occasion, but these consequences pale by comparison to the consequences of overzealous speech restrictions.

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\textsuperscript{337} See Anti-Vietnam War Protests in the San Francisco Bay Area and Beyond, PACIFICA RADIO/UC BERKELEY SOUND RECORDING PROJECT (1996), http://www.lib.berkeley.edu/MRC/pacificaviet.html (discussing student involvement in the antiwar movement).