

SILENCING THE REBEL YELL: EXCEPTIONS TO THE FIRST AMENDMENT AFTER *DEFOE EX REL. DEFOE V. SPIVA*, 625 F.3D 324 (6TH CIR. 2010)

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I. INTRODUCTION

To a few, it is just a flag. To others, it is a symbol of regional identity, a figure used to display Southern pride.¹ Some see it as a signal for proper balance between state and federal authorities and a desire for state sovereignty.² And for others, it has come to embody our nation's painful history of racism and the subordination of African Americans.³ Regardless of one's personal view of the Confederate flag, it is undisputed that the flag has been a source of tension and hostility in this nation for many years. Given the recent influx of news articles regarding public uproars in relation to displays of the Confederate flag,⁴ it seems unlikely that this issue will disappear any time in the near future.

American schools have not been spared from this hostility. High schools across the country have been faced with the dilemma of whether to ban the flag in their schools.⁵ As a result, many schools have banned the display of the Confederate flag in order to promote school safety.⁶ Consequently, the courts have been forced to confront the difficult issue of whether a school may constitutionally ban the display of the Confederate

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1. M. Saad, *Confederate Flag Meaning*, AMERICAN HISTORY (Apr. 28, 2011, 1:22 AM), <http://usamericahistory.blogspot.com/2011/04/confederate-flag-meaning.html>.

2. *Id.*

3. *Id.*

4. See generally Kevin Dolak, *Confederate Flag Courthouse Display Raises Racial Tensions*, ABC NEWS (Apr. 2, 2011), <http://abcnews.go.com/US/confederate-flag-display-raises-racial-tensions/story?id=13282963>; Bruce Smith, *Rebel flag still flying in black SC neighborhood*, YAHOO! NEWS (Sept. 26, 2011), <http://news.yahoo.com/rebel-flag-still-flying-black-sc-neighborhood-075154630.html>; Doug Richards, *Confederate flag locked to Ga. courthouse flagpole*, USA TODAY (May 5, 2011, 10:29 AM), http://www.usatoday.com/news/nation/2011-05-05-georgia-confederate-flag_n.htm.

5. See generally *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972); *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358 (10th Cir. 2000); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010).

6. See generally *Melton*, 465 F.2d 1332; *West*, 206 F.3d 1358; *Defoe*, 625 F.3d 324.

flag or if doing so is a violation of students' right to free speech.⁷ This issue was recently addressed in *Defoe ex rel. Defoe v. Spiva*.⁸

In *Defoe*, the United States Court of Appeals for the Sixth Circuit addressed the issue of students' First Amendment rights to free speech in high schools as they apply to the Confederate flag.⁹ Tom Defoe, a student, sued the principal and members of the school board, claiming that the banning of displays of the Confederate flag in the school violated the First and Fourteenth Amendments.¹⁰ The Sixth Circuit found in favor of the defendants and ruled that the prohibition against displays of the Confederate flag did not violate the First Amendment.¹¹

The decision in *Defoe* is notable because it is one of the first cases to deviate from the standard developed in *Tinker v. Des Moines Independent Community School District* for determining students' First Amendment rights.¹² The court used the *Morse v. Frederick* reasoning to reach their decision, and radically extended the coverage of *Morse* to reach "racially hostile or contemptuous speech."¹³ The court's holding in *Defoe* was incorrect because it erroneously extended the Supreme Court's ruling in *Morse* farther than it was intended to be applied, which may lead to great implications, including a decrease in students' First Amendment rights in schools across the country and an increase in viewpoint-based exceptions to freedom of speech. As a result of this decision, school administrators now have broader control over student speech and, consequently, a greater capacity to abuse that power.

This Note will outline the repercussions of *Defoe ex rel. Defoe v. Spiva* on the future of students' First Amendment guarantee to free speech. Before examining *Defoe*, it is important to understand the background of the First Amendment and the court's development of how it applies to students in the high school setting. Section II of this Note will review the legal background that led up to the *Defoe* decision. Next, Section III will provide a detailed exposition of the case. Finally, Section IV will offer an analysis of the case, focusing on the legal and societal implications of the *Defoe* decision. The analysis will primarily focus on how the *Defoe* court was incorrect in its decision and reasoning because the court construed the *Morse* decision too broadly.

7. See generally *Melton*, 465 F.2d 1332; *West*, 206 F.3d 1358; *Defoe*, 625 F.3d 324.

8. 625 F.3d 324.

9. *Id.* at 329.

10. *Id.*

11. *Id.* at 338.

12. See *id.* *Tinker* is the first Supreme Court decision on the subject of student speech and is the default position for all student speech issues.

13. *Id.* at 338. (Rogers, C.J., concurring) *Morse* is the most recent Supreme Court decision on the subject of student speech.

II. LEGAL BACKGROUND

The First Amendment states “Congress shall make no law . . . abridging the freedom of speech”¹⁴ However, the Supreme Court has consistently held the First Amendment does not provide the same protections for minors’ speech in public schools as it does for adult speech.¹⁵ First, this section will analyze the history of United States Supreme Court decisions regarding student speech, detailing the establishment of general constitutional protections for student speech and the scope given to school officials in regards to restricting certain types of student speech. This section will then explain recent and relevant Sixth Circuit cases dealing with t-shirt bans in school districts leading up to the decision in *Defoe ex rel. Defoe v. Spiva*.

A. Supreme Court Cases Regarding Students’ Freedom of Speech in Public Schools

The Supreme Court has developed a distinct jurisprudence on students’ speech. Together, these four decisions set out the parameters of what student speech is protected within the schoolhouse gate.

1. *Tinker v. Des Moines Independent Community School District*

Tinker was the first decision in the Supreme Court’s rulings on student speech. *Tinker* addressed whether students could wear black armbands to their high school to protest the United States’ involvement in the Vietnam War.¹⁶ The school, having heard about the proposed protest, adopted an armband prohibition policy only a few days before the protest was to occur in an attempt to prevent disturbances caused by the armbands.¹⁷ On the day of the protest, the students were sent home and suspended until they agreed to come back without the armbands.¹⁸ The Supreme Court held that the students were entitled to wear the armbands unless “school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”¹⁹ In holding the school’s actions violated the students’ freedom

14. U.S. CONST. amend. I.

15. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 266 (1988).

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

17. *Id.*

18. *Id.*

19. *Id.* at 509.

of expression, the Supreme Court stated that schools have the authority to regulate and control students' conduct in schools.²⁰

While students do not lose all of their free speech rights once they start to attend school,²¹ freedom of speech does not allow students to engage in behavior that disrupts or creates substantial disturbances.²² In order for a school to constitutionally ban speech, it must be shown that the expression would "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school" and the regulation was caused by more than just a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."²³ In reaching its decision, the Court highlighted a concern for deterring viewpoint-based discrimination, stating that "the prohibition of expression of one particular opinion . . . is not constitutionally permissible."²⁴ The Court left open for interpretation how administrators could forecast disruption or how much evidence would be required to support a claim that disruption would ensue without the questioned regulation. The second part of the test, "interfering with the rights of others," was also not further elucidated.

2. Bethel School District No. 403 v. Fraser

Seventeen years later, the Supreme Court again made a decision regarding freedom of speech for high school students.²⁵ In *Fraser*, a high school student gave a speech to the student body in which he nominated a classmate for an elected position using "elaborate, graphic, and explicit sexual metaphor[s]."²⁶ Students reacted to the speech in a variety of ways; some "hooted and yelled; some by gestures graphically simulat[ing] the sexual activities alluded to in [the student's] speech"; others, the Court noted, "appeared bewildered and embarrassed by the speech."²⁷ The student was suspended for three days because his speech violated the school's policy of prohibiting "conduct which materially and substantially interferes with the educational process."²⁸ The Court held the school's disciplinary action against the student was consistent with the First Amendment because the First Amendment does not prevent the school from disciplining the student for giving an offensive and lewd speech at the

20. *Id.* at 507.

21. *Id.* at 506.

22. *Id.* at 513.

23. *Id.* at 509.

24. *Id.* at 511.

25. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-79 (1986).

26. *Id.* at 677-78.

27. *Id.* at 678.

28. *Id.*

assembly.²⁹ In upholding the school's action, the Court relied on *Tinker*'s disruption standard, but also developed a balancing test.³⁰ The Court stated, "[T]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."³¹ The Court held that, due to the "slight social value" of the student's statement, the school's interest in protecting its students from exposure to vulgarity outweighed the student's interest in freedom of expression.³² This decision signified a departure from the Court's decision in *Tinker*. *Fraser* gave the school district more discretion to limit not only obscene speech, but speech that is lewd, vulgar, and plainly offensive.³³

3. Hazelwood School District v. Kuhlmeier

Soon after *Fraser*, the Supreme Court heard *Hazelwood School District v. Kuhlmeier*.³⁴ *Hazelwood* concerned the extent to which a school could censor articles written by students for a school newspaper.³⁵ The principal withheld two stories from the school newspaper because he found them to be inappropriate: one concerning teen pregnancy at the school and another discussing divorce and its effect on students.³⁶ The Court upheld the censorship of the articles, stating the school did not have to tolerate student speech that was "inconsistent with its basic educational mission."³⁷ The Court distinguished the case before it from *Tinker*, holding that educators are entitled to a greater control over school-sponsored expressive activities that "might reasonably [be] perceive[d] to bear the imprimatur of the school."³⁸ The Court stated educators can "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive authorities so long as their actions are reasonably related to legitimate pedagogical concerns."³⁹ However, it is important to emphasize that the *Hazelwood* standard only allows administrators broad control over student speech when it occurs in school-sponsored activities.⁴⁰

29. *Id.* at 685-86.

30. *Id.* at 680-81.

31. *Id.* at 681.

32. *Id.* at 685.

33. *Id.* at 683.

34. 484 U.S. 260 (1988).

35. *Id.* at 262.

36. *Id.* at 263. The students were writing the articles for the school newspaper for class credit. *Id.* at 268.

37. *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

38. *Id.* at 271.

39. *Id.* at 273.

40. *Id.* at 271.

4. *Morse v. Frederick*

The Supreme Court's most recent decision regarding student speech was *Morse v. Frederick*.⁴¹ At a school-supervised event, a student held up a banner with the message "Bong Hits 4 Jesus."⁴² The principal took away the banner and suspended Frederick for ten days.⁴³ She justified her actions by citing the school's policy against the display of material that promoted the use of illegal drugs.⁴⁴ The Court held that school officials can prohibit students from displaying messages promoting illegal drug use,⁴⁵ noting that "detering drug use by schoolchildren is an important—indeed, perhaps compelling—interest."⁴⁶ Although students do have some right to political speech while in school,⁴⁷ the majority said this speech does not extend to pro-drug messages that may undermine the school's mission to discourage drug use.⁴⁸ Schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.⁴⁹ Some members of the court expressed that this decision should apply only to pro-drug messages and not to broader political messages.⁵⁰

B. The Sixth Circuit's Approach to Student Speech

The Sixth Circuit has considered the extent to which student t-shirts can be regulated in light of the Supreme Court's student speech cases. The Sixth Circuit's decisions have often led to confusing and conflicting results.

1. *Melton v. Young*

The first case discussing this issue was *Melton v. Young*, decided in 1972.⁵¹ In *Melton*, a student wore a jacket with a Confederate flag patch on the sleeve and was subsequently suspended.⁵² The Sixth Circuit upheld the suspension, stating the school's racial history surrounding displays of the flag was much more than the "undifferentiated fear or apprehension of disturbance" discussed in *Tinker*.⁵³ Due to prior disruptions in the school,

41. 551 U.S. 393 (2007).

42. *Id.* at 397.

43. *Id.* at 398.

44. *Id.*

45. *Id.* at 410.

46. *Id.* at 407 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

47. *Id.* at 406.

48. *Id.* at 410.

49. *Id.* at 408.

50. *Id.* at 422 (Alito, J., concurring).

51. 465 F.2d 1332 (6th Cir. 1972).

52. *Id.* at 1334.

53. *Id.* at 1335.

including race-related violence and disturbances directly related to past events at the school involving the Confederate flag,⁵⁴ the court believed the school's administrators had good reason to foresee that further displays could lead to further disruptive conduct.⁵⁵ The court did note this was a difficult case that involved finding a balance between "the exercise of the fundamental constitutional right to freedom of speech, and the oft conflicting, but equally important, need to maintain decorum in our public schools."⁵⁶

2. Boroff v. Van Wert City Board of Education

The next case heard by the Sixth Circuit discussing t-shirts in schools was *Boroff v. Van Wert City Board of Education*.⁵⁷ In *Boroff*, a student wore a Marilyn Manson t-shirt with a depiction of a three-faced Jesus on the front.⁵⁸ On the back of the t-shirt the word "BeLIEve" was spelled out, with the "lie" portion of the word highlighted.⁵⁹ The student was asked to turn his shirt inside out or leave school.⁶⁰ The student chose to leave the school rather than change clothing.⁶¹ For the next three days, the student wore similar t-shirts and the school again asked him to change.⁶² Each day, the administrators informed the student that he would not be permitted to attend school while wearing these shirts.⁶³

The Sixth Circuit, in upholding the constructive suspension, relied on *Fraser* to reach its decision, stating, "[T]he standard for reviewing the suppression of vulgar or plainly offensive speech is governed by *Fraser*."⁶⁴ The court agreed with the school principal in finding the t-shirt was offensive ". . . because the band promote[d] destructive conduct and demoralizing values that are contrary to the educational mission of the school" and because it mocked a religious figure,⁶⁵ not because the principal disagreed with the student's viewpoint.⁶⁶

54. *Id.* at 1333-34.

55. *Id.* at 1335.

56. *Id.* at 1334.

57. 220 F.3d 465 (6th Cir. 2000).

58. *Id.* at 467.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 469.

65. *Id.*

66. *Id.* at 471.

3. *Castorina v. Madison County School Board*

The Sixth Circuit decided another t-shirt case the following year, but came to a different conclusion. In *Castorina v. Madison County School Board*, two students were suspended for violation of a school policy that prohibited clothing containing “racist implications” when they wore Confederate flag t-shirts to school.⁶⁷ Here, the Sixth Circuit instead relied on *Tinker* to reach its decision.⁶⁸ The court held in favor of the students, focusing on the fact the school only prohibited displays of the Confederate flag and had allowed students to wear other potentially racially disruptive clothing, such as Malcolm X t-shirts.⁶⁹ The court stated this was an unconstitutional “viewpoint-specific ban on certain racial materials but not others.”⁷⁰ Further, the school did not report any history of disturbance related to the Confederate flag justifying a belief that further display would lead to a disruption.⁷¹

4. *Barr v. Lafon*

The Sixth Circuit’s most recent case discussing t-shirts in schools was *Barr v. Lafon*, decided in 2008.⁷² In *Barr*, the school had a history of racial disruption including fights between students, graffiti, and hit lists with student names, all stemming from the display of the Confederate flag.⁷³ In light of these events, the school banned displays of the Confederate flag in the school, including on t-shirts.⁷⁴ The Sixth Circuit upheld the school’s ban on Confederate flag t-shirts.⁷⁵ In its decision, the Sixth Circuit addressed the students’ contention that the Confederate flag clothing needed to have caused prior disruptions for *Tinker* to apply, stating that this was a misapplication of *Tinker*.⁷⁶ The court held that *Tinker* and subsequent cases do not require the banned form of expression to have been the source of the past disruptions per se, but instead require an examination into “whether the banned conduct would likely trigger disturbances such as those experienced in the past.”⁷⁷ The court stated the school’s decision was

67. 246 F.3d 536, 538 (6th Cir. 2001).

68. *Id.* at 540-41.

69. *Id.* at 541.

70. *Id.* at 544.

71. *Id.*

72. 538 F.3d 554 (6th Cir. 2008).

73. *Id.* at 557-59.

74. *Id.* at 557.

75. *Id.* at 568.

76. *Id.* at 565.

77. *Id.*

a reasonable one in light of the past disturbances and high racial tension within the school.⁷⁸

As observed from the case law in both the Supreme Court and in the Sixth Circuit, there seems to be a lot of confusion into exactly what type of speech is allowed in schools and when it is appropriate to censor such speech. The muddled application of the Supreme Court precedent set forth in *Tinker* and subsequent cases has resulted in surprising and unpredictable results in the Sixth Circuit and beyond, and this uncertainty set the stage for *Defoe ex rel. Defoe v. Spiva*.

III. EXPOSITION OF *DEFOE EX REL. DEFOE V. SPIVA*

In order to fully comprehend the analysis and implications of *Defoe ex rel. Defoe v. Spiva*, the facts of the case, the majority opinion, and the concurring opinion must be discussed at length. It is important to note the concurring opinion is actually the governing opinion for the Sixth Circuit, and to the extent there are any differences between the majority opinion and the concurring opinion, the concurring opinion shall govern as stating the panel's majority position.⁷⁹

A. Facts and Procedural History

Anderson County School District (ACSD) implemented a school conduct code that addressed what students could and could not wear to school and school-sponsored activities.⁸⁰ The conduct code stated that “apparel or appearance, which tends to draw attention to an individual rather than to a learning situation, must be avoided.”⁸¹ The policy specifically prohibited racial or ethnic slurs/symbols, gang affiliations, vulgar, subversive, or sexually suggestive language, and any items that promote alcohol, tobacco, and drugs.⁸² This policy was implemented in response to several racially charged incidents in the district over the last sixty years.⁸³ Several ACSD officials testified about a number of incidents that occurred at the school, one of which involved the students displaying the Confederate flag in the school hallways, although none of the disturbances had been sparked by an item of clothing depicting the Confederate flag.⁸⁴ The officials testified that because the flag was

78. *Id.* at 568.

79. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 326 (6th Cir. 2010).

80. *Id.* at 326.

81. *Id.*

82. *Id.*

83. *Id.* at 327.

84. *Id.* at 327-29.

offensive to African-American students, its display would be disruptive.⁸⁵ Some officials testified that they would ban the flag, even if they knew it would not be disruptive, to prevent students from being offended.⁸⁶ It is important to note that ACSD has very few black students in the school district.⁸⁷

On October 30, 2006, the plaintiff-student, Tom Defoe, wore a t-shirt bearing the Confederate flag to school.⁸⁸ School officials for ACSD told him he was in violation of the school code of conduct.⁸⁹ Defoe was asked to either turn the shirt inside out or remove it.⁹⁰ He refused to comply with the school administrator's request and was subsequently sent home.⁹¹ On November 6, 2006, Defoe wore a belt buckle to school that displayed an image of the Confederate flag.⁹² Again he was told he was in violation of the code of conduct.⁹³ When he refused to comply, he was suspended from school.⁹⁴ Prior to the incidents described above, Defoe had worn clothing depicting the Confederate flag on several occasions to school, but had always complied with requests to either remove or cover the clothing.⁹⁵

On November 20, 2006, Defoe's parents, on behalf of their son, commenced an action in federal district court, where they alleged violations of the First and Fourteenth Amendments against the ACSD, specifically alleging violation of Defoe's freedom of speech rights.⁹⁶ They also petitioned the court for a preliminary injunction and a restraining order, but both motions were denied.⁹⁷ Between September 21, 2007 and April 28, 2008, both parties filed a multitude of motions for summary judgment.⁹⁸ Finally, from August 11, 2008 through August 15, 2008, a jury trial was held and ended in a mistrial when the jury was unable to reach a unanimous verdict.⁹⁹ After the mistrial, the court requested the parties file post-trial briefs in light of the Sixth Circuit decision in *Barr*.¹⁰⁰ On August 11, 2009, the district court granted summary judgment in favor of the defendants and dismissed the action.¹⁰¹ The plaintiffs appealed, stating the district court

85. *Id.* at 327.

86. *Id.*

87. *Id.* at 328.

88. *Id.* at 329.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 329-30.

99. *Id.* at 330.

100. *Id.*

101. *Id.*

erroneously granted summary judgment in favor of the defendants based on the court's conclusions that the evidence demonstrated school officials banned displays of the Confederate flag based on a reasonable forecast that those displays would substantially disrupt or materially interfere with the school environment.¹⁰²

B. The Sixth Circuit's Opinion

The Sixth Circuit panel unanimously affirmed the lower court's decision. However, the judges issued two separate opinions.¹⁰³ The opinion in which two of the judges joined was designated as the concurring opinion and governs as the majority position.¹⁰⁴

1. Main Opinion

The main opinion relied on the *Tinker* standard to determine whether the school's ban on displays of the Confederate flag in school was constitutional.¹⁰⁵ To justify prohibition of a particular expression of opinion under *Tinker*, a school district must be able to show "that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹⁰⁶ The wearing of a particular item must be shown to substantially interfere with the work of the school or impinge upon the rights of other students.¹⁰⁷ Based on the record, the court concluded that school officials could reasonably forecast that permitting Confederate flag-themed clothing would lead to racial tension and disruption of the school environment.¹⁰⁸ In reaching this conclusion, the court pointed to evidence in the record regarding racial violence, threats, and tension.¹⁰⁹ Specifically, the record indicated a large number of incidents where racial slurs were directed at certain students, racially charged graffiti was painted on the walls of the school, physical altercations occurred between students stemming from racial slurs, and an incident where Oreo cookies were thrown onto the basketball court during a game when a biracial member of the basketball

102. *Id.* at 333.

103. *Id.* at 326.

104. *Id.* Because the concurrence was joined by two Justices of the three Justice panel, the Justices decided the concurrence shall be the majority and governing opinion in places where it contradicts the main opinion.

105. *Id.* at 332.

106. *Id.* at 333-34 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

107. *Id.*

108. *Id.* at 335.

109. *Id.* at 334.

team from a neighboring school took the floor.¹¹⁰ While these incidents were not directly caused by displays of the Confederate flag, *Tinker* does not require that displays of the Confederate flag in fact cause substantial disruption or interference.¹¹¹ The court stated school officials must only have reasonably forecasted that such displays could cause substantial disruption or materially interfere with the school's learning environment in order to comply with *Tinker*.¹¹²

The main opinion also rejected the student's argument that the ban constituted unconstitutional viewpoint discrimination.¹¹³ The court stated there was no evidence to support this claim, pointing out the policy prohibited displays of all racially divisive symbols.¹¹⁴

Lastly, the opinion rejected the student's argument that the ban was not narrowly tailored because it did not allow officials at individual schools to make exceptions based on their particular circumstances.¹¹⁵ The Sixth Circuit stated that the plaintiffs pointed to no authority for the proposition that the school district was required to apply district policy on a school-by-school or classroom-by-classroom basis.¹¹⁶ The court held that "*Tinker* does not require an individualized analysis of each student's clothing each day, but rather a reasonable forecast by school officials that displays of the Confederate flag would cause disruptions."¹¹⁷ Because the administrators had met the *Tinker* standard, the dress code was narrowly tailored to the state and school's substantial interest in educating students in the public school system.¹¹⁸

2. *Concurring Opinion*

The concurring opinion deviated from the main opinion by relying on the reasoning in *Morse*, rather than *Tinker*, to reach its decision that the ban passed constitutional muster.¹¹⁹ The concurrence held:

A fair reading of *Morse*, then, in connection with a recognition that racial tension in today's public schools is a concern on the order of the problem of drug abuse, leads to the conclusion that a dress code that forbids racially hostile slogans and symbols—if fairly applied—comports with the

110. *Id.*

111. *Id.* at 335.

112. *Id.*

113. *Id.* at 336.

114. *Id.* at 337.

115. *Id.*

116. *Id.*

117. *Id.* at 338.

118. *Id.*

119. *Id.* at 339 (Rogers, J., concurring).

First Amendment even without a so-called *Tinker* showing of a reasonable forecast of substantial disruption.¹²⁰

The concurrence thus concluded that “[a] public high school that can put reasonable limits on drug-related speech by students can put reasonable and even-handed limits on racially hostile or contemptuous speech, without having to show that such speech will result in disturbances.”¹²¹

The concurrence stated two reasons why it chose to follow *Morse* rather than *Tinker*, as it did in prior Sixth Circuit cases.¹²² One reason was that the evidence of the threat of substantial disruption was not very strong.¹²³ The concurrence did not believe the evidence provided enough threat of disruption to faithfully sustain a *Tinker* analysis.¹²⁴ The second reason was the concurrence viewed *Tinker* to be the exception to the rule, rather than the standard.¹²⁵ The concurrence derived from *Morse* that “the mode of analysis set forth in *Tinker* is not absolute.”¹²⁶ The concurrence stated, “A fair look at *Tinker*, *Fraser*, *Hazelwood*, and *Morse* thus suggests that the general rule is that school administrators can limit speech in a reasonable fashion to further important policies at the heart of public education.”¹²⁷ The concurrence therefore concluded it was not necessary for the defendant school to show that a disruption would occur if the banned clothing was worn; the school administrators must merely reasonably have viewed the speech as impeding important public education policies.¹²⁸ The concurrence further reasoned that speech which is racially hostile or promotes racial conflict is an example of speech that *Morse* states can be restricted.¹²⁹

The concurrence did not define racially hostile speech; it left that up to the school administrators to determine.¹³⁰ However, the concurrence did decide that Confederate flags are an example of racially hostile and contemptuous speech, without having either party argue this point.¹³¹ The concurrence stated that while the Confederate flag may convey a noble message, for instance to signify honor for one’s ancestors who fought in the Civil War, it is also perceived by many, if not most, as a statement of racial

120. *Id.* at 340.

121. *Id.* at 338.

122. *Id.* at 341.

123. *Id.*

124. *Id.*

125. *Id.* at 341-42.

126. *Id.* at 340.

127. *Id.* at 342.

128. *Id.* at 339.

129. *Id.*

130. *Id.* at 338.

131. *Id.* at 339.

hostility.¹³² The concurrence compared the Confederate flag to a slogan that says, “Blacks should be slaves” or “Blacks are inferior.”¹³³ The concurrence further stated that, even if the individual student meant no such hostility or contempt, a school administrator cannot practically administer a rule that permits such clothing sometimes and prohibits it other times, depending on the intent of each individual wearer.¹³⁴

C. Subsequent History

After *Defoe* was decided, the plaintiff filed a petition for rehearing en banc.¹³⁵ On March 14, 2011, the petition was denied.¹³⁶ However, Justice Boggs wrote a strong dissent from the denial of rehearing, stating that “[t]he majority eviscerate[d] the core holding of *Tinker*,” and in applying *Morse*, the majority had disregarded the Supreme Court’s warnings and applied the decision too broadly.¹³⁷ The plaintiff then petitioned for writ of certiorari, but was denied on October 11, 2011.¹³⁸

IV. ANALYSIS

The Sixth Circuit’s decision in *Defoe ex rel. Defoe v. Spiva* is flawed because, rather than applying the *Tinker* standard, the concurrence applied the *Morse* rationale.¹³⁹ The concurrence failed to follow the appropriate precedent of both the Supreme Court and its own Sixth Circuit decisions.¹⁴⁰ Furthermore, even if the concurrence had applied the correct standard, the Sixth Circuit erred by not remanding the case so both parties could present evidence that either supports or refutes the new standard. Finally, the decision was made in error because it leaves the new standard of “racially hostile and contemptuous” speech undefined and unlimited. This result may lead to broad implications for students across the Sixth Circuit and potentially across the country.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Defoe ex rel. Defoe v. Spiva*, 674 F.3d 505, 506 (6th Cir. 2011).

136. *Id.*

137. *Id.* (Boggs, J., dissenting).

138. *Defoe ex rel. Defoe v. Spiva*, 132 S. Ct. 399, 399 (2011).

139. *Defoe*, 625 F.3d at 339. (Rogers, J., concurring).

140. *See id.* at 339-41; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008).

A. The *Tinker* Standard Should Control

The Sixth Circuit, by relying on *Morse*, held that school administrators can limit speech in a reasonable fashion to further important policies at the heart of public education without showing that the restriction satisfies the substantial disruption standard articulated in *Tinker*.¹⁴¹ As discussed above, *Tinker* held that public schools may constitutionally prohibit student speech only if it would cause “substantial disruption of or material interference with school activities.”¹⁴² Under this standard, the Supreme Court stated, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁴³ Nor can it be justified by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁴⁴ This standard is a blanket statement for regulations of student speech and, since being decided in 1969, has been the starting point for all student speech-related First Amendment issues. Since this landmark decision, the Court has been careful not to create too many exceptions to the rule, with the only three being *Fraser*, which allowed for regulation of lewd and indecent speech;¹⁴⁵ *Hazelwood*, which allowed for censorship of school-sponsored speech;¹⁴⁶ and the focus of this discussion, and *Morse*, which allowed for regulation of student speech reasonably perceived to advocate illegal drug use without a requisite showing of disruption.¹⁴⁷ The *Morse* exception was the basis for the Sixth Circuit’s erroneous decision in *Defoe ex rel. Defoe v. Spiva*.¹⁴⁸

The Sixth Circuit, in *Defoe*, concluded that the *Morse* exception could be extended to include regulation of “racially hostile” speech and any other speech restrictions that “further important policies at the heart of public education” without requiring a *Tinker* “substantial disruption” analysis.¹⁴⁹ While courts commonly extend precedent to fit present facts, for the Sixth Circuit to apply *Morse* here was error. The Supreme Court in *Morse* specifically stated that the holding was to be narrowly applied.¹⁵⁰ In the concurrence of that decision, Justice Alito stated that the action in *Morse* was upheld only:

141. *Defoe*, 625 F.3d at 342 (Rogers, J., concurring).

142. *Tinker*, 393 U.S. at 514.

143. *Id.* at 508.

144. *Id.* at 509.

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

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

147. See *Morse v. Frederick*, 551 U.S. 393 (2007).

148. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 342 (6th Cir. 2010) (Rogers, J., concurring).

149. *Id.*

150. *Morse*, 551 U.S. at 403.

[O]n the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.¹⁵¹

The concurrence also expressly denied the argument that the First Amendment permits censorship of student speech that interferes with a school's educational mission.¹⁵² The majority opinion even clarified its decision on this point and noted that the case was not about political debate.¹⁵³ Based on the majority and concurrence statements, it is clear the *Morse* exception was meant to go no further than speech reasonably conceived as advocating illegal drug use and, even then, only if that speech could not plausibly be interpreted as commenting on any political or social issue.

Some may argue that Alito's concurrence is merely advisory and not meant to be controlling. However, according to *Marks v. United States*, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"¹⁵⁴ Based on this holding, one could assume that since the decision in *Morse* did not have the assent of five Justices,¹⁵⁵ Justice Alito's narrow concurrence should be viewed as the holding of the Court and thus the standard to which *Defoe* should have been applied.

In *Defoe*, the Sixth Circuit directly conflicted with *Morse*'s call for a narrow application of the exception. The Sixth Circuit erroneously compared the facts of *Defoe* to *Morse*.¹⁵⁶ In *Defoe*, the panel of justices compared racial hostility to drug abuse and said that the two are basically the same in terms of student speech because they are both contrary to the school's core values.¹⁵⁷ As Justice Boggs wrote in his dissent of the denial of rehearing en banc, if this analogy were to carry weight, then "religious dogma, Republican propaganda, or seditious libel" could equally apply.¹⁵⁸

Furthermore, the Sixth Circuit could be said to have ignored the opinion and concurrence's warnings and applied the exception to the types of student speech *Morse* explicitly said it could not be applied to—political

151. *Id.* at 422 (Alito, J., concurring).

152. *Id.* at 423.

153. *Id.* at 403 (majority opinion).

154. *Marks v. United States*, 430 U.S. 188, 193 (1977).

155. *Morse*, 551 U.S. 393 (2007).

156. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 339 (6th Cir. 2010) (Rogers, J., concurring).

157. *Id.*

158. *Defoe ex rel. Defoe v. Spiva*, 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting).

speech.¹⁵⁹ The *Morse* opinion specifically stated that political speech could not be used in their analysis and instead that *Tinker* should apply.¹⁶⁰ The wearing of the Confederate flag does send a political message, or at least can be considered a political issue.¹⁶¹ While the message conveyed may vary from context to context, the message remains political.¹⁶²

However, there is the argument that the *Tinker* standard has become outdated and undermined by *Morse* and other circuit decisions. Though *Tinker* has never been explicitly overruled, some scholars argue that its holding has been “tremendously undermined” and greatly altered.¹⁶³ Part of this argument derives from the fact many instances of speech censorship that have been held to be constitutional “involve threats that are no more disruptive than the armbands in *Tinker* itself,”¹⁶⁴ which, as described above, were deemed to not be disruptive at all by the Supreme Court in 1969.¹⁶⁵ The other part of the argument comes from the fact that post-*Morse*, lower courts all over the country have side-stepped *Tinker*’s traditional and rigorous substantial and material disruption standard and have substituted the *Morse* rationale in its place.¹⁶⁶ And considering the Supreme Court’s recent denial of certiorari in *Defoe*,¹⁶⁷ perhaps the Court is satisfied with the lower court’s decision to extend *Morse* to political speech. However, until *Tinker* is explicitly overruled or the Supreme Court states that *Morse* can be extended, circuits should pay deference to *Tinker*’s holding and apply the substantial disruption test to student speech, unless it falls into the narrow exceptions described above.¹⁶⁸

159. *Morse*, 551 U.S. at 403, 422.

160. *Id.*

161. Eugene Volokh, *First Amendment Exception for “Racially Hostile or Contemptuous Speech,” Including Display of the Confederate Flag, in K-12 Public Schools—Denial of En Banc Rehearing by Sixth Circuit*, VOLOKH CONSPIRACY (Mar. 14, 2011, 12:00 PM), <http://volokh.com/2011/03/14/first-amendment-exception-for-%E2%80%9Cracially-hostile-or-contemptuous-speech%E2%80%9D-including-display-of-the-confederate-flag-in-k-12-public-schools-denial-of-en-banc-rehearing-by-sixth-circu/>.

162. *Id.*

163. Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 831 (2009).

164. R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 714 (2009).

165. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

166. Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1169 (2009).

167. *Defoe ex rel. Defoe v. Spiva*, 132 S. Ct. 399, 399 (2011).

168. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

B. The Sixth Circuit Has Ignored Its Own Precedent

The Sixth Circuit's decision in *Defoe ex rel. Defoe v. Spiva* also directly contradicts the clear precedent in the Sixth Circuit established in *Barr v. Lafon*, decided only two years before *Defoe*.¹⁶⁹ The Sixth Circuit, in *Barr*, held, post-*Morse*, that student displays of Confederate flags were subject to the "substantial disruption" standard.¹⁷⁰ In *Barr*, the Sixth Circuit even explained why *Morse* would not apply, stating:

The Court's most recent student-speech case, *Morse v. Frederick*, does not modify our application of the *Tinker* standard to the instant case. . . . The *Morse* decision . . . resulted in a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school "reasonably views as promoting illegal drug use."¹⁷¹

In light of the *Barr* decision to apply *Tinker* in factual circumstances that are almost identical to those in *Defoe*, one would infer that the doctrine of stare decisis would compel the Sixth Circuit to apply *Tinker* and disregard the *Morse* rationale in reaching its conclusion in *Defoe*, yet that did not happen.

The *Defoe* court tried to differentiate *Defoe* from *Barr* by alleging that *Barr* had more compelling evidence of a potential disruption.¹⁷² The Sixth Circuit also stated that just because the restriction in *Barr* was upheld under the *Tinker* standard, it did not mean the restriction was necessary to the decision.¹⁷³ This argument does not make much sense and does not seem persuasive enough to disregard post-*Morse* precedent. It seems highly unlikely the Sixth Circuit would consider the restriction in *Barr* for their decision if it were not necessary. Judges often try to make narrow decisions; considering the restriction for the sake of considering it would be out of character and unusual.

C. The Sixth Circuit Erred By Not Remanding the Case

Even if the Sixth Circuit was correct in applying the *Morse* exception to the facts presented in *Defoe*, the court erred by not remanding the case to the district court. The Sixth Circuit developed a new test in *Defoe*, but did not give the plaintiffs a chance to address the test or present evidence to

169. See *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008).

170. *Id.* at 565.

171. *Id.*

172. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 341 (6th Cir. 2010) (Rogers, J., concurring).

173. *Id.* at 341-42.

refute it. The court developed a new standard of student speech in *Defoe*, the “racially hostile and contemptuous” standard.¹⁷⁴ However, this new standard was never put to a test in the district court. The plaintiff was not given the opportunity to present evidence to show that wearing the Confederate flag was not racially hostile, nor did the school board have to provide any evidence to show that the flag met this standard. The Sixth Circuit not only created a new test, but decided without any showing by either party that the Confederate flag met their new test. This decision was a clear abuse of discretion on the part of the court and thus was error.

D. The Sixth Circuit Left the Terms “Racially Hostile and Contemptuous” Undefined

Finally, the Sixth Circuit erred by creating a standard without defining its terms. The court refused to define the terms “racially hostile and contemptuous,”¹⁷⁵ leaving future courts to try and figure out just what the phrase means. As Justice Boggs stated in his dissent of the denial of rehearing en banc, race can be defined as broadly or as narrowly as a court wants.¹⁷⁶ Justice Boggs postured as to whether it could include Jews or other religious sects.¹⁷⁷ Perhaps even national origin could be considered racially hostile. There are a great number of things that could potentially be banned in schools, including religious headgear or even the ubiquitous cross jewelry. There is an infinite number of ways this standard could be construed in the future, and the Sixth Circuit’s lack of guidance is a mistake.

Also, by basing the standard on what the school administration believes to thwart the achievement of the school’s core values, the court has effectively given school administrators an easy way to teach this nation’s youth their specific beliefs. If an administration believes that a certain race or religion or even lifestyle is an impediment to the promotion of a school’s education mission and goals, *Defoe* gives them the ability to regulate and prohibit such speech. As a recent ACLU op-ed piece pointed out:

By the court’s reasoning, a school in a liberal community that believes that support for gay rights is an ‘important policy’ will be able to ban anti-gay T-shirts. And a school in a conservative community that teaches

174. *Id.* at 338.

175. *Id.*

176. *Defoe ex rel. Defoe v. Spiva*, 674 F.3d 505, 507 (6th Cir. 2011) (Boggs, J., dissenting).

177. *Id.*

abstinence-only sex education could forbid students from expressing contrary views if the school believes that abstinence is 'important.'¹⁷⁸

Without requiring authorities to show proof of a potential disruption, the Sixth Circuit has effectively given school authorities the means to promote their own social agendas in schools by giving authorities great discretion in determining what is an important policy.

Another issue with an undefined standard is that the only way to determine the parameters of the standard is to go to trial and litigate. It is an established truth that litigating issues is a costly avenue. Especially with the trouble school systems across the country are already having with funding programs such as the arts and extra-curriculars,¹⁷⁹ one wonders how much money that could have been spent on educating children is instead being spent fighting lawsuits, never mind the embarrassment and intimidation the lawsuit could inflict on school officials.¹⁸⁰ With the Sixth Circuit's lack of a definable standard, there appears to be no way to determine outside of the court whether a student's right to wear a Confederate flag, a Che Guevara t-shirt, a black armband, a star of David or cross necklace, or a gay pride t-shirt is protected by the First Amendment.

V. CONCLUSION

In conclusion, the Sixth Circuit incorrectly decided *Defoe ex rel. Defoe v. Spiva* for a multitude of reasons. The Court acted outside its discretion by ignoring previous Sixth Circuit precedent and direct statements of the Supreme Court regarding the applicability of the *Morse* exception. Furthermore, the court erred by not remanding the case to the lower court. The Sixth Circuit should have given the plaintiff the opportunity to present facts to support the new standard developed at the appellate level and should have required the defendant to meet the burden of showing that the contested speech met the new standard. Neither of these events occurred, and the court took it upon itself to determine from the facts available that the standard had been met. This action was unfair

178. Hedy Weinberg & Catherine Crump, *Court Rulings Unreasonably Silence Student Speech*, KNOX NEWS (Dec. 26, 2010), <http://www.knoxnews.com/news/2010/dec/26/court-rulings-unreasonably-silence-student/>.

179. See generally Kimberly Hefling, *Schools Fear Worst Budget Cuts Ahead*, HIGHBEAM (Oct. 24, 2011), <http://www.highbeam.com/doc/1A1-f29d65254a7c44ff8344f479b82ddf5f.html>; Jodi Weigand, *Pittsburgh Public Schools Budget Cuts Threaten Private Lessons at CAPA*, PITTSBURGH TRIB.-REVIEW (Oct. 27, 2011), http://triblive.com/x/pittsburghtrib/news/s_764045.html#axzz2IMcjJaFn; Niko Kyriakou, *Redwood City School District Focuses on Budget Cuts, Achievement Gap*, S.F. EXAMINER (Nov. 5, 2011), <http://www.sfexaminer.com/local/peninsula/2011/11/redwood-city-school-district-focuses-budget-cuts-achievement-gap>.

180. David W. Lee, *Speaking Up: The Unintended Costs of Free Speech in Public Schools* by Anne Proffitt Dupre, FED. LAW., Jan. 2010, at 73, 73-74 (book review).

and clearly showed a bias towards the speech in question, the Confederate flag. Finally, the court erred by not defining the standard. The standard as written is too broad and can be applied to ban a large amount of speech in schools that administrators disagree with.

Notwithstanding one's thoughts concerning the Confederate flag, the right to free speech needs to be protected regardless of what the content of the speech is or what it stands for. The Sixth Circuit's decision greatly diminishes this right in favor of removing a possibly offensive signal from our schools. As Justice Holmes once said, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."¹⁸¹

181. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

