MORSE V. FREDERICK: WHY CONTENT-BASED EXCEPTIONS, DEFERENCE, AND CONFUSION ARE SWALLOWING TINKER

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I. INTRODUCTION

The United States Supreme Court's school speech jurisprudence attempts to strike a balance between the authority of school officials and the First Amendment rights of students. For much of U.S. history, the decisions of teachers and school officials were considered part of a field that was left to local and state legislatures and beyond the competence of the courts. Nevertheless, a significant change occurred with the Court's decision in West Virginia State Board of Education v. Barnette. In holding West Virginia's compulsory flag salute law unconstitutional, the Supreme Court declared that "[w]e cannot, because of modest estimates of our competence in such specialties as

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1. J.D., 2009, Seton Hall University School of Law; B.A., 2006, Rutgers University, Rutgers College. I would like to thank Professor Edward Hartnett for his thoughts, insights, and comments throughout the writing process.

2. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943) (holding a state compulsory flag salute regulation unconstitutional and noting that the conflict is between "authority and rights of the individual"). The conflict has also been described as one between the social reproduction model, which views the school as needing power to instill in students society's traditions and values so that they can be knowledgeable participants in democratic institutions, and the social reconstruction model, which views schools as needing power "to facilitate the child in his attempts to construct a new social order." Anne Proffitt Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 GEO. WASH. L. REV. 49, 64-70 (1996).


5. 319 U.S. 624.
public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.\(^6\)

Twenty-five years after Barnette, the Supreme Court proclaimed in *Tinker v. Des Moines Independent Community School District*\(^7\) that neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^8\) *Tinker* held that school officials cannot suppress speech unless it materially and substantially interferes with the operation of the school or infringes upon the rights of others;\(^9\) and in doing so, the Court shifted the balance in favor of students’ freedom of expression. Since *Tinker*, however, the Court’s decisions have gradually scaled back the breadth of student speech rights.\(^10\) The continuous erosion of student speech rights has largely been paralleled by the Court’s decisions concerning students’ privacy and procedural due process rights.\(^11\) Thus, in the years after *Tinker*, the balance has shifted in the direction of greater deference and power to school officials.\(^12\)

In its most recent school speech case, *Morse v. Frederick*,\(^13\) the Court held that schools may restrict student expression that can reasonably be interpreted as promoting illegal drug use.\(^14\) *Morse* essentially created a third exception to *Tinker’s* “material and substantial” disruption test. The first exception, delineated in *Bethel School District No. 403 v. Fraser*, permits school officials to suppress speech that is “offensively lewd and indecent”;\(^15\) the second, delineated in *Hazelwood School District v. Kuhlmeier*, permits the restriction of speech that bears the imprimatur of the school, so long as the regulation is related “to legitimate pedagogical concerns.”\(^16\) More important than the fact

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\(^{6}\) *Id.* at 640.
\(^{7}\) 393 U.S. 503 (1969).
\(^{8}\) *Id.* at 506.
\(^{9}\) *Id.* at 513.
\(^{13}\) 127 S. Ct. 2618 (2007).
\(^{14}\) *Id.* at 2629.
\(^{15}\) 478 U.S. at 685.
that Morse is another exception to Tinker, it creates a third exception that allows school officials to silence speech based on its content.\footnote{17} Content-based restrictions contrast with the Tinker standard, which condones the suppression of speech based on the effect, or possible effect, of a student's speech—that is, if it intrudes upon the work of the school or rights of others.\footnote{18}

Tinker may not have been explicitly overruled, but in light of Morse, as well as Fraser and Kuhlmeier (and how these decisions have been applied by lower courts), this Comment argues that the standard for school speech cases is gradually shifting toward a primarily content-based test rather than an effects-based test. This Comment does not contend that all speech will be analyzed based on its content. Rather, in addition to the expansion of the content-based restrictions of Fraser, Kuhlmeier, and Morse beyond their narrow holdings, other factors—such as greater discretion being accorded to school officials and general confusion among lower courts about how to apply school speech cases—increase the probability that speech will be suppressed based on its content.

Part II of this Comment provides an overview of the Supreme Court's school speech decisions and discusses how these decisions have changed the Court's approach to student speech. Part III looks specifically at what effect Morse v. Frederick may have and has had on the free speech rights of students. This analysis involves determining how Morse fits in with previous school speech decisions. In addition, Part III discusses a number of decisions that have applied Morse. Part IV addresses two themes that have developed in the Supreme Court's school speech jurisprudence—greater discretion and greater confusion. These two factors play a significant role in expanding the exceptions delineated in Fraser, Kuhlmeier, and Morse. Part IV also dis-

\footnote{17} See id. ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech . . . .") (emphasis added); see also Morse, 127 S. Ct. at 2626 ("The [Fraser] Court was plainly attuned to the content of Fraser's speech . . . .") (emphasis added). It should be noted that at least some courts have interpreted Fraser as permitting the prohibition of speech based on the manner of the speech, rather than the content. See Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Rather than being concerned with the actual content of what is being conveyed, the Fraser justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed."). Content-based restrictions are those that prohibit speech based on the disapproval of the idea expressed. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382 (1992). Two distinct types of content-based restrictions are viewpoint restrictions (e.g., restriction prohibiting Democratic or Republican political viewpoint) and subject matter restrictions (e.g., restriction prohibiting all political speech). KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1193–98 (15th ed. 2004).

discusses Supreme Court decisions concerning students' privacy and procedural due process rights and how the principles laid down in these decisions have affected the Court's school speech jurisprudence. Part IV additionally considers the influence that moral panic has had on the courts' deferential treatment of school officials' decisions to suppress student speech. Finally, Part V argues that Morse should be limited to its narrow holding, namely because of the likelihood that expansion of the decision to speech beyond that advocating drug use can have a contagion effect.

II. The Road to Morse

Although Tinker is considered by many to be the most important Supreme Court decision concerning student free speech rights, the Court's decision in Barnette laid the foundation for Tinker by holding that the decisions of public schools are not beyond the scope of judicial review. In Barnette, the Court held a compulsory flag salute regulation unconstitutional. In so holding, the Court recognized that boards of education, as arms of the state, are not exempted from the requirements of the Constitution. More significantly, the Court recognized the importance of protecting students' constitutional rights—"[t]hat [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." The Court acknowledged that teachers and administrators should be accorded discretion in how they perform their duties, but when the Bill of Rights is implicated, courts must not shy away from their own duties as guardians of the rights embodied therein.

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19 See, e.g., Chemerinsky, supra note 11, at 527.
21 319 U.S. at 642.
22 Id. at 637.
23 Id. The Supreme Court's decision in Barnette became possible only eighteen years earlier, after the Court decided Gitlow v. New York, 268 U.S. 652 (1925). There, the Court ruled that the rights embodied in the First Amendment are among the fundamental rights protected from infringement by state governments by the Fourteenth Amendment's Due Process Clause. Id. at 666.
24 See Barnette, 319 U.S. at 637–40.
In part, the Supreme Court's decision in *Barnette* was influenced by the rise of Nazism and the ongoing tragedy of World War II. Merely three years earlier, the Court held constitutional a similar flag salute regulation in *Minersville School District v. Gobitis*. In *Barnette*, the Supreme Court noted that a number of groups objected to the flag salute as "being too much like Hitler's." The Court further noted that such officially disciplined uniformity has often had disastrous consequences. Thus, the Court not only recognized the utmost importance of protecting individual rights, but also the power of public schools to go beyond inculcating core democratic values to potentially indoctrinating children.

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

*Tinker* concerned a number of students who wore black armbands to school to publicize their opposition to the Vietnam War. Officials of the Des Moines schools became aware of the students' plan to wear the armbands and adopted a policy prohibiting them. The students were subsequently suspended for violating the newly adopted policy.

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26 310 U.S. 586 (1940).


28 Id. at 637, 640–41. The Court stated:

"Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies."

29 See Solove, supra note 25, at 997 (explaining that at this period in time "state indoctrination of children appeared as a new and potentially dangerous form of power" because "Hitler had used the schools to promote Nazi propaganda").

30 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). The students and their families decided to wear the armbands during the holiday season in 1965 and to fast on December 16 and New Year's Eve. *Id.*

31 *Id.*

32 *Id.* The students were told that they were to remain suspended until they returned without their armbands. *Id.* They did not return to school until after New Year's Day, after the planned period for wearing the armbands was over. *Id.*
In a seven-to-two decision, the Supreme Court ruled in favor of the students, holding that the students' conduct did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." The Court declared that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate," but also recognized that these rights must be applied "in light of the special characteristics of the school environment."

Justice Fortas, writing for the majority, explained that the students' conduct was akin to "pure speech," entitled to comprehensive First Amendment protection. Even though some speech may be controversial, inspire fear, or start an argument, Justice Fortas reaffirmed prior decisions that teach that this is a risk that our society must be willing to take. Therefore, a student may not be silenced simply based on undifferentiated fear or apprehension of disturbance. Applying this notion to schools in particular, Justice Fortas stated that "schools may not be enclaves of totalitarianism . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."

Justice Black's dissent was sharply critical of the majority's student speech-friendly ruling. According to Justice Black, the majority ushered in a new era in which the power to control public schools was transferred to the Supreme Court. Justice Black further criticized the majority for subjecting public schools "to the whims and ca-

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53 Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). Under this standard, mere disagreement with particular speech, or the controversial nature of the speech, cannot be invoked as the basis for lawful restriction. Id. at 508-09.
54 Id. at 506.
55 Id.
56 Tinker, 393 U.S. at 505-06, 508.
57 See id. at 508-09 (citing Termiinelli v. Chicago, 337 U.S. 1 (1949)); see also W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) ("Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."). Justice Fortas explained that "history says that it is this sort of hazardous freedom . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." Tinker, 393 U.S. at 508-09.
58 Tinker, 393 U.S. at 508.
59 Id. at 511.
60 See id. at 515-27 (Black, J., dissenting).
61 Id. at 515.
prices of their loudest-mouthed, but maybe not their brightest, students.\textsuperscript{42}

\textbf{B. Bethel School District No. 403 v. Fraser}

Whereas the Court's opinion in \textit{Tinker} emphasized the need to protect the fundamental rights of students, in \textit{Fraser} the Court focused on the role of public schools in inculcating the "habits and manners of civility" in their students.\textsuperscript{43} The case concerned a high school student, Matthew Fraser, who delivered a speech nominating a classmate for student government.\textsuperscript{44} Throughout the speech, given during an assembly which was part of a school-sponsored program in self-government, Fraser referred to the classmate "in terms of an elaborate, graphic, and explicit sexual metaphor."\textsuperscript{45} Fraser was suspended for violating a disciplinary rule prohibiting the use of obscene language.\textsuperscript{46}

Both lower courts ruled in favor of Fraser, finding that under \textit{Tinker} Fraser's speech did not have a disruptive effect.\textsuperscript{47} The Supreme Court acknowledged \textit{Tinker}'s holding, but quickly turned its

\textit{Id.} at 525. Writing some thirty years after \textit{Tinker}, some commentators have argued that Justice Black's prophecy has to some degree come true. \textit{See} Dupre, \textit{supra} note 2, at 50 ("Researchers have inferred ... that the 'adversarial and legalistic character of urban public schools'—qualities attributable to the Court's school jurisprudence of recent years—and the corresponding unwillingness of teachers to maintain order have affected educational quality."); Kay S. Hymowitz, \textit{Tinker} and the Lessons From the Slippery Slope, \textit{48} DRAKE L. REV. 547, 555 (2000) ("Simply put, teachers [have] come to fear their students.").

\textit{Id.} at 675, 681 (1986) (internal citation omitted).

\textit{Id.} at 677.

\textit{Id.} at 678. Though the majority did not feel it necessary to reproduce excerpts of the speech, Justice Brennan's concurrence provided the following excerpts:

\begin{quote}
I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm. ... [The candidate] is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds ... .
\end{quote}

\textit{Id.} at 687 (Brennan, J., concurring).

\textit{Id.} at 678–79 (majority opinion).

\textit{Id.} at 1356 (9th Cir. 1985). Interestingly, the United States Court of Appeals for the Ninth Circuit rejected the school's argument that it has an interest in protecting young students from lewd and indecent language, reasoning that "if school officials had the unbridled discretion to apply a standard as subjective and elusive as 'indecency' in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." \textit{Id.} at 1363.
attention to explaining that schools, as well as society, have an interest in teaching students fundamental values and the "boundaries of socially appropriate behavior." The Court also explained that the rights of students are not necessarily coextensive with those of adults in other settings. The Court therefore reasoned that it is an appropriate function of public schools to proscribe the use of offensive and vulgar language in public discourse.

Turning to Fraser's speech in particular, the Court argued that Fraser's sexual innuendo was plainly offensive to both students and teachers. The Court distinguished Fraser's speech from Tinker's armbands in that Fraser did not express any political viewpoint. The Court also noted that the "First Amendment does not prevent . . . school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission." The Court thus concluded that the school acted appropriately in sanctioning Fraser to demonstrate to the students that lewd and vulgar speech is inconsistent with the educational mission of public schools.

Thus, in Fraser, the Court shied away from the permissive Tinker standard and carved out an exception to Tinker based on lewd, indecent, and offensive speech. In addition, the Court exhibited much

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48 Fraser, 478 U.S. at 681.

49 Id. at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340–42 (1985)). Justice Burger, writing for the majority, seems to have doubted the maturity and ability of the students of Bethel High School to exercise their constitutional rights, referring to Fraser as a "confused boy," id. at 683, and repeatedly referring to the students in the audience as "children," id. at 682, 684. This characterization by Justice Burger may reflect fundamentally differing views of children in Tinker and Fraser. Whereas Tinker views the student as a "citizen-child" worthy of civic participation and constitutional rights, Fraser seems to take a more pessimistic view of the ability of the child to exercise these rights appropriately, and thus affords school officials more authority to curtail them. See Hymowitz, supra note 42, at 553–55, 558–61.

50 Fraser, 478 U.S. at 683.

51 Id.

52 Id. at 685.

53 Id.

54 Id. at 685–86.

55 Noteworthy is Justice Brennan's opinion in which he concurred with the Court's judgment but advocated a narrow reading of the majority opinion. See id. at 687–91 (Brennan, J., concurring). According to Justice Brennan, the suppression of speech in this instance was permissible due to the school's interest in ensuring that the assembly proceeded in an orderly manner. Id. at 689. Because of the setting, the school's interest in maintaining civil public discourse was especially weighty. Id. Justice Brennan thus opined that the Court's holding concerned only "the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly." Id. (emphasis added).
deference in accepting the judgment of the school officials that Fraser’s speech disrupted the school’s educational mission.  

C. Hazelwood School District v. Kuhlmeier

Only two years after Fraser, the Supreme Court decided what would be called the third installment in the “Tinker trilogy.” Kuhlmeier concerned a high school principal who decided to remove two articles from the school newspaper because of confidentiality issues regarding students who were mentioned in the articles, and because he believed that references in the articles to sexual activity and birth control were inappropriate for some younger students.

The majority opinion began by reiterating that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” but also reaffirmed that school officials need not “tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.” The Court also stated that the decision as to what speech is appropriate in the classroom or in a school assembly is one that properly rests with school officials and not the federal courts. A student’s First Amendment claim, the Court explained, must be considered in this context.

The Court next concluded that the school newspaper was a non-public forum, and as such, the contents thereof could be regulated in any reasonable manner. Therefore, reasonableness—not Tinker—is the standard that applies to student speech that bears the imprimatur of the school. The Court remarked that in Tinker, the issue was

56 See Fraser, 478 U.S. at 690 (Marshall, J., dissenting) (“[W]here speech is involved, we may not unquestioningly accept a teacher’s or administrator’s assertion that certain pure speech interfered with education.”); 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, 131 (1995) (describing Justice Burger’s opinion as deferring “without hesitation” to the school’s “conclusory determination” that Fraser’s speech disrupted the school’s educational activity).
57 See, e.g., Miller, supra note 12, at 628.
58 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262–63 (1988). The principal was also concerned that an individual who was the subject of a story on divorce was not given an opportunity to respond. Id. at 263.
59 Id. at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
60 Id. (internal citation and quotation omitted).
61 Id. at 267 (citing Fraser, 478 U.S. at 683).
62 Id.
63 Id. at 270.
64 Kuhlmeier, 484 U.S. at 270.
whether the school was required to tolerate particular student speech, whereas in this case the issue was whether a school is required to affirmatively "promote particular student speech." Because the school newspaper publication process was part of the school curriculum, school officials were entitled to exercise greater control over student speech in this context "to assure that participants learn whatever lessons the activity is designed to teach." The Court held that school officials may "exercise[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Here, the Court reasoned that there were several reasons why the principal was justified in removing the articles: to protect the confidentiality of students and to protect younger students from inappropriate subject matter. According to the Court, "[i]t is only when the decision to censor a school-sponsored publication . . . has no valid educational purpose that the First Amendment is so directly and sharply implicate[d] as to require judicial intervention to protect students' constitutional rights."

Since the Supreme Court decided Kuhlmeier, the decision has been "invoked in a tremendous array of school speech cases." In fact, not only have courts applied Kuhlmeier in the school speech context, "but [they] have also relied on it in cases involving public schools’ textbook selections and curricular choices, teachers’ in-class speech, and even speech in a school setting by outside entities." More significantly, in the years after the Kuhlmeier decision, the Student Press Law Center "identified a 'steady increase' in incidents of censorship of the student press."

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65 Id. at 270–71 (emphasis added).
66 Id. at 271.
67 Id. at 273.
68 Id. at 274–77.
69 Id. at 273 (internal citation and quotation omitted).
71 Id. at 64 (citations omitted).
72 DAVID L. HUDSON, JR., THE SILENCING OF STUDENT VOICES: PRESERVING FREE SPEECH IN AMERICA’S SCHOOLS 16 (2003) (noting that in 1988, the year Kuhlmeier was decided, the Student Press Law Center received about 588 requests for legal assistance, while in 1999 it received over 1500 requests for legal assistance).
D. Morse v. Frederick

In January 2002, Deborah Morse, the principal of Juneau-Douglas High School (JDHS) in Juneau, Alaska, decided to allow staff and students to participate in the Olympic Torch Relay, which was on its way to Salt Lake City, Utah. Participation in the event was approved as a school-sanctioned social event or class trip. Joseph Frederick, a senior at JDHS, arrived late to school due to car trouble and joined his friends on the street to watch the relay. As the torchbearer and camera crews approached, Frederick and his friends outspread a fourteen-foot banner that bore the phrase “BONG HiTS 4 JESUS.” Principal Morse quickly demanded that the students take down the banner. When only Frederick failed to comply, Morse confiscated the banner and later suspended Frederick for ten days. Morse explained that the reason for the suspension was that she believed that the banner promoted illegal drug use, which constituted a violation of a school policy that prohibited public expression that advocates the use of illicit substances.

Frederick filed suit under 42 U.S.C. § 1983, alleging that Principal Morse and the school board violated his First Amendment rights. The United States District Court for the District of Alaska determined Fraser, rather than Tinker, was applicable to Frederick’s speech. The court reasoned that, like Fraser, Frederick chose a specific forum at which to make his speech (the school-sanctioned event) and that Frederick’s speech constituted a statement of personal opinion contrary to the school’s mission, whereas the speech involved in Tinker was unrelated to the school’s mission. Finding that Morse was reasonable in interpreting the banner as advocating illegal drug use, in violation of the school policy, the court granted summary judgment in favor of Morse.

73 Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
74 Id.; Frederick v. Morse, 439 F.3d 1114, 1117 (9th Cir. 2006), rev’d, Morse v. Frederick, 127 S. Ct. 2618 (2007).
75 Morse, 127 S. Ct. at 2622.
76 Id.
77 Id.
78 Id.
79 Id. at 2622–23.
81 Id. at *18.
82 Id. at *18–19.
83 Id. at *20–21.
The United States Court of Appeals for the Ninth Circuit, applying *Tinker*, reversed the district court's grant of summary judgment. The court conceded that Frederick's speech occurred during a school-authorized activity and that it expressed a positive sentiment about marijuana; nevertheless, the court found a violation of Frederick's First Amendment rights due to Morse's failure to demonstrate that Frederick's speech was likely to substantially disrupt the school's educational mission.

1. The Majority Opinion

The Supreme Court, in a five-to-four decision, reversed the appellate court's decision and held that "the special characteristics of the school environment" and the governmental interest in preventing student drug use permit school officials to restrict student expression that reasonably could be interpreted as encouraging illegal drug use.

The majority opinion, written by Chief Justice Roberts, initially rejected Frederick's argument that this was not a school speech case. The Chief Justice next explained that although the message on Frederick's banner may have been "cryptic" or ambiguous, Principal Morse believed that the banner could be interpreted as promoting illegal drug use, and such an interpretation was "plainly a reasonable one." The issue thus became whether a school official may restrict student speech at a school-sanctioned activity where the

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84 Frederick v. Morse, 439 F.3d 1114, 1125 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007). The United States Court of Appeals for the Ninth Circuit read *Fraser* more narrowly than the district court, finding that *Fraser* applies to speech of a sexual nature. 439 F.3d at 1119. Although the court recognized that Frederick's banner may have been "funny, stupid, or insulting," it was not "plainly offensive" as is sexual innuendo. *Id.* The issue of confusion in regard to the proper application of *Tinker* and its progeny is discussed in Part IV *infra.*

85 *Id.* at 1124.


87 Justices Scalia, Kennedy, Thomas, and Alito joined the majority opinion. *Id.* at 2621.

88 *Id.* at 2624. Both lower courts and the appellate bodies of the Juneau School Board also rejected this argument. *Id.*

89 *Id.* According to the majority, at least two interpretations of "BONG HiTS 4 JESUS" demonstrate that the phrase promoted illegal drug use. *Id.* at 2625. First, the phrase could be interpreted as inhale "bong hits," a phrase equivalent to "smoke marijuana" or "use an illegal drug." *Id.* (internal quotation marks omitted). Second, the phrase could be interpreted as "bong hits [are a good thing]," or "[we take] bong hits," which the Court deemed to be celebratory phrases that are not meaningfully distinguishable from express advocacy of illegal drug use. *Id.* Also, the Court stated that Frederick's motive for displaying the banner—to get on television—was irrelevant in interpreting what the banner said. *Id.*
speech is reasonably interpreted as encouraging illegal drug use.\textsuperscript{90} To resolve this issue, the Court began by discussing the \textit{Tinker} trilogy.

Chief Justice Roberts first discussed \textit{Tinker}'s material and substantial disruption standard, and the Justice emphasized the political nature of the speech involved in \textit{Tinker}.\textsuperscript{91} Turning to \textit{Fraser}, Justice Roberts stated that the mode of analysis that the \textit{Fraser} Court employed is not entirely evident,\textsuperscript{92} but the \textit{Fraser} Court was “plainly attuned to the content of Fraser’s speech” and “also reasoned that school boards have the authority to determine what manner of speech in the classroom or in school assembly is appropriate.”\textsuperscript{93} The Court then went on to distill two basic principles from \textit{Fraser}. (1) \textit{Fraser} shows that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”; and (2) \textit{Tinker}'s mode of analysis is not absolute—that is, it is not the only standard that can be employed to determine whether particular speech may be prohibited in school.\textsuperscript{94} The Court lastly discussed \textit{Kuhlmeier} and noted that although \textit{Kuhlmeier} is not applicable here because Frederick’s banner did not bear the imprimatur of the school, \textit{Kuhlmeier} did reaffirm \textit{Fraser}'s basic principle that “schools may regulate some speech even though the government could not censor similar speech outside the school.”\textsuperscript{95} \textit{Kuhlmeier}, the Court explained, also confirms that \textit{Tinker}'s mode of analysis is not absolute.\textsuperscript{96}

The Court next observed that its Fourth Amendment cases in the school context have applied the principles of the Court’s student speech cases.\textsuperscript{97} Most notably, the idea that “the school setting requires some easing” of constitutional protections, due to the “special

\begin{itemize}
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id. at 2626 (noting that political speech is “at the core of what the First Amendment is designed to protect”) (internal quotation marks omitted). Here, Chief Justice Roberts argued, Frederick’s banner did not convey “any sort of political or religious message.” Id. at 2625 (stating additionally that “this is plainly not a case about political debate over the criminalization of drug use or possession”).
\item \textsuperscript{92} Morse, 127 S. Ct. at 2626.
\item \textsuperscript{93} Id. (internal quotation marks omitted). Notably, Chief Justice Roberts quoted Justice Brennan's concurring opinion in \textit{Fraser}, in which Justice Brennan interpreted the \textit{Fraser} majority as not permitting viewpoint (or content-based) discrimination but, rather, permitting the restriction of speech so that the school assembly could proceed in an orderly manner. Id. Chief Justice Roberts explained that determining the precise mode of analysis employed in \textit{Fraser} was not necessary for the resolution of Morse. Id.
\item \textsuperscript{94} Id. at 2626–27.
\item \textsuperscript{95} Id. at 2627 (internal quotation marks omitted).
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id.
\end{itemize}
needs" of public schools, is prominent in these cases. Furthermore, the Fourth Amendment cases recognize that preventing drug use by children is an "important[, perhaps compelling interest.]"

The Court then went on to discuss the deleterious effects of drugs, especially on the developing mind of a child, and the extent of the drug problem among school children. Chief Justice Roberts also noted the powerful effect of peer pressure in leading students to take drugs and that school children are more likely to take drugs if school norms convey the message that such behavior is tolerable. With these concerns in mind, the Court recognized that student speech advocating drug use presents a particular challenge for school officials.

The Court thus held that school officials may suppress student speech encouraging illegal drug use because of "[t]he special characteristics of the school environment" and the governmental interest in preventing drug use. In so holding, the Court carved out the third exception to Tinker's material and substantial disruption standard—speech that can reasonably be interpreted as encouraging illegal drug use.

Significantly, the majority rejected Morse's argument that Frederick's speech is censorable because it is "plainly offensive" pursuant to Fraser. According to the Court, Fraser should not be read to subsume all speech that falls within some definition of "offensive," because much religious and political speech could be deemed offensive.

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99 Morse, 127 S. Ct. at 2628 (citing Vernonia, 515 U.S. at 661).

100 Id. The Court noted that Congress has declared that part of a public school's mission is to educate students about the harmful effects of illegal drug use. Id. Also, the Safe and Drug-Free Schools and Communities Act of 1994 requires each school to certify that the school's prevention programs "convey a clear and consistent message that... the illegal use of drugs [is] wrong and harmful." Id. (citing 20 U.S.C. § 7114(d)(6) (Supp. IV 2004)).

101 Id. at 2628 (citing Earls, 536 U.S. at 840).

102 Id.

103 Id. at 2629 (internal quotation marks omitted). Chief Justice Roberts also explained that the prohibition of such speech is due to more than an "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 508 (1969)). As noted, Tinker warned against prohibition of speech based on such fears or desires. See id.

104 Id. at 2629.

105 Morse, 127 S. Ct. at 2629.
2. The Concurring and Dissenting Opinions

Justice Thomas joined the majority opinion and wrote a concurring opinion primarily to express his view that the Tinker standard has no basis in the Constitution and should therefore be overruled. Justice Thomas also expressed his dissatisfaction with the Court's student speech jurisprudence, opining that it now says that "students have a right to speak in schools except when they don't." According to Justice Thomas, Frederick's speech could be prohibited for a very simple reason: "As originally understood, the Constitution does not afford students a right to free speech in public schools."

Justice Alito joined in the majority opinion on the understanding that (1) the majority's holding is limited specifically to speech that reasonably can be interpreted as advocating illegal drug use, and (2) the majority's holding cannot be invoked to restrict speech that comments on a political or social issue, such as speech regarding "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." According to Justice Alito, the regulation of speech in this case "stand[s] at the far reaches of what the First Amendment permits." Additionally, Justice Alito interpreted the majority opinion as not endorsing the argument that school officials can censor speech that interferes with the educational mission of the school. Justice Alito explained that such an argument could easily be used to inculcate the political and social views of the school's administration. Furthermore, Justice Alito stated that the majority opinion should not be read as stating that there are any other grounds for censorship beyond those already recognized by Tinker, Fraser, Kuhlmeier, and Morse. Specifically, Justice Alito stated that

[i]n addition to Tinker, the decision in the present case allows the restriction of speech advocating illegal drug use; [Fraser] permits the regulation of speech that is delivered in a lewd or vulgar

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106 Included here from the concurring and dissenting opinions are discussions of only some of the highlights that are most relevant to the issues that are discussed within this Comment.
107 Morse, 127 S. Ct. at 2630 (Thomas, J., concurring).
108 Id. at 2634. Though dissatisfied with the Court's jurisprudence, Justice Thomas was content enough to join the majority's opinion "because it erode[d] Tinker's hold in the realm of student speech." Id. at 2636.
109 Id. at 2634.
110 Id. at 2636 (Alito, J., concurring).
111 Id. at 2638.
112 Id. at 2637.
113 Morse, 127 S. Ct. at 2637 (Alito, J., concurring).
114 Id.
manner as part of a middle school program; and [Kuhlmeier] al-

Justice Alito’s interpretation of the majority opinion is of considera-
ble importance and relevance considering that Justice Alito’s vote was
necessary to make Chief Justice Roberts’s opinion a majority opinion.

Justice Breyer, concurring in part and dissenting in part, would
have decided the case on the question of qualified immunity and
avoided the constitutional issue decided by the majority. According
to Justice Breyer, the majority’s holding endorses a viewpoint restric-
tion—prohibiting speech that encourages illicit drug use rather than
all speech concerning illicit drugs—and, thus, raises a number of
concerns. For one, explained Justice Breyer, though the majority’s
holding may facially appear to be limited to illegal drug use, it may
permit further viewpoint-based restrictions. Justice Breyer was
especially troubled about the possibility that political speech concern-
ing drug use may be suppressed pursuant to the majority’s holding.
Justice Breyer also expressed concern with the fact that the majority
did not offer any guidance as to how its holding should be applied.
The majority stated that school officials may “take steps” to “safe-
guard” students, but failed to explain what those steps may be. Of-
fering some guidance, Justice Breyer explained, would help in pre-
venting overbroad interpretations of the majority’s holding.

Justice Stevens, dissenting, agreed that Morse should not be held
liable for confiscating Frederick’s banner, but the Justice would have
held that the school’s interest in censoring speech encouraging drug
use did not justify disciplining Frederick for making an equivocal or
cryptic statement that happened to mention drugs. Justice Stevens

115 Id. At least one court has already interpreted Justice Alito’s concurrence as
“expressly stat[ing] that Morse leaves open the question of whether there are any oth-
er grounds for restricting speech beyond those recognized in Tinker, Fraser, Kuhlmeier,
and now Morse.” Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07 C
1586, 2007 U.S. Dist. Lexis 94411, at *18 (N.D. Ill. Dec. 21, 2007), rev’d, Nuxoll v. In-
dian Prairie Sch. Dist. No. 204 Bd. of Educ., 523 F.3d 668 (7th Cir. 2008).
116 Morse, 127 S. Ct. at 2638–39 (Breyer, J., concurring in part and dissenting in
part).
117 Id. at 2639.
118 Id.
119 Id. (noting that “speech advocating change in drug laws might also be per-
ceived of as promoting the disregard of existing drug laws”).
120 Id. at 2640.
121 Id. (internal quotation marks omitted).
122 Morse, 127 S. Ct. at 2640 (Breyer, J., concurring in part and dissenting in part).
123 Id. at 2643 (Stevens, J., dissenting).
was especially critical of the majority for deciding the case based on a constitutional issue and went so far as to say that "the Court [did] serious violence to the First Amendment." Justice Stevens's first major concern was that the majority allowed the censorship of Frederick's speech based on the content of the speech. Justice Stevens emphasized that the Court's jurisprudence requires that content-based restrictions be scrutinized and "subject[ed] to the most rigorous burden of justification." Nonetheless, Justice Stevens did admit that it might be appropriate to allow some targeted viewpoint discrimination in the school setting because of the school setting's special characteristics.

Justice Stevens next argued that even if some viewpoint restrictions may be tolerable in the school environment, Frederick's speech did not, expressly or otherwise, advocate drug use. Justice Stevens also criticized the majority to the extent that it deferred to Morse's interpretation of Frederick's speech rather than engaging in an independent examination. According to Justice Stevens, the interpretations of third parties, "reasonable or otherwise, have never dictated which messages amount to proscribable advocacy." Lastly, Justice Stevens explained that to the extent that Frederick's speech was "cryptic" or ambiguous, the benefit of the doubt as to whether the speech is proscribable advocacy should be resolved in favor of the speaker.

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124 Id. at 2643-51. According to Justice Stevens, "nationwide evaluations of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed 'Glaciers Melt!'" Id. at 2643.
125 Id. at 2644-45.
126 Id. at 2644 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995)).
127 Id. at 2646.
128 Morse, 127 S. Ct. at 2646 (Stevens, J., dissenting) (stating that "it is one thing to restrict speech that advocates drug use," but that "[i]t is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy") (emphasis in original). Justice Stevens also disagreed with the majority that the speaker's motive is irrelevant to the determination of the meaning of speech—"a speaker who does not intend to persuade his audience can hardly be said to be advocating anything." Id. at 2649.
129 Id. at 2647-48.
130 Id. at 2647.
131 Id. at 2649 (citing Fed. Election Comm'n v. Wisc. Right to Life, Inc., 127 S. Ct. 2652, 2669, 2674 (2007)).
III. SCHOOL SPEECH DOCTRINE AFTER MORSE AND MORSE APPLIED

The Supreme Court's decision in Morse has the potential to significantly alter the state of school speech jurisprudence. The few cases that have been decided after Morse show that as with Fraser and Kuhlmeier before it, divergent interpretations of Morse are already emerging from the handful of courts that have had to construe the decision.

A. School Speech Doctrine after Morse

How does Morse change the landscape of school speech jurisprudence? Narrowly interpreted, Morse simply creates another content-based exception to Tinker for speech that can reasonably be interpreted to promote illegal drug use.\(^{132}\) As such, Morse continues the trend of Fraser and Kuhlmeier by further shifting the balance in favor of school authority. There are, however, a number of observations to be made about the ways in which the Supreme Court's third exception to Tinker alters school speech jurisprudence and of equal importance, how it does not.

Perhaps most importantly, the exception carved out in Morse, unlike the exceptions established in Fraser and Kuhlmeier, expands content-based restrictions beyond the realm of required curricular functions. Unlike Fraser, which created a content-based exception in the context of a school assembly,\(^{133}\) and Kuhlmeier, which created a content-based exception in the context of a student newspaper,\(^{134}\) Morse created a content-based exception in the context of a non-curricular activity.\(^{135}\) Although attendance at the Torch Relay was permitted as a "school-sanctioned" activity, this differs from an official activity that is either organized by the school (and for which attendance is required) or bears the imprimatur of the school.\(^{136}\) After Morse, one

\(^{132}\) Id. at 2629 (majority opinion).

\(^{133}\) 478 U.S. 675, 685 (1986).


\(^{135}\) Morse v. Frederick, 127 S. Ct. 2618, 2622-23, 2629 (2007).

\(^{136}\) Id. at 2622. As Chemerinsky notes,

[i]t is appropriate to see [Fraser] and [Kuhlmeier], in their specific holdings and their general approach, as being limited to public schools' ability to regulate speech in official programs and courses. Therefore, even in light of [Fraser] and [Kuhlmeier], there remains First Amendment protection of student speech in non-curricular areas where there is no evidence of disruption of school activities.

Chemerinsky, supra note 11, at 542. As discussed below, this so-called "appropriate" interpretation of Fraser and Kuhlmeier has not been applied by all courts, many of which have deemed that Fraser and Kuhlmeier apply outside of curricular activities. See infra Part IV.B. Although one may argue that Chemerinsky's view is unduly narrow
may argue that students have lost practically all of Tinker's protection in the non-curricular setting, at least when the speech does not involve a political message. However, this would only be true if one accepts the idea that Morse will be applied to speech other than that which advocates illegal drug use. For example, in Doninger v. Niehoff, discussed in Part III.B, the court interpreted Morse as extending Fraser beyond the curricular activity context. As per the Doninger court's interpretation of Morse, school officials could censor speech anywhere on a school's campus even if it does not cause a material or substantial disruption if it can reasonably be interpreted as advocating illegal drugs, if it is vulgar, obscene, or lewd, or perhaps even if it is viewed as clearly disruptive of a particular educational mission of the school.

Morse also marks the first time that the Court has restricted student speech based on the viewpoint of the speaker. This is rather

and the courts that broadly apply these cases are correct, both the Kuhlmeier and Fraser Courts emphasized the importance of context in school speech analysis. See Kuhlmeier, 484 U.S. at 262, 266, 270–72; Fraser, 478 U.S. at 681, 685. Indeed, each decision was based primarily on the context in which the speech was uttered. See Kuhlmeier, 484 U.S. at 260, 262, 266, 270–72; Fraser, 478 U.S. at 681, 685. Significantly, the Kuhlmeier Court, in laying the groundwork for its analysis, first explained that students cannot be punished merely for expressing their personal views on the school premises—whether in the cafeteria, or on the playing field, or on the campus during the authorized hours—unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students.

Kuhlmeier, 484 U.S. at 266 (citation and internal quotation marks omitted). The Court therefore distinguished between what standard should be applied to speech uttered during curricular activities, such as school assemblies and publishing a school newspaper, and speech uttered at other times or in other contexts. Id.

Notably, while some courts have applied Morse to speech other than that which promotes drug use, other courts have interpreted Morse narrowly. Compare Boim v. Fulton County Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007) (determining that Morse's holding supports restricting student speech reasonably interpreted as a threat of school violence), with DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 688–40 (D.N.J. 2007) (interpreting Morse as applicable solely to speech that promotes illegal drug activity).

514 F. Supp. 2d 199 (D. Conn. 2007).

Id. at 213.

Id.

See Morse v. Frederick, 127 S. Ct. 2618, 2639 (2007) (Breyer, J., concurring in part and dissenting in part); id. at 2644–45 (Stevens, J., dissenting); see also Hans Bader, BONG HIT5 4 JESUS: The First Amendment Takes a Hit, 2006–07 CATO SUP. CT. REV. 133, 142–45 (2007).
significant, and troubling to some,\textsuperscript{142} because viewpoint discrimination is usually viewed as a blatant violation of First Amendment rights.\textsuperscript{143} Indeed, viewpoint discrimination has been characterized as an "egregious form of content discrimination."\textsuperscript{144} Nevertheless, as Justice Stevens noted, the special nature of the school environment may allow for some targeted viewpoint restrictions.\textsuperscript{145}

\textit{Morse} also continues the trend of \textit{Fraser} and \textit{Kuhlmeier} (as well as other Supreme Court decisions concerning the constitutional rights of students) by providing to school officials an ever-increasing amount of discretion in deciding what speech should be restricted and how particular speech should be interpreted.\textsuperscript{146} With respect to interpretation, Justice Stevens argued that to the extent that certain speech is ambiguous, "when it comes to defining what speech qualifies as the functional equivalent of express advocacy . . . we give the benefit of the doubt to speech, not censorship."\textsuperscript{147} In \textit{Morse}, the majority gave the benefit of the doubt to the censor, reasoning that Morse's interpretation that Frederick's banner advocated drug use was just as plausible as Frederick's explanation that the banner was meaningless.\textsuperscript{148} The case cited for the proposition that the tie should go to the speaker, \textit{Federal Election Commission v. Wisconsin Right to Life, Inc.},\textsuperscript{149} concerned "adult" speech, and thus may not apply in the student speech context.\textsuperscript{150} Nevertheless, at least one court (in a case decided after \textit{Morse}) has cited \textit{Wisconsin Right to Life} for this exact proposition in the student speech context,\textsuperscript{151} leaving the possibility that the

\textsuperscript{142} See \textit{Morse}, 127 S. Ct. at 2639 (Breyer, J., concurring in part and dissenting in part); \textit{id.} at 2644–45 (Stevens, J., dissenting); Bader, supra note 141, at 142–45.
\textsuperscript{143} See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (citing \textit{R.A.V. v. City of St. Paul, Minn.}, 505 U.S 377, 391 (1992)). The Court in \textit{Rosenberger} explained that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." \textit{Id.} at 829.
\textsuperscript{144} \textit{Id.} (emphasis added).
\textsuperscript{145} \textit{Morse}, 127 S. Ct. at 2646 (Stevens, J., dissenting).
\textsuperscript{146} See \textit{id.} at 2647–49.
\textsuperscript{147} \textit{Id.} at 2649 (quoting Fed. Election Comm'n v. Wisc. Right to Life, Inc., 127 S. Ct. 2652, 2669, 2674 (2007)).
\textsuperscript{148} \textit{Id.} at 2624–25 (majority opinion). The majority acknowledged that "[g]ibberish is surely a possible interpretation" of Frederick's banner; however, such an interpretation would ignore the banner's "undeniable reference to illegal drugs." \textit{Id.} at 2625. The majority did not state "reference to using illegal drugs," and interpreted the banner as such only by reasoning that the banner can be interpreted in this way if the word "take" or the words "we take" are assumed by the listener. \textit{Id.}
\textsuperscript{149} 127 S. Ct. 2652 (2007).
\textsuperscript{150} See \textit{Morse}, 127 S. Ct. at 2649 (Stevens, J., dissenting).
majority opinion can be interpreted as not necessarily disposing of this principle in the school context. If the benefit of the doubt does indeed go to school officials, the Court may have opened the door to greater suppression of student speech, because borderline or ambiguous speech may be readily suppressed. With such a possibility comes the specter of the chilling effect and reluctance on the part of students to exercise their First Amendment rights.\footnote{152 See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 287–88 (1988) (Brennan, J., dissenting).}

Finally, the \textit{Morse} decision failed to provide adequate guidance to lower courts as to when and how the \textit{Tinker} trilogy should be applied.\footnote{153 For other observations and criticisms with respect to the \textit{Morse} opinion, see Bader, \textit{supra} note 141, at 141–65; see generally Brannon P. Denning & Molly C. Taylor, Morse v. Frederick and the Regulation of Student Cyberspeech, 35 HASTINGS CONST. L.Q. 835 (2008); Melinda Cupps Dickler, The Morse Quartet: Student Speech and the First Amendment, 53 LOY. L. REV. 355 (2007).} The majority essentially stated the obvious by explaining that \textit{Fraser} established that the mode of analysis set forth in \textit{Tinker} is not absolute, but that the mode utilized in \textit{Fraser} is not entirely clear.\footnote{154 Morse, 127 S. Ct. at 2626.} The Court did limit \textit{Fraser} by explaining that restricting speech simply because it is “offensive” would be stretching \textit{Fraser} too far.\footnote{155 Id. at 2629.} Many questions, however, remain unanswered, such as whether speech can be suppressed pursuant to a school policy when such speech is neither lewd, sexually explicit, nor advocative of illegal drug use. In other words, can a school censor speech that is against a particular educational mission embodied in a school policy?\footnote{156 For example, in \textit{Zamecnik} v. \textit{Indian Prairie School District No. 204 Board of Education}, No. 07 C 1586, 2007 U.S. Dist. LEXIS 94411 (N.D. Ill. Dec. 21, 2007), the court declined to issue a preliminary injunction to permit a student to wear a t-shirt with the phrase “Be Happy, Not Gay,” because the phrase was against the school’s educational mission of promoting tolerance. According to the \textit{Zamecnik} court, “\textit{Morse} is not powerfully convincing precedent that the Seventh Circuit would not continue to allow public schools to take into consideration pedagogical concerns and the school’s basic educational mission when restricting student speech.” \textit{Id.} at *19. Cases such as \textit{Zamecnik} show that school officials can rather easily characterize what is essentially “offensive” speech as being contrary to a particular educational mission of the school. On appeal, however, the United States Court of Appeals for the Seventh Circuit reversed the district court’s decision. Nuxoll v. \textit{Indian Prairie Sch. Dist. No. 204 Bd. of Educ.}, 523 F.3d 668 (7th Cir. 2008). In \textit{Nuxoll}, the court characterized the phrase “Be Happy, Not Gay” as “only tepidly negative,” and applying \textit{Tinker} decided that it was highly speculative whether this statement would cause a substantial disruption. \textit{Id.} at 676.} Thus, confusion remains as to when, where, and how the now “quartet”\footnote{157 See Dickler, \textit{supra} note 153, at 362.} of student speech cases is to be applied.
In sum, *Morse* has the potential to be more than simply a drug exception. *Morse*’s holding is certainly narrow on its face, and Justice Alito’s concurrence argues that it should be interpreted narrowly.\(^{158}\) A similar observation can be made about *Fraser*’s holding and Justice Brennan’s concurrence, which advocated a narrow interpretation;\(^ {159}\) however, *Fraser* has not been interpreted narrowly by all courts. Nonetheless, one may distinguish these two cases by pointing to the fact that Justice Alito’s vote was necessary for the result in *Morse*, whereas Justice Brennan’s vote was not necessary for the result in *Fraser*. Because Justice Alito’s vote was determinative, his interpretation should be adhered to more strictly.\(^{160}\) Part III.B discusses a number of decisions that have applied *Morse* and thus gives a glimpse as to the effect *Morse* is having and possibly will have in the future.

### B. Morse Applied

A number of student speech cases have been decided since the Supreme Court’s decision in *Morse*. These decisions have applied *Morse* both narrowly and broadly to various types of speech.

At least two courts have dealt with the issue of speech that can be interpreted as threatening school violence. *Boim v. Fulton County School District*,\(^{161}\) decided by the United States Court of Appeals for the Eleventh Circuit, concerned a student who wrote a passage in her notebook about a dream in which she killed her math teacher.\(^ {162}\) A

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\(^{158}\) See *Morse*, 127 S. Ct. at 2636–38 (Alito, J., concurring).


\(^{160}\) According to the *Marks* rule, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation and citation omitted). Although the *Marks* rule has only been applied to plurality decisions, its reasoning can be viewed as instructive with respect to five-to-four decisions, especially when a Justice or Justices join a majority opinion conditionally as in *Morse*. If Justice Alito had not joined the majority, he would have concurred in the Court’s judgment on the narrowest grounds. Because Justice Alito joined the majority on the understanding that the Court’s holding was narrow, *see Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring), it should be assumed that if the Court’s holding was actually broader, Justice Alito would not have joined the majority, and “no single rationale explaining the result” would have enjoyed the assent of five Justices. *Marks*, 430 U.S. at 193. Thus, because Justice Alito’s decision to join the majority was conditional and because his is the most narrow opinion, it should be viewed as controlling, or at the least, strongly persuasive. *Contra Nuxoll v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ.*, 523 F. 3d 668, 672–73 (7th Cir. 2008).

\(^{161}\) 494 F.3d 978 (11th Cir. 2007).

\(^{162}\) *Id.* at 980–81.
fellow student was viewing a different entry in the notebook, and a
teacher confiscated it after several requests to put the notebook
away. The teacher later noticed the entry, and the student was sus-
pended due to concerns that the notebook entry was “planning in
disguise as a dream.” The Boim court first concluded that the stu-
dent’s actions in writing the passage and giving her notebook to
another student “clearly caused and was reasonably likely to further
cause a material and substantial disruption to the ‘maintenance of
order and decorum’ within [the school].” Although the court ap-
parently found the speech proscribable under Tinker, the court went
on to discuss Morse, and after quoting Morse’s holding, the court con-
cluded that the “same rationale applies equally, if not more strongly,
to speech reasonably construed as a threat of school violence.” The
court thus expanded Morse’s reasoning to the realm of speech rea-
sonably interpreted as threatening school violence. Regardless of
whether one agrees that this is a reasonable expansion of Morse, this
case demonstrates that Morse may not be applied as narrowly as Jus-
tice Alito argued it should be.

Another post-Morse case concerning speech interpreted as
threatening school violence, Wisniewski v. Board of Education of Weeds-
port Central School District, dealt with a student who was suspended
for sharing with friends, over the Internet, a small drawing that sug-
gested that a named teacher should be killed. The United States
Court of Appeals for the Second Circuit upheld the lower court’s
dismissal of the case and held that the speech was proscribable under
Tinker. In DePinto v. Bayonne Board of Education, which involved
students who were suspended for wearing buttons that featured a
photograph of members of the Hitler Youth to protest the school’s
mandatory uniform policy, the court interpreted Morse as applicable
solely to speech that mentions, alludes to, or refers to illegal drug ac-
tivity. The DePinto court was attuned to the fact that the Morse ma-
ajority emphasized that prior students’ rights cases recognized the
importance of deterring drug use by schoolchildren. Thus, not all

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165 Id. at 980.
166 Id. at 981.
167 Id. at 983.
168 Id. at 984.
169 Id. at 980.
170 Id. at 34 (2d Cir. 2007).
171 Id. at 36.
172 Id. at 35.
173 Id. at 640.
174 Id.
courts are willing to expand Morse to prohibit speech other than that which encourages illegal drug use.

In addition to Boim v. Fulton County School District, another case that interpreted Morse broadly, Doninger v. Niehoff,173 concerned a student who was prohibited from participating in an extracurricular activity after she posted a vulgar message criticizing school officials on a social networking website.174 The Doninger court interpreted Morse as "extend[ing] Fraser to cover on-campus speech that school administrators could reasonably interpret as advocating the use of drugs, a message clearly disruptive of and inconsistent with the school's mission to educate students about the dangers of illegal drugs and to discourage their use."175 The court also stated that "Fraser and Morse teach that school officials could permissibly punish [a student for posting offensive speech on a blog], which interfered with the school's highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse."176 The court found this interpretation of Morse applicable only to the particular circumstances of the case, where the punishment imposed was prohibiting a student from participating in an extracurricular activity.177 Thus, although Doninger takes a broader view of Morse, potentially applying it to prohibit vulgar and offensive speech outside the context of the school's curriculum, it takes this broader view only under the particular factual circumstances of the student's actions and the punishment imposed.

As the above cases show, courts have already taken divergent approaches with respect to the breadth of Morse's holding. Some courts have interpreted Morse narrowly as applying only to speech promoting illegal drug use, while other courts have expanded Morse beyond its holding to speech purportedly threatening school violence and vulgar or offensive speech, posted on a blog, critical of faculty or administrators.

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173 514 F. Supp. 2d 199 (D. Conn. 2007), aff'd, 527 F.3d 41 (2d Cir. 2008). Whereas the district court decided this case under Fraser and Morse, the United States Court of Appeals for the Second Circuit upheld the decision under Tinker. Doninger v. Niehoff, 527 F.3d 41, 48-53 (2d Cir. 2008).
174 Id.
175 Id. at 213 (internal quotations omitted).
176 Id. at 217 (internal citations and quotations omitted). According to the court, under Second Circuit precedent, the student's blog entry could be considered on-campus speech for purposes of the First Amendment. Id.
177 Id. ("[T]his Court would be reluctant to find no First Amendment violation in other factual contexts or if the discipline imposed on Avery, [the student], were different.").
IV. GREATER DISCRETION AND GREATER CONFUSION

A. Greater Discretion

As previously noted, courts have accorded greater discretion to school officials in both the free speech context and in the context of privacy and procedural due process rights. On the one hand, school officials have more power to control the educational environment. For example, Anne P. Dupre, a former public school teacher and currently a professor of law at the University of Georgia School of Law, argues that *Tinker* "paved the way for the decline in school order and educational quality," and the Supreme Court's decisions concerning school authority since *Tinker*, allowing greater authority to school officials, are a step in the right direction. On the other hand, according greater discretion to school officials may have a chilling effect on the exercise of students' free speech rights. It is true that the chilling effect may also affect teachers and school officials if they are not accorded sufficient discretion; however, according teachers and school officials greater discretion, or granting them qualified immunity in certain situations, may alleviate this concern. In addition, increasing censorship of student speech, especially when it is not truly disruptive or harmful, runs counter to the role of public schools to teach the "values and responsibilities of United States citizenship."

Although the Supreme Court did not decide another school speech case until seventeen years after *Tinker*, the Court decided a number of important cases regarding student rights in the intervening years. In 1975, the Court decided *Goss v. Lopez,* in which it held that before a public school could suspend a student, it must give the

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178 Dupre, *supra* note 2, at 99-104.

179 Specifically, as this Comment argues in this Part and Part V.A, the accordance of great deference to school officials may often permit the suppression of speech found subjectively disagreeable, either due to ideology or overreaction, when it is otherwise constitutionally protected.

180 In other words, if a teacher or school official is unsure whether or not certain speech can lawfully be restricted, she may be hesitant to suppress such speech knowing she may be subject to liability.

181 For example, if a quick decision as to whether or not to suppress speech needs to be made, it may be appropriate to grant a school official qualified immunity. Granting qualified immunity in these types of situations, among others, will allow teachers to maintain order without the concern that they may be subject to personal liability.

182 Hudson & Ferguson, *supra* note 12, at 181.

student notice of the suspension as well as an informal hearing.\textsuperscript{184} Suspending a student without notice or a hearing would thus be a violation of the student's right to procedural due process.\textsuperscript{185} As in \textit{Tinker}, the Court in \textit{Goss} did not accord students the same constitutional rights as adults, but was student-rights friendly—that is, it emphasized the fact that public schools must exercise their authority consistently with the requirements of the Constitution.\textsuperscript{186}

Two years later, in \textit{Ingraham v. Wright},\textsuperscript{187} the Court held that the Eighth Amendment did not apply to disciplinary corporal punishment (paddling) in public schools, and public schools did not have to provide due process prior to the imposition of such punishment.\textsuperscript{188} According to the Court, the limitations on corporal punishment in public schools under common law and state tort law remedies were sufficient for the protection of students' rights.\textsuperscript{189} In addition, the Court stated that determining the appropriateness of school discipline "is committed . . . to the discretion of school authorities subject to state law."\textsuperscript{190}

In the Fourth Amendment context, the Court decided \textit{New Jersey v. T.L.O.},\textsuperscript{191} in which it held that reasonable suspicion, rather than probable cause, is sufficient to justify a search of a student and her belongings in a public school.\textsuperscript{192} The Court justified this relaxed standard in part on the increase in drug use and violent crime in schools, which had made maintaining order in the classroom difficult.\textsuperscript{193} Thus, the interest of teachers and administrators in maintaining order and discipline prevailed over the student's interest in privacy.\textsuperscript{194}

Finally, in \textit{Vernonia School District 47J v. Acton},\textsuperscript{195} also a Fourth Amendment decision, the Supreme Court held that a policy requiring suspicionless drug testing for student athletes was constitutional.\textsuperscript{196} The Court pointed to essentially all the major student rights

\textsuperscript{184} Id. at 582–83.
\textsuperscript{185} Id. at 583.
\textsuperscript{186} Id. at 574.
\textsuperscript{187} 430 U.S. 651 (1977).
\textsuperscript{188} Id. at 682–83.
\textsuperscript{189} Id. at 677–83.
\textsuperscript{190} Id. at 682.
\textsuperscript{191} 469 U.S. 325 (1985).
\textsuperscript{192} Id. at 341.
\textsuperscript{193} Id. at 339.
\textsuperscript{194} Id.
\textsuperscript{195} 515 U.S. 646 (1995). \textit{Vernonia} was decided after \textit{Fraser} and \textit{Kuhlmeier}.
\textsuperscript{196} Id. at 664–65.
cases discussed above and once again reaffirmed that "the nature [of
students' constitutional rights] is what is appropriate for children in
school."197 Also, the Court noted the important interest of deterring
drug use among student athletes, and compared student athletes to
adults working in "closely regulated industr[ies]" who have a lower
expectation of privacy.198 In Board of Education v. Earls,199 however,
Justice Thomas argued that the student athletes' lower expectation of
privacy was not essential to the decision in Vernonia; rather, the deci-
sion "depended primarily upon the school's custodial responsibility
and authority."200

Perhaps not surprisingly, the various student rights cases have
become intertwined, at least with respect to notions of the limited na-
ture of students' constitutional rights and how deferential courts
ought to be to school officials. In other words, principles adopted by
the Supreme Court in one context—free speech rights, for exam-
ple—have been readily transplanted to cases concerning privacy and
procedural due process rights, and vice versa. Goss began the inter-
twinement by citing and quoting Tinker.201 The intertwinment con-
tinued with the Court citing and quoting its various speech, privacy,
and procedural due process cases primarily for the propositions that
the rights of students are not coextensive with those of adults and
that the rights of students are what is appropriate in the school envi-
ronment.202 With the apparent increase in student drug use and
school violence, the courts have accorded increasing discretion to
school officials, so that they can maintain order and decorum in the
nation's schools. The Supreme Court has not, however, differenti-
tiated between the importance of speech, privacy, and procedural
due process rights, and how or to what degree the limitation of each
may contribute to the maintenance of order in public schools. Thus,
what may have initially been a recognition of the need for more dis-
cretion in the Fourth Amendment and student drug use context (New
Jersey v. T.L.O.) was later readily acknowledged by the Court in the
First Amendment context (Fraser and Kuhlmeier).203

197 Id. at 655–57.
198 Id. at 657.
200 Id. at 831.
260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 686 (1986);
203 See Kuhlmeier, 484 U.S. at 266; Fraser, 478 U.S. at 682, 686.
The comparatively equal discretion that is accorded to school officials in each context may need to be reconsidered. Although a good deal of discretion may be required in the Fourth Amendment context, considering the imminent nature of the threat when a student is possibly in possession of a harmful substance or weapon, the same sort of threat or harm is not involved in the First Amendment context, at least when the type of speech at issue is not that which causes or may cause a material and substantial disruption. As discussed in Parts V and VI, the free expression context involves different interests and consequences that may caution against according too much discretion to school officials.

The need to treat students' free speech, privacy, and procedural due process rights differently is in part illustrated by Kay Hymowitz in "Tinker and the Lessons from the Slippery Slope," in which she describes a number of situations where teachers refrained from taking disciplinary action against students. Significantly, the reasons given for not taking any disciplinary action relate to evidentiary issues, such as not having any witnesses to counter a student's possible "other side of the story," and not because the teacher was unsure whether particular speech could be censored. In such situations, perhaps what is needed is not greater discretion to silence speech, but an easing of evidentiary requirements—for example, eliminating the requirement of corroboration (in schools that have such a requirement). The blame placed on Tinker for such things as increasing verbal abuse and other disobedience may in many cases be misplaced. These types of disruptive speech are what Tinker does not permit. It simply does not follow that increased disorder in schools and reluctance among teachers to discipline necessarily requires the accordace of more discretion to teachers or the curtailment of student speech rights. Rather, teachers and school officials should come to understand that Tinker and its progeny do not leave them powerless. Similarly, courts may need to reconsider whether the curtailment of free speech rights actually has a substantial enough effect on the alleviation of these problems to justify the curtailment of a fundamental right.

Hymowitz, supra note 42, at 555-56. Hymowitz describes these incidents under the heading of "Tinker's Aftermath," arguing that Tinker has played a role in increasing disobedience in schools. Id. She argues that "empowering children with rights inevitably began the deconstruction and disempowerment of the teacher." Id. at 555. Id. at 562-68. See id. at 555-58; Dupre, supra note 2, at 50-51. See infra notes 223-28 and accompanying text.
The issue of whether significant discretion should be accorded to school officials also requires the consideration of the concept of moral panic. Throughout the history of the United States, albeit outside the school context, and primarily in times of war, fundamental rights have been curtailed in the name of security. Too often, hindsight has shown that curtailment of civil liberties was an overreaction. Although there is no doubt that adolescent drug use and school violence are serious problems in schools, such problems must be dealt with in a constructive and effective manner, without losing sight of the utmost importance of the First Amendment in the face of fear and panic.

Stanley Cohen coined the concept of moral panic to characterize "the reactions of the media, the public, and agents of social control to youth disturbances." Moral panics typically involve concern and hostility over the behavior of a group or category of people. The disturbance or perceived threat to the existing social order is amplified by the media, which depicts events as a sign of widespread moral anxiety and social disintegration. According to Donna Killingbeck, "[t]he response [to such events] is likely to be a demand for

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210 Id. at 528–29. It is true that such a criticism is easy to make after the fact—that is, hindsight is 20/20. Nevertheless, such an observation does not change the fact that the curtailment of civil liberties throughout various points in history was indeed an overreaction, and therefore unnecessary. Though it is much more difficult to look forward and determine whether a certain measure is truly an overreaction to a problem, the main objective here is to emphasize the need for judges to be cognizant of the propensity of educators and administrators to overreact in the face of a moral panic and closely scrutinize their decisions to suppress speech in such circumstances.

The key elements or stages of a moral panic are:
1. Someone or something is defined as a threat to values or interests;
2. This threat is depicted in an easily recognizable form by the media;
3. There is a rapid build up of public concern;
4. There is a response from authorities or opinion makers;
5. The panic recedes or results in social changes.

Killingbeck, supra, at 187.
212 Killingbeck, supra note 211, at 188.
213 Id.
greater social regulation or control and a demand for a return to traditional values. 214

Killingbeck argues that the media generated a moral panic after the Columbine school shootings. 215 Killingbeck writes that the media labeled school shootings as "a trend" and thus exacerbated the fears of the public about the safety of students in school. 216 The result of such fear is a misdirected public policy that attempts to safeguard schools, even though the root of the problem may lie elsewhere. 217 School officials and judges are not immune from the effects of moral panics. Clay Calvert notes that after Columbine many school administrators are interpreting what is otherwise harmless speech—for example, stories, poems, and other artwork—as true threats. 218 Also, the majority opinion in Boim v. Fulton County School District relied upon a number of media reports, rather than statistics, to demonstrate the extent of the problem of school violence. 219

Scholars and commentators alike have observed that moral panics have been generated with respect to the drug problem in the United States. 220 Although each of these authors does not discuss drug use among youth specifically, Professor Yuet W. Cheung notes that public belief in an ever-increasing problem of illicit drug use "has fuelled the prohibitionist reaction to drug use." 221 Among the criticisms of the prohibitionist approach is that it infringes the civil rights of citizens. 222

The point here is not that drugs or violence are not problems within schools. Instead, school officials, judges, and policy-makers must be cognizant of the possible effects of moral panics, especially when fundamental rights are at stake. For example, some amicus

214 Id.
215 See id. at 186.
216 Id.
217 Id.
219 Boim v. Fulton County Sch. Dist., 494 F.3d 978, 983–84 (11th Cir. 2007); see also Lavine v. Blaine Sch. Dist., 257 F.3d 981, 984 & n.2 (9th Cir. 2001).
221 Cheung, supra note 220, at 1697–99.
222 Id.
briefs submitted to the Supreme Court in Morse argued that allowing speech such as Frederick’s would undermine the ability of schools to protect their students from drug abuse. The amici further claimed that the susceptibility of students to such messages is evidenced by the fact that over half of American secondary school students have tried illegal drugs. Other amici, however, pointed out that no evidence was offered to support the claim that silencing student speech is necessary or even helpful in preventing student drug use. In addition, still other amici noted that “First Amendment doctrine already recognizes that some government interests are compelling enough to suppress speech.” But it also recognizes that claims of necessity will frequently be advanced. Consequently, so that the benefits of free expression may be protected, the First Amendment “requires that those claiming compelling interests show that the repressive means will make a substantial difference.” Lastly, Hans Bader of the Competitive Enterprise Institute notes that the Court restricted speech that was unlikely to cause drug use “in its zeal to give the government a win in the ‘War on Drugs.’”

Whether it is because of zeal or fear, in many circumstances there may be a rush to judgment that certain speech should be silenced due to its deleterious effects. Furthermore, it is unclear whether suppression of speech may have any substantial beneficial effects. In light of this, courts should consider granting less deference to school officials in many circumstances because otherwise harmless speech may be silenced. Such circumstances include where a court has reason to believe that speech is being censored simply because it is contrary to traditional (or a teacher’s or administrator’s personal) moral, cultural, religious, or political values, or where it appears that

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224 Id.
227 Id.
228 Id. Even if “substantial difference” is too demanding a standard, proof of some sort of demonstrable difference ought to be required to protect against overzealousness and otherwise pretextual justifications for speech suppression.
229 Bader, supra note 141, at 133.
there may have been a rush to judgment.\textsuperscript{230} Admittedly, there will be cases that require a quick decision as to whether to censor certain speech (\textit{Morse} itself being a good example). In these situations it may be appropriate to defer to the decision of a teacher or administrator. But, declining to find a teacher or administrator liable due to a split-second decision to censor speech should not necessarily foreclose the possibility of an equitable remedy, such as the expungement of a student's disciplinary record.\textsuperscript{231}

Continuance of the trend of giving school officials more discretion and deference ultimately leads to the suppression of speech that is otherwise permissible under the Supreme Court's school speech jurisprudence. This trend toward greater suppression includes speech beyond the context of speech related to school violence and illicit drugs. One such example of seemingly harmless and unobjectionable speech being silenced is \textit{Broussard v. School Board of the City of Norfolk}.\textsuperscript{232} There, a student was suspended for wearing a t-shirt with the phrase "Drugs Suck!" because school administrators deemed that the word "suck" was offensive.\textsuperscript{233} The \textit{Broussard} court found no First Amendment violation because the word "suck" in the context of the student's shirt could be interpreted as lewd, vulgar, or offensive.\textsuperscript{234} Indeed, as noted by Wilborn, "courts have become very deferential to suppression of student speech by school authorities who can offer any reason for their action that is related to some pedagogical objective, however fanciful."\textsuperscript{235}

Greater deference is also problematic in light of the fact that the response to a moral panic is "likely to be a demand for greater social regulation or control and a demand for a return to traditional values."\textsuperscript{236} Greater social regulation and demand for a return to tradi-

\textsuperscript{230} Although it is true that one of the functions of schools is to pass on moral, cultural, and political values, it is not true that schools ought to be silencing speech contrary to traditional values, especially when a student is speaking outside of class or is otherwise not directly interfering with the school's work in educating its students. \textit{See} Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

\textsuperscript{231} \textit{See} Morse v. Frederick, 127 S. Ct. 2618, 2638–39 (2007) (Breyer, J., concurring in part and dissenting in part); \textit{id.} at 2643 (Stevens, J., dissenting). In fact, the decision of a school official can be deferred to, or qualified immunity can be granted to protect the school official from personal liability, while leaving the student with the possibility of obtaining an equitable remedy. \textit{See id.}


\textsuperscript{233} \textit{Id.} at 1528.

\textsuperscript{234} \textit{Id.} at 1537.

\textsuperscript{235} Wilborn, \textit{supra} note 56, at 139 (noting also that increased deference to school officials leaves open a "black hole" into which school officials may toss any speech they dislike or with which they disagree).

\textsuperscript{236} Killingbeck, \textit{supra} note 211, at 187.
tional values raises the concern of the Barnette Court—that public schools may go beyond inculcating core democratic values to potentially indoctrinating children.\textsuperscript{237} The concern is thus not simply that there may be overregulation of student speech, but that overregulation may be employed selectively so that certain moral or political values are emphasized while others are completely excluded. Such a possibility should not be forgotten or ignored by the courts lest the nation's children become "closed-circuit recipients of only that which the State chooses to communicate."\textsuperscript{238}

B. Greater Confusion

After the Supreme Court's decisions in Fraser and Kuhlmeier, numerous commentators lamented the inconsistent application of these decisions by the lower courts.\textsuperscript{239} Indeed, lower courts themselves have found school speech jurisprudence unclear and difficult to apply.\textsuperscript{240} The Court's decision in Morse did not do much to clear up any of the confusion. On the one hand, Morse did limit Fraser by stating that the holding in Fraser cannot be stretched to restrict simply "offensive" speech.\textsuperscript{241} On the other hand, the Court implicitly opened the gates for further content-based restrictions by emphasizing that Fraser and Kuhlmeier established that Tinker is not the only standard that may be utilized to restrict speech. Also, although some courts have restricted speech in part because it was deemed offensive, other courts have taken different approaches that were not addressed by Morse.

\textsuperscript{237} See supra notes 25–29 and accompanying text.

\textsuperscript{238} Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969); see also Solove, supra note 25, at 960–70 (arguing that the bureaucratic state impedes individual self-definition and that increasing judicial deference effectively shuts judicial review—"which history has demonstrated can be a powerful tool for the furtherance of liberal values"—out of the bureaucratic state).

\textsuperscript{239} See Brief for Appellant-Petitioner at 71–72, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 U.S. S. Ct. Briefs LEXIS 18 ("Not only are the voices lamenting confusion and doubt infecting the fractious body of school speech law numerous, they are robustly and ideologically diverse."); Chemerinsky, supra note 11, at 541–46; Hudson & Ferguson, supra note 12; Miller, supra note 12, at 646–50; Justin T. Peterson, Comment, School Authority v. Students’ First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?, 2005 Mich. St. L. Rev. 931, 939–47 (2005).

\textsuperscript{240} See Morse v. Frederick, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in part and dissenting in part); Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994).

\textsuperscript{241} Morse, 127 S. Ct. at 2629. Thus, cases such as Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000) (holding the suppression of a Marilyn Manson t-shirt that mocked a religious figure constitutional because of the t-shirt’s offensive nature) may be implicitly overruled.
For example, in discussing the trend that lower court decisions are increasingly more in agreement with Justice Black’s dissent in *Tinker* (which advocated for great deference to school officials), Chemerinsky notes *Poling v. Murphy*, decided by the United States Court of Appeals for the Sixth Circuit. In *Poling*, a student was disciplined for making rude and discourteous comments about the school administration in a nomination speech delivered during a school-sponsored assembly. In affirming the district court’s grant of summary judgment, the court concluded that the student’s speech during the assembly fell within the meaning of *Kuhlmeier*, and thus applied *Kuhlmeier*’s rational basis standard, determining that school officials had legitimate pedagogical concerns to discipline the student. The issue with *Poling* is whether such an expansion of *Kuhlmeier* to speech not bearing the imprimatur of the school is permissible. According to Chemerinsky, *Poling*’s approach—rational basis review and deference to school authorities—is representative of the majority of lower court school speech decisions since *Tinker*.

Questions remain not only about the boundaries of *Kuhlmeier* but also with respect to *Fraser*. For example, in *Boroff v. Van Wert City Board of Education*, which held constitutional the suppression of a Marilyn Manson t-shirt that mocked a religious figure, the court noted that the speech was both offensive and against the school’s educational mission. Thus, how far may a school go in silencing speech that it deems contrary to its educational mission? This question may very well be asked with respect to *Morse*, because the Court’s holding is based in part on the notion that speech advocating illegal drug use is counter to the educational mission of schools. Furthermore, what are the limits to speech that is lewd and indecent?

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242 Chemerinsky, *supra* note 11, at 544.
243 872 F.2d 757 (6th Cir. 1989).
244 Id. at 758. The “rude” and “discourteous” remarks included: “The administration plays tricks with your mind and they hope you won’t notice. . . . If you want to break the iron grip of this school, vote for me . . . .” Id. at 759.
245 Id. at 763–64.
246 Chemerinsky, *supra* note 11, at 545.
247 220 F.3d 465 (6th Cir. 2000).
248 Id. at 469–70. The confusion among lower courts in applying the *Tinker* trilogy is further illustrated by comparing *Boroff* with *Nixon v. Northern Local School District Board of Education*, 383 F. Supp. 2d 965 (S.D. Ohio 2005), which involved facts very similar to those in *Boroff*, but reached the opposite result. The *Nixon* court opined that “[r]ather than being concerned with the actual content of what is being conveyed, the *Fraser* justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed.” *Nixon*, 383 F. Supp. 2d at 971.
Can a school adopt an abstinence-only policy and prohibit all speech of a sexual nature?  

As discussed above, greater discretion afforded to school officials in some cases leads to suppression of speech that would otherwise be permissible according to the Supreme Court's school speech jurisprudence. The same idea holds true with a confused jurisprudence. Although Tinker continues to be applied, many courts apply Fraser or Kuhlmeier in circumstances where Tinker is the appropriate standard—some courts even treating Tinker as though it has been overruled. Similarly, at least two courts have already expanded Morse to speech other than that which advocates illegal drug use. Thus, after Morse it is quite likely that the trend of greater discretion and greater confusion will continue and even increase.

V. LIMITING PRINCIPLES: ARE OTHER TYPES OF SPEECH VULNERABLE?

A. How Liberally Should Morse Be Interpreted?

Boim v. Fulton County School District, which involved speech that could reasonably be interpreted as threatening violence, shows that courts may be willing to interpret Morse beyond its narrow drug exception. At first glance, Boim's expansion may look like a reasonable one. After all, both school violence and illicit drug use are illegal, and both are serious problems facing the nation's schools. Despite these concerns, one must question whether it is actually necessary to expand Morse to speech threatening school violence. Such speech, if actually threatening, can be suppressed under Tinker's material and substantial disruption standard as well as under Watts v. United States, which holds that the government may restrict true


251 See supra notes 232–34 and accompanying text.

252 See Chemerinsky, supra note 11, at 542.


254 In Bar-Navon v. School Board of Brevard County, No. 6:06-cv-1434-Orl-19KRS, 2007 U.S. Dist. LEXIS 82044 (M.D. Fla. Nov. 5, 2007), a case decided after Morse, the court noted that courts at all levels are confused about the scope of Tinker's holding, and that Morse "did little to clarify the scope of Tinker's holding." Id. at 15. See also D.G. v. Florida, 961 So. 2d 1063 (Fla. Dist. Ct. App. 2007) (citing Morse for the proposition that great weight should be afforded to the judgment of school officials).

Furthermore, the concept of moral panic cautions against expanding *Morse*, because the true gravity of the student drug use and school violence problems, and the uncertainty of whether the restriction of ambiguous speech has any effect on decreasing either problem, may not warrant the curtailment of a fundamental right. There may also be more effective means for dealing with these issues. For example, when objectionable speech is uttered in school, "the resolution should not focus on silencing the offender, but on educating both the offending and the offended about appropriate responses." Instead of simply punishing students by way of a suspension (as a first resort), school officials should take the time to educate their students about First Amendment principles, including how to properly exercise First Amendment rights in the school environment.

Expansion of *Morse* to other speech may also place the narrow holding on a slippery slope. Rather than applying *Morse* to speech

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256 *Id.* at 708. In *Watts*, the petitioner was convicted for violating a federal statute that prohibited "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States." *Id.* at 705. The petitioner made the following statements in a discussion group at a public rally: "[N]ow I have received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. In reversing the conviction, the Supreme Court held that petitioner's speech was not a true "threat" but rather "political hyperbole." *Id.* at 708.

257 See *supra* notes 225–27 and accompanying text.

258 Hudson & Ferguson, *supra* note 12, at 207; see *id.* at 207 n.211 (noting Justice Brandeis's famous quote from his concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927), "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). Justice Brandeis also stated in *Whitney* that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education . . . , not abridgement of the rights of free speech and assembly." 274 U.S. at 378 (Brandeis, J., concurring) (emphasis added). Hudson and Ferguson further explain that:

[c]ensorship [should be used] as a last resort, instead of the first. Civics and character education, peer counseling, opportunities for expression and debate of ideas that may be outside the mainstream, and other alternative education opportunities not only protect the free expression rights of students, but they also provide a more robust educational environment that leads to better educated students.


259 Interestingly, Clay Calvert notes that "[r]esearch demonstrates that suspensions fail to modify negative behavior." Calvert, *supra* note 218, at 765 (citation omitted).

concerning drug use and perhaps school violence, courts may further expand Morse to other speech deemed contrary to the school's educational mission. Such an interpretation of Morse was made by the court in Doninger v. Niehoff, in which the court interpreted Morse as expanding Fraser to on-campus speech advocating illegal drug use—speech deemed contrary to the educational mission of the school—and read the case as permitting the punishment of a student for posting objectionable language critical of school administrators on a Internet blog. With such an expansion comes possible further expansion due to subjective beliefs as to what type of speech is contrary to a school's educational mission.

B. Religious Speech

An amicus brief filed by the Christian Legal Society in support of Frederick warned the Supreme Court that "undue deference to public school power . . . would . . . end up undermining legitimate expressions of religion by public school students." One of the Christian Legal Society's main concerns was that school officials may silence some religious speech simply because they believe it is "offensive." The Supreme Court was sympathetic to this concern as it held that Fraser cannot be extended to suppress speech that is merely "offensive." The Christian Legal Society also noted that, besides labeling speech offensive, some school officials believe that religious expression can invade the rights of others, because it may be discriminatory or be interpreted as a "verbal assault." The Morse Court did not specifically address the boundaries of this part of the Tinker standard.

261 514 F. Supp. 2d 199 (D. Conn. 2007).
262 Id. at 213.
263 See Hudson & Ferguson, supra note 12, at 201-03; Peterson, supra note 239, at 943-47. The problem of subjectivity does not necessarily concern the school's educational mission itself; rather, subjectivity comes into play when school officials decide what speech is contrary to a particular educational mission. See, e.g., supra note 156.
265 Id. at 12.
266 Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) (noting that both religious and political speech may be offensive).
267 Brief for CLS, supra note 264, at 6-7.
268 As noted above, the Tinker standard permits suppression of speech that materially and substantially interferes with appropriate discipline in school or if it "intrudes upon the . . . rights of other[s]." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).
In fact, in Harper v. Poway Unified School District, the United States Court of Appeals for the Ninth Circuit held that Tinker permits school officials to prohibit a t-shirt bearing a biblical phrase critical of homosexuality because it "collide[s] with the rights of other students." The Christian Legal Society also notes that many school districts argue that allowing certain religious speech in their schools would interfere with the schools' educational mission. Thus, although Morse rejected expanding Fraser to allow proscription of offensive speech, such speech may be silenced if it is deemed to collide with the rights of other students. In light of the amount of discretion that courts are willing to accord to school officials, subjective judgments of whether speech collides with the rights of others or interferes with a school's educational mission may withstand scrutiny. Courts should therefore scrutinize restrictions on religious speech in schools more scrupulously.

C. Speech Concerning Homosexual Sex

In Caudillo ex rel. Caudillo v. Lubbock Independent School District (decided before Morse), the United States District Court for the Northern District of Texas upheld the denial of access to school facilities to a gay student group because part of the group's message conflicted with the school's abstinence-only policy. According to the court, the group's website contained links to indecent material, and "the group's goal of discussing sex [fell] within the purview of speech of an indecent nature." The group's speech was thus "beyond the bounds of First Amendment protection in the public school set-

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269 445 F.3d 1166 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007).
270 Id. at 1178 (internal quotations omitted); see also Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 872-73 (2d Cir. 1996) ("[W]hen a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious . . . or would otherwise disrupt or impair the school's educational mission.").
271 Brief for CLS, supra note 264, at 18-19 (citing Hsu, 85 F.3d 839). Although in Hsu the United States Court of Appeals for the Second Circuit ultimately rejected this argument, the district court accepted it, concluding that "a school-recognized club that is permitted to discriminate on the basis of religion likely would be disruptive to the educational mission of the school, because it would be invidious and would impinge on the rights of other Roslyn students to be free from discrimination in school." Hsu, 85 F.3d at 871 (internal citation and quotations omitted).
273 Id. The court's decision rested on both First Amendment and Equal Access Act grounds. Id. at 559. This Comment discusses only the First Amendment aspects and implications of the decision, regarding the Tinker trilogy specifically.
274 Id. at 563.
The court further explained that the school's abstinence-only policy was consistent with Kuhlmeier, because "'[a] school need not tolerate student speech that is inconsistent with its basic educational mission.'"  

Although the Caudillo decision may be erroneous for a plethora of reasons, Morse, if expanded, may permit the proscription of speech in this case. Significantly, Texas law makes it a crime for minors of the same sex to engage in sexual acts. Because of this prohibition, speech concerning homosexual sex between minors can be compared to speech concerning illegal drug use. One may argue that simply discussing the activity does not constitute encouragement or advocacy; however, it is very likely that speech "discussing" engaging in illegal drug use would be proscribable under Morse. Thus, discussion of homosexual sex may likewise be proscribable under Morse's reasoning.  

Further, unquestioning deference to school officials may also permit the suppression of such speech. A troubling aspect of according too much discretion to school officials in this context is that the Caudillo court agreed with the school district that suppression of all speech concerning sex is permissible under Fraser. Such speech suppression allows a school district to inculcate into its students that a particular moral or religious view, in this case the propriety of abstinence or the wrongfulness of premarital sex, is the appropriate moral view to hold. To argue that the Fraser Court intended to allow the silencing of any and all discussion of sex is a drastic overexpansion of the meaning of offensive and vulgar language. Caudillo is also yet another example of the way in which a school district can utilize Fraser's and Kuhlmeier's "inconsistent with its basic educational mission" language to impose on its students a particular religious or moral view. Although schools will inevitably inculcate certain values, it does not follow that school officials should have the discretion to impose upon their students whichever values they may choose at all times and in all places. In other words, particular values are undoubtedly emphasized as part of the curriculum, but expression of contrary values by students outside of the curriculum context should not be pro-

275 Id. at 564.
276 Id. at 563 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).
278 See Caudillo, 311 F. Supp. 2d at 558 (citing TEX. PENAL CODE ANN. § 21.11(a) (Vernon 2003)).
279 Id. at 562–63.
scribed unless such expression causes a material and substantial disruption to the orderly operation of the school. The inculcation of values in a manner that suppresses or prohibits competing values should be limited to certain "core" values that are necessary to the orderly administration of a public education and "values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."

Although the discussion relating to the expansion of Morse to prohibit other types of speech may be speculative to a certain degree, it is not altogether improbable. Some of the cases discussed above show that both Fraser and Kuhlmeier were expanded beyond the scope of their holdings and were applied to suppress speech that should have been analyzed under the Tinker standard. Similarly, some courts have already begun expanding Morse beyond its narrow drug exception. Such expansion allows school officials to prohibit speech not because of its propensity to cause material and substantial disruption or to collide with the rights of others, but because of subjective disagreement with the content of the speech or overreaction.

VI. CONCLUSION

By creating a drug exception to Tinker, Morse creates the third in a series of content-based exceptions to Tinker's material and substan-

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280 As noted above, the Kuhlmeier Court was explicit in stating that the material disruption standard applies outside of the curriculum context. See supra note 136. To elaborate further, conveyance of a particular moral or religious view as part of a school's educational mission may not in and of itself be troubling. What is troubling, however, is the suppression of competing or contrary views. For example, American public schools undoubtedly attempt to inculcate in their students the notion that the United States is "a great country." But, as part of this attempt, schools do not prohibit students to voice a contrary or alternative opinion, such as "America is not a great country," or "France is a great country"—assuming, one supposes, that a substantial disruption is not being caused by the voicing of such opinions. Similarly, schools may inculcate a particular religious or moral view as part of their educational mission, but it should not follow that the suppression of contrary or alternative views is necessary to the effective inculcation of any given view.


tial disruption test. Although Tinker has not been overruled, the expansion of Morse, Fraser, and Kuhimeier has the propensity to render Tinker negligible to a large extent. Many courts distinguish student speech from the speech involved in Tinker as not being political. Consequently, courts are more willing to apply one of the content-based exceptions to speech that does not have a political message. In some cases, speech that contains a political message is nevertheless being censored pursuant to one of the content-based exceptions to Tinker. Even if Tinker still has significant force with regard to political speech, substantial protection for only political speech is simply not sufficient. Protection of such speech is not the sole purpose of the First Amendment. Among the various justifications for the First Amendment, “autonomy” or “self-realization” theories, which stress the individual’s right to self-realization and self-determination, demand the protection of speech other than political speech, particularly in light of the fact that adolescence is a crucial stage in the development of self-identity. Increased suppression of non-political student speech (which may further increase with the expansion of content-based exceptions), may have a detrimental effect on the development of self-identity if children are not able to meaningfully en-

283 See Wilborn, supra note 56, at 137 (“[T]he practical effect of the Fraser/Kuhimeier judicial deference to school officials leaves little real protection for student expression not endorsed by school authorities. In short, the school authorities may label the speech and then suppress it, without fear of serious judicial oversight.”).

284 See, e.g., Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989).


286 See id. at 27–29.


[A]dolescents tend to increasingly think about political or religious systems of beliefs and values, and often feel the need to figure out who they are in terms of these belief and value systems. Many adolescents and young adults make commitments to religious or political ideologies after exploring various options. . . . Adolescents must also sort through beliefs and values that guide sexual behavior, such as those regarding whether or not premarital sex is acceptable. Some adolescents and young adults also have to deal with their sexual identity—that is, acknowledging whether they are heterosexual, gay or lesbian, or bisexual.

SIEGLER ET AL., supra, at 432. Both Lau and Siegler et al. discuss Erik Erikson’s theory of identity formation. Erikson argued that the primary developmental task in adolescence is the resolution of the various identity issues discussed by Siegler et al. Id.
gage in self-expression. Although the strength of free expression justifications is diminished due to the special characteristics of the school environment, as well as the immaturity of children, these factors are to a substantial degree already taken into consideration in the Supreme Court’s student speech cases. That is, *Tinker* and its progeny recognize the special characteristics of the school environment and the vulnerable nature of children, and have tailored student speech jurisprudence to take account of these realities.

In addition to the content-based exceptions and the overexpansion thereof, courts are increasingly deferential to school officials. Such deference allows school officials to silence speech they subjectively find objectionable under the pretense that it interferes with the school’s educational mission, is indecent, or otherwise. While judges should defer to the decisions of school officials in many circumstances—when a split-second decision has been made or when a decision to maintain order has been made—courts must be cognizant of the propensity of public schools to indoctrinate children and should be wary about according too much deference where subjective beliefs or overreactions may influence censorship. Courts should be critical (and thus less deferential) when analyzing cases involving religious speech, speech concerning sex, drug activity, school violence, and other potentially controversial speech.

Due to the confused state of the Supreme Court’s school speech jurisprudence, many courts apply one of the exceptions to *Tinker* in situations where the actual *Tinker* test is the more appropriate standard. It is certainly true that not all courts over-expand the exceptions to *Tinker*; however, most lower courts tend to take a school authority-friendly approach in their analysis of school speech. The combination of these factors has resulted in many types of speech being analyzed based on content, with *Morse* only further perpetuating this trend. Although a content-based test may not be problematic per se, limits need to be delineated so that school officials, as well as courts, do not over-expand permissible restrictions. The Supreme

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289 *See* Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (stating that “the rights of students must be applied in light of the special characteristics of the school environment” (internal citations omitted)).

290 *Saunders, supra* note 285, at 38–42.

Court should definitively rule that a school may not censor speech due to the fact that the content thereof conflicts with a purported "educational mission" of the school. Justice Alito's concurring opinion in *Morse* along with several lower court decisions show that "educational mission" can be defined in a subjective manner to include the inculcation of social or political values of the school's administration. Additionally, school officials can easily suppress speech because it is contrary to a particular educational mission as a way to subvert the prohibition on restricting speech merely because it is offensive.

Lastly, *Morse* should be applied only to speech advocating illegal drug use. Expansion of *Morse* to speech reasonably interpreted as threatening school violence may lead courts down a slippery slope. Further, such speech, if in fact disruptive, can be restricted under *Tinker's* material and substantial disruption standard, and if the speech is deemed a "true threat," it can be suppressed under *Watts*. Such a broad interpretation may result in school officials attempting to argue that speech advocating (or simply concerning) any and all illegal or harmful activities should be censored, regardless of whether it causes a material or substantial disruption.292

In sum, courts cannot allow fear and zeal to dictate the nature of students' constitutional rights. Without meaningful judicial review and a clear framework to guide lower courts, the future of student expression rights looks bleak indeed.
