

Note

The “Bong Hits” Case and Viewpoint Discrimination: A State Law Answer to Protecting Unpopular Student Viewpoints

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Introduction

Administrators frequently censor high school students who attempt to express views on homosexuality.¹ For instance, when a Flor-

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¹ See, e.g., Maggie Beckwith, *Student in N.Y. Sent Home for Wearing Pro-Gay T-Shirt*, STUDENT PRESS L. CTR., Nov. 1, 2007, <http://www.splc.org/newsflash.asp?id=1640> (student sent home by principal for wearing a shirt with the message “gay? fine by me”); Kathleen Fitzgerald, *District Court Again Rules Against Calif. Student Who Wore Anti-Gay T-Shirt*, STUDENT PRESS L. CTR., Feb. 21, 2008, <http://www.splc.org/newsflash.asp?id=1696> (student punished for wearing a T-shirt to school with “Homosexuality is shameful. Romans 1:27” on the front and “Be ashamed” on the back); Kathleen Fitzgerald, *High School Junior Sues Fla. District over Ban on Pro-Gay Rights Symbols*, STUDENT PRESS L. CTR., Feb. 1, 2008, <http://www.splc.org/newsflash.asp?id=1678> (students told by principal that supporting gay and lesbian rights was impermissible in school); Erica Hudock, *High School Journalism Adviser Placed on Leave After Officials Decry Homosexuality Article*, STUDENT PRESS L. CTR., Mar. 21, 2007, <http://www.splc.org/newsflash.asp?id=1483> (high school journalism adviser placed on “administrative leave” after allowing the school newspaper to publish a piece on tolerance for homosexuality); Campbell Roth, *Judge Will Not Order Calif. School Officials to Allow Articles to Be Distributed*, STUDENT PRESS L. CTR., May 25, 2005, <http://www.splc.org/newsflash.asp?id=1015> (students ordered to remove a spread of five articles about homosexuality from the school newspaper); *Two Houston Area Schools Censor Stories About Gay Students*, STUDENT PRESS L. CTR., May 24, 2002, <http://www.splc.org/newsflash.asp?id=430> (articles about the struggles of being a homosexual student pulled from two Houston area high schools for being “too controversial”).

ida high school senior tried in October 2005 to print a piece in the student newspaper titled “Homosexuality is not a choice,” the school’s principal censored the column, calling it “too mature” for a high school audience.² In October 2007, on the other hand, school administrators at a Georgia high school allowed a column calling homosexuality one of biology’s “reproductive errors” to run in the student newspaper.³ The column stated that homosexuality is a medical disorder “as much as Down’s syndrome.”⁴ As a justification for running the column, a school administrator said: “Whether the content is popular or not, it’s not up to us to decide what runs as long as it’s not disruptive.”⁵

The student who wrote the censored column in the first example is not alone. Students around the country face censorship by administrators based on the viewpoints they are attempting to express on a number of topics.⁶ In addition to both columns mentioned above, this Note will argue that students should be able to express their views on a wide range of topics in the high school setting without facing interference from administrators.

While students necessarily should not enjoy the same First Amendment rights as nonstudents because of school officials’ need to

² Clay Gaynor, *Principal Censors Article on Homosexuality, Calling It ‘Too Mature,’* STUDENT PRESS L. CTR., Nov. 7, 2005, <http://www.splc.org/newsflash.asp?id=1119>.

³ Maggie Beckwith, *School Officials in Ga. ‘Standing By’ Decision to Run Controversial Column,* STUDENT PRESS L. CTR., Oct. 3, 2007, http://www.splc.org/newsflash_archives.asp?id=1620&year=2007.

⁴ *Id.*

⁵ *Id.*

⁶ Viewpoint discrimination generally occurs when an administrator censors one side of the argument, but would probably allow the opposite viewpoint to be expressed. For example, administrators censor articles on teen pregnancy all the time, but they undoubtedly would allow columns advocating that high school students should wait until marriage before becoming sexually active. See, e.g., Kathleen Fitzgerald, *Principal Pulls Pregnancy Story from Texas Yearbook,* STUDENT PRESS L. CTR., Feb. 13, 2008, <http://www.splc.org/newsflash.asp?id=1686> (story about two student-mothers pulled because it “glamorized the teen mothers’ mistakes”); Jared Taylor, *High School Principal Halts Distribution of Newspaper,* STUDENT PRESS L. CTR., Jan. 19, 2007, <http://www.splc.org/newsflash.asp?id=1405> (administrators refused to allow distribution of edition of school newspaper with stories about teen pregnancy and sexually transmitted diseases); *Independent Paper is Latest Victim at La. School District Known for Censorship,* STUDENT PRESS L. CTR., Apr. 5, 2002, <http://www.splc.org/newsflash.asp?id=401> (principal forced students to alter an article on teen pregnancies before letting it run). The distinction between content and viewpoint discrimination is beyond the scope of this Note. A number of scholars, though, have pointed out that the differences between content and viewpoint discrimination are murky and courts have failed to adequately define the terms. See, e.g., Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL’Y 131, 132–33 (2008).

maintain order in public high schools, they should be able to speak freely to the extent that their speech does not create a substantial disruption at school. The trend toward greater censorship analyzed in this Note undermines students’ understanding of their rights under the First Amendment.⁷ When students are taught First Amendment values in civics classes but they are not allowed to express unpopular opinions at school, it amounts to a “do as I say, not as I do” hypocrisy⁸ that causes students to take the First Amendment for granted.⁹

The law especially disfavors government regulation of speech on the basis of the speech’s message or viewpoint.¹⁰ Courts have decided that restricting speech based on disapproval of the viewpoint or message of the speech “poses the greatest danger to liberty of expression.”¹¹ It has been said that “[t]he most intense constitutional hostility is reserved for measures that discriminate on the basis of viewpoint.”¹²

Ever since the Supreme Court declared that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”¹³ the Court has been struggling to determine what level of First Amendment protection it should provide to student speech. Part I of this Note will describe this struggle by providing a brief history of student speech law, including relevant Supreme Court decisions. Next, Part II will describe the current state of the law regarding the applicability of viewpoint neutrality to student speech. In this section, the Note will analyze the current split in the circuit courts on whether the First Amendment requires viewpoint neutrality in the context of school-sponsored student speech. This section will also analyze the recent *Morse v. Frederick*¹⁴ decision, which arguably allows administrators to discriminate based on view-

⁷ A 2007 survey of nearly 5500 high school students conducted by the John S. and James L. Knight Foundation found that “[s]tudents support individual free expression rights that directly affect or interest them; they’re less supportive of rights that are less relevant to their lives.” KEN DAUTRICH & DAVID YALOF, *FUTURE OF THE FIRST AMENDMENT, 2007 FOLLOW-UP SURVEY 7* (2007), available at <http://firstamendmentfuture.org/FOFA2007Survey.pdf>. For more of the survey’s findings, see *infra* notes 101–04 and accompanying text.

⁸ See *infra* note 105 and accompanying text.

⁹ See DAUTRICH & YALOF, *supra* note 7, at 5.

¹⁰ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) (“[R]estrictions based on *viewpoint* . . . are particularly pernicious.”).

¹¹ Kent Greenawalt, Essay, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 698 (1996).

¹² Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 609–10 (1986).

¹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁴ *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

point—even in censoring student speech that is not school-sponsored—if only in the limited context of speech that advocates drug use.¹⁵

Part III will analyze why viewpoint neutrality is an important First Amendment principle in the context of student speech. This Part will show that because the Supreme Court has not addressed the circuit split regarding the necessity of viewpoint neutrality in censoring school-sponsored speech and because the *Morse* decision suggests a willingness of the Court to allow viewpoint discrimination even in the context of independent student speech, a solution outside of the courts is required to protect students' free speech rights. Part IV will address the counterarguments to a viewpoint neutrality requirement.

Finally, Part V will analyze existing state laws related to student free expression that give more free speech rights to students than the Court has interpreted the First Amendment to require. Some of these laws were passed specifically to counteract a Supreme Court decision limiting students' free expression rights.¹⁶ In light of the 2007 *Morse* decision that reduced protections for student speech, states must step in again to protect student speech. The Note will propose model legislation for states that have not yet adopted student free expression laws that will give students greater protection in expressing controversial viewpoints—including unpopular viewpoints on homosexuality—while allowing administrators the ability to maintain order in the nation's public high schools. The Note will conclude that the model legislation strikes the right balance between maintaining order and allowing students to express themselves.

I. History of Student Speech

A. The Tinker Decision

The Supreme Court first extended First Amendment protections to students in its landmark *Tinker v. Des Moines Independent Community School District* decision.¹⁷ In *Tinker*, three students were suspended for protesting the Vietnam War by wearing black armbands to school.¹⁸ In holding that the First Amendment does not permit school officials to interfere with this form of expression, the Court concluded:

¹⁵ See *id.* at 2629.

¹⁶ See *infra* notes 129–30 and accompanying text.

¹⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁸ *Id.* at 504.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “*materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,*” the prohibition cannot be sustained.¹⁹

The *Tinker* case involved independent student speech, which is an expression of a student at the school that the school itself did not sponsor.²⁰ The above passage from *Tinker* holds the only mention of the word “viewpoint” in the entire decision.²¹ Although at least one scholar has suggested that *Tinker* might allow for public school administrators to censor student speech based on the viewpoint being expressed,²² it has generally been accepted that *Tinker* extended the viewpoint neutrality requirement to independent student speech.²³ Indeed, the plain language of the text indicates that administrators cannot censor to avoid the “discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁴ After *Tinker*, the test to

¹⁹ *Id.* at 509 (emphasis added) (citations omitted).

²⁰ *See id.* at 504.

²¹ *See supra* note 19 and accompanying text.

²² *See* R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 201–03 (2007) (arguing that *Tinker* can be interpreted as promoting viewpoint-based speech restrictions because the determination of whether hostile student speech constitutes an “interference” is “clearly framed, motivated, and mediated by the cognitive and emotional reactions of some persons to the perceived merits of the views expressed by others”).

²³ *See, e.g.,* Bar-Navon v. Sch. Bd., No. 6:06-cv-1434-Orl-19KRS, 2007 U.S. Dist. LEXIS 82044, at *23 (M.D. Fla. Nov. 5, 2007), *aff’d*, No. 07-15639, 2008 U.S. App. LEXIS 17562 (11th Cir. Aug. 15, 2008) (holding that a dress code banning body piercings was constitutional under the *Tinker* standard because, among other justifications, the dress code was “content-neutral, and the Court was not directed to any evidence of viewpoint discrimination”); Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (holding suspension of student for wearing T-shirt that denigrated homosexuality, Islam, and abortion violated the student’s First Amendment rights under *Tinker* because, among other things, it discriminated against the student’s viewpoint); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 829–30 (1985) (Blackmun, J., dissenting) (“[T]he Court in *Tinker* held that in order to justify the exclusion of particular expressive activity, the government ‘must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.’”); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 49 n.9 (1983) (“*Tinker* . . . involve[d] . . . an unequivocal attempt to prevent students from expressing their viewpoint on a political issue.”).

²⁴ *Tinker*, 393 U.S. at 509.

determine whether administrators could censor student speech became whether the speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”²⁵ Federal courts applying the substantial disruption test have interpreted it to provide broad protections for student speech.²⁶ Because of the broad protection *Tinker* provides, this Note will advocate for model legislation codifying this test.²⁷ Although this test governed student speech for more than fifteen years, the Court subsequently began to cut back the First Amendment rights it had granted in *Tinker*.

B. Chipping Away at *Tinker*

While *Tinker* might have declared that students do not shed their free speech rights at the schoolhouse gate, decisions after *Tinker* made it clear that at least some shedding occurs. *Bethel School District No. 403 v. Fraser*²⁸ involved a student who was suspended for giving a sexually suggestive speech at a high school assembly.²⁹ The Court in *Bethel* held that school officials could suspend a student for offensively lewd or indecent speech without a showing of substantial disruption because school officials need to have authority to determine appropriate speech for school assemblies and classrooms.³⁰

In *Bethel*, the Court focused on the special characteristics of a school, saying that the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³¹ On the facts in *Bethel*, it is clear that the student’s speech at the high school assembly did not materially or substantially disrupt school activity³²—which means *Tinker*’s test was not satisfied.³³ *Bethel*, therefore, provides an exception to *Tinker* when admin-

²⁵ *Id.* at 513.

²⁶ *See, e.g.,* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (“As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.”). In sum, the court in *Saxe* found that “if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.” *Id.* at 212.

²⁷ *See infra* Part V.C.

²⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁹ *Id.* at 677–78.

³⁰ *Id.* at 685–86.

³¹ *Id.* at 682.

³² *See id.* at 679 (noting that the Ninth Circuit had “explicitly rejected the School District’s argument that the speech . . . had a disruptive effect on the educational process”).

³³ *But see id.* at 685 (distinguishing *Tinker* by saying the penalties imposed in this case were unrelated to any political viewpoint).

istrators are faced with “vulgar and lewd speech” that would “undermine the school’s basic educational mission.”³⁴

The *Bethel* Court also distinguished *Tinker* by saying that the speech in *Tinker* was directly related to a political viewpoint, while the speech in *Bethel* was not.³⁵ The fact that *Bethel* places importance on the distinction between a political viewpoint and a nonpolitical viewpoint supports the idea that student speech expressing certain viewpoints should be entitled to greater protection. In addition, there is no mention of viewpoint discrimination or a viewpoint neutrality requirement in *Bethel*. In summary, *Bethel* stands for the proposition that administrators do not have to show a substantial disruption before censoring lewd or indecent speech unrelated to any political viewpoint.

The Court significantly limited *Tinker*’s scope again in *Hazelwood School District v. Kuhlmeier*.³⁶ In *Hazelwood*, three students who worked on the school newspaper sued the school saying school officials violated their First Amendment rights when they deleted two pages of articles from the paper on pregnancy and divorce.³⁷ The *Hazelwood* Court differentiated *Tinker* by saying that the speech in *Tinker* involved a “student’s personal expression that happen[ed] to occur on the school premises.”³⁸ The type of speech presented in *Hazelwood*, on the other hand, was school-sponsored speech, a category that includes “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”³⁹ The Court held that school-sponsored student speech is not subject to *Tinker*’s substantial disruption test,⁴⁰ adopting a new test for this type of student speech: “[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.”⁴¹ In sum, *Hazelwood* stands for the proposition that if speech can reasonably be perceived to bear the imprimatur of the school,

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

³⁷ *Id.* at 262–64.

³⁸ *Id.* at 271.

³⁹ *Id.*

⁴⁰ *See id.* at 272–73.

⁴¹ *Id.* at 273.

school officials can censor it as long as the censorship reasonably relates to legitimate pedagogical concerns.⁴²

II. Current State of the Law Regarding Viewpoint Neutrality

A. The Circuit Court Split

While it is generally accepted that *Tinker* requires administrators to be viewpoint neutral in censoring independent student speech,⁴³ circuit courts are split as to whether administrators must remain viewpoint neutral in censoring school-sponsored speech. The *Hazelwood* case does not explicitly state that school officials are required to be viewpoint neutral in censoring school-sponsored student speech.⁴⁴ As one scholar has pointed out, it appears the *Hazelwood* Court relies on cases that do recognize a viewpoint neutrality requirement.⁴⁵ Because of the ambiguity regarding whether *Hazelwood* abandoned the viewpoint neutrality requirement in school-sponsored student speech cases, the circuit courts have struggled since 1988 in applying the decision.

The First⁴⁶ and Tenth⁴⁷ Circuits have held that school officials can censor school-sponsored speech based on the viewpoint being expressed. The Third Circuit briefly weighed in on the issue—siding with the First and Tenth Circuits—but ultimately retracted the opinion on other grounds.⁴⁸ The Second,⁴⁹ Ninth,⁵⁰ and Eleventh⁵¹ Circuits,

⁴² See *id.*

⁴³ See *supra* notes 23–26 and accompanying text.

⁴⁴ Although the majority opinion in *Hazelwood* does not explicitly mention viewpoint discrimination, scholars have debated what the Justices thought at the time. For a discussion on the Court's intention regarding viewpoint discrimination, see Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 224–27 (2004). One scholar argues that *Hazelwood* provides evidence advocating both for and against a viewpoint neutrality requirement. Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 90–94 (2008).

⁴⁵ Wright, *supra* note 22, at 189 & n.105.

⁴⁶ Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993) (“[T]he Court in [*Hazelwood*] did not require that school regulation of school-sponsored speech be viewpoint neutral.”).

⁴⁷ Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002) (“[W]e conclude that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech.”).

⁴⁸ C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 173–74 (3d Cir. 1999) (“*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns.”), *aff'd in part, vacated in part en banc*, 226 F.3d 198 (3d Cir. 2000) (vacating the earlier opinion and resolving the case on jurisdictional grounds).

⁴⁹ Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 (2d Cir. 2005)

meanwhile, have concluded that *Hazelwood* prohibits viewpoint-based restrictions on school-sponsored student speech. The Sixth Circuit briefly weighed in on the issue—siding with the Second, Ninth, and Eleventh Circuits—but ultimately resolved the case on other grounds.⁵² The Fourth, Fifth, Seventh, and Eighth Circuits have not addressed the issue according to the author’s research.

B. *The Morse Decision*

In January 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah.⁵³ The principal of Juneau-Douglas High School (“JDHS”), Deborah Morse, decided to let students leave class to participate in the event.⁵⁴ Students were allowed to observe the relay from either side of the street in front of the school, with teachers and officials monitoring the students’ actions.⁵⁵ Joseph Frederick, a senior at the high school, did not show up for school on time that day.⁵⁶ Instead, he joined his friends across the street from the school to watch the relay as it passed.⁵⁷ As the torchbearers and the cameras passed by, Frederick and his friends unfurled a 14-foot banner reading: “BONG HiTS 4 JESUS.”⁵⁸ Upon seeing the banner, Morse demanded that it be taken

(“[W]e conclude that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even if* reasonably related to legitimate pedagogical interests.”).

⁵⁰ *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829–30 (9th Cir. 1991) (finding that *Hazelwood* required viewpoint neutrality).

⁵¹ *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (“[W]e do not believe [*Hazelwood*] offers any justification for allowing educators to discriminate based on viewpoint.”).

⁵² The Sixth Circuit interpreted *Hazelwood* as supporting the proposition that “if the school did not intentionally create a public forum, then the publication remains a nonpublic forum, and school officials may impose any reasonable, non-viewpoint-based restriction on student speech exhibited therein.” *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir.) (citations omitted), *vacated en banc*, 197 F.3d 828 (6th Cir. 1999). Forum analysis is beyond the scope of this Note. It is important to note, however, that the *Hazelwood* Court reversed a circuit court decision finding that the student newspaper was a public forum. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267–70 (1988). Although the *Hazelwood* Court did not explicitly call the student newspaper a nonpublic forum, the Court implies as much. *See id.* The Court’s First Amendment jurisprudence indicates, however, that it is impermissible to discriminate based on viewpoint, even when a forum is deemed to be nonpublic. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48–49 & n.9 (1983).

⁵³ *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

down.⁵⁹ Everyone complied except for Frederick, whom Morse suspended for ten days.⁶⁰ Frederick filed suit alleging the school had violated his First Amendment rights in suspending him over the banner.⁶¹

The district court held under the Supreme Court's ruling in *Bethel*—which allowed an administrator to restrict lewd or indecent speech without a showing of substantial disruption⁶²—that Frederick's speech was not protected.⁶³ A Ninth Circuit panel unanimously vacated and remanded.⁶⁴ The Ninth Circuit found that Frederick's banner was not lewd or indecent speech under *Bethel* or school-sponsored speech as defined by *Hazelwood*, and thus Frederick's punishment would be best reviewed under *Tinker*.⁶⁵ The panel then found that the banner did not cause a substantial disruption under *Tinker* and therefore Frederick's First Amendment rights were violated.⁶⁶

The Supreme Court reversed the Ninth Circuit's decision.⁶⁷ Writing for the Court, Chief Justice Roberts⁶⁸ held: "The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."⁶⁹ The Court agreed with the Ninth Circuit that *Hazelwood's* school-sponsorship test and *Bethel's* lewd speech test did not apply,⁷⁰ but also found that *Tinker's* substantial disruption test is "not absolute."⁷¹ In yet another exception to *Tinker*, *Morse* allows school officials to censor independent student speech that can be reasonably

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2623.

⁶² See *supra* note 30 and accompanying text.

⁶³ Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *4-5 (D. Alaska May 27, 2003).

⁶⁴ Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006).

⁶⁵ See *id.* at 1119-23.

⁶⁶ *Id.* at 1123 ("*Tinker* requires that, to censor or punish student speech, the school must show a reasonable concern about the likelihood of substantial disruption to its educational mission. Appellees conceded that the speech in this case was censored only because it conflicted with the school's 'mission' of discouraging drug use. That reason fails to meet the bar.").

⁶⁷ Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).

⁶⁸ Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts's opinion. *Id.* at 2621.

⁶⁹ *Id.* at 2629.

⁷⁰ *Id.* at 2626-27 (finding that *Hazelwood* did not control because "no one would reasonably believe that Frederick's banner bore the school's imprimatur" and declining to apply the test in *Bethel* because "[t]he mode of analysis in [*Bethel*] is not entirely clear").

⁷¹ *Id.* at 2627.

regarded as promoting drug use without showing a substantial disruption to school activities.⁷²

C. *Morse and Viewpoint Discrimination*

Before *Morse*, it was generally accepted that *Tinker* restricted school officials from censoring independent student speech based on the viewpoint being expressed.⁷³ The circuit courts are split as to whether this tenet of First Amendment jurisprudence applies to school-sponsored speech under *Hazelwood*.⁷⁴ While some may have hoped the circuit split would be resolved by the *Morse* decision, it does not explicitly address the issue. Instead, the court adopts another exception to the *Tinker* rule, this one for speech that can reasonably be perceived as advocating drug use.

The Supreme Court in *Morse* certainly had an opportunity to address the viewpoint discrimination question. In the petitioner’s brief, *Morse* argued that courts have upheld bans on pro-drug messages in the context of school-sponsored activities.⁷⁵ Respondent’s brief pointed out that there is a circuit split as to whether *Hazelwood* permits viewpoint discrimination in restricting school-sponsored speech.⁷⁶ Because the Court found that Frederick’s banner did not qualify as school-sponsored speech under *Hazelwood*,⁷⁷ any resolution of the circuit split would have been in dicta, which could be why the Court chose not to address the issue.

In oral arguments, Douglas Mertz, attorney for the respondent, answered a question posed by Justice Roberts by saying, “I think it was clearly established at the time, Your Honor, that a principal could not engage in viewpoint censorship of a nondisruptive expression, under both Ninth Circuit law and this Court’s law.”⁷⁸ Discussion about whether a school must remain neutral or can discriminate based on viewpoint comes up in other parts of the oral argument as well.⁷⁹

⁷² See *id.* at 2629.

⁷³ See *supra* notes 23–26 and accompanying text.

⁷⁴ See *supra* Part II.A.

⁷⁵ Brief for Petitioner at 29, *Morse*, 127 S. Ct. 2618 (No. 06-278) (citing *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004) (approving viewpoint discrimination in school-sponsored speech to forbid pro-drug messages)).

⁷⁶ Respondent’s Brief at 28 n.20, *Morse*, 127 S. Ct. 2618 (No. 06-278).

⁷⁷ *Morse*, 127 S. Ct. at 2627.

⁷⁸ Transcript of Oral Argument at 31, *Morse*, 127 S. Ct. 2618 (No. 06-278).

⁷⁹ For example, at one point during the argument Chief Justice Roberts asks, “[C]an’t the school decide that it’s part of its mission to try to prevent its student from engaging in drug use and so that it’s going to have a viewpoint on drug use and that viewpoint is going to be that it’s opposed to it and so that it takes a particular view with respect to signs that in their view seem to

While the Court most likely did not address the circuit split regarding a viewpoint neutrality requirement in applying *Hazelwood* because it found *Hazelwood* did not apply on the facts, the Court also did not explicitly affirm that there is a viewpoint neutrality requirement in applying *Tinker*. This omission may be significant because, as stated earlier, it was generally understood by the plain language of the decision in *Tinker* that *Tinker* requires school officials to be viewpoint neutral in censoring independent student speech.⁸⁰

D. Implications of *Morse*

The *Morse* decision implies that it is acceptable for school officials to discriminate based on viewpoint in censoring independent student speech, at least when a pro-drug message is involved. Justice Stevens pointed out in his dissent that the Court's opinion ignores the fact that legalization of marijuana is an issue of considerable public concern in Alaska.⁸¹ Further, Justice Stevens stated that "the Court's test invites stark viewpoint discrimination."⁸² Stevens said that for the sake of argument, he might be willing to concede that because of the unique school setting, it might be acceptable to restrict speech that advocates drug use.⁸³ His problem with the majority opinion was that he did not think Frederick's message expressly advocated for drug use.⁸⁴ The majority addressed viewpoint discrimination only in responding to the dissent near the end of the opinion: "Although accusing this decision of doing 'serious violation to the First Amendment' by authorizing 'viewpoint discrimination,' the dissent concludes that 'it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting.'"⁸⁵ This passage implies that here

encourage drug use?" *Id.* at 32. Later, in discussing appropriate rules of decorum in schools, Chief Justice Roberts also asks, "Does the school have to be completely neutral in that respect?" *Id.* at 40–41.

⁸⁰ See *supra* notes 23–24 and accompanying text.

⁸¹ *Morse*, 127 S. Ct. at 2649 n.8 (Stevens, J., dissenting).

⁸² *Id.* at 2645. Justice Stevens goes on to say:

In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

Id. at 2651.

⁸³ *Id.* at 2646.

⁸⁴ See *id.* ("[I]t is one thing to restrict speech that advocates drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy.").

⁸⁵ *Id.* at 2629 (citations omitted).

the Court is allowing viewpoint discrimination in the context of a pro-drug message.

At least one scholar has also pointed out this implication. Professor Emily Gold Waldman states that the *Morse* Court “endorsed an explicitly viewpoint-based rationale for restricting some student speech even when that speech does *not* bear the school’s imprimatur.”⁸⁶ Waldman asserts that if viewpoint-based restrictions can be appropriate in the context of independent student speech, this is further evidence that viewpoint-based restrictions are permissible in the context of school-sponsored student speech.⁸⁷

The decision in *Morse* is another significant limitation on students’ free expression rights in public high schools.⁸⁸ *Morse* seems to be the first indication by the Supreme Court that it is permissible in certain situations for school officials to censor independent student speech based on the viewpoint expressed. Because *Morse* did not explicitly speak to the viewpoint neutrality requirement, the circuit split with regard to school-sponsored speech still stands. Also, *Tinker*’s apparent disapproval of viewpoint discrimination still stands, at least when one of the Court’s exceptions is not triggered.⁸⁹ But the implication in *Morse* that there are certain situations in censoring independent student speech where a basic tenet of First Amendment jurisprudence—viewpoint neutrality—does not apply warrants a closer look at how that will affect student expression.

III. Why Viewpoint Neutrality is Important

The Supreme Court has been suspicious of government regulation that discriminates based on viewpoint.⁹⁰ The problem with such

⁸⁶ Waldman, *supra* note 44, at 111.

⁸⁷ *Id.* at 111–12.

⁸⁸ Joanna Nairn summed it up best when she said:

Morse v. Frederick can best be understood as creating yet another exception to *Tinker*, for its holding that pro-drug speech may be censored by schools allows content-based regulations grounded in precisely the type of undifferentiated apprehension of harm against which the Court spoke out in 1969. The Court’s decision relies primarily upon what it assumes to be two self-evident propositions: that there is a correct viewpoint on drug use and that schools should be entitled to inculcate their students with that view. In so holding, the majority does violence to the idea that regulation of the content of student speech may take place only where school officials can show necessity, leaving students otherwise free to form their own opinions.

Joanna Nairn, Recent Development, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 255–56 (2008).

⁸⁹ See *supra* Parts I.B, II.B.

⁹⁰ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)

restrictions is that they are aimed at “suppressing particular ideas” and lend themselves to “invidious, thought-control purposes.”⁹¹ This risk of “thought-control” is no less serious in public high schools.⁹² Rather, as an amicus brief for the respondents in the *Morse* case pointed out: “[I]n the compulsory educational context where inquiry and critical thinking should be encouraged, that risk is at its zenith.”⁹³

Admittedly, the state has many interests in educating the nation’s children, including inculcating the youth with civic values while maintaining order and protecting students from harm.⁹⁴ It is finding this balance that has caused the discussion in the courts over whether a viewpoint neutrality requirement extends to student speech.

The *Morse* holding goes too far in protecting students from drugs in that it implies that high school students are not allowed to have a debate about the merits of drug use.⁹⁵ Justice Stevens’ dissent sounds similar to the popular First Amendment argument that “bad” speech should be countered with “good” speech rather than censoring it.⁹⁶ Before the Court promulgated all of its exceptions to *Tinker*, school officials could censor only speech that caused a substantial disruption to school activities.⁹⁷ This standard allowed school officials to protect students from harm while simultaneously giving them a right to speak freely as long as they did not cause a substantial disruption.⁹⁸ Susanah Barton Tobin argues that this respect for freedom of expression is

(“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” (citations omitted)); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (noting that the government must “not [make] an effort to suppress expression merely because public officials oppose the speaker’s view”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“There is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.” (citation omitted)).

⁹¹ See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part and dissenting in part).

⁹² See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 285–86 (1988) (Brennan, J., dissenting); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

⁹³ Brief for Amicus Curiae Lambda Legal Defense & Education Fund, Inc. in Support of Respondent at 17, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278).

⁹⁴ See, e.g., *Hazelwood*, 484 U.S. at 285 (Brennan, J., dissenting); *Tinker*, 393 U.S. at 513–14; Tobin, *supra* note 44, at 265 (noting that the public education system was created to promote the inculcation of moral and democratic values).

⁹⁵ See *Morse*, 127 S. Ct. at 2649–50 (Stevens, J., dissenting).

⁹⁶ See, e.g., Tobin, *supra* note 44, at 243 (discussing this argument in the context of the factual scenario in *Hazelwood*).

⁹⁷ See *supra* Part I.A.

⁹⁸ See *supra* Part I.A.

important in the school setting,⁹⁹ and it follows from Tobin’s argument that just because an official is dealing with student speech does not mean viewpoint discrimination is any less threatening. As Justice Brennan said: “Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’”¹⁰⁰

A 2007 study by the John S. and James L. Knight Foundation, a national nonprofit organization dedicated to transforming journalism and ensuring that citizens get the information they need to thrive in a democracy,¹⁰¹ found that nearly three-fourths of public high school students do not know how they feel about the First Amendment or take it for granted.¹⁰² The survey also found that more than half of all high school students say they have not heard of Constitution Day, which is mandated by federal law to be a day when the Constitution is taught in schools.¹⁰³ The survey’s findings indicate that high schools are failing to educate students about the First Amendment. Journalism professors around the country argue that allowing students to practice democracy firsthand through student media, for example, is a vital step toward preparing the nation’s youth for life in a democracy.¹⁰⁴

Finally, to the extent students are taught the First Amendment in civics class, current student free-speech doctrine amounts to hypocrisy. As one commentator has written:

In the “cradle of our democracy,” students learn the fundamentals of that democracy. If the freedom of expression is so fundamental, then concluding that our nation’s schools should teach our students to respect that freedom is a simple matter of completing the syllogism. However, teaching students to respect the freedom of expression while simultane-

⁹⁹ Tobin, *supra* note 44, at 243 (“High School students are sensitive to signs of secrecy and discomfort on the part of their teachers and advisors, and speech suppressive reactions by administrators only serve to encourage concern and tension instead of open and useful dialogue.”). For more on why viewpoint neutrality is important, see Tobin, *supra* note 44, at 238–44.

¹⁰⁰ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

¹⁰¹ Our Mission—Knight Foundation, http://www.knightfoundation.org/about_knight (last visited Jan. 4, 2009).

¹⁰² DAUTRICH & YALOF, *supra* note 7, at 5.

¹⁰³ *Id.* (finding that only one in ten students surveyed remember how their high school celebrated the day).

¹⁰⁴ See, e.g., Future of the First Amendment, Comments on Follow-up Survey, http://firstamendmentfuture.org/report91707_comments.php (last visited Mar. 4, 2009).

ously prohibiting them from exercising it verges on a “do as I say, not as I do” hypocrisy.¹⁰⁵

Students should learn about their First Amendment rights in civics classes and be able to exercise those rights on school grounds as long as they do not cause a substantial disruption.

IV. *Silencing Speech Is Not the Answer*

Tinker's substantial disruption test strikes the right balance between the school's dual responsibilities of protecting students and inculcating them with civic values. One of the main arguments against viewpoint neutrality is that controversial speech can cause problems and should be silenced as part of a pedagogical strategy.¹⁰⁶ Outside of the educational context, the Supreme Court has stated that the answer to problematic speech is more speech, not less speech.¹⁰⁷ Tobin argues that courts have been reluctant to extend this approach to student speech because of the idea that students are impressionable and unable to distinguish “good” speech from “bad” speech.¹⁰⁸ School officials can educate students without censoring them. Students should be able to express views on controversial issues, with the caveat that their speech does not create a substantial disruption in school activities, which would limit school officials' ability to educate.¹⁰⁹

One scholar opines that courts should be careful to guard against regulation of student speech that is not “specifically and demonstrably necessary for the functioning of the school, lest that regulation stray into the realm of viewpoint discrimination.”¹¹⁰ Joanna Nairn argues that the *Morse* decision reflects an implicit endorsement of the inculcative approach to education.¹¹¹ According to this philosophy, “the

¹⁰⁵ Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 625 (2002) (citations omitted).

¹⁰⁶ See, e.g., Tobin, *supra* note 44, at 242.

¹⁰⁷ See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

¹⁰⁸ See Tobin, *supra* note 44, at 242–43.

¹⁰⁹ Tobin argues that school environments can provide a marketplace of ideas where “bad” speech can be countered by “good” speech by students or administrators. *Id.* at 243 (“If student journalists, guest speakers and other non-school officials raise troubling issues, whether regarding the traditional parental concerns of ‘sex, drugs and rock and roll’ or the frightening specter of violence in the schools, the advantage gained by knowing that the students are thinking and talking about these issues outweighs the discomfort or administrative burden involved in directly confronting the issues.”).

¹¹⁰ Nairn, *supra* note 88, at 248.

¹¹¹ See *id.* at 249.

role of schools is to inculcate values, and restricting student speech that disagrees with the approved values of the school is necessary to ensure that students receive the right messages.”¹¹² Nairn points out that a number of scholars have refuted this philosophy as inconsistent with the “democratic engagement that animates society.”¹¹³ This Note flatly rejects the inculcative philosophy, arguing instead that students are better educated to become citizens in a democracy when they are allowed to express unpopular views as long as those views do not affect the functioning of the school. As Nairn notes, rejection of the inculcative model does not require unlimited rights for students;¹¹⁴ *Tinker* demonstrates that an alternative lies in “balancing student speech and the need for student discipline.”¹¹⁵

Bethel, *Hazelwood*, and *Morse* promulgate unnecessary restrictions on student speech. The speech in those cases—a sexually explicit speech,¹¹⁶ articles on divorce and teen pregnancy,¹¹⁷ and the “BONG HiTS 4 JESUS” banner,¹¹⁸ respectively—did not cause a substantial disruption to school activity and therefore did not require censorship. Schools should be allowed to counteract student speech that goes against the values they are attempting to inculcate, but they can do so without censoring students. To counteract the speech in *Bethel*, the school should have instead stated that it did not advocate sexually suggestive language. The school in *Hazelwood* should have informed students and parents that it did not support the views of the student newspaper, perhaps by holding an assembly or passing out information it agreed with on divorce and teen pregnancy. In *Morse*, the school could have held a forum on the dangers of drug use and reiterated its position and policy against students’ use of illegal drugs. These solutions do not involve censorship, but more speech to counteract what the school saw as “bad” speech. The exceptions to *Tinker* created in these cases had nothing to do with maintaining order in the nation’s public schools—an interest this Note concedes is an important one. These exceptions, rather, amount to censorship based solely on the viewpoints students were attempting to express, which is

¹¹² *Id.*

¹¹³ *Id.* at 250 (“[T]he inculcative approach does not merely curtail individual rights, but it also threatens the ability of schools to transmit the core values with which the approach purports to be concerned.”).

¹¹⁴ *Id.* at 251.

¹¹⁵ *Id.*

¹¹⁶ See *supra* note 29 and accompanying text.

¹¹⁷ See *supra* note 37 and accompanying text.

¹¹⁸ See *supra* note 58 and accompanying text.

an inappropriate restriction in a democratic society and with respect to the First Amendment.

The model legislation proposed in this Note is more in line with the goals of the First Amendment because it does not allow viewpoint discrimination. In order to give students the ability to express unpopular viewpoints—viewpoints the courts have slowly taken away since the *Tinker* decision in 1969—this Note will now turn to looking at potential solutions to the problem.

V. *How to Bring the Viewpoint Neutrality Requirement Back*

A. *Why Judicial Solutions Are Inadequate*

A number of scholars have proposed various solutions regarding the viewpoint neutrality requirement as applied to student speech. Tobin argues that the Supreme Court should explicitly prohibit viewpoint discrimination in schools with regard to school-sponsored speech.¹¹⁹ The Supreme Court has only taken four student speech cases in the past forty years. Before *Morse*, which was decided in 2007, the Court had not heard a student speech case since the *Hazelwood* case in 1988. Aside from the fact that the Court does not take many student speech cases, the *Morse* decision indicates that the current Court is not likely to prohibit viewpoint discrimination, at least in certain areas.¹²⁰ Instead, *Morse* implies that a majority of the justices are comfortable with school officials practicing viewpoint discrimination in limited circumstances.¹²¹ Thus, it appears that Tobin's solution to rely on Court action is not very likely to succeed.

Professor R. George Wright argues that courts should not require viewpoint neutrality in the context of school-sponsored speech.¹²² Wright bases his argument on a finding that the direct and indirect costs of strict scrutiny and a viewpoint-neutrality requirement in school-sponsored speech regulation contexts are likely to be signifi-

¹¹⁹ Tobin, *supra* note 44, at 263.

¹²⁰ See *supra* Part II.D.

¹²¹ See Nairn, *supra* note 88, at 256 (“The chilling effect that this decision will have upon students is likely to be profound, as it will embolden school administrators who wish to engage in increasingly restrictive speech regulation and will encourage lower courts to be more reluctant to strike down such policies. Equally important may be the message it sends about the Court’s attitude toward students’ rights to expression. By saying that some viewpoints are entirely out of bounds for students, the Court has declared that student speech on such matters is of little import—a dangerous attitude with which to approach any government regulation of citizen expression.”).

¹²² Wright, *supra* note 22, at 213–16.

cant.¹²³ He finds that a lower level of judicial scrutiny will involve more limited social costs and bring significant benefits to the educational process and the broader public.¹²⁴ But Wright’s conclusion is based on the idea that “[i]ndependent speakers who are publicly understood to be independent of the school can retain their own speech rights under cases such as *Tinker*.”¹²⁵ Wright’s article was published before the *Morse* decision, which implies that independent speech can also be subject to viewpoint discrimination in certain circumstances.¹²⁶ This makes it unclear whether students will be able to fall back on *Tinker* when they express themselves independently, and, therefore, Wright’s solution assumes propositions from *Tinker* that may not be correct.

B. State Law Provides the Best Solution

Because of *Morse*’s implications on viewpoint discrimination, this Note proposes that the Court is not the proper channel to restore free expression rights to public high school students and that student speech is not adequately protected after the *Bethel-Hazelwood-Morse* decisions limited *Tinker*’s effect. This Note proposes that states should remedy this problem by enacting legislation codifying the *Tinker* standard of substantial disruption for student speech. A state statute codifying the *Tinker* standard would extend protection of students’ free expression rights beyond what the Court currently says the First Amendment requires.¹²⁷ Also, a state statute codifying *Tinker* as the standard for dealing with all student speech would effectively eliminate the viewpoint censorship allowed by *Hazelwood*, *Bethel*, and *Morse* in state court actions.

¹²³ *Id.* at 213. In talking about the costs of a viewpoint neutrality requirement, Wright argues:

[A] lower level of judicial scrutiny . . . better promotes social, educational, and cultural values, and even basic constitutional values including overall freedom of speech itself. To the extent that the major institutional educational actors and most public schools generally wish to send messages of tolerance, civility, inclusion, equality, and responsibility, such messages are blurred, if not entirely garbled, when persons who at least appear to speak in the school’s name contradict those messages.

Id. at 214.

¹²⁴ *Id.* at 213.

¹²⁵ *Id.* at 214.

¹²⁶ *See supra* Part II.D.

¹²⁷ *See supra* Part II.

A state may “adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”¹²⁸ In the years after *Hazelwood*, numerous states passed legislation limiting the case’s scope.¹²⁹ Iowa’s statute dealing with student exercise of free expression, which was enacted only one year after the *Hazelwood* decision in 1989, is typical.¹³⁰ The statute states, “[S]tudents of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications.”¹³¹ The statute limits student expression that is obscene; libelous or slanderous; or encourages students to commit unlawful acts, violate lawful school regulations, or “[c]ause the material and substantial disruption of the orderly operation of the school.”¹³² Arkansas,¹³³ California,¹³⁴ Colorado,¹³⁵ Kansas,¹³⁶ and Massachusetts¹³⁷ all have similar statutes, with slight differences in the amount of restrictions they impose on student speech.¹³⁸ Also, some of the statutes, like those in Arkansas and Kan-

¹²⁸ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

¹²⁹ Iowa, Arkansas, California, Colorado, Kansas, Oregon, and Massachusetts all have statutes protecting either student press freedom, student free expression, or both, while Pennsylvania and Washington both have administrative codes protecting students’ free speech rights. See *infra* notes 130–142 and accompanying text.

¹³⁰ IOWA CODE ANN. § 280.22 (West 1996).

¹³¹ *Id.*

¹³² *Id.*

¹³³ ARK. CODE ANN. §§ 6-18-1201 to -1204 (2007). The Arkansas law applies only to student publications and not student expression in general. *Id.*

¹³⁴ CAL. EDUC. CODE § 48907 (West 2008). California’s statute was the first of its kind in the nation and predated the *Hazelwood* decision by more than a decade. See *Legal Analysis XXVIII, No. 3: Understanding Student Free-expression Laws*, STUDENT PRESS L. CTR. REPORT, Fall 2007, http://www.splc.org/report_detail.asp?id=1351&edition=43. Following the *Hazelwood* decision, the California Department of Education issued a news release to school officials stating that the *Hazelwood* decision did not change existing state law. Press Release, Cal. Dep’t of Educ., Honig Clarifies Status of Students’ “Freedom of the Press” (Mar. 18, 1988), available at <http://www.splc.org/pdf/caldoeadvisory.pdf>.

¹³⁵ COLO. REV. STAT. ANN. § 22-1-120 (West 2007). The SPLC reports that the Colorado law’s legislative history indicates that it was passed specifically in response to *Hazelwood*. See *Legal Analysis XXVIII, No. 3, supra* note 134.

¹³⁶ KAN. STAT. ANN. §§ 72-1504 to -1506 (2007). The Kansas act only applies to student publications and not to student speech in general. See *id.*

¹³⁷ MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2002). The Massachusetts statute is broader than the others in that it covers both student speech in general and students’ ability to write, publish, and disseminate their views in particular. See *id.* In a case discussing the law, the court notes that the legislative history of the law was introduced specifically to limit the impact of *Hazelwood*. See *Pyle ex rel. Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 167 (D. Mass. 1994) (“[T]he statute itself and its sparse legislative history confirm that the law was aimed at *Hazelwood*.”).

¹³⁸ For example, Iowa’s law limits student expression with regard to materials that are obscene; libelous or slanderous; and materials that encourage students to commit unlawful acts,

sas, only apply to student publications, while others, like those in Massachusetts and California, apply to student expression generally.¹³⁹ Oregon was the most recent to enact a student free expression law in 2007.¹⁴⁰ Pennsylvania¹⁴¹ and Washington¹⁴² both have administrative codes protecting students’ free speech rights.¹⁴³ Each of the states that passed this legislation expanded free speech for students under state law, effectively giving students a state court forum to litigate infringements upon their right to free speech.¹⁴⁴

Because these state statutes essentially codify *Tinker* to varying degrees, students attempting to bring lawsuits in state courts do not need to worry about the *Hazelwood* standard, which allows school officials to censor school-sponsored speech as long as the censorship is “reasonably related to a pedagogical concern.”¹⁴⁵ This means that students in these states who publish articles in student newspapers (which some courts have deemed to be school-sponsored speech) are subject only to the substantial disruption standard. In addition, because these statutes essentially codify *Tinker*—and it was generally accepted that *Tinker* did not allow viewpoint discrimination—it follows that school officials in these states are not allowed to discriminate based on viewpoint in censoring student speech. State action of this sort is necessary because after the Court’s decision in *Morse*, it is less clear that *Tinker* requires viewpoint neutrality in *all* cases of censorship.¹⁴⁶

C. Model Legislation

Like the above states that passed student free expression laws in *Hazelwood*’s wake, state legislatures should act again to curb the ef-

violate lawful school regulations, or cause the material and substantial disruption of the orderly operation of the school. IOWA CODE ANN. § 280.22 (West 2005). Arkansas’ law lists the same limitations but adds a limitation on expression that constitutes an unwarranted invasion of privacy. ARK. CODE ANN. § 6-18-1204(3) (2007). The Massachusetts law arguably gives students the greatest amount of free speech protection because it does not include a list of explicit limitations. See Mass. Gen. Laws Ann. ch. 71, § 82 (West 2002).

¹³⁹ See *supra* notes 133–34, 136–37.

¹⁴⁰ OR. REV. STAT. ANN. § 336.477 (West 2008); see also 2007 Or. Laws 3279.

¹⁴¹ 22 PA. CODE § 12.9 (2008).

¹⁴² WASH. ADMIN. CODE 392-400-215 (2008).

¹⁴³ The administrative codes are similar to the statutes in the protection they provide to public high school student expression.

¹⁴⁴ See Mike Hiestand, *Understanding “Anti-Hazelwood” Laws*, TRENDS IN HIGH SCH. MEDIA, Jan. 23, 2001, <http://www.studentpress.org/nspa/trends/~law0101hs.html> (describing the effect these laws have had on students’ rights to free expression).

¹⁴⁵ See *supra* note 41 and accompanying text.

¹⁴⁶ See *supra* Part II.D.

fect of the *Morse* decision. The states that already have a student free expression law need only amend the law to include the phrase: "School officials cannot restrict student speech based on the viewpoint being expressed unless that speech causes a substantial disruption to school activities." States that do not currently have a student free expression law should act quickly to curb *Morse* as well as *Hazelwood*. The Student Press Law Center ("SPLC"), a nonprofit organization advocating for student free expression rights, has proposed model legislation that relies on the *Tinker* standard as well as language drawn from various student free expression statutes.¹⁴⁷ Although the SPLC's model legislation focuses solely on creating "the highest quality student publications and the most responsible student journalists,"¹⁴⁸ parts of it are incorporated into the model legislation this Note proposes to protect student speech in general.

Section 1 of the model legislation this Note proposes should include a statement of the state's intention to provide students with free expression rights: "Students at public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the publication of expression in school-sponsored publications and other news media, except as provided in Section 2." Section 2 should read: "Nothing in this section shall be interpreted to authorize expression by students that so incites students as to create a material or substantial disruption of the orderly operation of the school. School officials must base a forecast of material and substantial disruption on specific facts, including past experience in the school and current events influencing behavior, and not on undifferentiated fear or apprehension." Section 3 should address the viewpoint neutrality requirement: "School officials cannot discriminate based on the student speaker's viewpoint unless that speech falls under Section 2."

Section 1 of the model legislation is important because it provides students with rights in the student speech context generally and in the student press context specifically (which includes school-sponsored publications, thus rejecting *Hazelwood*). Section 2 is important because it codifies *Tinker* and how federal courts have interpreted the *Tinker* test for substantial disruption.¹⁴⁹ Section 3 is important for the

¹⁴⁷ Student Press Law Center Model Legislation to Protect Student Free Expression Rights, <http://www.splc.org/legalresearch.asp?id=7> (last visited Jan. 4, 2009). The SPLC proposed the model legislation after state lawmakers approached the SPLC to seek guidance in drafting legislation that would provide legal protection on behalf of the states for the free expression rights of students. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See supra* Part I.A.

reasons stated in this Note.¹⁵⁰ By enacting this legislation, states are demonstrating a commitment to allowing their public high school students to speak freely while preserving the ability to censor students that cause a disruption to school-day activities.

D. Applying the Model Legislation

If a state passed the above statute with an express restriction on viewpoint-based censorship of student speech, school officials would not be allowed to censor based on viewpoint. If Alaska had such a statute when Frederick held up his “BONG HiTS 4 JESUS” banner, Principal Morse would have violated Frederick’s free expression rights under state law because she censored his speech based on the viewpoint being expressed.¹⁵¹ The American Civil Liberties Union of Alaska reported in a press release that in September 2008 Frederick argued before the circuit court on the issue of “whether he was entitled to a ruling on whether the Alaska Constitution provides stronger protections for free speech than does the U.S. Constitution.”¹⁵² The press release indicated that the school district agreed to pay Frederick \$45,000 and the school board agreed to hold a forum on student civil liberties for all students and staff.¹⁵³ Because the case settled, Alaska state courts did not have a chance to weigh in on whether the Alaska Constitution or state laws protected Frederick’s speech. If Alaska had the free expression statute this Note proposes, Frederick certainly would have a valid claim in state court. Principal Morse’s censorship of Frederick’s banner based on its viewpoint would be unlawful under the model legislation proposed in this Note.

Looking back at the students’ attempts to express views on homosexuality brought up at the beginning of this Note,¹⁵⁴ it is clear that under the model legislation a principal could not censor an article on homosexuality if his or her reason for censorship was disagreement with its viewpoint, absent a substantial disruption. For example, the student’s column calling homosexuality one of biology’s reproductive

¹⁵⁰ See *supra* Part III.

¹⁵¹ It has been suggested that the record in the case strongly supported that a banner with an anti-drug message would not have been censored. Brief for Amicus Curiae Lambda Legal Defense & Education Fund, Inc. in Support of Respondent at 19, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278).

¹⁵² Press Release, Am. Civil Liberties Union, All Claims in *Morse v. Frederick* Settled, Accord Reached in Landmark “Bong Hits 4 Jesus” Case (Nov. 5, 2008), available at http://www.akclu.org/NewsEvents/PressReleases/110508_morse.pdf.

¹⁵³ *Id.*

¹⁵⁴ See *supra* notes 2–3, 6 and accompanying text.

errors would be acceptable expression under the proposed model legislation.¹⁵⁵ Had Georgia adopted this Note's model legislation, the school spokesperson's statement that "whether the content is popular or not, it's not up to us to decide what runs as long as it's not disruptive,"¹⁵⁶ would be correct. Because Georgia currently does not have a student free expression law,¹⁵⁷ any censorship of school-sponsored speech likely would be governed by the *Hazelwood* standard, which probably would allow for censorship in this instance. The fact that this Georgia administrator is confused about what standard applies to student speech furthers the need for state legislation clarifying students' free expression rights. State legislatures should adopt this Note's model legislation to both clarify students' free expression rights and to provide greater protection to students than the Supreme Court has said the First Amendment requires.

Conclusion

It appears that in the years since *Tinker*, the Court has minimized one key purpose of public education: educating young people for citizenship.¹⁵⁸ Justice Jackson said in 1943: "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 our government as mere platitudes."¹⁵⁹

Because it seems clear after *Morse* that the Court is not serious about extending a viewpoint neutrality requirement to all student speech, states should adopt the model legislation this Note proposes. It is a workable solution because nine states have already adopted legislation or administrative codes similar to the model. It is practical

¹⁵⁵ See *supra* note 3 and accompanying text.

¹⁵⁶ See *supra* note 5 and accompanying text.

¹⁵⁷ See *supra* note 129.

¹⁵⁸ In *Tinker*, Justice Fortas, speaking for the Court, said:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this 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.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

¹⁵⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

in that it finds the right balance between school officials’ duty to maintain order and their duty to allow students to express themselves. It is up to the states to give students the free expression rights the Supreme Court announced in *Tinker*.