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I would like to thank my parents for their unwavering support.

RECONCILING *MORSE* WITH *BRANDENBURG*

*Steven Penaro**

This Note examines Morse v. Frederick *in connection with the* Brandenburg v. Ohio *test governing speech that advocates unlawful acts. In* Morse, *the U.S. Supreme Court devised a new test that gives school officials the power to restrict student speech promoting the use of illegal drugs. However, in* Brandenburg, *the Supreme Court held that speech must be struck down if the speaker intends to incite imminent lawless action and that speech is likely to produce such action. This Note argues that a relaxed application of the* Brandenburg *standard would be useful in prohibiting student drug speech within a school setting.*

INTRODUCTION

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska along a street in front of Juneau-Douglas High School (JDHS) during school hours.[1] When the torchbearers and camera crews broadcasting the event on national television traveled near the school, Joseph Frederick, a JDHS senior, and his friends unfurled a fourteen-foot banner bearing the phrase: "BONG HiTS 4 JESUS."[2] The banner was directed toward the school, visible to most students.[3] Upon viewing the banner, Principal Deborah Morse immediately confiscated it and suspended Frederick for ten days, consistent with school policy.[4] After Frederick appealed his suspension, the JDHS superintendent declared that Morse's actions were "permissible because Frederick's banner was 'speech or action that intrudes upon the work of the schools.'"[5] Soon thereafter, Frederick filed a lawsuit under 42 U.S.C. § 1983, alleging that the school board and Morse had violated his First Amendment right to free speech.[6]

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1. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
2. *See id.*
3. *See id.*
4. *See id.* at 2622–23. "JDHS Policy No. 5520 states: 'The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors.'" *Id.* at 2623.
5. *Id.*
6. *See id.* The U.S. District Court for the District of Alaska granted summary judgment for Juneau-Douglas High School, ruling that it was entitled to qualified immunity and that the school did not infringe on Joseph Frederick's First Amendment rights. *Id.* Frederick appealed. *Id.* On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the district

"[W]hile children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school."[7] Imagine teachers powerless to discipline a student for making off-color comments. Imagine students free to say whatever they want to whomever they want during class. These examples of extreme disorder can become a reality if the First Amendment's Freedom of Speech Clause is applied strictly within a school setting.[8] However, after years of judicial scrutiny and a long line of cases, the Supreme Court determined that the First Amendment rights of students in schools are not identical to those of adults outside of the school context.[9] This does not mean that students forfeit their constitutional rights to freedom of speech or expression in school.[10] Rather, schoolchildren enjoy somewhat altered rights to accommodate their unique standing in society.[11]

Nearly five years after Frederick displayed his controversial banner, the Supreme Court in *Morse v. Frederick*[12] ruled in favor of JDHS, holding that school officials may prohibit speech promoting illegal drug use without violating a student's First Amendment rights.[13] Although the Court was presented with a case involving student speech, it did not find traditional school speech jurisprudence directly applicable.[14] Instead, *Morse* established a new category of prohibited school speech—speech advocating illegal drug use.[15] In doing so, the Court seemingly relied on the principles established in *Brandenburg v. Ohio*,[16] yet the majority failed to discuss the case at all, and the dissent believed a genuine application of *Brandenburg* would have changed the Court's holding.[17]

The test established in *Brandenburg* restricts speech when the speaker intends to incite imminent lawless action and the speech is likely to produce such action. Although speech inciting lawless acts can and does arise in a school setting, the test in *Brandenburg* has never been used in relation to school speech. This Note argues that the *Brandenburg* test can be useful in restricting student drug speech if interpreted in a relaxed fashion within a

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court, reasoning that Frederick's First Amendment rights were violated because the school punished Frederick without demonstrating that his speech threatened substantial disruption. *Id.* The Ninth Circuit also held that Principal Deborah Morse was not entitled to qualified immunity because Frederick's right to display the banner was so clearly established that a reasonable principal in Morse's position would have understood that her actions were unconstitutional. *Id.* at 2623–24. Following the Ninth Circuit's ruling, the U.S. Supreme Court granted certiorari. *Id.* at 2619.

7. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995).

8. U.S. CONST. amend. I.

9. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

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

11. *See infra* Part II.C.3.

12. 127 S. Ct. 2618, 2622 (2007).

13. *See id.* at 2622.

14. *Id.* at 2622; *see* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *Fraser*, 478 U.S. at 675; *Tinker*, 393 U.S. at 503.

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

16. 395 U.S. 444, 447 (1969).

17. *See infra* Part I.C.1–2.

school context. Furthermore, while there is no precedent regarding how this standard should apply in an American public school setting, this Note argues that the *Brandenburg* test can, and should, be applied in schools. In fact, the *Brandenburg* standard has mainly been applied to threats of violence in connection with political speech.[18] However, inherent ambiguities provide the *Brandenburg* standard with flexibility, allowing for an extremely circumstantial and individualized application, while also offering school officials a workable standard. *Brandenburg* also explains the narrow holding in *Morse*.

This Note examines how *Brandenburg* and its well-established test should apply in a school setting.[19] First, it analyzes student speech in school settings, establishing the framework through which the *Morse* case must be viewed. Next, it examines restrictions on speech that incites unlawful action. Part I explores the particulars of the *Morse* decision. It first explains the majority and dissenting opinions, and then demonstrates how the *Brandenburg* test can be applied, either in a strict sense or in a more relaxed fashion, to the facts of the *Morse* case. Part II, illustrates the arguments for both a strict and relaxed application of *Brandenburg* and discusses the special considerations implicit in a school setting. Finally, Part III suggests an easing of the *Brandenburg* standard when it is applied to schools.[20]

I. HISTORICAL LIMITATIONS ON FREE SPEECH

Part I.A discusses First Amendment jurisprudence in public schools. Next, Part I.B analyzes the development of case law involving speech inciting unlawful acts. Finally, Part I.C examines the majority and dissenting opinions of *Morse*. Part I.C.1 discusses the narrow holding of the majority, while Part I.C.2 summarizes the dissenting opinion's rejection of the *Brandenburg* standard.

A. *Schools' Right to Prohibit Speech: First Amendment Jurisprudence in Public Schools*

This section discusses the development of existing school speech jurisprudence prior to the *Morse* decision. Over the past several decades, the Supreme Court has developed a legal framework for cases involving students' First Amendment rights.[21] Faced with a rigorous balancing act,

18. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973).

19. *See infra* Part III.

20. *See infra* notes 316–30 and accompanying text.

21. *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see also* Elliot M. Mincberg, *A Practical Approach to* Tinker *and Its Progeny*, 69 ST. JOHN'S L. REV. 519, 520 (1995). Under the *Tinker–Fraser–Hazelwood* framework, three basic approaches are available to practitioners. *Id.* First, the practitioner should attempt to characterize the activity as non-school-sponsored in order to fit it within

the Court weighed the rights and interests of schoolchildren against the overwhelming concern for order and stability within the American public school system and has determined that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[22] Through a series of detailed opinions, the Court has gradually given schools much greater discretion in prohibiting certain speech within a school setting.[23]

In the landmark decision of *Tinker v. Des Moines Independent Community School District*,[24] a group of high school students wore black armbands during class as a silent protest against the Vietnam War. The Court held that freedom of expression of personal views is permissible so long as students do not substantially disrupt the work of the school or impinge upon the rights of other students.[25] The Court relied upon the notion that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[26] In *Tinker*, the Court struck a balance between students' inherent First Amendment rights and the need for school officials to retain necessary control in order to fulfill their educational obligations.[27] Although the Court in *Tinker* ruled in favor of the students, recognizing their First Amendment rights, it established that the principles of the First Amendment are not absolute and do not extend to speech in the school setting given the "need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[28]

Years later, the Court furthered the development of school speech jurisprudence in *Bethel School District. No. 403 v. Fraser*.[29] In *Fraser*, a high school student was disciplined for giving a speech filled with sexual

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the *Tinker* framework. *Id.* Second, "the practitioner should characterize the expressive activity as one within the recognized categories that limit *Hazelwood*." *Id.* Finally, the practitioner can claim that the school has removed the activity from school-sponsored speech. *Id.*

22. *Fraser*, 478 U.S. at 682.

23. *See generally Hazelwood*, 484 U.S. at 272–73; *Fraser*, 478 U.S. at 685–87; *Tinker*, 393 U.S. at 505–06.

24. 393 U.S. 503.

25. *See id.* at 511–13; *see also* Andrew H. Montroll, *Students' Free Speech Rights in Public Schools: Content-Based Versus Public Forum Restrictions*, 13 VT. L. REV. 493, 511 (1989) (arguing that the *Tinker* standard is a public forum test and under *Tinker*, a school becomes a limited public forum for student speech when school officials permit some students to speak).

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

27. *See, e.g.*, Anthony B. Schutz, *Public School Restrictions on "Offensive" Student Speech in* Boroff v. Van Wert City Board of Education, *220 F.3d 465 (6th Cir. 2000): Has* Fraser*'s "Exception" Swallowed* Tinker*'s Rule?*, 81 NEB. L. REV. 443, 448 (2002).

28. *See Tinker*, 393 U.S. at 507; *see also* Walter E. Forehand, *Constitutional Law Tinkering with* Tinker*: Academic Freedom in the Public Schools–*Hazelwood School District v. Kuhlmeier, *108 S. Ct. 562 (1988)*, 16 FLA. ST. U. L. REV. 159, 160 (1988) (explaining that *Tinker* established two schools of thought that courts must confront: deference to the broad authority of school officials versus the constitutional guarantees of teachers and students).

29. 478 U.S. 675 (1986).

innuendos to the entire student body. This prompted the Court to hold that the school had the authority to prohibit lewd, vulgar, or offensive speech even if it did not disrupt schoolwork.[30] According to the Court in *Fraser*, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[31] The Court distinguished its holding in *Tinker* by stating that the restriction was based upon the sexually vulgar, lewd, and indecent content of the message.[32] It also emphasized that vulgar, lewd, and indecent speech will inevitably intrude on the work of the schools or rights of others.[33] According to *Fraser*, schools are responsible to teach students the "fundamental values necessary to the maintenance of a democratic political system."[34] In furtherance of that goal, *Fraser* permitted schools to prohibit inappropriate speech that would infringe upon the teaching of fundamental values.[35]

A further refinement on student speech came in *Hazelwood School District v. Kuhlmeier*,[36] where a school censored articles in a school newspaper, written as part of a journalism class, pertaining to students' experiences with pregnancy and the impact of divorce on students at school.[37] The Court ruled that educators do not offend the First Amendment rights of schoolchildren by exercising control over student speech in school-sponsored activities so long as the school's actions are reasonably related to legitimate pedagogical concerns.[38] The Court extended the school's restrictive powers over speech beyond the confines of a traditional classroom setting, "so long as [the activities] are supervised by

30. *See id.* at 677–79; *see also* James C. Dever III, Tinker *Revisited:* Fraser v. Bethel School District *and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1165 (discussing that the school regulation in *Fraser* was "a reasonable time, place, and manner restriction that justified disciplining the student for delivering a crude and sexually suggestive speech at the assembly"); *see also* Robert Block, *Students' Shrinking First Amendment Rights in the Public Schools:* Bethel School District No. 403 v. Fraser, 35 DEPAUL L. REV. 739, 759 (1986) (arguing that the Supreme Court misinterpreted the facts of *Fraser* because Matthew N. Fraser's speech was given in a political arena in order to help elect his candidate, and that it created ambiguity by failing to reconcile with *Tinker*).

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

32. *See id.* at 680; *see also* David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 206 (2002) (explaining that, if *Fraser* is applied too broadly, it could swallow the *Tinker* test and eliminate First Amendment freedoms for public school students). It is also argued that the *Fraser* standard should be limited to school-sponsored speech and that all other student expression should be governed under the *Tinker* standard. *Id.*

33. *See Fraser*, 478 U.S. at 680.

34. *Id.* at 683.

35. *See id.* at 685.

36. 484 U.S. 260 (1988).

37. *See id.* at 263. The principal chose to delete two pages of text because he was concerned that the identities of the pregnant students were not adequately concealed. *Id.* at 264. He also felt that the article's reference to sex and birth control was inappropriate for some of the younger students, and that the parents of the child who was the subject of the divorce article were not given a chance to adequately respond to the accusations. *Id.* at 262–64.

38. *See id.* at 273.

faculty members and designed to impart particular knowledge or skills to student participants and audiences."[39] According to the Court, schools are justified in restricting student speech at a school-sponsored event when the event attempts to assure "that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[40] From *Tinker* to *Hazelwood*, the Court recognized that students' First Amendment rights were not identical to those of adults and gradually gave greater deference to school officials.

B. *Limiting Speech Regarding Unlawful Acts*

In contrast to Part I.A, which dealt with schools' rights to prohibit speech, Part I.B discusses the evolution of case law regarding speech inciting unlawful acts. In an entirely separate line of cases, the Supreme Court has examined the First Amendment and the Free Speech Clause as applied to speech promoting unlawful acts.[41] However, this line of cases has never been applied in a school setting.[42] Instead, the Supreme Court has restricted the Free Speech Clause based on the content of the speech in order to prohibit speech likely to result in harm.[43] Generally, the Court had been active in greatly restricting unlawful speech related to governmental threats until its decision in *Brandenburg*.[44] *Brandenburg* provided a more protective approach than its predecessors in dealing with free speech and unlawful acts.[45] In holding that for speech to be restricted it must call for imminent lawless action that is likely to produce such action, *Brandenburg* gives the speaker a tremendous degree of freedom.[46]

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39. *Id.* at 271.

40. *Id.*; *see also* Bruce C. Hafen, Comment, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 687–88. This Comment echoes the *Hazelwood* dissent, explaining that the First Amendment should limit schools' discretion and increase the autonomy for First Amendment institutions in order to advance our long-term interest in sustaining individual liberty. *Id.*

41. *See infra* notes 47–87 and accompanying text.

42. *See infra* notes 47–87 and accompanying text; *see also* Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007). The Court in *Morse* suggested that the *Brandenburg* standard could be eased at school: "It is possible that our rigid imminence requirement ought to be relaxed at schools." *Id.* (citation omitted).

43. *See infra* notes 47–87 and accompanying text.

44. *See infra* notes 47–80 and accompanying text; *see also* Rodney A. Smolla, *Should the* Brandenburg v. Ohio *Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 12 (2000). "This strain of First Amendment tradition has historically dealt with the unique problems posed by attempts to curb violent political discourse as it is manifest in protest demonstrations, rallies, leafleting, picketing, boycotts, and similar collective political and social activity." *Id.*

45. *See infra* notes 47–80 and accompanying text.

46. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969); *see also infra* notes 47–87 and accompanying text.

The Court first addressed speech promoting unlawful acts in *Schenck v. United States*,[47] where the defendants printed a circular opposing military conscription and distributed it to persons accepted for military service.[48] In the opinion, written by Justice Oliver Wendell Holmes, the Court allowed the government to prohibit the speech, insisting that the speech created a "clear and present danger" that could bring about the substantive evils that Congress has a right to prevent.[49] This approach allowed the Court to compare the circumstances surrounding the speech in connection with the degree of danger the speech presents.[50] According to the Court, "the character of every act depends upon the circumstances in which it is done."[51] The clear and present danger test offered the Court a way of incorporating the circumstances surrounding speech into First Amendment protection without ever showing that the speech, in isolation, presented a substantial threat.[52]

A few weeks later, in *Abrams v. United States*,[53] a case involving the printing and distribution of two circulars written in both English and Yiddish that denounced the sending of troops into Russia to oppose the Russian Revolution, the Court upheld the convictions without applying the recently devised clear and present danger test.[54] However, in his now famous dissent, Justice Holmes applied the clear and present danger test articulated in *Schenck* in disagreeing with the majority's decision, explaining that "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[55] Justice Holmes also advocated a standard that would allow for suppression of speech upon a showing of the mere possibility of harm.[56]

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47. 249 U.S. 47 (1919).

48. *See id.* at 49.

49. *Id.* at 52. Justice Oliver Wendell Holmes summarized the test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Id.* The Court held that Charles T. Schenck's leaflet constituted a clear and present danger and therefore fell outside the scope of First Amendment protection. *Id.*

50. *See, e.g.*, David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INT'L L.J. 263, 272 (2006).

51. *See Schenck*, 249 U.S. at 52.

52. *See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166–67 (1982).

53. 250 U.S. 616 (1919).

54. *See id.* at 622–24. Justice John Hessin Clarke upheld the convictions on the ground that the defendants' purpose was "to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war." *Id.* at 622.

55. *Id.* at 628 (Holmes, J., dissenting).

56. *See id.*; *see also* Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1119–20 (1989). The shift in Holmes' opinion in *Abrams* was compelled by the criticism of his friends and the pressure of events. *Id.* Justice Holmes's critics also suggest that the change in his viewpoint

Justice Holmes continued this more protective approach to dissident speech in his dissent in *Gitlow v. New York*.[57] In *Gitlow*, the defendant distributed a "Manifesto" condemning not only capitalism, but also "moderate Socialism," and called for the "annihilation of the parliamentary state."[58] Although the majority upheld the conviction under New York's Criminal Anarchy Statute, which prohibited advocating "that organized government should be overthrown by force or violence,"[59] Justice Holmes again disagreed with the outcome and argued that the clear and present danger test should have been applied.[60] He asserted that there was "no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[61]

Two years later, the Court revisited this issue in *Whitney v. California*[62] and once again failed to apply the clear and present danger test in the majority opinion.[63] The case involved a political activist who had participated in a convention called to organize a branch of the Communist Labor Party of America. The defendant was convicted of violating California's criminal syndicalism statute, which made it a crime to advocate for "the commission of crime, sabotage, . . . or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."[64] Here, Justice Louis Brandeis, joined by Justice Holmes in his concurrence, promoted the use of the clear and present danger test and noted that a restriction cannot be imposed "unless speech would produce, or is intended to produce, a clear and

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represented a radical transformation of his thinking. *Id.*; *see also* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 433 (1992) (noting that Justice Holmes used *Abrams* as an opportunity to reformulate the meaning of the clear and present danger test devised in *Schenck*).

57. 268 U.S. 652 (1925).

58. *Id.* at 656–59; *see also* Terry Heinrichs, Gitlow *Redux: "Bad Tendencies" in the Great White North*, 48 WAYNE L. REV. 1101, 1105 (2002). Because the Manifesto's rhetoric was virtually harmless, *Gitlow*

> was not a case involving incitement in the narrow sense of inflamed rhetoric directed on site to an audience ready and willing to act in the here and now, nor was it a case which involved any such action attempted or carried out in the immediate past. It was a case of extremist rhetoric directed mainly to party members and workers attempting to persuade them of the need to take direct action at some date in the future, perhaps even 'tens of years' down the road.

Id.

59. *Gitlow*, 268 U.S. at 654.

60. *Id.* at 673 (Holmes, J., dissenting); Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 693 (2007) (explaining that Justice Edward Terry Sanford dismissed the clear and present danger test as irrelevant in this context because, in passing the statute, the state legislature found that such a danger did exist).

61. *See Gitlow*, 268 U.S. at 673; *see also* Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 119 (1986) ("The evidence in the *Gitlow* case did not support a finding of a clear and present danger in the view of Justice Holmes, because there was no evidence of any ill effect from the speech.").

62. 274 U.S. 357 (1927).

63. *See id.* at 371–72.

64. *See id.* at 359–60.

imminent danger of some substantive evil which the State constitutionally may seek to prevent."[65] This concurrence provides a coherent formulation of the clear and present danger test in its most protective form: "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent."[66]

In both *Gitlow* and *Whitney*, the Court deferred to state legislative judgment that certain speech is harmful and may be prohibited.[67] Both cases ignored the clear and present danger test in favor of a state legislation approach.[68] The Court stated that "a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means."[69] Furthermore, these cases argued that the statutes did not violate the Equal Protection Clause because "[a] state may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses."[70]

The next step in the evolution of the clear and present danger test came in *Dennis v. United States*,[71] in which the Court rejected the *Gitlow-Whitney* state legislative judgment approach.[72] In *Dennis*, the defendants were leaders of the American Communist Party who had been convicted of violating the Smith Act,[73] which criminalizes the organization of any society, group, or assembly of people who advocate or encourage the overthrow of the United States government by force or violence.[74] The Court applied the principles of the clear and present danger test but severely altered the test's structure.[75] Chief Justice Fred M. Vinson applied the test in a situation of unlawful advocacy stating, "[i]n each [case, courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[76]

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65. *Id.* at 373.

66. *Id.* at 376; *see also* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 668 (1988) ("[T]he opinion dwells almost exclusively on what might be considered the cornerstone issue of first amendment interpretation: namely, under what circumstances does the first amendment prohibit the government from making the advocacy of revolution a crime?").

67. *See Whitney*, 274 U.S. at 372; *Gitlow*, 268 U.S. at 670.

68. *See supra* notes 57–66 and accompanying text.

69. *Gitlow*, 268 U.S. at 667.

70. *Whitney*, 274 U.S. at 370.

71. 341 U.S. 494 (1951).

72. *See id.* at 507–10.

73. *See* Smith Act, 18 U.S.C. § 2385 (2000).

74. *See id.*

75. *See* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); *see also* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 751 (1975) ("[T]he Vinson Court in *Dennis* restated clear and present danger in a manner draining it of most of the immediacy emphasis it had attained over the years.").

76. *Dennis*, 341 U.S. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (1950) (internal quotations omitted)); *see* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 231 (1995).

This altered test focused on the probability and gravity of harm, finding that the graver the evil promoted by the speech, the less probable need be its occurrence before the government is justified in suppressing the speech.[77] Basically, this test permitted suppression of speech that is a threat of great evil irrespective of whether it is imminent.[78]

From *Schenck* to *Dennis*, the Court created a malleable test able to shift on a circumstantial basis.[79] The first half of the twentieth century was defined by a Court with great power in restricting speech related to unlawful acts in connection with governmental affairs.[80]

Finally, in 1969, the Court developed a more concrete and protective approach to free speech issues under the First Amendment. In *Brandenburg*, a leader of a Ku Klux Klan group arranged for a local Cincinnati television station to cover a speech, in which he stated "[w]e're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken." The Court declared the Ohio Criminal Syndicalism statute[81] unconstitutional.[82] In declaring the Ohio statute unconstitutional, the *Brandenburg* Court asserted that the statute failed to distinguish between "mere advocacy" and "incitement to imminent lawless action."[83] Under *Brandenburg*, a legislature may prohibit advocacy of unlawful action without violating the First Amendment rights of the speaker when the speaker intends to incite an imminent lawless action,[84] and that lawless action is likely to occur.[85]

Dennis was the most important case in which the Court applied the clear and present danger test. *Id.* However, it was an altered version of the clear and present danger test that was heavily influenced by Judge Learned Hand, whose lower court version of the Holmes test was adopted by Chief Justice Fred M. Vinson's opinion. *Id.*; *see also* Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 119 (using *Dennis* as a case study, and exploring the psychological influences that may lead judges to succumb to fear and prejudice and to abdicate their judicial role).

77. *See* Redish, *supra* note 52, at 1166.

78. *See id.*

79. *See supra* notes 47–78 and accompanying text.

80. *See supra* notes 47–78 and accompanying text.

81. Brandenburg v. Ohio, 395 U.S. 444, 444–46 (1969) (The Ohio Criminal Syndicalism statute criminalized advocating, sabotage, violence, or unlawful methods of terrorism as a means of bringing about political reform).

82. *See id.* at 445.

83. *Id.* at 449; *see also* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1165 (1970) (citing *Brandenburg*, 395 U.S. at 448–49). "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." *Brandenburg*, 395 U.S. at 448 (citing Noto v. United States, 367 U.S. 290, 297–98 (1961)).

84. *See Brandenburg*, 395 U.S. at 447.

85. *Id.*; *see also* Douglas E. Plocki, *Harm Advocacy Theory: Where to Draw the Line Between Free Speech and Criminal Advocacy*, 12 Geo. MASON U. CIV. RTS. L.J. 29, 52–53 (2001) ("Under *Brandenburg*, criminal advocacy can only be punished when (1) the speaker advocates imminent illegal conduct, (2) intends to incite either the use of force or illegal

Thus, the *Brandenburg* test requires the fulfillment of both intent and effect.[86] This test is clearly separate from the clear and present danger test and more firm and protective in its application.[87]

Immediately following the decision in *Brandenburg*, legal scholars and commentators exhibited great confusion.[88] One source of confusion was reconciling the new *Brandenburg* standard with other tests from recent precedent:

> *Imminent* lawless action? *Likely* to incite or produce such action? [Other] opinions took pains to deny that the unlawful action advocated need be 'imminent,' or that the advocacy need be 'likely' to produce the forbidden action; they appeared to hold that intentional incitement to concrete, unlawful action, no matter how distant or unlikely, was not 'protected speech.'[89]

Not only did the *Brandenburg* decision seem to reject previous case law, it also appeared to many to be ambiguous, inviting several unanswered questions: "Why, then, reintroduce the objective criteria of imminence and probability . . . ? Is the fourth element—objective danger—part of the first amendment analysis of a statute or not?"[90] Clearly, *Brandenburg* left behind several unanswered questions.[91] From the establishment of the clear and present danger test to the more protective incitement test of *Brandenburg*, the Court has radically transformed its evaluation of unlawful speech, giving more protection to the speaker.

As previously stated, *Brandenburg* and the line of cases from which it derived have never been directly applied in a school setting or to speech promoting illegal drug use.[92] This precedent has almost exclusively been applied to unlawful speech related to politics.[93]

C. Morse v. Frederick

This section examines both the majority and dissenting opinions of *Morse* and how they rationalize their positions in light of the *Brandenburg*

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conduct, and (3) the speech is likely to incite such conduct." (citing *Brandenburg*, 395 U.S. at 447)).

86. *See id.*

87. *See supra* notes 83–86 and accompanying text.

88. *See e.g.*, Linde, *supra* note 83, at 1163.

89. *See id.* at 1167 (citing Yates v. United States, 354 U.S. 298, 321–22 (1957)) (explaining that the action advocated for might arise in the undefined future in which case, the court will examine the content of the proscribed advocacy, not the immediacy of any danger it might create); *see also* Scales v. United States, 367 U.S. 203 (1961) (including jury instructions that excluded requirements for immediacy and likelihood).

90. Linde, *supra* note 83, at 1167.

91. *See supra* notes 88–90 and accompanying text.

92. *See supra* notes 47–87 and accompanying text.

93. *See supra* notes 47–87 and accompanying text; *see also* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1168 (2000) (explaining that the *Brandenburg* test was "designed to protect political speech and the abstract advocacy of violence or revolution").

test. In *Morse*, a case involving student speech advocating illegal drug use, the Court devised a new standard allowing schools to prohibit pro-drug speech although it seemed clear that the speech was in line with the traditional school speech jurisprudence of *Tinker*, *Fraser*, and *Hazelwood* and the *Brandenburg* line of cases dealing with inciting lawless acts.[94] It also seems plausible that the speech in *Morse* could have been interpreted either as speech substantially disrupting the work of the school prohibited under *Tinker* or as offensive speech in a school environment prohibited under *Fraser*.[95] However, the Court accepted the U.S. Court of Appeals for the Ninth Circuit's interpretation that the speech did not present a risk of substantial disruption under *Tinker*.[96] The Court also reasoned that applying *Fraser* and determining the speech to be offensive would have "stretch[ed] *Fraser* too far."[97] As the traditional school speech jurisprudence was considered inapplicable, the Court could have sought guidance from the relevant precedent regarding the incitement of unlawful action but instead chose to develop a bright line rule through a narrow holding.[98]

1. Majority Opinion: A New, Narrow Test

In the majority opinion written by Chief Justice John Roberts, the Court formulated a unique and narrow holding that prohibited speech promoting illegal drugs in a public school context because those viewing the student's banner would interpret the message as advocating or promoting illegal drug use.[99] The Court relied on the belief that the banner, while not saying "do drugs now," would have the same effect on those reading it as if it had made the message explicit.[100] According to the majority, the principal's interpretation of the banner as promoting illegal drugs was reasonable because she believed that it would be understood by students and others as a reference to smoking marijuana.[101] Not only did the Court agree with

94. *See supra* Part I.A–B.

95. *See supra* notes 24–35 and accompanying text.

96. Morse v. Frederick, 127 S. Ct. 2618, 2623–24 (2007); *see* Frederick v. Morse, 439 F.3d 1114, 1125 (9th Cir. 2006) (holding that Frederick's First Amendment rights were violated when he was censored and punished for unfurling his banner because, under *Tinker*, Frederick's speech did not substantially disrupt a school activity).

97. *Morse*, 127 S. Ct. at 2629. The Court also explained that *Hazelwood* was not applicable in this case "because no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Id.* at 2627.

98. *See id.* at 2629.

99. *See id.*; *see also The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 295, 296 (2007) ("In its eagerness to allow schools to prohibit pro-drug speech, the Court failed to provide any contained or compelling justification for its newly created exception to the First Amendment. As a result, schools and courts will have wide latitude not only in deciding how and when to apply *Frederick* to student drug-related speech, but also in deciding what other viewpoints are simply outside a student's right to freedom of expression.").

100. *See Morse*, 127 S. Ct. at 2624–25.

101. *See id.*

Principal Morse's assessment of the banner, but it asserted that the message could be interpreted as either an imperative statement encouraging the use of drugs or a celebration of marijuana: "'[Take] bong hits . . . '—a message equivalent, as Morse explained in her declaration, to 'smoke marijuana' or 'use an illegal drug.' . . . the phrase could [also] be viewed as celebrating drug use—'bong hits [are a good thing].'"[102]

In his opinion, Chief Justice Roberts recognized drug abuse as a serious problem for our nation's youth:[103] "'School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . [T]he effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.'"[104] The opinion refers to the fact that Congress has required the schools to educate students about the dangers of drug abuse.[105] As Chief Justice Roberts stated, "[t]he particular concern [here is] to prevent student drug abuse."[106]

The *Morse* Court only briefly mentioned *Brandenburg* in response to the dissent by suggesting that *Brandenburg*'s imminence requirement might be relaxed in schools.[107] Justice Clarence Thomas concurred but wrote separately in order to express that *Tinker* was decided without basis in the Constitution.[108] Justice Thomas's concurrence, which focused on the history of public school education and how the First Amendment does not protect student speech in public schools, made no reference to *Brandenburg*.[109] Justices Samuel Alito and Anthony Kennedy joined the Court in holding that a public school may restrict speech interpreted as advocating illegal drug use, but would not support restriction of speech regarding political or social issues.[110] Unlike Justice Thomas's concurrence, Justices Alito and Kennedy did make reference to *Brandenburg*.[111] However, while Justices Alito and Kennedy cited to *Brandenburg*, they found it inapplicable in the *Morse* case because, "due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence."[112] Justice Stephen Breyer, writing separately, noted that the Court should have held that qualified immunity barred the student's claim, and that he wished to

102. *Id.* at 2625.

103. *See id.* at 2628–29.

104. *Id.* at 2628 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–62 (1995)).

105. *See id.* (explaining that Congress recently passed the Safe and Drug-Free Schools and Communities Act of 1994 in order to combat messages similar to Frederick's).

106. *Id.* at 2629.

107. *See id.*

108. *See id.* at 2629–30 (Thomas, J., concurring).

109. *See id.* at 2630–31. Justice Clarence Thomas argued that, historically, under the legal doctrine of *in loco parentis*, courts have upheld the right of schools to discipline students to enforce rules and to maintain order. *Id.* at 2631.

110. *See id.* at 2636.

111. *See id.* at 2638 (Alito, J., concurring).

112. *Id.*

leave the First Amendment issue untouched.[113] Although Justice Breyer never explicitly mentioned *Brandenburg*, he acknowledged the possibility that encouraging drug use might be acted upon and lead to harm.[114]

2. Dissenting Opinion: The Rejection of the *Brandenburg* Standard

It is only in Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg's dissent that *Brandenburg* is applied to the facts of *Morse*.[115] In applying *Brandenburg*, the dissent reasoned that the student's speech could not be restricted under the *Brandenburg* incitement test:[116] "'promoting illegal drug use' comes nowhere close to proscribable 'incitement to imminent lawless action.'"[117] The dissent asserted that "'the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon.'"[118]

Unlike the majority, the dissent viewed the student's banner as "a nonsense message, not advocacy."[119] The dissent paid particularly close attention to the student's desire to get on television rather than promote illegal drugs.[120] For the dissent, "[t]he notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible."[121]

The dissent also explored the possibility that the student's speech may have been political in nature, thus deserving of protection under the First Amendment:[122] "[t]he Court's opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska."[123] Here, Justices Stevens, Souter, and Ginsburg criticized the majority for taking a

113. *See id.* (Breyer, J., concurring in part and dissenting in part).

114. *See id.* at 2638–40. Justice John Paul Stevens further explicated the point: "Encouraging drug use might well increase the likelihood that a listener will try an illegal drug . . . [because] '[e]very denunciation of existing law tends in some measure to increase the probability that there will be a violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. . . . [A]dvocacy of law-breaking heightens it still further." *Id.* at 2645 (Stevens, J., dissenting) (citing Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

115. *See id.* at 2645–46.

116. *See id.* at 2643.

117. *Id.* at 2645 (quoting Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).

118. *Id.* at 2645–46 (citing *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring)). The dissent argues that "[n]o one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, 'ha[s] no chance of starting a present conflagration.'" *Id.* at 2646 (quoting Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).

119. *Id.* at 2649.

120. *See id.*

121. *Id.*

122. *See id.* at 2650–51; *see also* Marshall H. Tanick & Phillip J. Trobaugh, *From* Tinker *to "Bong" The School Bell Tolls for Student Rights*, 64 BENCH & B. MINN. 18, 19 (2007) (viewing *Morse* in a political context similar to *Tinker* and arguing that *Morse* seriously hinders students' rights).

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

categorical approach to a sensitive political issue:[124] "the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about . . . legalizing marijuana for medicinal use."[125] Finally, the dissent also gave a historical account of the crucial issue of the legalization of marijuana in Alaska.[126] In sum, both the majority and dissent briefly cited to *Brandenburg*, but neither viewed the *Brandenburg* test as an appropriate means to determine the outcome of *Morse*.

II. STRICT AND RELAXED APPLICATIONS OF *BRANDENBURG*

While the *Morse* Court elected not to incorporate the *Brandenburg* test in its decision, the dissent found that an application of *Brandenburg* would prohibit the punishment of the drug-related speech.[127] However, neither the majority nor the dissent examined whether the *Brandenburg* test could be modified to limit the free speech rights of students, as the Court previously had done in the school setting.[128] Whether or not *Brandenburg* should be applied in a school setting depends on whether it is applied in a strict or relaxed fashion.

In general, supporters of both the strict and relaxed applications of the *Brandenburg* standard advocate their views in the shadow of the First Amendment.[129] The proponents of a strict approach give more deference and greater weight to upholding the cherished principles of the First Amendment, while those in support of a relaxed application promote their views in light of the First Amendment but with a watchful eye on security.[130] This part examines the strict applications of *Brandenburg*, like that of the dissent in *Morse*, and the possibility of a less stringent analysis of *Brandenburg* as applied to drug speech in the school setting. While precedent tends to favor a strict application of *Brandenburg*, this part also analyzes special circumstances surrounding both speech in the school environment and speech promoting drug use. Part II.A details the arguments supporting a strict application of the *Brandenburg* standard. Part II.B then discusses the arguments supporting a relaxed application of the *Brandenburg* standard. Finally, Part II.C examines the special considerations innate in a school environment, while focusing on the effects of speech promoting illegal drug use.

124. *See id.* at 2649.
125. *Id.*
126. *See infra* notes 305–07 and accompanying text.
127. *See supra* Part I.C.1–2.
128. *See supra* Part I.C.1.
129. *See supra* Part II.A–B.
130. *See supra* Part II.A–B.

A. *Strict Application of* Brandenburg

This section discusses the arguments supporting a strict application of the *Brandenburg* standard. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[131] When applied strictly, the *Brandenburg* standard can provide for almost completely free speech.[132] Not only would the speaker have to intend to incite an imminent unlawful act, but that act must immediately follow the speech.[133] When *Brandenburg* is read strictly, speech without a likelihood of immediate action will not meet the *Brandenburg* standard. For example, in *Rice v. Paladin Enterprises*,[134] a case involving a book that contained detailed instructions on how to commit a contract killing, the U.S. District Court for the District of Maryland held that the *Brandenburg* test was not satisfied because the murders were committed a year after the book was received and only one murder occurred after 13,000 copies were sold.[135] Thus, because of the length of time between when the speech was published and when the reader acted, the imminent requirement for the intent and effect elements was not fulfilled.[136]

Ambiguous as it may have been, since its inception in 1969, the *Brandenburg* test has proven to be a very difficult standard to meet, thus giving far more protection to the speaker than the equally amorphous clear and present danger test.[137] With difficult elements to prove, the *Brandenburg* standard allows speakers nearly complete protection under the First Amendment when applied strictly.[138] For example, in *Hess v. Indiana*,[139] the Court overturned a conviction of an antiwar protestor who yelled out, "We'll take the fucking street later" to a group of protestors

131. NAACP v. Button, 371 U.S. 415, 433 (1963) (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).

132. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973).

133. *See* Steven G. Gey, *The* Nuremberg Files *and the First Amendment Values of Threats*, 78 TEX. L. REV. 541, 546 (2000); *see also* James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment* Virginia v. Black, 2003 CATO SUP. CT. REV. 81, 99 ("Under *Brandenburg* . . . the imminence element is strict, and speech cannot be suppressed unless it threatens to incite violence at that moment, or almost immediately.").

134. 128 F.3d 233, 264 (4th Cir. 1997) (explaining that the lower court erred in its judgment and the speech is unprotected under *Brandenburg* because the *Brandenburg* Court meant to imply that when one prepares another for violent action when his speech is directed to incite or produce that imminent lawless action, such preparation is not protected speech); *see* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 66 (2004). "The *Rice* court thus chose to adopt the far less protective reading of the *Brandenburg* imminence test, where lack of imminence is somehow equated not with the lack of an immediate temporal connection between advocacy and harm (as both the common sense use of the word and its historical use by Justice Brandeis in his *Whitney* concurrence necessarily suggest), but rather with purely abstract advocacy, in the sense cryptically described in *Yates*." *Id.*

135. *See* Rice v. Paladin Enters., 940 F. Supp. 836, 847 (D. Md. 1996).

136. *See id.*

137. *See supra* notes 81–87 and accompanying text.

138. *See supra* notes 81–87 and accompanying text.

139. 414 U.S. 105 (1973).

recently cleared off of a public space.[140] The Court reasoned that this language did not satisfy the *Brandenburg* standard, noting that it was "nothing more than advocacy of illegal action at some indefinite future time."[141] According to the Court, there was no evidence that these words were likely to produce imminent disorder under *Brandenburg*.[142] In fact, Justice William O. Douglas suggested in his *Brandenburg* concurrence that the government may only punish speech when it is "brigaded with action."[143]

The strictness of the *Brandenburg* test could also be seen in *NAACP v. Claiborne Hardware Co.*,[144] in which several merchants in a small Mississippi town sued to recover damages from a NAACP-sponsored boycott.[145] In this case, Charles Evers, a leader of the boycott, warned the audience that anyone breaking the boycott "would be *answerable to him*" and "'have their necks broken' by their own people."[146] At a later speech, Evers warned that violators of the boycott would be "disciplined," and that the police could not protect them.[147] Ultimately, the Court concluded that Evers's remarks were not removed from the protection of the First Amendment and could not be restricted under *Brandenburg*.[148] According to the Court, unless such speech incites lawless action, it must be protected in light of "the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'"[149] The *Brandenburg* test's stringent elements of intent, effect, and imminence make it extremely difficult to demonstrate that restrictions on speech are warranted.[150]

The narrow interpretation of *Brandenburg*'s elements can be traced back to its roots in the clear and present danger test.[151] Not only does the *Brandenburg* test seem to derive from the test articulated in *Whitney*, but it is also similar in its interpretation: "There must be reasonable ground to believe that the danger apprehended is imminent. . . . [and] the evil to be prevented is a serious one."[152] As noted by Justice Brandeis in his *Whitney* concurrence, the imminence requirement can be defined as immediate.[153]

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140. *Id.* at 107.
141. *Id.* at 108.
142. *See id.* at 108–09.
143. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).
144. 458 U.S. 886 (1982).
145. *See id.* at 889–90.
146. *Id.* at 900 n.28.
147. *Id.* at 902. After the speeches, activists stationed outside of the stores recorded the names of blacks who traded with white merchants and reported the blacks to the NAACP, ostracizing those people from the black community. *Id.* at 903–04. In addition, at least four violent incidents of retaliation occurred against those who violated the boycott, including shots fired at a house, a rock thrown against a windshield, and the destruction of a flower garden. *Id.* at 904.
148. *See id.* at 927–28.
149. *Id.* at 928 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
150. *See supra* notes 83–93, 137–49 and accompanying text.
151. *See supra* Part I.B.
152. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).
153. *See id.*

"In order to support a finding of clear and present danger it must be shown . . . that immediate serious violence was to be expected . . . ."[154] Although Justice Brandeis in *Whitney* required "immediate serious violence," no clear definition of this requirement was ever devised.[155]

Supporters rationalize a strict application of the *Brandenburg* standard by arguing that the government may only punish speech when it is "brigaded with action."[156] According to Justice Douglas's concurrence in *Brandenburg*, "speech is . . . immune from prosecution . . . . and government has no power to invade that sanctuary of belief and conscience."[157] The proponents of a strict application of the *Brandenburg* standard argue that the justification for punishing incitement lies in its proximity to action.[158] The theoretical reasoning behind the narrow interpretation of *Brandenburg* is connected to the notion that the First Amendment protects speech and not actions and, "when speech increases the likelihood of imminent violent action, it becomes analogous to an action, to which the First Amendment affords less protection."[159] It is only when the *Brandenburg* standard is satisfied that speech becomes analogous to actions that fall outside the protection of the First Amendment.[160] Proponents further assert that an attempt to impose liability on a speaker without adequately satisfying the *Brandenburg* elements of intent and effect will result in unconstitutional discrimination based on the content of the speech.[161] "[R]ecent relaxation of these [*Brandenburg*] requirements impermissibly infringes upon the Supreme Court's protection of abstract advocacy which the *Brandenburg* decision was designed to protect."[162]

Another argument raised in support of a strict application of the *Brandenburg* test is derived from Justice Brandeis's concurrence in *Whitney* and is commonly referred to as the "more speech" argument.[163] According to Justice Brandeis, "[i]f 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."[164] Basing his argument on the framers' intent, Justice Brandeis reasoned that fear of serious harm cannot alone justify suppression of free speech.[165] By putting

154. *Id.*

155. *See id.*; *see also* Plocki, *supra* note 84, at 53.

156. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

157. *Id.* at 457.

158. *See* Scott Hammack, *The Internet Loophole: Why Threatening Speech On-line Requires A Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 77 (2002).

159. *Id.*

160. *See id.*

161. *See* Vivien Toomey Montz, *Recent Incitement Claims Against Publishers and Filmmakers: Restraints on First Amendment Rights or Proper Limits on Violent Speech?*, 1 VA. SPORTS & ENT. L.J. 171, 205 (2002).

162. *Id.*

163. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

164. *Id.*

165. *See id.* at 376.

a more restrictive caveat on the already stringent clear and present danger test, Justice Brandeis proclaimed that, when there is time for more speech between the act and the social harm, it should be insisted upon rather than leaping to conclusions as to whether or not the harm is truly a serious threat.[166] Under this view, "[o]nly an emergency can justify repression."[167] With their firm adherence to the clear and present danger test, their unwillingness to restrict speech, and their commitment to allowing the opportunity for more speech, supporters of a strict application of *Brandenburg* rely on rather traditional conceptions of free speech.

B. *Relaxed Application of* Brandenburg

This section examines the arguments in favor of relaxing the *Brandenburg* test. Although the *Brandenburg* standard historically has been applied strictly, a relaxed interpretation of the standard can give it the teeth necessary to combat extraordinarily dangerous speech.[168] A stringent interpretation of the "likelihood" element comports with the Court's tradition of permitting frivolous threats; however, supporters of a relaxed *Brandenburg* application assert that requiring a rigid imminence standard in every case is unrealistic and insensitive to societal interests.[169] "[A] stringent imminence standard unduly restricts authorities' ability to deter criminal conduct."[170] Under a strict approach, promoting a social harm on a definite date in the future will be protected under the First Amendment because the danger resulting from the speech will not be imminent as required by the *Brandenburg* test.[171] By forbidding the courts from restricting speech advocating probable harm in the future, a rigid imminence requirement pushes First Amendment protection to an "impractical extreme."[172] Proponents of a relaxed application of the *Brandenburg* standard argue that, "[r]equiring imminence in every case in the belief that[,] if it is not present[,] the advocacy will never lead to harm is theoretically unjustifiable."[173]

Employing a flexible imminence requirement can give courts the necessary discretion for evaluating the level of immediacy, in each case paying close attention to the surrounding circumstances.[174] Martin H.

166. *See id.* at 377.
167. *Id.*
168. *See infra* notes 174–76 and accompanying text.
169. *See* Redish, *supra* note 52, at 1180–81.
170. *Id.* (explaining that when a person advocates for violence on a definitive future date, "imminence" in its legitimate meaning will prohibit the restriction of that speech).
171. *See id.*
172. *Id.* at 1181; *see also* Malloy & Krotoszynski *supra* note 93, at 1169. "Because instructional books, songs, and movies generally require time for an individual to digest, such materials generally will not meet *Brandenburg*'s imminence requirement—a requirement that demands that the speech cause an individual to act without rational thought." *Id.*
173. Redish, *supra* note 52, at 1181.
174. *See id.*

Redish, a professor at Northwestern University School of Law and a supporter of a relaxed imminence requirement, champions a sliding scale, with speech presenting a low level of immediacy and high likelihood of harm on one end, and speech presenting a high level of immediacy and indeterminable degree of likelihood of harm on the other end.[175] "Where a very serious offense is directly and forcefully advocated, a lesser showing of imminence will justify suppression; at the other end of the scale, greater evidence of imminence would be required in the case of indirect advocacy of a less serious offense."[176]

Furthermore, strict adherence to the imminence standard encounters difficulty when applied to more modern forms of communication, such as the Internet.[177] For example, if the imminence requirement is interpreted as imminence from the speaker's perspective, then most Internet posts cannot be categorized as intending to incite anything due to the large time lag that often exists between when the speech was expressed and when it was actually received.[178] The ambiguity of the imminence requirement has not been adequately addressed in the courts, because under traditional forms of communication, imminence from the perspective of the speaker and listener are identical.[179] However, if the imminence requirement is interpreted traditionally, that is, from the speaker's perspective, "the vast majority of Internet communications can never constitute incitement, regardless of the message."[180] By basing their arguments on a more circumstantial platform, proponents of a relaxed *Brandenburg* application argue in favor of its flexibility.

C. *Special Considerations in the School Setting*

This section analyzes the special considerations implicit in both the school environment and speech promoting illegal drug use.

1. Free Speech Versus Establishing Order

As the Supreme Court suggests, the balancing of rights changes in the context of a school setting. Ultimately, the courts are presented with the question of liberty versus order and must find a middle ground between these two compelling interests, taking into account the extra concerns and questions that accompany the unique situation of schoolchildren.[181]

175. *Id.* at 1181–82.

176. *Id.*

177. *See* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 450 (2002).

178. *See id.* at 450–51.

179. *See id.*

180. *Id.*; *see also* Malloy & Krotoszynski, *supra* note 93, at 1169 ("*Brandenburg* addresses speech activity designed to persuade someone to commit an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act.").

181. *See infra* Part II.C.3.

Advocates of placing liberty above order naturally support a strict application of the *Brandenburg* standard, allowing the speaker nearly unrestricted free speech.[182] For strict constitutional rights proponents, freedom is paramount. According to supporters of a strict application of constitutional rights in schools, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[183] Such supporters are not concerned with what students may be exposed to at school, rather they are concerned with giving students the opportunity to share in a "'marketplace of ideas.'"[184] "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.'"[185] Supporters of a strict application of the *Brandenburg* test desire students to gain exposure to various ideas irrespective of the content.[186]

Justice Abraham Fortas proclaimed in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[187] In fact, many believe that full constitutional rights should be extended to students while at school and use these powerful words as justification.[188] According to supporters of a strict application of constitutional rights in schools, leaving too much discretion in the hands of school authorities displaces federal courts' power under the Constitution.[189] They further assert that the easing of constitutional rights and privileges will result in "undesirable . . . social effects: increased segregation, continued inequality of school funding, suppressed student speech, and lost privacy rights for students."[190]

It is also argued that infringement of fundamental rights secured by the Constitution will cause tremendous hardships for "insular minorities."[191] Traditionally, "insular minorities" have been associated with racial minorities.[192] However, staunch supporters of this notion classify students as "insular minorities" because they are unlikely to rely on the political

182. *See supra* Part II.A.

183. Shelton v. Tucker, 364 U.S. 479, 487 (1960); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.").

184. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

185. *See id.* at 512.

186. *See infra* notes 199–204 and accompanying text (discussing a student's freedom of access to a marketplace of ideas).

187. *Tinker*, 393 U.S. at 506. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Id.* at 511.

188. *See infra* notes 189–204 and accompanying text.

189. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 131 (2004).

190. *Id.*

191. *Id.* at 133.

192. *See id.*

process for sufficient protection under the law.[193] "[S]tudents [do not] have political power to protect their First or Fourth Amendment rights through the political process. For student[s'] rights, courts must take action or there will be no protections at all."[194] The "deconstitutionalization" of education poses a severe threat to students because they "cannot trust the other branches of government."[195]

Another approach offered by supporters of a strict adherence to constitutional rights in school attempts to teach by example. Schools try to teach students about the democratic principles of fairness and equality, and it is argued that they should practice what they preach.[196] "[I]f educational institutions are not subject to the same constitutional constraints as other governmental agencies, students will not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary."[197] This argument operates under the assumption that democratic values are taught to students by more than formal instruction.[198]

A final approach to a strict adherence to constitutional rights in schools was presented by Justice William J. Brennan in his majority opinion in *Board of Education v. Pico*.[199] In this case, the Court held that the Constitution would not bar school officials from removing books from a school library that are "pervasively vulgar" or educationally unsuitable.[200] Although Justice Brennan permitted the school to restrict some of the reading materials in school libraries, he promoted students' access to a marketplace of ideas and choice among different ideas and schools of thought.[201] According to Justice Brennan, access to different ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[202] However, despite the fact that Justice Brennan allowed schools to prohibit books that are "pervasively vulgar," he expressed deep concern about the

193. *See id.*

194. *Id.*

195. *Id.*

196. *See generally* Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986).

197. *Id.* at 1654 (footnote omitted).

198. *See generally* RICHARD E. DAWSON ET AL., POLITICAL SOCIALIZATION: AN ANALYTIC STUDY (2d ed. 1969); ROBERT WEISSBERG, POLITICAL LEARNING, POLITICAL CHOICE, AND DEMOCRATIC CITIZENSHIP (1974); Edgar Litt, *Civic Education, Community Norms, and Political Indoctrination*, 28 AM. SOC. REV. 69 (1963).

199. 457 U.S. 853 (1982).

200. *Id.* at 871.

201. *See id.* at 868; *see also* Martin D. Munic, Case Comment, *Education or Indoctrination—Removal of Books from Public School Libraries:* Board of Education, Island Trees Union Free School District No. 26 v. Pico, 68 MINN. L. REV. 213, 216–17 (1983). "The first amendment's objective of preserving a free marketplace of ideas from which enlightened discussion will ultimately lead to truth is especially important in a school setting because students are entitled to, and a quality education requires, exposure to a broad range of ideas." *Id.* (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

202. *Pico*, 457 U.S. at 868.

possibility of the abuse of discretion: "If a Democratic school board . . . ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students . . . ."[203] For Justice Brennan, the Constitution permits prohibiting vulgarity in a school setting, but "does not permit the official suppression of *ideas*."[204] Justice Brennan concluded that by allowing students exposure to different ideas, students will be better equipped to become functioning members of a vastly diverse society.

On the other hand, those supporting a strict application of *Brandenburg* in order to achieve a sense of liberty put less emphasis on the special circumstances necessary to create an orderly and effective environment for America's schoolchildren. "The 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."[205] Although the absolute protection of the fundamental right may become diluted, the protection over the essential nature of the rights remains pure.[206] To create an effective learning environment for the entire school, school officials argue that they must be able to establish order, which may be achieved by curtailing certain individual rights.[207] "Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."[208] According to the Supreme Court, this notion that order, in certain situations, must precede liberty is an essential and deeply rooted practice of government.[209] In an example offered by the Court, the Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives, prohibits the use of "impertinent" speech during debates and other proceedings.[210]

Not only has the Court recognized that order, in certain situations, comes before liberty among adults and in government, the Court has also developed an understanding that order and regulations are necessary to ensure the positive development of the nation's schoolchildren. In

203. *Id.* at 870–71.

204. *See id.* at 871.

205. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

206. *See generally* Bd. of Educ. Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); New Jersey v. T.L.O., 469 U.S. 325 (1985); Goss v. Lopez, 419 U.S. 565 (1975).

207. *See Fraser*, 478 U.S. at 681.

208. *Id.*

209. *See id.* at 681–82.

210. *See id.* Written by Thomas Jefferson in 1801 while he was Vice President, the Manual for Parliamentary Practice became America's first book on parliamentary procedure. This book contains fifty-three sections and each section includes rules and practices of the British Parliament along with the applicable texts from the U.S. Constitution and the thirty-two Senate rules that existed in 1801. *See generally* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES (Washington City, S.H. Smith 1801).

Ginsberg v. New York,[211] the Court upheld a New York statute banning the sale of sexually oriented materials to children, even though the materials were entitled to First Amendment protection regarding adults.[212] The Court indicated that there should be limitations on the interests of the speaker in reaching an unlimited audience where the audience may include children.[213] The Court again limited the scope of the First Amendment in *Pico* by giving public school officials the authority to remove books from a public school library that were considered vulgar.[214] These cases exhibit the "obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience."[215]

2. The Special Case of Drug Speech: Evaluating the Persuasiveness of Pro-drug Speech and Antidrug Speech

The majority in *Morse* recognized the risks of drug abuse among students: as Chief Justice Roberts wrote, "'[m]aturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'"[216] By compromising a student's memory and learning ability, drug abuse robs a child of all the fruits offered in a public school education.[217] In addition, "[r]esearch shows that students who use marijuana don't do as well in school, as compared to their non-using counterparts[, and a] teen user's odds of dropping out are more than twice that of non-users."[218] Not only do drugs have terribly detrimental effects on schoolchildren, but drugs have infiltrated the fabric of many American public schools.[219] In 2000, more than fifty percent of teens said drugs were used, kept, or sold at their school.[220] Drug abuse has become a serious problem within American public schools in large part because of the

211. 390 U.S. 629 (1968).

212. *See id.* at 645.

213. *Id.*

214. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871–72 (1982).

215. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986). *In loco parentis* translates directly to mean "in the place of a parent," and refers to a temporary guardian of a child that takes on all or some of the responsibilities of a parent. BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

216. Morse v. Frederick, 127 S. Ct. 2618, 2628 (2007) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–62 (1995)).

217. *See* Marijuana and Academic Success Questions and Answers, http://www.theantidrug.com/drug_info/marijuana-and-academic-questions-and-answers.asp (last visited Aug. 16, 2008).

218. *Id.*

219. *See* Dep't of Health & Human Servs., Ctr. for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States*, Morbidity & Mortality Wkly. Rep., June 9, 2006, at 1, 19 (explaining that about twenty-five percent of high school students have been offered, sold, or given an illegal drug on school property within the 2006 year).

220. *See* NAT'L CTR. ON ADDICTION OF SUBSTANCE ABUSE AT COLUMBIA UNIV., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE VI: TEENS, at iii (2001).

introduction of students to drugs at an early age: in 2005, about half of American twelfth graders had used an illicit drug, as had more than a third of tenth graders and about one-fifth of eighth graders.[221] Today, instead of learning at school, many students are experimenting with drugs, which deprive them of necessary values essential to become a functioning member of society and will ultimately lead to serious problems later in adulthood.[222]

In the First Amendment context, speech about drug use has special force among adolescents. Messages advocating illegal drug use are routinely followed; school boards resoundingly cite peer pressure as the most important factor prompting schoolchildren to take drugs.[223] "[S]tudents are more likely to use drugs when the norms in school appear to tolerate such behavior."[224] Moreover, pro-drug messages are conveyed in an inviting form to naïve schoolchildren and neglect to inform their audience of the dangers implicit in drug use: "television, films, radio, music, and newsprint journalism can deliver much more attractive images of drug use than parents are capable of counteracting in their antidrug efforts."[225] With students internalizing such pro-drug messages, the risks are great for future health related issues and an interruption in the learning process.[226]

While the rationale for a strict *Brandenburg* application relies on the opportunity for "more speech" in order to counteract student speech positively portraying drugs,[227] Professor Gilbert J. Botvin suggests that school, government, and parent antidrug messages fall on deaf ears.[228] Paradoxically, these antidrug messages often produce the opposite intended effect on their audience: "[I]t has been suggested that antidrug commercials, instead of presenting a persuasive case against the use of drugs, may serve as a source of information which may be perceived as subtle support for their use."[229] With drug abuse among teenagers on the rise over the last two decades, it now has become a "rite[] of passage for many American youth."[230] To combat the recent drug epidemic, schools have devised educational programs aimed at informing youths about the negative impacts of drugs.[231] However, these programs have proven inadequate, as students have ignored the message completely or found logical flaws in the arguments being advanced by school officials: "the

221. *See* NAT'L INST. ON DRUG ABUSE, NAT'L INST. OF HEALTH, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE: 1975–2005, at 202 (2006).

222. *See* Gilbert J. Botvin, *Substance Abuse Prevention: Theory, Practice, and Effectiveness*, 13 CRIME & JUST. 461, 462 (1990).

223. *See* Morse v. Frederick, 127 S. Ct. 2618, 2628 (2007).

224. *Id.*

225. MARSHA MANATT, NAT'L INST. ON DRUG ABUSE, PARENTS PEERS AND POT II: PARENTS IN ACTION 148 (1983).

226. *See supra* notes 216–25 and accompanying text.

227. *See supra* note 163 and accompanying text.

228. *See* Botvin, *supra* note 222, at 462.

229. F. Earle Barcus & Susan M. Jankowski, *Drugs and the Mass Media*, 417 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., 86, 92 (1975).

230. Botvin, *supra* note 222, at 462.

231. *See id.*

'formal operational' thinking of the adolescent facilitates the discovery of inconsistencies or logical flaws in arguments being advanced by adults .... which may in turn permit rationalizations for ignoring potential risk[s]."[232]

Even government programs designed to halt drug use in teenagers have failed. Similar to school-based programs, government programs often send the wrong message: "When teens are told by program leaders to admit that they are helpless against the power of drugs—a standard approach—they lose faith in the program's efficacy."[233] Not only are the programs failing to adequately equip students with the skills to combat drug abuse, but they actually exacerbate the problem.[234] Many experts see the cause of the ineffectiveness of governmental programs as a general misdiagnosis.[235] In fact, one in six teens forced into treatment programs do not even fit the criteria for a "substance abuse disorder."[236]

Not only is government-sponsored counter-speech ineffective, parental advisement regarding the dangers of drugs also has failed to prompt a change in student behavior.[237] As teenagers begin to drift away from their parents and toward their peers, fellow classmates who partake in drug abuse fill the vacuum as influential members of a student's life and lead the student down a dark path.[238] "An increased reliance on the peer group may ... facilitate the promotion of substance use among individuals who are members of peer groups that hold various supportive attitudes toward substance abuse."[239] With peers having the most influence over students, the argument for "more speech" by school officials, government, or parents to counteract school drug problems seems to be a moot point.

3. Other Constitutional Rights Relaxed in a School Setting

It has been suggested that, because students learn best in an orderly environment, pro-drug messages, disrupting that order, may severely

232. *Id.* at 471; *see also* Joel H. Brown, Marianne D'Emidio-Caston & John A. Pollard, *Students and Substances: Social Power in Drug Education*, 19 EDUC. EVALUATION & POL'Y, 65, 73 (1997) (explaining that a random survey done in California of 5,045 students in grades 7–12 showed that over 40% of California's students were "not at all" influenced by drug education programs, 15% were influenced "a lot," and nearly 70% described a neutral or negative effect towards the program).

233. Maia Szalavitz, *Drug Treatment Leads to Substance Abuse, in* TEEN DRUG ABUSE: OPPOSING VIEWPOINTS 126, 126 (Pamela Willwerth Aue ed., 2006). "[A] 1996 study published by Bill Miller, professor of psychology at the University of New Mexico, found that those adults who most accepted the idea of personal powerlessness had the most severe and dangerous relapses. Since teenage identities are fluid anyway, encouraging them to view themselves as powerless addicts may cement an anti-social identity that a teen was just trying on for size." *Id.*

234. *See id.* at 128. "[R]ecent research suggests that parents and schools may be sending binge-drinking/social marijuana smokers off to treatment and getting back crackheads in their stead." *Id.*

235. *See id.* at 130.

236. *See id.*

237. *See id.*

238. *See id.*

239. *Id.*

hamper a student's ability to learn.[240] Recognizing that the school environment is a unique setting, the Supreme Court has already started to relax students' other constitutional rights in the school setting.[241]

In *New Jersey v. T.L.O.*,[242] the Supreme Court upheld a search by school officials of a high school girl's purse, reasoning that the need to maintain an orderly environment at school required an easing of the restrictions set forth in the Fourth Amendment regarding government searches.[243] In this case, the Court relaxed the "probable cause" requirement necessary to conduct a search under the Fourth Amendment by establishing a "reasonable cause" standard that school employees needed to fulfill in order to conduct a search.[244]

In addition, the Court relaxed another Fourth Amendment right in *Vernonia School District 47J v. Acton*.[245] In this instance, the Court upheld a school's policy authorizing random drug testing of student athletes.[246] This decision was predicated upon the existence of a serious drug problem among the school's athletes.[247] "Justice [Antonin] Scalia . . . found that the program did not violate the Fourth Amendment . . . [and] stressed that students have a relatively minimal privacy interest, especially when compared to the schools' significant interest in stopping the use of illegal drugs."[248]

The Court has also relaxed the enforcement of the Fourteenth Amendment Due Process Clause within the confines of a school environment. Under this clause, adults are entitled to notice and an opportunity to be heard.[249] In *Goss v. Lopez*,[250] the Supreme Court held that, before being suspended, a student is entitled to "notice" of the charges and an "opportunity" to respond to them.[251] However, the Court concluded that "notice" and an "opportunity" to respond to the allegations may occur within "minutes" of the misconduct and under some exigent circumstances, "prior notice and hearing cannot be insisted upon."[252]

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240. *See supra* Part II.C.1–2.

241. *See infra* notes 242–55 and accompanying text.

242. 469 U.S. 325 (1985).

243. *See id.* at 339.

244. *See id.* at 341. The Court deferred to school officials, declaring that "strict adherence to the requirement that searches be based on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* The Court also established a new two-prong test for judging the reasonableness of a search conducted by school officials: (1) whether the search was justified at its start; and (2) whether the search was reasonably related to the circumstances that justified the initial interference. *Id.*

245. 515 U.S. 646 (1995).

246. *See id.* at 665.

247. *See id.* at 649.

248. Chemerinsky, *supra* note 189, at 128.

249. U.S. CONST. amend. XIV, § 1.

250. 419 U.S. 565 (1975).

251. *See id.* at 581.

252. *See id.* at 582. Interestingly, one constitutional provision that has been strictly complied with by schools is the Establishment Clause of the First Amendment. The

Those who support a relaxed application of constitutional rights in schools do not view student and adult rights as "coextensive."[253] One justification for the easing of constitutional rights is that "the Framers did not intend the First Amendment to include children; children are too young to fully exercise First Amendment rights; restrictions on these rights are necessary for the state to safeguard the child's future rights; and fewer rights are warranted to protect the parents' authority over the child."[254] Here, supporters argue that the framers purposely excluded schoolchildren from its protection during the drafting of the Constitution.[255]

As previously stated, school students hold a unique status within American society, thus calling into question the degree to which constitutional rights should be applied.[256] Given (1) the need to establish order to ensure a quality education, (2) the serious threats caused by pro-drug speech, and (3) the growing trend of the Supreme Court to ease students' constitutional rights, many argue that students' constitutional rights should be relaxed within a school setting.[257]

III. A RELAXED *BRANDENBURG* STANDARD SHOULD APPLY TO DRUG SPEECH IN A SCHOOL SETTING

This part argues in favor of applying a relaxed *Brandenburg* standard to drug speech in a school setting. The Court in *Morse* permitted the prohibition of student speech on the grounds that it promoted illegal drug use.[258] However, the *Morse* Court failed to incorporate the principles of *Brandenburg*, which directly relate to speech promoting illegal acts.[259] Under *Brandenburg*, a court can prohibit speech without violating the First Amendment rights of the speaker when the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[260] By not adequately addressing *Brandenburg* in *Morse*, the Court created a new test from a narrow holding.[261] However, if the majority had

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Establishment Clause of the First Amendment forbids a school from favoring one religion over another or from favoring religion over nonreligion. *See* U.S. CONST. amend I. Although there is no straight and narrow path to follow when implementing the Establishment Clause within a school environment, courts have required schools to accommodate all religious beliefs. *See* Lisa A. Brown & Christopher Gilbert, *Understanding the Constitutional Rights of School Children*, 34 APR HOUS. LA. 40, 43 (1997).

253. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

254. Jennifer L. Specht, Note, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313, 1324 (2006).

255. *See id.*

256. *See supra* Part II.C.1–2.

257. *See supra* Part II.C.1–2.

258. *See supra* Part I.C.1.

259. *See supra* notes 81–93 and accompanying text.

260. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

261. *See supra* Part I.C.1.

applied *Brandenburg* in a relaxed fashion, then it could have reached the same result without the need to develop a new test.[262]

When applied in a school setting, the traditionally strict application of the *Brandenburg* test should be relaxed.[263] According to the Supreme Court in *Fraser*, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[264] In fact, the Court has encouraged the easing of constitutional regulations in the school setting.[265] The Court in *Hazelwood* acknowledged that schools may regulate some speech even though the government could not censor similar speech outside the school.[266] Furthermore, it is widely recognized that pro-drug messages have a profoundly negative impact on schoolchildren.[267] This great threat to our nation's children has been recognized and articulated in Chief Justice Roberts's majority opinion in *Morse*.[268] With student speech jurisprudence in favor of giving schools the authority to restrict otherwise unregulated speech to create order, and the great danger posed to American schoolchildren by the threat of drugs, the *Brandenburg* test should be applied and relaxed in a school environment.[269]

Although Justices Stevens, Souter, and Ginsburg applied *Brandenburg* to the facts of *Morse* in their dissent and ultimately decided that *Morse* did not satisfy the *Brandenburg* standard, they failed to consider the serious dangers posed by student drug abuse and ignored the Supreme Court's trend toward relaxing other constitutional rights in the American school setting to create a sense of order.[270] The dissenting justices failed to consider that a relaxed application of the *Brandenburg* standard would have resulted in a formula that was able to combat the problem of drug advocacy in American public schools, while also remaining consistent with the notion of easing constitutional regulations in a school setting.[271]

The American educational system plays a key role in shaping the minds of our country's future citizens and leaders.[272] As such, a strict application of the *Brandenburg* standard will foster an environment rampant with speech that seriously jeopardizes and undermines the very principles that our school system seeks to teach.[273] In contrast, a relaxed application of the *Brandenburg* standard, which eases the rigid imminence requirement on both the intent and effect elements, will enable schools to greatly reduce the

262. *See supra* Part II.B.
263. *See supra* Part II.B–C; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973).
264. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
265. *See supra* Part II.C.3.
266. *See supra* notes 36–40 and accompanying text.
267. *See supra* Part II.C.2.
268. *See supra* notes 103–06 and accompanying text.
269. *See supra* Part II.C.
270. *See supra* Parts II.C.2, II.C.3.
271. *See infra* notes 316–26 and accompanying text.
272. *See supra* note 34 and accompanying text.
273. *See supra* notes 132–33 and accompanying text.

dangers to schoolchildren implicit in messages advocating for social harms such as drug abuse.[274]

Both liberty and order are of paramount importance in a democratic society. In order for that democratic society to flourish, it needs to educate its young about the fundamental values of democracy.[275] Keeping in mind the importance of our nation's future, schools should have the discretion to implement educational programs in order to teach these fundamental values.[276] Therefore, it is necessary for schools to maintain order even at the expense of restricting certain liberties enjoyed by adults.[277]

Although school boards should follow a relaxed application of *Brandenburg* because a message promoting illegal drugs enhances the dangers to students and the overall school environment, a relaxed standard should also be implemented because the Supreme Court has relaxed other constitutional rights in American schools.[278]

Not only are students and adults afforded different applications of the law under the Constitution, the "special characteristics" of a school environment also factor into this decision. Students, as a captive audience, are not fully developed intellectually, emotionally, or physically.[279] As such, educational institutions have an obligation to protect students and "provide them with an atmosphere conducive to education, and . . . to inculcate the social, moral and political values of the community (however defined) and, in particular, to prepare the young to participate as citizens in our democratic society."[280] In order to establish this productive atmosphere, "[school officials] prevent[] access to alternative ideas . . . [to] subordinate the individual's constitutional rights to the interest of others in the educational enterprise."[281]

Not only are there independent notions supporting the relaxation of some fundamental rights in schools, but the Supreme Court has also offered its support.[282] In both *T.L.O* and *Goss*, Justice Lewis F. Powell emphasized the special relationship between student and teacher that makes it senseless to afford them the same constitutional protections granted to both in a nonschool setting.[283] In Justice Powell's view, "the relationship between student and teacher is akin to that between child and parent, and thus

274. *See infra* notes 316–26 and accompanying text.
275. *See supra* note 34 and accompanying text.
276. *See supra* notes 34–35 and accompanying text.
277. *See supra* notes 211–15 and accompanying text.
278. *See supra* Part II.C.3.
279. *See* Levin, *supra* note 196, at 1678.
280. *Id.*; *see also* Melissa LaBarge, *"C" is for Constitution: Recognizing the Due Process Rights of Children in Contested Adoptions*, 2 U. PA. J. CONST. L. 318, 323 (1999) ("The United States Constitution does not contain any specific reference to children, parents, or families. Nothing about children or parents appears in the records or debates leading to the drafting and ratification of the Constitution.")
281. *See* Levin, *supra* note 196, at 1679.
282. *See supra* Part II.C.3.
283. *See supra* notes 242–52 and accompanying text.

students should not have the same expectation of privacy as the population generally."[284]

Clearly the primary concerns for school authorities are to maintain order and establish an effective learning environment. These concerns have not gone unrecognized by the Supreme Court: "[w]e have recognized that 'maintaining security and order in the schools requires a certain degree of flexibility in the school disciplinary procedures and we have respected the value of preserving the informality of the student-teacher relationship.'"[285] School officials fear that a strict application of fundamental rights in schools will "legalize" traditional functions of the school, placing authority once held by school administrators in the hands of the court. Not only would it undermine a school's authority, but it would also interfere with the creation of an effective learning environment. For example, the legalizing effect on a school's suspension process could put a chill on its desired purpose.[286] "[F]urther formalizing the suspension process and escalating its formality and adversary nature may . . . destroy its effectiveness as part of the teaching process."[287] Because of the framers' intent to exclude certain rights from children; the special characteristics implicit in schools; the strong support in Supreme Court precedent; and the realization that fears of "legalization" severely outweigh any individual interest, the Supreme Court has correctly relaxed many student constitutional rights in schools, and the *Brandenburg* standard should be next in line.[288]

Although supporters of a strict *Brandenburg* application argue that *Brandenburg* was created to promote a greater sense of freedom over political speech, a relaxed approach to *Brandenburg* in a school setting targeted at combating pro-drug speech avoids the concerns of strict *Brandenburg* advocates.[289] In the cases leading up to *Brandenburg*, governing political speech that promoted unlawful acts posed a serious threat to First Amendment liberties.[290] During this period, the Court was undecided on how to deal with political speech of this nature.[291] It was this concern that led to the articulation of *Brandenburg*'s rigid incitement test.[292] "The *Brandenburg* Court tried to summarize in a paragraph the developments that have redefined the constitutional position of revolutionary advocacy."[293]

Since its creation, a strict application of the *Brandenburg* test has effectively been applied in cases governing political speech that advocates

284. Levin, *supra* note 196, at 1671.
285. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (quoting New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).
286. *See id.*
287. *See id.* at 583.
288. *See supra* Part II.C.3.
289. *See supra* Parts II.A., II.C.2.
290. *See supra* notes 47–78 and accompanying text.
291. *See supra* notes 47–78 and accompanying text.
292. *See supra* notes 47–80 and accompanying text.
293. Linde, *supra* note 83, at 1163.

unlawful action.[294] For example, in *Claiborne Hardware*, the Court concluded that boycott leader Charles Evers's remarks "contained highly charged political rhetoric lying at the core of the First Amendment."[295] Not only did the Court view this speech as political, but it also validated the manner in which it was presented.[296] "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases."[297] Clearly, the Court viewed the *Brandenburg* standard as a medium for permitting speech of a political nature, even if that speech leads to future violence.[298] According to the Court, "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."[299]

Advocates of a strict *Brandenburg* standard in a political speech situation may even look to the traditional school speech jurisprudence in order to justify their conclusion.[300] One source of validation comes from *Tinker*, where the Court held that controversial political speech was permitted so long as it did not materially or substantially interfere with the school or the rights of others.[301] Only under a relaxed *Brandenburg* application can a test giving partial deference to order over liberty in a school setting be justified in light of the First Amendment.[302] A student may convey his personal opinion "even on controversial subjects like the conflict in Vietnam, if he does so 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."[303]

Furthermore, Justices Stevens, Souter, and Ginsburg in their dissent in *Morse* recognized the importance of protecting political speech under the First Amendment.[304] According to the dissenting justices, the majority ignored the fact that the issue of legalizing marijuana was of considerable concern in Alaska.[305] In fact, the dissent chronicled the history of marijuana use and possession in Alaska to establish that it was an issue of great importance.[306] These Justices viewed opinions regarding marijuana

294. *See supra* notes 137–50 and accompanying text.

295. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926–27 (1982); *see also supra* notes 144–50 and accompanying text.

296. *See supra* notes 144–50 and accompanying text.

297. *Claiborne Hardware*, 458 U.S. at 928; *see also supra* notes 144–50 and accompanying text.

298. *See supra* notes 137–50 and accompanying text.

299. *Claiborne Hardware*, 458 U.S. at 928.

300. *See supra* Part I.A.

301. *See supra* notes 24–28 and accompanying text.

302. *See supra* Part II.C.1.

303. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (internal quotations omitted).

304. *See supra* Part I.C.2.

305. *See supra* Part I.C.2.

306. *See supra* Part I.C.2. The dissent explains that in 1975 the Alaska Supreme Court protected the right of adults to possess up to four ounces of marijuana for personal use. In 1990, Alaskan voters attempted to recriminalize marijuana possession. However, at the time Frederick unfurled his banner, the constitutionality of that referendum had not been tested.

use as important political speech deserving protection: "[i]n 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."[307] As articulated in *Tinker* and reaffirmed in *Morse*, it is clear that freedom of political speech is one of the most cherished and coveted rights under the First Amendment; as such, the *Brandenburg* standard should be strictly applied in order to uphold this sacred right for students.

However, proponents of a strict *Brandenburg* standard in a school setting have nothing to fear if a relaxed *Brandenburg* application is applied in situations concerning speech advocating for illegal drug use. Because pro-drug speech does not constitute political speech, it will not require the same strict scrutiny as purely political speech.[308] In fact, the dissent in *Morse* recognizes this argument. "Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection . . . ."[309] Examining the facts of *Morse*, it is clear that the student intended to fulfill his ambition of appearing on television by unfurling a pro-drug banner and did not argue that his banner was intended to convey any sort of political or religious message.[310]

Restricting speech concerning illegal drug use or any advocacy of unlawful action in the school setting does not infringe on the same fundamental values as restricting political speech. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[311] Not only is freedom of speech concerning political views ultimately protected under the First Amendment, it is a foundation upon which this nation was established.[312] Under this interpretation, a strict application of *Brandenburg* to political speech in the school setting is appropriate. However, speech advocating illegal drug use is not an essential and fundamental constitutional right. As previously stated, pro-drug messages inevitably lead to student drug abuse.[313] Unlike varying political viewpoints that cause growth and awareness of others under a "marketplace of ideas"[314] theory, speech advocating illegal drug use has no beneficial effect on the viewers or society whatsoever.[315] While speech

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Finally, sections 11.71.090, 17.37.010–17.37.080 of the Alaska Statutes "rejected a much broader measure that would have decriminalized marijuana possession and granted amnesty to anyone convicted of marijuana-related crimes." Morse v. Frederick, 127 S. Ct. 2618, 2650 n.8 (2007).

307. *See Morse*, 127 S. Ct. at 2651.

308. *See supra* Part I.C.2.

309. *Morse*, 127 S. Ct. at 2650; *see also supra* Part I.C.2.

310. *See supra* Part I.C.1.

311. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

312. *See* Whitney v. California, 274 U.S. 357, 357–76 (1927) (Brandeis, J., concurring) (explaining that the Framers "amended the Constitution so that free speech and assembly should be guaranteed").

313. *See supra* Part II.C.2.

314. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

315. *See supra* Part II.C.2.

advocating an unpopular political viewpoint in a school setting is protected under a strict application of *Brandenburg*, a relaxed application of *Brandenburg* in a school setting involving pro-drug speech does not carry with it the same concerns of infringing on a basic fundamental right essential to American liberty.

Now that recent studies have established that pro-drug messages are a serious problem in American schools, the *Brandenburg* standard should adequately adapt to meet this new and very dangerous challenge. In order to meet the threat of social harms in schools, the *Brandenburg* standard should be applied with a relaxed imminence requirement for both the intent and effect prongs.[316] With relaxed imminence, the school can have the discretion to reasonably restrict speech that it believes could endanger the student as an individual or the student body as a whole.[317] Just as the Court held in *T.L.O* and *Vernonia*, the school should be able to act according to its discretion when it is confronted with a potential harm.[318]

Applying the imminence requirement of the *Brandenburg* test strictly in a school will prove to be highly unrealistic.[319] A message may intend for a student to commit a lawless act at some unknown time in the future that will be just as detrimental to the student as if it were intended for him to comply with the message immediately.[320] For example, if a student wore a t-shirt to school with the language "Smoke Pot; It's Fun," there is no immediacy to that message. The student is clearly promoting smoking marijuana to his classmates, but has not indicated his intent for them to smoke marijuana immediately. Although there is no intent of immediacy, an observing student may make the decision to purchase drugs in the near future that will inevitably have the same outcome for that student as a t-shirt stating "Smoke Pot Now; It's Fun." In both cases, the end result is the same. The observing student will be conducting a lawless and extremely dangerous act harmful to him and others around him. The fact that the current *Brandenburg* standard, as it stands outside the school context, would restrict the second message but not the first is absurd and illustrates the unrealistic and paradoxical nature of this flawed test.[321]

Not only should the imminence requirement regarding the intent element of the *Brandenburg* standard be relaxed, but so too should the imminence requirement pertaining to the effects portion of the test.[322] Just as with the relaxing of the imminence requirement of the intent element, the relaxing of the imminence requirement of the effects element will restrict speech that will ultimately harm a student who conforms to the message and those around him.

316. *See supra* Part II.B.
317. *See supra* Part II.B.
318. *See supra* notes 242–48 and accompanying text.
319. *See supra* Part II.B.
320. *See supra* Part II.B.
321. *See supra* notes 174–76 and accompanying text.
322. *See supra* notes 174–76 and accompanying text.

Moreover, the "likelihood" portion of the effects element should be relaxed in a school setting. As previously stated, students' minds are more malleable than those of adults.[323] A message promoting drugs may be more likely to affect children than adults.[324] The naiveté of schoolchildren must be taken into account when determining the likelihood that a message will ultimately become harmful.[325] A relaxation of the imminence requirement on the effects element will better equip school officials to restrict speech (particularly speech advocating for illegal drug use) that would increase the likelihood of a harmful, lawless act in a school setting because when speech promotes the use of illegal drugs, the likelihood that a schoolchild will follow it is very high.[326]

As previously stated, the school environment contains special characteristics that must be considered in order to ensure an effective learning environment.[327] As such, a relaxed *Brandenburg* standard will enable school officials to secure an orderly environment.[328] In addition, it will better equip school officials to deal with pro-drug speech.[329] Lastly, it will remain consistent with the Supreme Court's trend towards relaxing other constitutional rights within a school setting.[330]

CONCLUSION

The Supreme Court has provided little guidance on the issue of whether or not *Brandenburg* and its test prohibiting speech inciting imminent lawless acts likely to produce harm should apply in the school setting.[331] The Court had the opportunity to address this issue when it arose in *Morse*, but ultimately avoided it by failing to thoroughly discuss *Brandenburg*.[332] The little attention the *Brandenburg* test did receive came from the dissent.[333] However, the dissent applied *Brandenburg* strictly without regard for the extreme problems posed by drug abuse in the American school system and ignored the Supreme Court's trend towards relaxing constitutional rights when applied to schoolchildren.[334]

Although the *Brandenburg* standard has yet to be applied in a school setting, it should not be forgotten.[335] If applied correctly, *Brandenburg* can be used effectively in restricting speech advocating for illegal drug use in

323. *See supra* Part II.C.2.
324. *See supra* Part II.C.2.
325. *See supra* Part II.C.2.
326. *See supra* Part II.C.2.
327. *See supra* Part II.C.
328. *See supra* notes 275–77 and accompanying text.
329. *See supra* notes 316–18 and accompanying text.
330. *See supra* Part II.C.3.
331. *See supra* Part I.C.1–2.
332. *See supra* Part I.C.1–2.
333. *See supra* Part I.C.2.
334. *See supra* Part I.C.2.
335. *See supra* Part II.B.

American public schools.[336] With drug use on the rise in American schools and the fact that counter-speech is seen to be extremely ineffective in combating student drug abuse, the *Brandenburg* standard provides schools with the means to extinguish pro-drug speech on site.[337] Furthermore, the Court should feel comfortable in justifying the relaxation of *Brandenburg*'s elements because it has repeatedly done so in the past in cases involving students and other constitutional rights, including freedom of speech cases.[338] In addition, the Court has made a habit of recognizing order as a prerequisite to ensure liberty.[339]

Finally, a modification of the *Brandenburg* standard is not complicated. By merely easing the imminence requirement on both the intent and effects prongs, a more natural, circumstantial standard will evolve, giving school officials much needed deference to create a sense of stability and order essential to foster an effective learning environment.[340]

336. *See supra* Part III.
337. *See supra* Part III.
338. *See supra* Part II.C.3.
339. *See supra* Part II.C.1.
340. *See supra* Part III.