

NOTE

DID STUDENT SPEECH GET THROWN OUT WITH THE BANNER? READING “BONG HITS 4 JESUS” NARROWLY TO UPHOLD IMPORTANT CONSTITUTIONAL PROTECTIONS FOR STUDENTS*

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I. INTRODUCTION

Paramount and MTV films are currently producing a film about “a young man standing up for his rights” after he was suspended for flying a fourteen-foot banner bearing the phrase “Bong Hits 4 Jesus” outside his school.¹ The movie is based on the

1. Jeff Giles, *Paramount, MTV Doing Bong Hits 4 Jesus*, ROTTEN TOMATOES, Oct. 22, 2007, http://www.rottentomatoes.com/m/jesus_loves_me_lets_sing_about_doing_your_best_in_school/news/1682499/. The film’s producers compare it to the classic *Mr. Smith*

real life story of Joseph Frederick, who made national headlines when he challenged his suspension all the way to the Supreme Court.² It is the story of a high school senior who, in an effort to show he would not "bow down in submission before an authority," created a banner with a large piece of paper, three dollars worth of duct tape, and a peculiar phrase that would become the subject of a Supreme Court case.³ The strange words and nature of the banner led to the most important student speech case heard by the Supreme Court since 1969.⁴ The media attention surrounding the case, *Morse v. Frederick*,⁵ both before and after the Court's decision, demonstrates the importance of the case and its potential impact on the free speech rights of students in public schools across the nation.⁶

The Court's decision in *Morse* demonstrates the tension between students' valuable free speech rights and schools' legitimate interests in maintaining an effective learning environment, and the Court's efforts to reach a workable balance between the two.⁷ The Court held that Principal Morse did not violate Joseph Frederick's First Amendment rights when she suspended him for displaying his banner.⁸ In reaching its holding, the Court balanced the free speech rights of the student with the school administrator's effort to ensure school order by

Goes to Washington. Id.

2. *Id.*; see, e.g., Linda Greenhouse, *Court Hears Whether a Drug Statement Is Protected Free Speech for Students*, N.Y. TIMES, Mar. 20, 2007, at A16 (describing the interactions between the attorneys and the Supreme Court Justices during oral arguments).

3. See Robert Barnes, *Justices to Hear Landmark Free-Speech Case*, WASH. POST, Mar. 13, 2007, at A3 (quoting an online post by Joseph Frederick).

4. *Id.* ("The most important student free-speech conflict to reach the Supreme Court since the height of the Vietnam War hinges on a somewhat absurd, vaguely offensive, mostly nonsensical message of protest.").

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

6. See, e.g., Bill Mears, *"Bong Hits 4 Jesus" Case Limits Student Rights*, CNN.COM, June 26, 2007, <http://www.cnn.com/2007/LAW/06/25/free.speech/index.html> [hereinafter Mears, *Student Rights*] (discussing implications of the Court's ruling); Bill Mears, *High Court Hears "Bong Hits 4 Jesus" Case*, CNN.COM, Mar. 19, 2007, <http://www.cnn.com/2007/LAW/03/19/free.speech/index.html> (covering the oral arguments in "Bong Hits 4 Jesus").

7. See Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 50 (1996) ("The lack of order and discipline in many schools makes it nearly impossible for students to receive a serious education."); Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 525-29 (1997) (discussing the values of free speech for students and the circumstances in which educators can limit that freedom); see also Thomas R. Hensley, *Preface to THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY*, at xi (Thomas R. Hensley ed., 2001) ("Freedom of expression and order are both important values . . . in the United States.").

8. *Morse*, 127 S. Ct. at 2625.

narrowly limiting its holding to only cover speech that “can reasonably be regarded as encouraging illegal drug use.”⁹

This Note argues that the Court ruled correctly in *Morse* and shows that, contrary to arguments that the decision could justify “[v]irtually all restrictive speech policies,”¹⁰ it actually “threaten[s] student rights less than some initially feared.”¹¹ The Court fit its holding into the existing principles governing student free speech jurisprudence, and also specifically emphasized the narrowness of its new rule.¹² In reconciling the majority and concurring opinions, this Note argues that by ruling narrowly on the facts in issue, the Court enabled school officials to take appropriate steps in maintaining order at a school event, but did so without sacrificing important student speech protections. *Morse* should not be applied to give school officials greater latitude in censoring student speech. Instead, when students engage in speech at the core of First Amendment protection, such as political and religious speech, school officials should be held to the highest of burdens.

Part II of this Note discusses the events that led to the litigation and follows the case’s path through the court system. Part III analyzes the Court’s reasoning in detail, beginning with an examination in Part III.A of the existing state of the law governing student free speech at the time of *Morse*. Part III.B argues that the Court fit its holding within the principles established by previous Supreme Court decisions and created only a limited exception in which a school can prohibit student speech that promotes illegal drug use. Parts III.C and III.D identify the types of speech a school administrator may constitutionally prohibit and argue that political and religious speech, as well as speech on controversial social issues, are shielded by a standard that affords the least deference to school administrators. Finally, Part III.E examines a recent lower court’s decision to provide a model of how *Morse* should be applied to future student speech issues. Part IV concludes this Note.

9. *Id.* at 2622.

10. See Posting of David French to Phi Beta Cons, <http://phibetacons.nationalreview.com/post/?q=ZDUxMjJkZWVmZTBhMjFkYjIwZWU2ZGZiZGRiMjdIM2Q=> (June 25, 2007, 12:19 EST); see also Press Release, Am. Civil Liberties Union, ACLU Slams Supreme Court Decision in Student Free Speech Case (June 25, 2007), available at <http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html>.

11. Douglas Lee, *Lower Court Takes Narrow View of “Bong Hits” Ruling*, FIRST AMENDMENT CENTER, July 18, 2007, <http://www.fac.org/commentary.aspx?id=18814>.

12. See *Morse*, 127 S. Ct. at 2622, 2636 (explaining that the holding goes no further than to restrict speech that can reasonably be viewed as promoting illegal drug use).

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II. CASE RECITATION

A. *Factual History*

On January 24, 2002, when the Olympic Torch Relay passed through Juneau, Alaska, on its way to the Winter Olympics in Salt Lake City, Utah, Joseph Frederick was a senior at Juneau-Douglas High School (JDHS). Deborah Morse, the principal of JDHS, allowed the students to leave class, as “an approved social event or class trip,” to watch the torch relay as it passed the school.¹³ JDHS teachers and administrators observed the students during the event.¹⁴

Frederick, arriving late that day, joined his friends across the street from the school to observe the event. When the Olympic torch and television camera crews passed Frederick and his friends, they unfurled a fourteen-foot banner with the phrase: “BONG HiTS 4 JESUS.”¹⁵ The group directed the banner toward the school and the students standing across the street.¹⁶

Principal Morse and the other students could easily read the banner from the other side of the street, where they were watching the event. Morse immediately instructed the students to take down the banner. All students except Frederick complied with this demand.¹⁷ Morse subsequently confiscated the banner and suspended Frederick for ten days, relying on Juneau School Board Policy No. 5520, which specifically prohibited any public expression or assembly that “advocates the use of substances that are illegal to minors.”¹⁸

Frederick appealed his suspension to the school district administration, but the superintendent of the Juneau School District upheld the suspension, though he limited it to the eight days already served. The superintendent based his decision on the fact that Frederick’s speech advocated the use of illegal drugs, not on the fact that Morse disagreed with the message on Frederick’s banner.¹⁹ The superintendent also relied on the standard established by the Supreme Court in *Bethel School*

13. *Id.* at 2622.

14. *Id.* As the students waited for the torch to arrive, several became rowdy, throwing plastic bottles and snowballs. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 2622–23; *see also* Juneau Sch. Dist. Bd. of Ed., Policy No. 5520: Disruption & Demonstration (Feb. 17, 1998), *available at* http://www.jsd.k12.ak.us/newdistrict/departments/boardofeducation/policymanual/_displayPolicy.php?recid=106.

19. *Morse*, 127 S. Ct. at 2623.

District No. 403 v. Fraser, which permits restriction of speech that “intrudes upon the work of the schools,” to support the validity of the principal’s actions.²⁰

B. Procedural History

The U.S. District Court for the District of Alaska ruled in favor of the principal’s decision to suspend Frederick, relying, as the superintendent had, on the standard put forth in *Fraser*.²¹ The court not only held that Morse had the right to restrict the message found on Frederick’s banner, but also suggested she may have had an obligation to restrict it at a school-sanctioned event.²² The court rejected Frederick’s argument that his speech was protected by the First Amendment.²³

The U.S. Court of Appeals for the Ninth Circuit reversed the district court, holding that the school district could not prohibit Frederick’s speech because doing so violated his First Amendment rights.²⁴ The Ninth Circuit disagreed with the district court’s analysis of Frederick’s speech under the standard established in the *Fraser* decision, holding instead that the case clearly fell under *Tinker*.²⁵ Despite acknowledging that Frederick acted during a school-authorized activity and that the message on his banner expressed a “positive sentiment about marijuana use,” the court held that Frederick’s First Amendment rights were violated because the school punished him without showing

20. *Id.*; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (upholding a school’s discipline of a student for the use of lewd language at a school event); *infra* Part III.A.2 (discussing the *Fraser* decision).

21. *Morse*, 127 S. Ct. at 2623. The district court found that Principal Morse reasonably interpreted the banner as promoting illegal drug use and granted summary judgment for the school because that message violated the school district’s drug policy. *Frederick v. Morse*, No. J 02-008 CV, 2003 U.S. Dist. LEXIS 27270, at *21–22, *25 (D. Alaska May 27, 2003). The court ruled that Frederick’s First Amendment rights were not violated and therefore extended qualified immunity to the school board. *Id.* at *9–10.

22. *Frederick*, 2003 U.S. Dist. LEXIS 27270, at *20.

23. *Id.* at *7–10.

24. *Frederick v. Morse*, 439 F.3d 1114, 1124–25 (9th Cir. 2006) (holding that because Morse’s conduct violated a clearly established constitutional right, she was not entitled to qualified immunity under *Harlow v. Fitzgerald*); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing the standard for determining if an official is entitled to qualified immunity).

25. *Frederick*, 439 F.3d at 1117–18 (stating that instead of the analysis used by the district court, “the question comes down to whether a school may . . . punish and censor nondisruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school. The answer under controlling, long-existing precedent is plainly ‘No.’”); see also *infra* Part III.A.1 (discussing *Tinker v. Des Moines*).

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that his speech would give rise to a “risk of substantial disruption.”²⁶

The Supreme Court granted certiorari on the case to consider two issues: (1) whether Frederick had a First Amendment right to display the banner at the event; and (2) “if so, whether that right was so clearly established that the principal [could] be held liable for damages.”²⁷ A plurality decision by the Supreme Court reversed the Ninth Circuit, holding that Frederick’s message was not protected under the First Amendment. The Court found no need to reach the second question presented on certiorari.²⁸

C. *The Supreme Court’s Reasoning*

1. *Majority Opinion: Frederick’s Speech Is Not Protected by the First Amendment.* The Court’s opinion, authored by Chief Justice Roberts, affirmed both lower courts in finding that the facts of the case fit into the “school speech” line of cases.²⁹

The Court first addressed the message found on Frederick’s banner, admitting that the message itself was “cryptic” and subject to multiple interpretations.³⁰ The Court, however, focused on the reasonableness of Principal Morse’s interpretation of the banner as “promoting illegal drug use.”³¹ Citing both the plain meaning of “bong hits” and the “paucity of alternative meanings the message might bear,” the Court expressly agreed with Morse’s interpretation of the banner as promoting drug speech.³² The majority dismissed the possible alternative meanings of the banner’s message, which were raised in the dissenting opinion.³³

26. *Frederick*, 439 F.3d at 1118, 1121–23.

27. *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007).

28. *Id.*

29. *Id.* (citing the following facts in support of that finding: the event occurred during normal school hours; the school’s principal sanctioned the event; students and teachers attended the event; and the school’s band and cheerleading squad performed during the event). The Court thus avoided the difficult task of determining the appropriate boundaries for the application of school speech precedent. *See, e.g.*, *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (declining to apply student speech precedent to a violent drawing completed by a student at home and then inadvertently taken to school by that student’s brother).

30. *Morse*, 127 S. Ct. at 2624.

31. *Id.* at 2624–25. Morse explained that she thought the bong hit reference “would be widely understood by high school students and others as referring to smoking marijuana” and that displaying the banner would be construed by students, parents, and district personnel as promoting drug speech, in violation of district policy. *Id.*

32. *Id.* at 2625.

33. *Id.* (discussing the various descriptions employed by the dissent, including “ambiguous,” “nonsense,” and “quixotic”). The Court stated that gibberish is not the *only*

The Court also dismissed the suggestion that the words were meaningless—designed only to get Frederick on television.³⁴ Instead, the Court found this to be a “description of Frederick’s *motive* for displaying the banner”—a separate issue from the interpretation of the *content* of the banner’s message.³⁵ The Court also dismissed the dissent’s suggestion that the banner could be an example of protected political speech, addressing the issue of drug legalization, because not even Frederick himself made this argument. Once the Court made these findings, it stated that the entire issue in the case was whether the First Amendment allows for the restriction of such student speech by a school administrator.³⁶

In holding that a school official can restrict such speech, Chief Justice Roberts’s opinion first analyzed established standards for student speech in three prior First Amendment cases.³⁷ The Court then examined several Fourth Amendment cases in which it had drawn “on the principles applied in our student speech cases” and in which it had held that the Fourth Amendment applies to students, but in a manner that is appropriate for children in school.³⁸ In examining these Fourth Amendment cases, the Court reaffirmed that the constitutional rights found in the First, Fourth, and Fourteenth Amendments are “different in public school than elsewhere.”³⁹ From these same cases, the Court identified the “important—indeed, perhaps compelling” interest of schools in deterring students from using illegal drugs.⁴⁰

To the Court, the “special characteristics of the school environment” and the strong government interest in halting the

possible meaning of the message and that “dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.” *Id.*

34. *Id.* at 2624 (quoting Frederick himself as saying “the words were just nonsense meant to attract television cameras” (citing *Frederick v. Morse*, 439 F.3d 1114, 1117–18 (9th Cir. 2006))).

35. *Id.* at 2624–25.

36. *Id.* at 2625.

37. *Id.* at 2625–27; see *infra* Part III.A (discussing the principles established in *Tinker*, *Fraser*, and *Hazelwood*); *infra* Part III.B.2 (discussing the Court’s comparison of the facts in these cases to the facts presented by *Morse*).

38. *Morse*, 127 S. Ct. at 2627 (“[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.” (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995))).

39. *Id.* at 2627–28 (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829–30 (2002)); see also *Vernonia*, 515 U.S. at 656 (observing that constitutional rights present different issues in schools than other locations).

40. *Morse*, 127 S. Ct. at 2628 (quoting *Vernonia*, 515 U.S. at 661); see *infra* Part III.B.3 (discussing the state’s interest in drug prevention in schools).

use of illegal drugs by schoolchildren, as reflected in the JDHS policy, “allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁴¹ The Court therefore held that the First Amendment does not require a school to permit speech that may reasonably be construed to promote the use of illegal drugs.⁴²

2. *Justice Thomas’s Concurrence: Students Have No Free Speech Rights.*⁴³ Justice Thomas joined the majority in deciding that a public school may prohibit speech that advocates illegal drug use.⁴⁴ He wrote separately, however, to express his view that the “standard set forth in *Tinker v. Des Moines Independent Community School District* is without basis in the Constitution.”⁴⁵ He joined in the Court’s ruling because it eroded the *Tinker* standard in the realm of student speech, but stated that the better method of reaching this result would be to overrule *Tinker* altogether. In Justice Thomas’s view, overruling *Tinker* would be preferable to merely “adding to the patchwork of exceptions to the *Tinker* standard” the Court had already developed.⁴⁶

Justice Thomas’s analysis consisted of two prongs: a historical analysis of the rights that nineteenth century courts afforded students and a critique of *Tinker’s* application and inconsistency in practice.⁴⁷ In his view, the “history of public

41. *Morse*, 127 S. Ct. at 2629.

42. *Id.*

43. A full analysis of Justice Thomas’s concurring opinion is beyond the scope of this Note. His opinion alone is worth an entire article. For example, did the Founders truly intend for the government to compel children to attend a government school and then afford those children no right to disagree with government policy in a nondisruptive manner? *See id.* at 2630 (Thomas, J., concurring) (opining that, as originally understood, the First Amendment does not extend to student speech in public schools). Did Justice Thomas manipulate originalism to reach a desired political result—that children should be seen and not heard? *See id.* at 2631 (“[I]n the earliest public schools, teachers taught, and students listened.”). How does this opinion reflect Justice Thomas’s First Amendment jurisprudence? *See generally* William D. Araiza, *Morse v. Frederick: History, Policy, and Temptation*, FIRST AMENDMENT CENTER, Oct. 8, 2007, <http://www.firstamendmentcenter.org/analysis.aspx?id=19022> (discussing Justice Thomas’s “discomfort with the balancing and line-drawing that marks much of the Court’s contemporary free-speech jurisprudence”); Thomas C. Goldstein, *Justice Thomas: Constitutional “Stare Indecisus,”* FIRST AMENDMENT CENTER, Oct. 8, 2007, <http://www.firstamendmentcenter.org/analysis.aspx?id=19133> (discussing the three features of Justice Thomas’s jurisprudence—constitutional candor, a willingness to rethink profound constitutional questions, and an unwillingness to defer to precedent—and how they were displayed in *Morse*).

44. *Morse*, 127 S. Ct. at 2629–30 (Thomas, J., concurring).

45. *Id.* (internal citation omitted).

46. *Id.* at 2636.

47. *Id.* at 2630–36; *see* Araiza, *supra* note 43 (“[I]n *Morse* Thomas combines his historical analysis with a critique both of *Tinker’s* vagueness and intrusiveness on school administration, and of the Court’s subsequent application of *Tinker*, which he derides as

education suggests that the First Amendment . . . does not protect student speech in public schools” and that “early public schools were not places for freewheeling debates or exploration of competing ideas.”⁴⁸ Justice Thomas supported this interpretation by invoking the legal doctrine of *in loco parentis* and a series of cases from the nineteenth century upholding school administrators’ authority to regulate student speech, as well as the appropriateness of their punishments.⁴⁹

In his view, *Tinker* extended student speech rights far beyond their traditional bounds.⁵⁰ As a result, the Court was subsequently forced to scale back *Tinker* through a number of exceptions, as it became clear that strict adherence to its standard would lead to an impermissible extension of student free speech rights.⁵¹ Justice Thomas viewed the Court’s decision in *Morse* as creating yet another exception to *Tinker*.⁵² He did not see the need for the continued use of balancing tests, and instead would simply overturn *Tinker*’s standard as unconstitutional and afford no protection to Frederick’s actions.⁵³

3. Justice Alito’s Concurrence: An Important Limitation.

Justice Alito, joined by Justice Kennedy, also sided with Principal Morse, but expressly conditioned his concurrence on the understanding that the Court’s opinion went “no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use” and provided “no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social

unprincipled.”)

48. *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

49. *Id.* at 2630–33; see also Araiza, *supra* note 43 (criticizing Thomas’s “absolutist claims in *Morse*” regarding nineteenth century case law); Eric F. Citron, *Flexibility and the First Amendment*, FIRST AMENDMENT CENTER, Oct. 8, 2007, <http://www.firstamendmentcenter.org/analysis.aspx?id=19149> (summarizing Justice Thomas’s analysis of public education in the 1800’s as supporting a view of “the school [as] a zone of closed-universe learning and [a] teacher-dominated discipline, not a zone of open dialogue and student-oriented debate”).

50. *Morse*, 127 S. Ct. at 2633 (Thomas, J., concurring).

51. See *id.* at 2634 (“[O]ur jurisprudence now says that students have a right to speak in schools except when they don’t—a standard continuously developed through litigation against local schools and their administrators.”).

52. *Id.*; see also Citron, *supra* note 49 (“Justice Thomas’ problem with *Tinker* and its progeny is not only that they insert the judiciary as a protector of First Amendment rights where the school authorities should reign supreme, but also the simple fact that they represent too-flexible approaches to a problem with a potentially brighter-line solution.”).

53. *Morse*, 127 S. Ct. at 2634, 2636 (Thomas, J., concurring) (propounding that petitioners “could prevail for a much simpler reason” and that extending constitutional protection to Frederick’s expression would be “farcical”).

issue."⁵⁴ Justice Alito's concurrence stressed, in plain and direct language, the narrow application of the Court's opinion.⁵⁵ Because he saw speech advocating illegal drug use as a serious threat to student safety, Justice Alito sanctioned the restriction of such speech.⁵⁶

4. *Justice Breyer's Dissent: No Reason to Evaluate the Case Under the First Amendment.* Justice Breyer wrote an opinion concurring in the judgment in part and dissenting in part. Specifically, he concurred in barring Frederick's claim for monetary damages, but would have chosen instead to extend qualified immunity to the principal in order to reach that result.⁵⁷

Justice Breyer would have avoided the discussion of the First Amendment in the resolution of the case. He found both the position of the majority and that of Justice Stevens on the First Amendment to be unacceptable.⁵⁸ He feared the majority's holding would not be limited, as it claimed to be, and instead would extend too far in its restriction of student speech.⁵⁹ At the same time, he also feared that Justice Stevens's approach could hinder the ability of schools to reasonably maintain discipline.⁶⁰

Justice Breyer proposed a different solution, under which he would have extended qualified immunity to Principal Morse due to the fact that she did not "clearly violate the law during her confrontation with the student."⁶¹ His opinion then fit the facts of the case into the established standards for qualified immunity.⁶²

54. *Id.* at 2636 (Alito, J., concurring). For example, Justice Alito clarified that he would not restrict speech that could be seen as commenting on social issues such as the war on drugs or the legalization of marijuana for medical uses. *Id.*

55. *Id.* at 2637–38 (examining the four areas in which a school can regulate student speech and rejecting the "broad argument advanced by petitioners . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'" as well as the *in loco parentis* rationale for restricting speech).

56. *Id.* at 2638.

57. *Id.* (Breyer, J., concurring in the judgment in part and dissenting in part).

58. *Id.* Breyer's analysis of the majority and dissenting positions highlights the tension between student free speech rights and the need to maintain school order. *See id.* at 2638–39.

59. *Id.* at 2639. For example, Justice Breyer noted the difficulty in determining what speech would constitute advocacy of illegal drug use versus a social argument for the legalization of drugs. *Id.*

60. *Id.*

61. *Id.* at 2640.

62. *Id.* at 2640–41 (arguing that the case could be decided on qualified immunity grounds with "relative ease," particularly because the Ninth Circuit and the majority of the Court disagreed on the constitutionality of Morse's actions, indicating that the law was not "clearly established").

5. *Justice Stevens's Dissent: Punishment for Frederick's Speech Is Unjustified.* Justice Stevens, joined by Justices Souter and Ginsburg, agreed that Principal Morse should not be held liable for pulling down the banner under the doctrine of qualified immunity, but did not view the school's interest as sufficiently compelling to justify disciplining Frederick for his ambiguous statement.⁶³ In Justice Stevens's view, the "First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students;" he found that Frederick's "nonsense banner [did] neither."⁶⁴ Justice Stevens identified two core principles from the *Tinker* decision, which he believed the Court's decision "trivialize[d]."⁶⁵ First, "censorship based on the content of speech . . . is subject to the most rigorous burden of justification."⁶⁶ Second, punishing the advocacy of illegal conduct is only constitutionally acceptable when such advocacy is likely to produce the type of harm that the government is seeking to avoid.⁶⁷ By finding the school's interest in protecting children from illegal drugs to be strong enough to support a prohibition against all speech in a school setting that promotes drug use, the Court, in Justice Stevens's view, rejected these two principles.⁶⁸

Even if the school's interests were sufficiently compelling to prohibit such speech, Justice Stevens still would have found Frederick's message to be so obscure and meaningless that it could not be found to expressly advocate drug use.⁶⁹ Justice Stevens argued that the case should be analyzed under *Tinker*, and therefore, the speech should only be punishable if some likely connection between the banner and the choice to use marijuana by students could be shown.⁷⁰ Justice Stevens objected to the majority's decision because it failed to engage in a proper

63. *Id.* at 2643 (Stevens, J., dissenting) (explaining that the First Amendment demands "much more" and expressing the concern that the focus on the public's perception of Frederick's conduct would have justified Principal Morse's decision to remove the banner, "even if it had merely proclaimed 'Glaciers Melt!'").

64. *Id.* at 2644.

65. *Id.* at 2644–45.

66. *Id.* at 2644.

67. *Id.* at 2645.

68. *Id.* at 2646 ("Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.")

69. *Id.* at 2646–47. Nor did he find evidence that the banner infringed on anyone's rights or interfered with the school's function. *Id.* at 2647.

70. *Id.*; see *infra* Part III.A.1 (discussing the *Tinker* standard in detail).

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Tinker analysis and instead deferred to the judgment of a third party, in this case the principal.⁷¹

III. ANALYSIS

A. *Student Free Speech Jurisprudence*

The Court carefully fit its holding in *Morse* within the existing principles of students' rights to speech and expression in school as established in prior case law. A survey of these important cases provides the necessary context for understanding *Morse*.

1. *Tinker v. Des Moines Independent Community School District*. The Supreme Court took a significant step toward defining the contours of the free speech rights of students in 1969 with the case of *Tinker v. Des Moines Independent Community School District*.⁷² The *Tinker* decision is the “most important Supreme Court case in history protecting the constitutional rights of students.”⁷³

In December 1965, a group of students and adults in Des Moines decided to wear black armbands as a public display of their objections to the Vietnam War. The principals of several Des Moines schools learned of this plan and developed a policy that would allow them to suspend students who did not remove their armbands upon request. The students wore their armbands to school and refused to remove them, resulting in their suspension. The students then sued the school district, alleging that the suspensions were unconstitutional.⁷⁴

Tinker is best known for the statement: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse

71. *Morse*, 127 S. Ct. at 2647 (Stevens, J., dissenting) (stating that instead of holding the school to *Tinker*'s standard, “the Court punts”).

72. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); see also Justice Mary Muehlen Maring, “*Children Should Be Seen and Not Heard*: Do Children Shed Their Right to Free Speech at the Schoolhouse Gate?”, 74 N.D. L. REV. 679, 679 (1998) (“[T]he modern era of free speech in the public school context was ushered in with *Tinker* . . .”).

73. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 527 (2000); see also Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate—Students' Rights Thirty Years After Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 445, 454 (2000) (opining that the Supreme Court's decision in *Tinker* represents “the high-water mark of the Court's decisions upholding rights in our nation's schools”).

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

gate.”⁷⁵ After declaring that students do have such rights, the Court attempted to craft a rule for “the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”⁷⁶ The Court concluded that school administrators could only restrict or suppress student speech if they could reasonably conclude that the speech would “materially and substantially disrupt the work and discipline of the school.”⁷⁷

The students in *Tinker* had attempted to engage in political speech in order to set an example for other students and encourage them to adopt their views on the Vietnam War. The Court found no disturbances, disorders, or interferences with school activities as a result of the students’ expression.⁷⁸ The only interest the Court could identify as a justification for the school’s actions was the school’s “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” and a hope to avoid any conflict that might result from the students expressing such an idea.⁷⁹ The Court held that such an interest was not sufficient to justify silencing an expression of opinion that was in no way disruptive; therefore, it held that the school violated the students’ First Amendment rights when it suspended the students for refusing to remove their black armbands.⁸⁰

Tinker, therefore, provides a strong safeguard under the First Amendment for student speech in a school setting.⁸¹ Under *Tinker*, a student’s expressive activity or speech is protected as a First Amendment right if it does not materially disrupt a school activity, but school authorities maintain “broad authority to

75. *Id.* at 506; Chemerinsky, *supra* note 73, at 527.

76. *Tinker*, 393 U.S. at 507; *see also* NELDA H. CAMBRON-MCCABE, MARTHA M. MCCARTHY & STEPHEN B. THOMAS, PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS 118 (5th ed. 2004) (“The Supreme Court emphasized that educators have the authority and duty to maintain discipline in schools, but they must consider students’ constitutional rights as they exert control.”); Maring, *supra* note 72, at 680 (addressing the competing interests of students’ free speech rights and school administrators’ duty to maintain order).

77. *Tinker*, 393 U.S. at 513.

78. *Id.* at 514.

79. *Id.* at 509–10.

80. *Id.* at 508–09, 514.

81. *See* Chemerinsky, *supra* note 73, at 532 (declaring that the protection of student speech under the First Amendment is a “core theme” of the majority opinion); *see also* CAMBRON-MCCABE ET AL., *supra* note 76, at 118 (noting that *Tinker* allows students to “express opinions on controversial issues in the classroom, cafeteria, playing field, or any other place”).

restore order" when the student's speech or expressive conduct does result in a material and substantial disruption.⁸²

2. Bethel School District Number 403 v. Fraser. In two subsequent cases the Supreme Court, while not overruling the case, declined to follow its *Tinker* rule. After *Tinker*, the Supreme Court next addressed student speech in the 1986 case *Bethel School District Number 403 v. Fraser*.⁸³

Matthew Fraser was a student at Bethel High School when he gave a nomination speech at a school assembly in which he repeatedly referred to the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor."⁸⁴ The school suspended Fraser as a result of his speech, which was found to violate a Bethel High School policy prohibiting "conduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."⁸⁵ Fraser sued the school, alleging that the school's disciplinary actions infringed upon his First Amendment right to freedom of speech.⁸⁶

The Court began its analysis of the issues by reaffirming *Tinker's* pronouncement that "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸⁷ The Court then proceeded to distinguish the political content of the speech at issue in *Tinker* from the "sexual content" of Fraser's speech.⁸⁸ Most importantly, in *Fraser* the Court emphasized the need for judicial deference to educational institutions in the area of determining the appropriateness of

82. Maring, *supra* note 72, at 682; see also Fletcher N. Baldwin, Jr., *The Academies, "Hate Speech" and the Concept of Academic Intellectual Freedom*, 7 U. FLA. J.L. & PUB. POL'Y 41, 61 (1995) ("In *Tinker*, the Court demonstrated that pure political speech that did not interfere with the rights of others received full constitutional protection . . .").

83. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); see also Maring, *supra* note 72, at 682 (calling *Fraser* the "next major post mark in the evolution of student speech" (quoting Richard S. Vacca & H.C. Hudgins, Jr., *Student Speech and the First Amendment: The Courts Operationalize the Notion of Assaultive Speech*, 89 ED. LAW REP. 1, 4 (1994))).

84. *Fraser*, 478 U.S. at 677–78. The responses to the speech from the approximately 600 students in the crowd ranged from hooting and hollering to "graphically simulat[ing] the sexual activities pointedly alluded to in [Fraser]'s speech." *Id.* at 678. Some students appeared "bewildered and embarrassed by the speech." *Id.*

85. *Id.* Fraser's name was also removed from the list of candidates to speak at the school's upcoming graduation. *Id.*

86. *Id.* at 679.

87. *Id.* at 680 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

88. *Id.*

nonpolitical student speech.⁸⁹ In the words of Chief Justice Burger, “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”⁹⁰

The Court took a different approach to its analysis in *Fraser* than it did in *Tinker*—focusing on the *content* of the speech as opposed to the *effects* of the speech. By concentrating on the vulgarity of the speech, rather than its disruptive effect, the Court demonstrated that in certain situations a First Amendment analysis different from *Tinker* may be appropriate.⁹¹ At the very least, the Court’s holding stands for the proposition that the First Amendment does not bar a school from prohibiting vulgar or lewd speech at a school activity because such speech is “wholly inconsistent with the ‘fundamental values’ of public school education.”⁹²

3. *Hazelwood School District v. Kuhlmeier*. The Supreme Court next addressed the right of student speech in *Hazelwood School District v. Kuhlmeier*.⁹³ The *Spectrum* was a newspaper written and edited by the Journalism II class at Hazelwood East High School. The newspaper was funded in part by the district board of education.⁹⁴ The newspaper planned to publish, among other things, one article dealing with the experiences of students’ pregnancies and another covering the impact of divorce on students. The Journalism II instructor, a member of the school’s faculty, submitted the articles to the school’s principal for approval, according to the customary practice at the school.⁹⁵ Despite the instructor’s approval of the articles on pregnancy and divorce, the principal decided to publish the paper without them.

89. *Id.* at 683–85; see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1150–52 (3d ed. 2006) (discussing the *Fraser* opinion in the context of First Amendment free speech rights of students in schools); see also CAMBRON-MCCABE ET AL., *supra* note 76, at 109 (“[T]he Supreme Court granted school authorities considerable latitude in censoring lewd, vulgar, and indecent student expression.”).

90. *Fraser*, 478 U.S. at 683 (“[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”); see also Kelly Frels, *Balancing Students’ Rights and Schools’ Responsibilities*, 37 HOUS. L. REV. 117, 122 (2000) (“*Fraser* allowed school officials to regain control of school sponsored assemblies and functions.”).

91. See Maring, *supra* note 72, at 685.

92. *Fraser*, 478 U.S. at 685–86; see also CAMBRON-MCCABE ET AL., *supra* note 76, at 110 (“The majority recognized that an important objective of public schools is the inculcation of fundamental values of civility . . .”).

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

94. *Id.* at 262.

95. *Id.* at 263.

The students sued the school district, alleging that their First Amendment rights had been violated.⁹⁶

The Court began by quoting *Tinker* for its proposition that students maintain their constitutional rights in school and then proceeded to distinguish the situation in *Hazelwood* from that in *Tinker*.⁹⁷ The Court found that schools are entitled to a greater degree of control over speech that “may fairly be characterized as part of the school curriculum,” than they would have over student expression that simply “happens to occur on the school premises.”⁹⁸ Under the standard put forth by the Court, a school’s control extends over student expression in the context of any activity that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁹⁹ Thus, the Court did not extend First Amendment protections to the students’ newspaper articles because the school promoted the newspaper.¹⁰⁰ In its holding, the Court left no doubt that it did not apply the *Tinker* standard, and it allowed the school to have editorial control over “the style and content of student speech” in the context of school-sponsored student expression, where the school’s actions “are reasonably related to legitimate pedagogical concerns.”¹⁰¹

The *Hazelwood* decision, by extending even greater authority to the schools, joined with *Fraser* in granting wide authority to school officials to restrict speech further than the *Tinker* standard would support.¹⁰²

96. *Id.* at 264.

97. *Id.* at 266, 270–71 (“Students . . . do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))); *see also* SUSAN D. LOONEY, EDUCATION AND THE LEGAL SYSTEM: A GUIDE TO UNDERSTANDING THE LAW 123 (2004) (noting the Court distinguished *Hazelwood*’s focus on “educational authorities’ restrictions on school-sponsored publications” from *Tinker*’s focus on “the issue of restricting a student’s personal expression”).

98. *Hazelwood*, 484 U.S. at 271. The Court expressly extended the definition of activities characterized as part of the school’s curriculum beyond the traditional classroom setting. *Id.* As long as the activity is “supervised by faculty members and is designed to impart particular knowledge or skills to student participants and audiences,” it can be considered part of the school’s curriculum. *Id.*

99. *Id.*

100. *Id.* at 271–73.

101. *Id.* at 272–73 (“[W]e conclude that the standard articulated in *Tinker* . . . need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

102. *See* Maring, *supra* note 72, at 688 (“The *Hazelwood* majority gave broad authority to school principals to look away from the results or effect of speech”); *see also* CHEMERINSKY, *supra* note 89, at 1152 (“The Court went even further in its deference to school authorities in [*Hazelwood*].”); Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 691–92 (1988) (arguing that

4. *Student Speech and Expression Under Tinker, Fraser, and Hazelwood.* Though *Tinker* was never expressly overruled, the Supreme Court chose not to follow the *Tinker* standard in the two subsequent student speech cases it heard prior to *Morse*.¹⁰³ In both of these cases, the Court examined situations involving official school functions, specifically the school assembly and school newspaper, in which it could appear as though the school in fact sponsored the speech, and thus, school officials should be afforded greater control. This heightened degree of control afforded to school officials applies only to official school activities and does not extend to private student speech in noncurricular areas.¹⁰⁴ As summarized by Justice Mary Muehlen Maring in 1998, school officials, after these cases, could “limit speech and expression that: (1) materially disrupted the educational environment; (2) was vulgar or offensive; or (3) carried the school’s official imprimatur.”¹⁰⁵

B. Free Speech Jurisprudence Applied in the Morse Decision

1. *The Banner Is Student Speech.* The Court found that Frederick’s action of unfurling the banner at the Olympic torch rally was clearly student speech.¹⁰⁶ The majority opinion also held that the banner could be reasonably interpreted as promoting

“from the perspective of *Hazelwood*, *Fraser* was an important transitional case that signaled the Court’s willingness to read *Tinker* more narrowly than many lower courts had read it,” which is “a desire that *Hazelwood* confirms with a concrete and relatively broad new rule”).

103. See Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN’S L. REV. 365, 366 (1995) (“Although these [later decisions] have not specifically overruled *Tinker*, *Tinker*’s progeny have greatly altered the holding [it] set forth . . .”).

104. See Chemerinsky, *supra* note 73, at 542 (explaining what remains of the *Tinker* standard after *Fraser* and *Hazelwood*).

105. Maring, *supra* note 72, at 688–89. See generally CHARLES C. HAYNES ET AL., *THE FIRST AMENDMENT IN SCHOOLS* 59–65 (2003) (identifying and explaining the “three tests” developed by the Supreme Court from the landmark student speech cases: *Tinker*, *Fraser*, and *Hazelwood*). Justice Alito, while sitting on the Third Circuit Court of Appeals, provided a good summary of the types of speech these cases allow schools to prohibit:

To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school’s own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*’s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001).

106. *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007); see also *supra* Part II.C.1 (examining the Supreme Court’s analysis in *Morse*).

illegal drug use.¹⁰⁷ Thus, as stated by Chief Justice Roberts, the question was whether the First Amendment and its guarantee of freedom of speech permitted Principal Morse’s actions.¹⁰⁸ The Court relied on the principles of existing student speech cases to answer this question.

2. *Comparison of Morse Facts to Previous Student Speech Cases.*

a. *Tinker v. Des Moines*. The Court started by discussing the *Tinker* standard. The Court asserted that the “facts of *Tinker* are quite stark” and explained that the students in that case were engaging in political speech, which is “at the core of what the First Amendment is designed to protect.”¹⁰⁹ To the Court in *Tinker*, the mere desire to avoid the discomfort of an unpopular view or the fear of controversy was not enough to silence a political viewpoint.¹¹⁰

The *Morse* Court did not overrule *Tinker*, but instead distinguished the facts from those at issue in *Tinker*, emphasizing that the “concern to prevent student drug abuse . . . extends well beyond an abstract desire to avoid controversy.”¹¹¹ To the majority, the importance of restricting speech that promotes illegal drug use within a school setting, which it characterized as a “far more serious and palpable” danger, justified the use of a different standard than that in *Tinker*.¹¹²

107. *Morse*, 127 S. Ct. at 2624–25; see also *supra* Part II.C.1 (discussing potential meanings of the banner). It is worth noting that the Court could have dismissed the school’s appeal if it found the meaning of the sign impossible to determine. See Brief of the Liberty Legal Institute as Amicus Curiae in Support of Respondent at 3–5, *Morse*, 127 S. Ct. 2618 (No. 06-278) [hereinafter Brief of the Liberty Legal Institute]. The sign, instead of being interpreted as promoting illegal drug use, could have been interpreted in a variety of constitutionally protected manners—for example, it could plausibly have been construed as “anti-religious” and thus “clearly protected.” *Id.* at 3. A loosely worded prohibition of Frederick’s speech on the basis of its promotion of drug speech could have resulted in the chilling of student speech on a number of protected issues. *Id.* at 5. Importantly, the Court attempted to avoid this result by creating an explicit exception to *Tinker* that should be narrowly applied to the facts. See *infra* Part III.C (discussing the impact of the Court’s holding in *Morse* on student speech rights).

108. *Morse*, 127 S. Ct. at 2625; see also U.S. CONST. art. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

109. *Morse*, 127 S. Ct. at 2626 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

110. *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–10 (1969)).

111. *Id.* at 2629.

112. See *id.* at 2627–29 (relying on school cases dealing with the Fourth Amendment to identify the compelling interest of schools in deterring drug use by students); *infra* notes 118–122 and accompanying text (discussing compelling governmental interest in preventing drug use).

b. *Bethel School District v. Fraser*. To the *Morse* Court, two principles from *Fraser* were of particular importance. First, *Fraser* demonstrated that students in public schools have constitutional rights that are “not automatically coextensive with the rights of adults in other settings.”¹¹³ Second, *Fraser* established that *Tinker* was not the sole standard by which to analyze prohibitions on student speech.¹¹⁴ These two principles allowed the Court to take a different approach to analyzing Frederick’s banner than the substantial disruption test set forth in *Tinker*.¹¹⁵

c. *Hazelwood School District v. Kuhlmeier*. The last free speech case the *Morse* Court examined was *Hazelwood*. The Court stated that *Hazelwood* did not control because Frederick’s banner did not reasonably appear to be sanctioned by the school.¹¹⁶ To the majority, the main importance of *Hazelwood* was its affirmation of the existence of rules other than *Tinker* that justify the restriction of student speech.¹¹⁷

3. *The Compelling Government Interest in Preventing Student Drug Use*. Also of importance to the Court was the recognition by a line of Fourth Amendment cases that “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”¹¹⁸ The Court drew on Fourth Amendment jurisprudence not only for the proposition that students’ constitutional rights are different from those of adults outside of

113. *Morse*, 127 S. Ct. at 2626 (quoting *Bethel Sch. Dist. No. 203 v. Fraser*, 478 U.S. 675, 682 (1986)).

114. *See id.* at 2627 (“[T]he mode of analysis set forth in *Tinker* is not absolute.”); *see also supra* Part III.A.2 (discussing the Court’s decision in *Fraser*).

115. *See Morse*, 127 S. Ct. at 2629 (justifying the use of a different test because of heightened dangers of illegal drug use).

116. *Id.* at 2627; *see also* David L. Hudson, Jr., *Did Student-Speech Rights Go Up in Smoke?*, FIRST AMENDMENT CENTER, June 27, 2007, <http://www.firstamendmentcenter.org/commentary.aspx?id=18730> (“[Chief Justice] Roberts rejected the school officials’ specious argument that the analysis was controlled by . . . *Hazelwood* . . . in which the Court created a huge exception to *Tinker* for school-sponsored speech. . . . An expansion of the [*Hazelwood*] decision would have been a tragic loss for student speech rights.”).

117. *See Morse*, 127 S. Ct. at 2627 (noting the decision is instructive in two ways: “it acknowledges that schools may regulate some speech” that could not be censored by the government outside the school context, and it confirms, as did *Fraser*, “that *Tinker* is not the only basis for restricting student speech”); *see also* Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1282–83 (1991) (explaining that the standard articulated in *Hazelwood* grants greater authority to schools to restrict student speech than *Tinker*).

118. *Morse*, 127 S. Ct. at 2628 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

the school setting, but also to support this compelling interest.¹¹⁹ The Court highlighted the importance of the ongoing job of schools to "educat[e] students about the dangers of illegal drug use" within a youth culture where this problem is very prevalent.¹²⁰ The Court also acknowledged the role of peer pressure as a leading factor influencing students' decisions to take drugs; therefore, when a school administrator is faced with student speech "celebrating illegal drug use at a school event," a problem results for "school officials working to protect those entrusted to their care from the dangers of drug abuse."¹²¹

By identifying the strong interest of school administrators in deterring student drug use, as well as the special characteristics of the school environment, the Court ruled in favor of Principal Morse.¹²²

4. *The Importance of Justice Alito's Concurrence.* Justice Alito concurred in the Court's ruling based on the strict understanding that the majority's holding went no further than to impinge on speech that can reasonably be construed as advocating illegal drug use.¹²³ For one scholar, this narrow concurrence spared the opinion from becoming "a complete disaster" for student speech rights.¹²⁴ Importantly, Justice Alito wrote that the holding of the Court "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use."¹²⁵ Thus, Justice Alito would allow

119. *Id.* at 2627–28 (citing *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 834 (2002)); *Vernonia*, 515 U.S. at 661–62.

120. *Id.* at 2628 (referencing national studies, congressional acts, and school board policies in support of a school's interest in preventing student drug use); *see also* Safe and Drug-Free Schools & Communities Act of 1994, 20 U.S.C. § 7114(d)(1) (2006) (directing that local educational agencies foster a "safe and drug-free learning environment that supports academic achievement"); Bureau of Justice Statistics, U.S. Dep't of Justice, Drug and Crime Facts: Drug Use, <http://www.ojp.usdoj.gov/bjs/dcf/du.htm> (last visited Apr. 10, 2009) (finding that 31.7% of high school seniors in 2007 reported using marijuana in the last twelve months).

121. *Morse*, 127 S. Ct. at 2628; *see also* Revathy Kumar et al., *Effects of School-Level Norms on Student Substance Use*, 3 PREVENTION SCI. 105, 121 (2002) ("Students are more likely to use substances when the norms in school reflect a greater tolerance for substance use.").

122. *Morse*, 127 S. Ct. at 2629.

123. *Id.* at 2636 (Alito, J., concurring); *see supra* Part II.C.3 (examining Justice Alito's concurring opinion).

124. *See* Hudson, *supra* note 116 ("[S]ome may draw a measure of reassurance that Roberts gained a majority only with the votes of Justice Samuel Alito and Anthony Kennedy.").

125. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring) (quotation omitted).

any speech, even controversial speech, that is part of participating in a social or political debate.¹²⁶

Justice Alito concurred that *Tinker* did not establish the only ground upon which a school administrator could restrict student speech and conceded that speech advocating the use of illegal drugs presents a serious threat to the safety and welfare of students.¹²⁷ Justice Alito, therefore, joined the Court in allowing public schools to ban speech that advocates illegal drug use; however, he specified that he views “such regulation as standing at the far reaches of what the First Amendment permits.”¹²⁸ He further stated that he conditioned joining the majority on “the understanding that the opinion does not endorse any further extension.”¹²⁹

5. *Rejecting the School’s “Educational Mission” Argument.* Kenneth Starr, representing Principal Morse and the school district, argued that the school could prohibit Frederick’s banner because it is “plainly ‘offensive’ as that term is used in *Fraser*.”¹³⁰ Starr further argued in favor of allowing schools, as an extension of the *Fraser* standard, to regulate all student speech that “interferes with a school’s educational mission.”¹³¹

The application of *Fraser’s* “plainly offensive” standard by lower courts to restrict student speech demonstrates the danger of such a broad interpretation of *Fraser*.¹³² As Chief Justice

126. *Id.*

127. *Id.* at 2637–38.

128. *Id.* at 2638.

129. *Id.*; see also *id.* at 2637 (recognizing only four grounds for the regulation of student speech: (1) speech that causes a material and substantial disruption under the *Tinker* standard; (2) speech that is delivered “in a lewd or vulgar manner as part of a . . . school program; (3) speech that appears to be the school’s own speech; and (4) speech that advocates illegal drug use).

130. *Id.* at 2629 (majority opinion); see Reply Brief for Petitioners at 14, *Morse*, 127 S. Ct. 2618 (No. 06-278) (arguing that *Fraser* allows “regulation of categories of speech much broader than sexual innuendo” and includes speech that “offends the sensibilities of others’ or that does not reflect ‘socially appropriate behavior’” (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986))).

131. *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring); Brief for Petitioners at 21, *Morse*, 127 S. Ct. 2618 (No. 06-278); see also Brief for the United States as Amicus Curiae Supporting Petitioners at 14, *Morse*, 127 S. Ct. 2618 (No. 06-278) (arguing that a school cannot tolerate student speech that violates the school’s “educational mission”); Transcript of Oral Argument at 7–8, *Morse*, 127 S. Ct. 2618 (No. 06-278) (propounding the position that *Fraser* allows the schools to “prevent a message that is inconsistent with a fundamental message of the schools”).

132. See Hudson, *supra* note 116 (noting that some lower courts have restricted a wide range of controversial political expression by extending the *Fraser* rationale broadly); 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.

Roberts noted, “much political and religious speech might be perceived as offensive to some,” and thus, under the petitioners’ logic, schools could restrict student speech on such topics.¹³³

The educational mission argument has the potential to dangerously limit student speech in many of these areas.¹³⁴ If the Court allowed schools to regulate all speech contrary to their “basic educational missions,” its holding would essentially authorize schools to exercise “standardless discretion” in defining their educational missions, which would thereby permit administrators to suppress broad categories of expression.¹³⁵ Such a subjective standard for determining when the government can suppress speech would be contrary to a line of cases holding the government to a heavy burden when justifying the suppression of speech.¹³⁶

In addition to granting schools a level of deference never intended by any of the earlier student speech cases, the “educational mission” argument would allow schools to specifically regulate political and religious speech by defining such speech as outside of their educational goals.¹³⁷ As Justice

REV. 181, 183, 191–200 (2002) (providing examples of cases in which courts have applied *Fraser* inconsistently and often quite broadly).

133. *Morse*, 127 S. Ct. at 2629 (majority opinion); see also Hudson, *supra* note 116 (“[T]he Court could [have] place[d] any controversial student speech—on subjects ranging from abortion to gay rights to religion—at grave risk.”). At oral argument, Justice Alito stated that he found the educational mission argument “very disturbing . . . because schools have . . . defined their educational mission so broadly that they can suppress all sorts of political speech and speech expressing fundamental values of the students, under the banner of . . . getting rid of speech that’s inconsistent with educational missions.” Transcript of Oral Argument at 20, *Morse*, 127 S. Ct. 2618 (No. 06-278).

134. See *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring) (revealing the dangers of the “educational mission” standard).

135. Brief of the Liberty Legal Institute, *supra* note 107, at 5–6; see also Brief of Amicus Curiae Center for Individual Rights in Support of Respondent at 4, *Morse*, 127 S. Ct. 2618 (No. 06-278) (demonstrating that a school could punish a wide range of speech by defining its educational mission to include, for example, patriotism or chastity).

136. See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183 (1999) (“[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction.”); *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (“The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective”); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (“[T]he State bears the burden of justifying its restrictions”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (finding that a school must be able to show more than a mere desire to avoid discomfort to restrict speech).

137. See Brief of the Liberty Legal Institute, *supra* note 107, at 6 (arguing that the proposed test “threatens to seriously undermine landmark decisions of this Court, including *Tinker* and *Good News Club*,” cases that protect students’ rights to engage in political and religious speech). *Good News Club v. Milford Central School* held that a school’s refusal to allow a Christian students’ club to meet at school after hours based on the club’s religious nature was unconstitutional religious viewpoint discrimination. Good

Alito pointed out in his concurrence, the public school could have regulated the students' armbands in *Tinker* depending on how it defined its educational mission in relation to the war.¹³⁸ Significantly, Justice Alito followed this analysis with these words: "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed[, which] strikes at the very heart of the First Amendment."¹³⁹

Both Chief Justice Roberts's opinion and Justice Alito's concurrence explicitly rejected the argument made by the school for the extension of *Fraser*.¹⁴⁰ By making this pronouncement and emphasizing the narrow reach of its holding, the Court upheld *Tinker* as an important protection of students' rights to engage in political, religious, and social speech.¹⁴¹

C. *The Impact of the Morse Holding on Student Free Speech: Public Schools Can Prohibit Four Categories of Speech*

The Court's decision in *Morse* undoubtedly placed a new limit on student free speech rights.¹⁴² The intent of the Court to limit the newly created exception to the rule articulated in *Tinker* is important in understanding how *Morse* fits into the framework of existing tests used by the Court in defining the free expression rights of students in public schools.

Tinker still stands as good law.¹⁴³ However, in the forty years since *Tinker* was decided, the Supreme Court has carved out three narrow exceptions to it, resulting in four different tests to determine the extent to which public school officials can restrict student expression.¹⁴⁴ Lower courts have been inconsistent in

News Club v. Milford Cent. Sch., 533 U.S. 98, 103, 120 (2001).

138. *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring).

139. *Id.*

140. *Id.* at 2629 (majority opinion); *id.* at 2637 (Alito, J., concurring).

141. See Brief of the Liberty Legal Institute, *supra* note 107, at 1 ("[T]he Court's approach in *Tinker* . . . is the best protection for freedom of religious speech." (citations omitted)); see also Hudson, *supra* note 116 ("Roberts warned against extending the 'plainly offensive' wand of censorship . . .").

142. See, e.g., Mears, *Student Rights*, *supra* note 6; *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 295–96 (2007) (indicating *Morse* created a new exception to the First Amendment).

143. *Morse*, 127 S. Ct. at 2627 (majority opinion).

144. *Id.* at 2637 (Alito, J., concurring) (listing the four grounds sufficient to allow the restriction of student speech); see also Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 201 (2007) ("*Tinker* commonly is considered the default standard, with *Fraser* and *Hazelwood* creating two specific exceptions and *Morse* now a third."); Andrew D.M. Miller, *Balancing*

their application of the *Tinker*, *Fraser*, and *Hazelwood* standards, and the same potential for inconsistency exists with the new rule established in *Morse*.¹⁴⁵ A proper examination of these rules will help clarify how courts should rule on student speech controversies in the future.

1. *The Fraser Standard.* Under *Fraser*, a court can restrict student speech if it is found to be "vulgar, lewd, obscene, and plainly offensive."¹⁴⁶ The opinion in *Morse* provided an important clarification on this standard, stating that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive.'"¹⁴⁷ Thus, the Supreme Court means for the *Fraser* test to be a narrow exception to the *Tinker* standard, and therefore those lower courts that have applied the rule narrowly are the closest to the meaning intended by the Supreme Court.¹⁴⁸

School Authority and Student Expression, 54 BAYLOR L. REV. 623, 662 (2002) (characterizing *Fraser* and *Hazelwood* as creating "narrow exceptions" to *Tinker*); *supra* Part III.A (analyzing development of school speech jurisprudence in *Tinker*, *Fraser*, and *Hazelwood*).

145. See Hudson & Ferguson, *supra* note 132, at 191–203 (examining the inconsistency with which lower courts have applied the *Fraser* standard and the resulting curtailment of student speech, including the extension of *Fraser* so broadly that schools were allowed to prohibit any speech they find offensive); *The Supreme Court, supra* note 142, at 296 (arguing that as a result of the Court's "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," and thus, "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"). A full examination of the inconsistent application of the rules established by the Supreme Court for student speech is beyond the scope of this Note, and it has been addressed elsewhere. See generally Chemerinsky, *supra* note 73, at 542 (arguing that the dozens of lower court cases dealing with student speech have "follow[ed] no consistent pattern"); Miller, *supra* note 144, at 662 (recognizing that *Fraser* is fluid and can be used to circumvent *Tinker*); Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 589 (2002) ("In the process of fitting novel fact patterns into the mold of the issues the Court has considered, lower courts have made holdings directly inconsistent with the Court's rules.").

146. HAYNES ET AL., *supra* note 105, at 64; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (holding that schools can prohibit a student from using vulgar and profane language at a school assembly); *supra* Part III.A.2 (analyzing *Fraser*).

147. *Morse*, 127 S. Ct. at 2629 (majority opinion).

148. Compare *McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415, 1426 (W.D. Okla. 1992) (holding that *Fraser* should only apply when speech could be reasonably viewed as school sponsored), and *Heller v. Hodgin*, 928 F. Supp. 789, 798 (S.D. Ind. 1996) (holding school was justified in disciplining a student for using profanity, finding the student's words to be "plainly offensive, even vulgar"), with *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (upholding the suspension of a high school student for wearing a Marilyn Manson T-shirt by extending *Fraser* to allow school officials to prohibit student expression promoting "disruptive and demoralizing values").

2. *The Hazelwood Standard.* Under *Hazelwood*, a school may limit “school-sponsored” speech¹⁴⁹ or speech that carries “the school’s official imprimatur.”¹⁵⁰ In addition to the speech being school-sponsored, the school must show that its actions restricting the student speech are reasonably related to a legitimate educational goal.¹⁵¹ *Hazelwood* applied specifically to a school newspaper, but lower courts have applied the standard to school band songs, mascots, symbols, assignments, and student campaign speeches.¹⁵² When making the determination of whether speech is school-sponsored, a court will examine “the involvement of a faculty supervisor, the educational value of the activity to the participants or audience, and the use of the school’s name and resources,” with the ultimate inquiry being “whether the ‘student’s school-sponsored speech could reasonably be viewed as speech of the school itself.’”¹⁵³ If it is determined that the speech is not school-sponsored, the school may not prohibit it under *Hazelwood*.¹⁵⁴

3. *The Morse Standard.* The *Morse* decision created the newest standard by which schools can prohibit student speech without violating the First Amendment.¹⁵⁵ Under *Morse*, student

See also A Troubling Trend, FIRST AMENDMENT RTS. EDUC. (First Amendment Rights in Education Project), Sept. 2000, at 16 (criticizing *Boroff* because “its rationale would permit school officials to restrict virtually any student speech they deem to be offensive”).

149. HAYNES ET AL., *supra* note 105, at 63; *see also* LOONEY, *supra* note 97, at 123 (explaining that *Hazelwood* allows an educational institution a “right to exercise [reasonable] control over school-sponsored publications”).

150. Maring, *supra* note 72, at 688–89; *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities . . .”).

151. HAYNES ET AL., *supra* note 105, at 63; *see also* Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 446–48 (2000) (examining courts’ interpretations of the requirement that schools’ restrictions be “reasonably related to legitimate pedagogical concerns” (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988))).

152. HAYNES ET AL., *supra* note 105, at 62–65.

153. Miller, *supra* note 144, at 662 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213–14 (3d Cir. 2001)). It is not enough for a school to ban speech under *Hazelwood* by merely asserting that students may perceive that whatever a school permits, it sponsors. *See, e.g.*, *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (rejecting a school’s argument that banning the distribution of materials on school grounds was justified under *Hazelwood* because the students might believe that whatever speech a school allows, it endorses).

154. *See Saxe*, 240 F.3d at 213–14 (analyzing the *Hazelwood* standard).

155. *See Hudson*, *supra* note 116 (“With a stroke of the powerful pen of Chief Justice John G. Roberts Jr., the U.S. Supreme Court limited student speech rights this week, creating another exception to *Tinker* . . .”).

speech can be prohibited if a school official reasonably believes the speech promotes the use of illegal drugs.¹⁵⁶

4. *The Tinker Standard.* All other instances of student speech fall under *Tinker*, and therefore schools can only prohibit such speech when they can objectively show that the speech would otherwise lead to a material and substantial interference.¹⁵⁷ “Under *Tinker*, the court would have to determine whether the school officials could have reasonably forecasted a ‘substantial disruption’ of the school environment” or if instead “the school officials overreacted out of an ‘undifferentiated fear or apprehension.’”¹⁵⁸

D. *Student Speech That Is Still Shielded by Tinker Following Morse*

Tinker still survives following *Morse*.¹⁵⁹ The danger of the school’s “educational mission” argument in *Morse* is that it would have stripped *Tinker* of all of its protective power; in rejecting that argument, the Court clearly had this disastrous effect in mind.¹⁶⁰ As stated above, unless the student speech falls into one

156. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007); *id.* at 2637 (Alito, J., concurring); see discussion *supra* Part III.B (discussing the extent of the Court’s holding in *Morse*).

157. See HAYNES ET AL., *supra* note 105, at 64 (summarizing the *Tinker* standard).

158. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 514 (1969)). When school officials can demonstrate a substantial disruption, the student’s expressive activity is no longer protected by *Tinker*. See, e.g., *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 750–54 (5th Cir. 1966) (finding a school’s ban on political buttons to be reasonable where the buttons led to a multi-day student disturbance that interrupted classes and caused some students to cry). The Supreme Court adopted *Tinker*’s material and substantial disruption test from the 1966 Fifth Circuit cases, *Blackwell* and *Burnside v. Byars*. See *Tinker*, 393 U.S. at 512–13 (prohibiting interference with students’ freedom of expression absent material and substantial interference with school operations resulting from the expression (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966))); *Blackwell*, 363 F.2d at 752–53 (same). Even otherwise protected speech is not justified under *Tinker* when the student speaker disregards the “general rules of classroom conduct.” See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 167–68 (2007). For example, *Tinker* does not permit “students to interrupt the teacher, talk during ‘quiet time,’ or spew expletives at their classmates.” *Id.* at 168. A court will likely find that actions disrupting class schedules, administrative duties, or scheduled school activities involve a “material and substantial disruption.” TYLL VAN GEEL, THE COURTS AND AMERICAN EDUCATION LAW 229 (1987).

159. See *Morse*, 127 S. Ct. at 2636–37 (Alito, J., concurring) (stating specifically that *Morse* “reaffirms the . . . fundamental principle” of *Tinker* and that the restriction recognized in the current case and the prior Supreme Court student speech cases were “[i]n addition to *Tinker*”).

160. See *supra* Part III.B.5 (examining how the Court protected important areas of student speech by rejecting the educational mission argument); see also Hudson, *supra*

of the three *Tinker* exceptions, all student speech should be evaluated under *Tinker*.¹⁶¹

1. *Political Speech.* As Chief Justice Roberts stated in the *Morse* opinion, the facts in *Tinker* directly implicated “concerns at the heart of the First Amendment.”¹⁶² Specifically, “[t]he students [in *Tinker*] sought to engage in political speech” at school when they wore armbands to express disapproval of the Vietnam War.¹⁶³ The case implicated “the heart of the First Amendment” because the Court has held that “[p]olitical speech . . . is ‘at the core of what the First Amendment is designed to protect.’”¹⁶⁴ The “mere desire to avoid” an uncomfortable or unpopular view is not sufficient to uphold a school’s restriction of purely political speech.¹⁶⁵ Every justice on the Court agreed that purely political student speech is protected by *Tinker*, with the exception of Justice Thomas, who argued that *Tinker* itself is unconstitutional.¹⁶⁶

note 116 (highlighting the speech that would no longer be protected under the related “plainly offensive” argument).

161. See *supra* Part III.C (discussing the *Tinker* test and the three exceptions to it).

162. *Morse*, 127 S. Ct. at 2626 (majority opinion).

163. *Id.* (citing *Tinker*, 393 U.S. at 514); see also S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 129 (1995) (“[T]he *Tinker* Court emphasized that a school official’s discretionary authority is limited greatly when the student conduct being regulated involves political speech—even symbolic speech such as black armbands . . .”).

164. *Morse*, 127 S. Ct. at 2626 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

165. *Id.* (quoting *Tinker*, 393 U.S. at 509). This is consistent with First Amendment free speech principles stated in non-student speech cases. See, e.g., *Black*, 538 U.S. at 358 (“The hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.” (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

166. Chief Justice Roberts rejected the “plainly ‘offensive’” extension of *Fraser* because much political speech could be called offensive and thus would no longer be protected under *Tinker*. *Morse*, 127 S. Ct. at 2629. Justice Alito agreed to join the Court’s holding because it “provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.” *Id.* at 2636 (Alito, J., concurring). Justice Breyer voiced concern that the holding might open the door to “further viewpoint-based restrictions.” *Id.* at 2639 (Breyer, J., concurring in judgment in part and dissenting in part). Justice Stevens opined that the majority opinion “trivializes the two cardinal principles upon which *Tinker* rests.” *Id.* at 2645 (Stevens, J., dissenting). Additionally, several of the justices focused their questions on political speech during the oral arguments. See, e.g., Transcript of Oral Argument at 6–7, 9, *Morse*, 127 S. Ct. 2618 (No. 06-278) (illustrating questions from Justice Souter and Chief Justice Roberts, respectively).

2. *Religious Speech.* In rejecting the “plainly offensive” argument of the petitioners, Chief Justice Roberts observed that in addition to political speech, religious speech could be endangered by such a rule.¹⁶⁷ As the Supreme Court has recognized, religious speech is clearly protected in the public schools as long as it is not school-sponsored.¹⁶⁸ Just as political speech is at the core of the First Amendment, so too is religious speech.¹⁶⁹ Because religious speech, like political speech, is fully protected under the First Amendment, students should only be prohibited from engaging in voluntary religious speech when the school can show that a material and substantial interference would otherwise result.¹⁷⁰

3. *Speech on Social Issues.* Student speech on contentious social issues, such as abortion, same sex marriage, or the legalization of marijuana should be protected under *Tinker* in the same manner as political speech.¹⁷¹ Even following *Morse*, lower courts should apply the *Tinker* standard to situations involving

167. *Morse*, 127 S. Ct. at 2629 (majority opinion).

168. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) (concluding that the school’s refusal to allow a Christian student group, which desired to meet after school hours on school grounds, constituted impermissible viewpoint discrimination because there was no realistic danger that outsiders would attribute the group’s activities to the school); *see also* EISGRUBER & SAGER, *supra* note 158, at 167 (noting that *Tinker* “applies to religious speech no less than to political speech”).

169. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“Our precedent establishes that private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression. Indeed . . . government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.” (citations omitted)); *see also* *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (declaring that “religious worship and discussion . . . are forms of speech . . . protected by the First Amendment” (citations omitted)); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 11 (1987) (“The Court had always given religious speech the same constitutional protections as other speech. Indeed, many of the most basic principles of free speech were developed in the Jehovah’s Witness cases.”).

170. *See* Chemerinsky, *supra* note 73, at 533 (noting that under *Tinker* the school bears the burden of proving that the disruption necessitates the restriction of student speech); *see also* Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 322 (2007) (“[R]eligious speech, including prayer and worship, is high-value speech under the Free Speech Clause . . . [Thus], it is strongly protected from censorship or discriminatory treatment at the hands of government . . . even when the speech occurs in the public schools . . .”).

171. *See* *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring) (stating that the Court’s ruling does not restrict a student from commenting on a “social issue”); *see also* Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 375 (2007) (“Alito’s opinion in *Saxe* and his concurrence in *Morse* . . . emphasize the First Amendment’s protection of not only political student speech but also student speech on social issues.”).

student speech on political, religious, and social issues, placing the burden on the school to show an actual disruption.¹⁷²

E. Layshock Provides a Model for the Appropriate Application of Morse

Layshock v. Hermitage School District was litigated in federal district court at the same time *Morse* was argued before the Supreme Court, but the district judge delayed his ruling until after *Morse* was decided.¹⁷³ Justin Layshock, a senior in a public high school, created a profile on MySpace ridiculing his principal, containing “nonsensical answers to silly questions” and “crude juvenile language.”¹⁷⁴ Layshock sent the profile electronically to other students at his high school, and it circulated widely, until most of the school’s students had seen the page.¹⁷⁵ Though Layshock created the profile outside of school, on at least one occasion he accessed the profile from school and showed it to other students. Eventually, three other profiles containing “vulgar and offensive statements” about the principal appeared on MySpace.¹⁷⁶ In response, the school cancelled computer programming classes and limited student computer use for five days, which forced several teachers to change their lesson plans.¹⁷⁷ After admitting that he had created one of the profiles, Layshock was suspended from school for ten days.¹⁷⁸ Layshock and his parents sued the school district, alleging a violation of Layshock’s First Amendment rights.¹⁷⁹

The *Layshock* case is important because it serves as an indication that the *Morse* decision, if read narrowly and in line with the Supreme Court’s three other student speech cases,

172. See generally ALAN LEVINE, EVE CARY & DIANE DIVOKY, THE RIGHTS OF STUDENTS: THE BASIC ACLU GUIDE TO A STUDENT’S RIGHTS 24 (1973) (“[I]ssues of national policy concern students, too The war, the draft, abortion, women’s rights, the environment, race relations, school busing, welfare, government corruption—these questions affect the lives of students directly, and they have the right to make their views known.”).

173. Lee, *supra* note 11.

174. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 590–91 (W.D. Pa. 2007).

175. *Id.* at 591.

176. *Id.*

177. *Id.* at 592–93.

178. *Id.* at 593. School officials disciplined Layshock for violating the district’s policies by using “[o]bscene, vulgar and profane language” and causing the “[d]isruption of the normal school process.” *Id.* In addition to being suspended, Layshock was placed in an alternative curriculum and banned from participating in the district’s extracurricular activities and the school’s graduation ceremony. *Id.* at 593–94.

179. *Id.* at 594.

might “threaten student rights less than some initially feared.”¹⁸⁰ For this reason, Judge McVerry’s reasoning in *Layshock* as he attempted to reach a proper balance between student free speech rights and the “responsibility of a public school” in maintaining an effective learning environment is worth examining in some detail.¹⁸¹

Judge McVerry noted that all “Justices unanimously agreed that *Morse* involved school-related speech,” and therefore he read *Morse* narrowly to hold that it did not control.¹⁸² Judge McVerry, however, still relied on the reasoning in *Morse* to analyze *Layshock*.¹⁸³ One commentator notes that McVerry specifically highlighted three principles from *Morse*.¹⁸⁴ First, “*Morse* rejected the notion that . . . [the *Fraser* decision] allowed school administrators to regulate all speech they found offensive.”¹⁸⁵ Second, “*Morse* defined ‘school-related speech’ to include only speech that occurred during school hours at a sanctioned school event and that was directed at most of the student body.”¹⁸⁶ Third, Justice Alito’s concurring opinion does not allow school administrators “‘unfettered latitude’ in determining whether student speech is disruptive.”¹⁸⁷ Judge McVerry stated specifically that *Morse* did not change the principles or “basic framework” of student free speech jurisprudence as developed by *Tinker*, *Fraser*, and *Hazelwood*.¹⁸⁸

By examining the standards discussed above, Judge McVerry engaged in the proper analysis for determining whether

180. Lee, *supra* note 11; see, e.g., Press Release, Am. Civil Liberties Union, ACLU Slams Supreme Court Decision in Student Free Speech Case (June 25, 2007), available at <http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html> (criticizing the Court’s ruling in *Morse* as “allow[ing] the censorship of student speech,” “impos[ing] new restrictions on student speech rights,” and creating uncertainty about the protection of student speech on unpopular subjects in the future); Posting of David French, *supra* note 10 (arguing that *Morse* is in fact broadly applicable and may permit the silencing of speech on an array of controversial issues because the Court’s justification that drugs are “really harmful and really illegal” could apply to “[v]irtually all restrictive speech policies”).

181. *Layshock*, 496 F. Supp. 2d at 595; see also Lee, *supra* note 11 (discussing Judge McVerry’s reasoning).

182. *Layshock*, 496 F. Supp. 2d at 595; see also Lee, *supra* note 11 (noting that “McVerry refused to read the decision in *Morse* as expanding the deference due school officials”).

183. *Layshock*, 496 F. Supp. 2d at 596–97.

184. Lee, *supra* note 11.

185. *Id.* (discussing *Layshock*, 496 F. Supp. 2d at 596–97).

186. *Id.* (discussing *Layshock*, 496 F. Supp. 2d at 599).

187. *Id.* (quoting *Layshock*, 496 F. Supp. 2d at 599).

188. *Layshock*, 496 F. Supp. 2d at 596; see also Lee, *supra* note 11 (“By reading *Morse* narrowly, McVerry was able to fit it within the basic framework of the First Amendment jurisprudence governing student speech.” (quotation omitted)).

a school administrator has violated a student's First Amendment rights.¹⁸⁹ The school district in *Layshock* attempted to justify the suspension using *Fraser* and *Tinker*. While assuming that the language of the profile was lewd and profane, Judge McVerry applied the *Fraser* test narrowly as "a subset of the more generalized principle in *Tinker*," which applies to vulgar speech expressed on campus, even in the absence of a showing of "a substantial disruption to the school learning environment."¹⁹⁰ Here, however, there was no evidence that Layshock used this profane or lewd language while at school, and thus *Fraser* did not allow the school to punish his speech. Nor was his speech punishable under *Tinker*, as the school failed to meet its burden of showing "a sufficient nexus between [Layshock]'s speech and a substantial disruption of the school environment."¹⁹¹ Judge McVerry's reading of Justice Alito's concurrence in *Morse* is instructive because he refused to see the decision as an expansion of the latitude given to school officials in determining whether student speech is disruptive.¹⁹² The *Layshock* opinion places the burden on school officials to show a "well-founded expectation of disruption" in order to justify the prohibition of student speech under *Tinker*.¹⁹³

Layshock is the perfect example of how lower courts should apply *Morse*: the decision should be read narrowly in order to fit into the existing framework of First Amendment jurisprudence governing student free speech.¹⁹⁴

189. See *Layshock*, 496 F. Supp. 2d at 599–600 (analyzing the case using the legal standards announced in *Tinker*, *Fraser*, and *Morse*); *supra* Part III.C (describing the tests developed in student speech cases).

190. *Layshock*, 496 F. Supp. 2d at 599.

191. *Id.* at 599–600.

192. *Id.* at 599; see also Lee, *supra* note 11 (discussing McVerry's application of the *Morse* decision).

193. *Layshock*, 496 F. Supp. 2d at 597 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001)); see also Lee, *supra* note 11 ("McVerry set a high bar for administrators attempting to show a substantial disruption.").

194. See Lee, *supra* note 11 ("McVerry's decision in *Layshock* is a reasonable and fair reading of *Morse* and the cases that preceded it. If other judges follow McVerry's approach, fears that *Morse* will expand to swallow students' First Amendment rights will prove to be unfounded."). However, a recent case involving a First Amendment challenge to a school regulation that prevents students from distributing religious information may be cause for concern. See *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 906–07 (S.D. Tex. 2007). The *Pounds* court upheld a school district policy prohibiting the distribution of *any* materials that are not school-sponsored, including religious materials, in response to a facial challenge. *Id.* at 917, 925. The court examined *Morse* and the other school speech cases, concluding that *Tinker* was inapplicable to this "viewpoint-neutral" restriction. *Id.* at 911–15. In another case, a court reviewed the suspension of two eighth grade students who created a fake MySpace profile of her principal, depicting him as a pedophile and sex addict. *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL

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IV. CONCLUSION

The *Morse* decision does not spell the end of student free speech protections.¹⁹⁵ Instead, the Court carefully crafted its opinion to avoid such a disastrous result. The language employed by Chief Justice Roberts and Justice Alito demonstrates their intent to extend the holding only to speech that a school administrator reasonably construes as promoting illegal drug use.¹⁹⁶ Furthermore, the Court was careful to fit its ruling into the existing jurisprudence governing student free speech rights. As such, it upheld the preexisting tests and framework used to determine whether a school is justified in prohibiting student speech, only adding to this process a new *Morse* test.

The district court in *Layshock* provided the correct model for courts to follow in employing this series of cases.¹⁹⁷ Unless a student’s speech falls into one of the three exceptions to *Tinker* (under *Fraser*, *Hazelwood*, or *Morse*), then *Tinker* will apply. In making all of these determinations, lower courts should read the Supreme Court decisions narrowly.

Of great importance, in rejecting the arguments the school’s lawyers made to extend school prohibition of speech over any speech inconsistent with a school’s educational mission, the Court protected the rights of students to engage in religious and political speech. Thus, following *Morse*, all student speech on religious, political, or social matters should be protected by *Tinker*.

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4279517, at *1–2 (M.D. Pa. Sept. 11, 2008). Even though the students’ actions occurred off school grounds, the court held that the students’ civil rights were not violated because the language on the profile was vulgar and potentially illegal. *Id.* at *6–7.

195. See Hudson, *supra* note 116 (exploring *Morse*’s impact on student speech rights).

196. See *supra* note 156 (identifying the Court’s new rule).

197. See *supra* Part III.E (examining the *Layshock* decision).