

Tinkering with Tinker:

Morse v. Frederick's Failure to Define Student Speech Rights

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Abstract:

This thesis argues that the Supreme Court's decision in *Morse v. Frederick* (2007), the infamous 'BONG HiTS 4 JESUS' case, fails to appropriately define First Amendment protections for student speech. Their exception for pro-drug speech lacks rational justification and leaves administrators without clear guidance. Three viable alternatives existed for the Court: affirming Justice Breyer's opinion, applying a relaxed *Brandenburg* test, or employing commercial speech regulations.

Additionally, the Court should at some point expand *Tinker v. Des Moines School District* (1969) to allow school officials to protect students from non-low value, harassing speech. By integrating the law with reasonable pedagogical concerns, courts could avoid making the mistakes exemplified at all levels of the federal judiciary in *Morse v. Frederick*.

Preface:

I am deeply indebted to all those who have helped me with the completion of this thesis. First, I need to thank Suffield Academy for their support of my graduate studies. Their financial assistance made the completion of my masters possible. Second, I must thank the James Madison Foundation, whose generous fellowship and summer institute were indispensable. Third, my advisors and all the faculty and staff in the MALS program guided me patiently through this process. Chris Wren, Sonu Bedi and Peter Rodis carefully read my many emails and earlier drafts, and I am very grateful for their wise recommendations. Fourth, I am indebted to many other friends who good-naturedly listened as I took my first baby steps into the law's jurisprudence in schools. Most notable amongst this group was Michael Stahler, whose unwavering support as my Best Man not only helped me get to my wedding on time but also ensured that I didn't grossly err in my assessment of any court cases. Any mistakes or omissions, of course, are my own. Finally, I could not have made any headway without the patience of my wife, Story Schildge, who listened as I continually mused throughout the year about how schools ought to respond to various situations.

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¹ Justice Thomas in his concurrence in *Morse v. Frederick*

² *Guiles v. Marineau*, (2d Cir. Aug. 30, 2006) 461 F.3d at 321

Introduction

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹

"...we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."²

After an almost twenty-year hiatus, the US Supreme Court has again debated the subject of students' voices in public schools. For the first time since *Hazelwood School District v. Kuhlmeier* (1988)³, the Court ruled in a 5-4 majority with five written opinions⁴ to further restrict student speech rights in America's government-run educational institutions. *Morse v. Frederick* (2007),⁵ the infamous "BONG HiTS 4 JESUS" case, has now added a new caveat to the standard for proscription that many legal critics consider muddled and unnecessary. The ruling allows schools to restrict speech that a reasonable person could interpret as the promotion of illegal drugs. Given the opaque language and divided majority, many scholars have noted that is unclear how the lower courts will interpret this ruling.⁶ The decision,

¹ *Tinker v. Des Moines Sch. Dist.*, 393 U. S. 503 (1969) p. 506

² *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) p. 682, echoing Justice Stewart's concurrence in *Tinker v. Des Moines* 393 U. S. 503 (1969) 515, which argued against the claim that, "...the First Amendment rights of children are coextensive with those of adults."

³ 484 U.S. 260 (1988)

⁴ Chief Justice Roberts delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito joined. Thomas filed a concurring opinion. Alito filed a concurring opinion, in which Kennedy joined. Breyer filed an opinion concurring in the judgment in part and dissenting in part. Stevens filed a dissenting opinion, in which Souter and Ginsburg joined.

⁵ 127 S. Ct. 2618

⁶ See Chemerinsky, Erwin "How Will *Morse v. Frederick* Be Applied?" *Lewis and Clark Law Review* Vol 21:1 2008

however, illustrates a lack of judicial restraint and a misguided attempt to expand the powers of administrators without curtailing other forms of religious and political expression in schools. Rather than clarifying the law, the Court merely created an exception to *Tinker v. Des Moines* (1969) and left administrators and students without a clear direction to proceed in this “vast, perplexing desert.”⁷ This thesis will show the process by which this unproductive decision was reached and the viable alternatives at all levels of the federal courts that could have helped avoid this unfortunate outcome.

The central case in this thesis originated on winter day in 2002 when Joseph Frederick, an eighteen-year-old Alaskan high school student, held up his fateful banner at an Olympic torch rally.⁸ His principal, Deborah Morse, suspended him partially because of the banner’s message, and he appealed the decision through the school system and into the federal courts. In the three tiered federal court system, Frederick initially lost in the district court and then won in the 9th Circuit Court of Appeals, but Morse then appealed to the Supreme Court. In addition to the highest court’s ruling, the details of the initial event and the subsequent court cases are discussed at length in this study. Most importantly, the case’s ambiguous outcome is criticized for its failure to satisfy the needs of lower courts, students, and school officials.

An ideal decision by the Supreme Court would have been narrow, offered more guidance for the lower courts, clarified the standard for proscription, reduced

⁷ *Helms v. Picard* 151 F.3d 347

⁸ The case is discussed at greater length on page 7 of this Introduction and in Part 2, Section A.

litigation and school officials' fear of lawsuits, and protected students' core First Amendment rights. While the Court may have not been able to offer a decision both as narrow as Justice Breyer's and as elucidatory as the standard outlined in Part 1 of this thesis, they failed in all aspects of this criterion. When the Court attempts to make a ruling without establishing a clear precedent, as they have done in *Morse*, they are failing in their duty. As Scalia wrote in the same term, "Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future."⁹ As a result of the decision in *Morse*, the field of student rights is still too amorphous and requires more guidance from the Court.

It is necessary to acknowledge that this legal field applies only to schools and not to government officials censoring non-student speech. Any law proposed by a city or state to ban Frederick's banner would be immediately struck down for violating the First Amendment; however, there is a tension within a school setting between the greater need for order and the rights of students. This tension has not been properly adjudicated. Meanwhile, Internet speech and other new forms of communication complicate this formative field leaving educators unsure what tools they have for maintaining control in their classrooms. This thesis does not discuss all the future implications of mischievous Internet speech in schools, yet most of the existing scholarship remains guesswork as lower courts find little guidance from above.

⁹ *Hein v. Freedom from Religion Foundation*, 551 U.S. ___ (2007)

The five justices' opinions in *Morse* illustrate the many contentious pedagogical questions still swirling around students' First Amendment rights. For instance, do students have the right to speak factually in a way that might insult other students? Should undisruptive political or religious speech be given the utmost protection, even over the interests of schools' pedagogical concerns? Can schools restrict any speech that impedes the faculty's ability to pursue an institution's broad educational mission?

These questions dovetail into matters of educational philosophy: how best can we instill in our youth the values of citizenship in a democratic society? Is the responsible exercise of free speech a worthy pedagogical goal? Should the courts even decide these issues for the schools? As the most recent decision illustrates, the answer to this last question apparently is 'no'.

The Supreme Court first waded into these treacherous waters with *Tinker v. Des Moines Independent Community School District* in 1969. This decision and all subsequent opinions apply to every primary and secondary public school in the country, and thus these cases have a wide-ranging, practical impact on the landscape of American education. The rulings by the Court on student speech rights affect millions of young Americans today who will soon inherit the reins of power in our democracy.

The field of student speech rights is a unique field of First Amendment law. Three cases prior to *Morse v. Frederick*, starting with *Tinker*, laid out the concept that these rights are not coextensive with adult rights and that courts need to balance the competing interests of decorum and liberty. This introduction briefly

explains these cases in order to provide some context for the subsequent commentary on the most recent decision. This section also provides a brief summary of the most recent case as an overview of the thesis's subject.

The Warren Court was the first to 'discover' the constitutional mandate to protect students from administrators' prescriptions of political orthodoxy on campus. The case of *Tinker v. Des Moines* raised the question of whether students could wear black armbands in opposition to the war in Vietnam. Prior to this ruling, school officials had an almost unlimited ability to regulate student activity. Political discussions anywhere have a tendency to get heated, so teachers who wished to avoid controversy could go to great lengths to stifle speech that made them uncomfortable. The Court's decision in support of the students' symbolic protest affirmed that young people do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁰ Students have the right to protests that were akin to 'pure speech', which is granted the greatest protection by the First Amendment. This decision justifiably protected students who wished to display a non-disruptive political message.

The question, however, was how far students' rights paralleled those of adults. What allowed public educational institutions to restrict speech that could not be proscribed outside schools? *Tinker* said that, given the "special characteristics of the school environment,"¹¹ regulation of student expression was generally permissible only when the speech would "materially and substantially disrupt the

¹⁰ 393 U. S. 503 (1969)

¹¹ *ibid*

work and discipline of the school”¹² or infringe on the rights of other students. This two-pronged test made it substantially more difficult for public schools to punish students for espousing controversial viewpoints. There was no explicit requirement that student speech be political or of high value, and courts have read the second prong as only limiting speech with tortuous liability, such as slander. As a result, students speaking in front of an audience of their peers could, under this decision, deride the faculty, other students, or the mission of the school as long as they didn’t create a substantial disruption or violate any preexisting laws governing speech in general. The ruling also protected the student who presented an expository essay in English class with violent themes, as long as it didn’t create a “substantial disruption.” The Court placed the onus on the administration to show that they were not simply suppressing, “expressions of feelings with which they do not wish to contend.” Justice Black’s dissent warned that this decision effectively “surrender[ed] control of the American public school system to public school students.”¹³ His voice appears prophetic of the apparent shift in the Court’s subsequent decisions.

Seventeen years later the composition of the Court changed and so did the attitude towards student speech rights. *Bethel School District v. Fraser* added a caveat to the *Tinker* test with Chief Justice Burger ruling that schools could restrict non-obscene speech (obscenity could already be stifled outside of schools for the protection of minors) if it was “offensively lewd and indecent.”¹⁴ Given that students were often a captive audience, the Court decided that the school could restrict

¹² *ibid*

¹³ *ibid*

¹⁴ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)

speech that is incongruous with the “habits and manners of civility.” This case would apply to the proscription of speech in a cafeteria where students make lunch announcements as well as in an auditorium where debates are held. This case also mentioned that schools do not need to tolerate vulgar speech that “undermine[s] the school’s basic educational mission.”¹⁵ These words provided the basis for Morse’s assertion that Tinker doesn’t protect non-political speech that conflicts with a school’s mission.

The third case in this student speech trilogy was *Hazelwood School District v. Kuhlmeier* (1988), in which Chief Justice Rehnquist’s Court ruled that administrators could censor the speech of students in a school newspaper if it was not, “by policy or by practice...[open] for indiscriminate use by... student organizations.”¹⁶ Because the student newspaper was not a public forum, the school could restrict student expression because “the public might reasonably perceive [the student’s opinion] to bear the imprimatur of the school.” The Court reasoned that teaching students how to use their voices appropriately in a public setting includes showing them what is appropriate or inappropriate for publication. This case arose in the Morse decision when the Principal dubiously claimed that her failure to act would lend implicit support for Frederick’s banner, and hence her actions were necessary to prevent the perception that drug advocacy bore the school’s imprimatur. Needless to say, the Court agreed in Morse with earlier

¹⁵ *ibid*

¹⁶ 484 U.S. 260 (1988)

holdings that the government's mere failure to censor does not constitute their tacit support for a particular opinion.

The most recent decision adds a fourth case to this trilogy. As this thesis will show, *Morse v. Frederick* allows public schools an additional means of justifying speech restrictions. The case involved a student in Alaska unfurling a banner at an Olympic torch relay that infamously read: "BONG HiTS 4 JESUS." Although the statement made no logical sense, it drew Principal Morse's attention, and she confiscated the banner and suspended the student, Joseph Frederick. As the debates in the courts unfolded, the ACLU, religious organizations, LGBT organizations, and drug policy reform advocates forged an unlikely alliance behind Frederick. Some of their contentions arose from the speech being off-campus, non-disruptive, and non-obscene. These groups were also concerned that the widening of student speech restrictions would eventually encompass all forms of expression. Religious groups in particular feared that anti-homosexual and anti-abortion speech could be restricted. None of the previous Court decisions explicitly allowed Morse to seize the banner because of its message, and free-speech advocates were concerned that schools would be given broad leeway in their censorship. In fact, Justice Thomas's characteristically outlandish concurring solo opinion aimed to do exactly that by completely overturning *Tinker* and denying the very concept of student rights. Whatever decision these pundits supported, they and both the petitioner and respondent agreed that the Court should not act as the overseer of all matters of school discipline; administrators should be given leeway to act with reasonable

judgment to maintain decorum and fulfill their mission. How far their powers extended, however, was up for debate.

In addition to discussing the factual matters of the Morse case, this thesis will also examine the five opinions of the Court, which represent a variety of views on how this case could have concluded. The majority's opinion of the Court established a new loophole in the Tinker standard: schools could now restrict speech that could reasonably be interpreted as advocating illegal drugs. In Roberts's opinion for the majority, he chose to abandon his judicial philosophy of producing narrow, unanimous decisions. His controversial opinion created a special speech restriction because of the Court's well-founded concern that, "drug abuse can cause severe and permanent damage to the health and well-being of young people."

Roberts did not join two opinions of other justices, Alito and Breyer, which presented viable alternatives that the majority could have adopted. Alito's ruling was narrow and acknowledged Stevens' concern about setting a precedent for broader restrictions. Alito specified that he and Kennedy joined the majority as long as:

"(a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"

This more limited decision became the controlling opinion for lower courts to follow.¹⁷ Its broad implications and questionable applicability are discussed later in this work.

Roberts also chose not to sign on to Breyer's limited concurrence. Breyer supported simply overturning the lower court by granting qualified immunity from monetary damage to Morse and relying on lower courts to decide if the suspension was justified on non-speech grounds. This would sidestep the constitutional question completely and leave the Tinker standard intact. As will be shown, Breyer's extremely narrow holding represented the best choice amongst the written opinions.

Over the last forty years since Tinker, the balance between rights and restrictions initially struck by the Court has certainly shifted. That initial enumeration of student speech rights now represents a high water mark for those First Amendment protections. Since then, the evolution of the justices' logics shows a trend towards granting more powers to school administrators.¹⁸ The latest Morse decision sheds even more light on how the current Court values decorum and control over students' free expression. While this trend itself is not negative *per se*, the ambiguity in the rational for proscriptions has hurt educators and students. Both groups deserve a clear set of guidelines for how to avoid litigation.

¹⁷ Ponce v. Socorro 5th Circuit 2007

¹⁸ For a broad reading of Tinker, see Lowery v. Euverard (6th Cir. Aug. 3, 2007)

Before this thesis discusses how these guidelines ought to operate, it is necessary to acknowledge the two very polarized opinions that represent the extremes of this debate. Neither side was entirely satisfied with Roberts's and Alito's opinions in *Morse*, and this result could be expected after any ruling attempting to find a midpoint between far reaching freedoms and broad proscriptions. On one end of this spectrum, this decision is very worrisome to those who value the First Amendment protections granted to students under *Tinker*. Many scholars, such as David Hudson of the First Amendment Center, have been justifiably concerned that denying students their rights in the interest of pursuing an educational mission contributes to a hidden curriculum in undemocratic values.¹⁹ These students will one day be governing our country, Hudson argues, and we aim to prepare them well for the exigent demands of that task. How can we claim to be teaching them the underpinnings of democracy while denying them their constitutional rights? In addition, the Court's apparent logic of shielding students, many of whom are over 18 years old, from potentially 'harmful' speech reflects a more traditionalist understanding of the purpose of schooling in American society, one which many educators see as counterproductive in an experiential learning environment. On the other end of the spectrum, representatives of the National School Board Association and the American Association of School Administrators argued in their amicus brief²⁰ that "local school boards and administrators, and not

¹⁹ Hudson, David. *The Silencing of Student Voices* The First Amendment Center. Nashville, TN 2003

²⁰ A brief filed with the court by someone who is not a party to the case but has a significant interest in the outcome unrepresented by the parties filing the suit.

federal courts, are generally best situated to make and enforce reasonable and appropriate policy decisions for their schools in fulfilling [their] duty.”²¹

Furthermore, “schools must be able to maintain safe and effective learning environments to carry out their educational mission.”²² Neither of these positions appropriately addresses the other’s concerns regarding student rights and educators’ needs. Therefore, the Court was right to avoid both poles of the debate. The mid-point, however, has so far been maddeningly elusive for everyone involved.

The Court attempted to sidestep the issue presented in various amici briefs by granting school officials the power only to restrict speech concerning illegal drugs. The evolving Rube Goldberg standard for school speech now is only waiting for future cases to arise in which the Court will carve out new exceptions from students’ rights. In the meanwhile, schools and students will inevitably be wringing their hands over how to proceed.

²¹ Negrón, Francisco M. Jr. (General Counsel), et al. Brief Of Amici Curiae National School Boards Association, et al., p1

²² *ibid*, p4

Part 1- Pathfinding in the Judicial Wilderness of Educational Law

*"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."*²³

Section A: Overview of Recommendations

In *Morse v. Frederick*, the Supreme Court ought to have supported Breyer's opinion. In all cases, they have an obligation to rule in as limited a manner as possible "unless such adjudication is unavoidable."²⁴ Chief Justice Roberts argued that the best decision is that which decides the minimum necessary to resolve a specific case; the cardinal principle of judicial restraint is that "if it is not necessary to decide more, it is necessary not to decide more."²⁵ To rule on more invites accusations of "legislating" from the bench and undermines respect for the courts. In addition, any unnecessary dicta or complicated standards serve only to muddle constitutional protections, which need to be clearly defined to function effectively. In such an unfortunate manner, Roberts's and Alito's opinions now only pose new challenges in understanding student speech rights. Supporting Breyer would have avoided clouding the waters of students' rights.

However, if the Court felt compelled to define the law or if they accept a case necessitating clarity in the future, they ought to affirm that *Tinker v. Des Moines* (1969), the landmark case in student speech rights, supports a relaxed application

²³ *West Virginia State Bd. Of Educ. V. Barnette*, 319 U. S. 624 (1943)

²⁴ *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)

²⁵ 362 F. 3d 786 (D.C. Cir. 2004) at 799

of the test set by *Brandenburg v. Ohio* in the same year²⁶. While the strict version of this standard permits the regulation of speech “directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” a relaxed test would not require proof of imminence in the intent or effects. Given that youths are more susceptible to the influences of their peers, the likelihood of illegal action would also be necessarily broadened and the degree of harm from the activity would need to be considered. As a result, the school’s reasonable interpretation of Frederick’s speech as the advocacy of illegal drugs would permit them to censor his banner. Stevens proposed strictly applying *Brandenburg* in his dissent but failed to differ to Principal Morse in her assessment of the banner’s content; the test would have been satisfied had he appropriately relaxed the requirements. In addition or alternatively, the Court could affirm that *Tinker* primarily governs high value speech (expressions concerning political, social or religious issues) and Frederick’s speech was more akin to commercial speech advertising illegal products, which can be regulated under the standard employed in *Central Hudson Gas & Electric v Public Service Commission*.²⁷ Either *Brandenburg* or *Central Hudson* would permit the school’s regulation of Frederick’s speech.

Lastly, the Court should look into future cases where they can clarify *Tinker*’s second prong: the protection of the rights of others. By distinguishing between harmful speech that targets specific students, particularly for their innate characteristics, from speech that is primarily commenting on a political, social or

²⁶ 395 U.S. 444, 227 (1969)

²⁷ 447 U.S. 557 (1980)

religious issue, the Court could strike a more appropriate balance for students and teachers. Lower courts would apply this standard by weighing the potential harmful effects of student speech against the merits of any particular expression. Over time, an appropriate body of case law would evolve against which courts could also measure student speech. This second prong is currently subsumed by the requirement that any speech that violates another student's rights also be 'substantially disruptive' or tortuous, for example, by anti-defamation laws; however, expanding this prong to protect students from harmful speech would allow schools to restrict milder harassment and other forms of bullying that wouldn't constitute a 'substantial disruption.' This would also help schools avoid the accusations of viewpoint discrimination because their actions would be in the expressed pursuit of a valid state interest. While these measures would expand the powers of administrators to regulate student speech, they would provide legal supports for the legitimate pedagogical efforts of well-intentioned educators.

Section B: Breyer's is Best

The courts reached unreasonable conclusions at the district and circuit levels because of an inconsistent application of a vague standard. The Supreme Court has now done nothing to resolve that ambiguity in the law and instead only contributed to the confounding set of tests governing student speech. While Roberts's and Alito's opinions do not substantially undo the protections of *Tinker*, they complicate the job of courts and educators as they attempt to determine the extent of student speech rights.

When the Court attempts to make a decision without acknowledging that they are establishing a binding precedent, they are failing in their role as the highest judicial panel. They cannot make a one-off to dispense with a particular case. It is the Court's duty to set standards that fit within their overarching jurisprudence and that lower courts can apply in future cases. If a case requires the Court to test the limits of the law, a decision that provides an exception from the existing standard creates a new standard or will likely create an unexpected loophole through which future decisions can evade the pre-existing jurisprudence. Such a loophole was created by Alito's concern about the harm of illegal drugs.

Alito's opinion provides a broad exception to *Tinker* for speech advocating harmful activities, but he attempts to deny the breadth of his own opinion. He repeatedly argues that the holding goes no further than to allow restrictions on speech that advocate drug use, and he does not support any restrictions on political or religious speech. This was the first time that the Court found a constitutional

right for the government to suppress speech regarding a particular topic in a forum where other forms of expression are broadly permitted.²⁸ Because of this unique decision, he wrote that his justification for proscribing drug speech is predicated on the harm substantial caused by drugs, not just their illegality. This language opened the door for other applications, and “like a football running back seeing daylight and bursting through a tiny seam in the defensive line and then exploding down-field for a touchdown, [lower courts] seized the opportunity provided by Justice Alito... and ran with it to reach [their] goal line conclusion[s].”²⁹ Alito unintentionally provided a legal justification for broader censorship of speech that compromises students’ safety.

It should not have been difficult for Alito to imagine other types of speech that also advocate for harmful behavior. For instance, adolescent gun ownership can be potentially harmful when considering the frequency with which gun owners shoot themselves. Youth gun ownership may also be illegal in certain states. Thus, schools can argue that they have a very compelling interest in limiting pro-gun speech that can potentially result in violence. In a post-Columbine world in which school shootings are the nightmare of every administrator, many schools would rather not wait until a ‘substantial disruption’ is imminent. Lower courts may recognize this pedagogical need and find its legal support in *Morse*.

²⁸ Chemerinsky, Erwin “How Will *Morse v. Frederick* be Applied?” *Lewis and Clark Law Review*. Vol. 12:1, 2008

²⁹ Calvery, Clay “Article: Misuse and Abuse of *Morse v. Frederick* by Lower Courts. Stretching the High Court’s Ruling Too Far to Censor Student Expression” *32 Seattle Univ. L. R.* 1, 15 (Fall 2008)

By selectively reading Alito’s opinion, lower courts are already granting school officials greater powers to protect students from such harm. Three particular cases, which are discussed at greater length in the conclusion, highlight Alito’s failure to foresee the possible implications of his opinion. In the case of *Ponce v. Socorro*, a student was suspended for write a diary describing a Columbine style attack on his school. The 5th Circuit found for the school by showing how *Morse* demonstrates that *Tinker*’s standard is not absolute and the threat of harm can justify censorship. In *Boim v. Fulton County School Districts*, a student penned a similar threatening scenario, and the 11th Circuit also used *Morse* to justify the suppression. Lastly, in the latest incarnation of *Harper v. Poway Unified School District* a district court found against a student who wore a t-shirt reading, “Be Ashamed, Our School Embraced What God had Condemned” on the front and “Homosexuality is Shameful ‘Romans 1:27’” on the back.³⁰ The Court ruled that *Morse* supported the suppression of harmful speech even if that speech causes only emotional anguish rather than physical danger.

As these three cases illustrate, Alito’s opinion lacked a rational justification for the suppression of pro-drug speech, and as a result the lower courts read a broader standard into the decision. Even worse, their interpretations are now inconsistent with each other because the Supreme Court’s opinions lacked the necessary clarity. For instance in *Nuxoll ex rel. Nuxoll v Indian Prairie School District No. 204*, Judge Posner of the 7th Circuit wrote, “[v]iolence was not the issue

³⁰ Order Denying Plaintiff’s Motion for Reconsideration at 9, *Harper v. Poway Unified Scho. Dist.*, Civ. No. 04CV1103 JAH, at 9 (S.D. Cal. Feb. 11, 2008)

in Morse,” and with this simple assertion he contradicted 5th and 11th. Such an “extraordinary lack of consistency”³¹ in the application of the law is likely only to increase.

For these reasons, Justice Breyer’s decision to grant qualified immunity without addressing the constitutional issues would have been best. He acknowledged that teachers needed a flexible degree of authority because,

“students will test the limits of acceptable behavior in myriad ways.... Under these circumstances, the more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.”

The ruling would also have been unanimous, because all the justices agreed to award qualified immunity. Additionally, it would have signaled to lower courts that they could do the same. The courts could apply the reasonableness test to protect any administrator from monetary damages who reasonably acts to protect students from potential harm without confronting the complex issues of free speech rights. While this decision would not solve the constitutional issues at the heart of student speech rights, it would do little damage to the fabric of the law. In the future, there will likely be other, more effective opportunities for the Court to clarify the standard.

³¹ Diamond, David A. “The First Amendment and Public Schools: The Case Against Judicial Intervention” 59 Tex. L. Rev. 477, 487 (1981)

Section C: Applying a Relaxed Brandenburg Test

If the Court felt compelled to clarify the law, two options existed for them: applying the relaxed Brandenburg test to any quasi-political student speech advocating illegal activities or classifying Frederick's banner as mid-value commercial speech. By applying either of these measures, the Court could steer away from its pattern in *New Jersey v. T.L.O* (1985), *Vernonia School District 47J v. Acton* (1995), and *Board of Education of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Lindsay Earls et. al.* (2002) where they exempted students with *sui generis* rules from other constitutional protections because of the dangers posed by drugs.

Their concern in this case likely rested on potentially permitting an unlikely Establishment Clause violation. They need not worry, however, about granting schools the power to stifle religious expression. The relaxed Brandenburg standard would only apply to the advocacy of illegal activity and the commercial speech designation is limited to pecuniary expressions promoting unlawful activity. If the latter application was read broadly, it still would be restricted to speech serving a primarily economic, not political, function. Therefore, messages like "Consensual Sex is Fun" and "God Supports Sex Only for Procreation" would be still governed by *Tinker* or *Fraser* because they do not advocate illegal activity or serve the financial interests of the speaker.

Roberts rightly honed in, at first, on the importance of whether Frederick's banner had any political content. He appeared dangerously willing, however, to differentiate the case from *Tinker* on solely this point. This acknowledgement that high value content is necessary could certainly aid lower courts in dismissing

students claims to free speech regarding nonsensical and immature expressions. However, such a decision would have permitted unchecked viewpoint discrimination. He wisely didn't dismiss banner's protections by simply ruling that it lacked the merits of Tinker's armbands. Instead, he and Alito unfortunately deemed it necessary to specify that their holdings only dealt with illegal drugs.

If he had continued the logical path he had begun to follow, he should have discovered that the banner's quasi-political content and advocacy of drug use suggested the application of Brandenburg. This line of reasoning, however, has never been applied in a school setting and almost exclusively reserved to unlawful speech related to politics.³² However, the Court has acknowledged that some balance needs to be struck: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior." No more socially inappropriate behavior exists than the advocacy of illegal activity in the absence of a clear political intent and reception, and thus with an application of Brandenburg, it would appear likely that the Court would find little reason to find in favor of Frederick.

Given that Brandenburg serves as a common standard governing politically-related speech advocating illegal action outside of schools, one might expect the Court to follow its logic, "yet the majority failed to discuss the case at all, and the dissent believed a genuine application of Brandenburg would have changed the

³² Penaro, Steven. "Note: Reconciling Morse with Brandenburg" 77 Fordham L. Rev. 251, 259

Court's holding."³³ Under the non-school standard, the dissent would be correct that a strict imminence requirement must be satisfied; however, requiring the protection of speech in schools that advocates illegal activity in the indefinite future is an "impractical extreme."³⁴ Alito recognized this but dispensed with *Brandenburg* completely because "due to the special features of the school environment, school officials must have a greater authority to intervene before speech leads to violence." In contrast, Stevens acknowledged the possibility for adapting the standard by writing, "It is possible that our rigid imminence requirement ought to be relaxed at schools." If the Court was to apply a relaxed *Brandenburg* test, it would also benefit by adopting a framework already successfully employed by the lower courts instead of inventing a new untested standard out of whole cloth.

Martin H. Redish, a professor at Northwestern University School of Law, supports relaxing the *Brandenburg* scale in schools to require lower levels of immediacy, likelihood of danger, direct intent to incite, and severity of the harm: "Where a serious offense is directly and forcefully advocated, a lesser showing of imminence will justify suppression; at the other end of the scale, greater evidence of imminence would be required in the case of indirect advocacy of a less serious offence."³⁵ He argues that "requiring imminence in every case in the belief that[,] if it is not present[,] the advocacy will never lead to harm is theoretically

³³ *ibid*, 252

³⁴ Malloy, S. Elizabeth Wilborn; Krotoszynski, Ronald J. Jr. "Recalibrating the Cost of Hrm Advocacy: Getting Beyond *Brandenburg*" 41 *Wm. & Mary L. Rev.* 1159, 1168 (2000)

³⁵ Redish, Martin, H. "Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger" 70 *Cal. L. Rev.* 1159, 1181 (1982)

unjustifiable.”³⁶ Thankfully, the appropriate balance is not impossibly illusive: “inherent ambiguities provide the Brandenburg standard with flexibility, allowing for an extremely circumstantial and individualized application, while also offering schools a workable standard.”³⁷ In the case of Frederick, Roberts could have concluded that the banner constituted indirect advocacy that wouldn’t likely result in imminent lawlessness, but still the seriousness of the illegal offense would merit censorship. By lessening the intent, imminence and likelihood requirements, the Brandenburg test would permit schools more appropriately to address pro-drug messages. This would effectively address Scalia’s wish for schools to be able to restrict any speech that advocates for lawless activity. He hoped for a bright line rule to permit “any school whether it has expressed the policy or not, [to] suppress speech that advocates violation of the law....” This standard would effectively serve this purpose while permitting high value speech that advocates less dangerous, illegal activities such as draft dodging and most civil disobedience.

Applying the Brandenburg test strictly would not effectively address schools’ unique needs. If schools were obligated to show that the illegal activity was intended and going to occur soon after the speech, then students could be permitted to wear shirts saying, “Snort Cocaine” but then prohibited for others stating, “Snort Cocaine Now”. Such a difference is meaningless within the context of a school and thus should not constitute a standard courts employ. Similarly, the school should not be obligated to find the student who took part in an illegal activity after the

³⁶ *ibid*

³⁷ Penaro, 252

speech occurred because such a requirement would be impractical. A court should simply determine that a student wearing either shirt is advocating a harmful, illegal activity that the school has a compelling interest in suppressing for the wellbeing of their students.

An additional advantage of the relaxed Brandenburg test is that it focuses more on likely consequences rather than the nature and meaning of the speech itself. One substantial criticism of the majority's opinion in *Morse* is that it adopts the disadvantages of Judge Learned Hand's "expressed advocacy" standard without benefiting from its advantages. On the positive side, Hand's test was intentionally strict and objective: "One may not counsel or advise others to violate the law as it stands." This standard is a relatively straightforward test to apply. However, any such speech can be suppressed regardless of the likelihood of it causing an undesirable result.³⁸ *Morse*, on the other hand, does not require such a direct support for illegality and also differs to the reasonable judgment of administrators to determine the textual nature of an expression. Thus, educators are expected to analyze the content of a speech to determine if it constitutes "advocacy" rather than surmising the expression's potential outcomes. This is inimical to how educators approach their challenging task.

The entire goal of teaching students is to promote a desirable outcome and prevent undesirable events from occurring. If courts offer judicial deference to

³⁸ Nuttall, Sean R. "The Hart-Fuller Debate t Fifty: Note: Rethinking the Narrative on Judicial Deference in Student Speech Cases" 83 N.Y.U.L. Rev. 1282, 1286

educators to make reasonable determinations to censor speech, it should concern its potential outcomes rather than the speech's particular content. This determination was supported in *Tinker* as well, and the majority would have been well advised to acknowledge this point. Justice Fortas state in *Tinker* that speech could be limited because of disruptions or interferences in the "work of the school," school "discipline," "the operation of the school," "classwork," and "school activities."³⁹ Apply the relaxed *Brandenburg* test would institute an outcome-based standard that is consistent with *Tinker*'s intent.

In *Tinker*'s grant of judicial deference to educators, there is the implicit suggestion that physical disruptions are not necessarily the only interference censorable. As the 8th Circuit determined, schools have been given the right to make a complex judgment involving "past experiences in the school, current events influencing student activities and behavior, and instances of actual or threatened disruption relating to the [speech] in question."⁴⁰ Accordingly, other circuit courts have upheld speech restrictions even when there is potential emotional damage to children⁴¹ or when the expression may 'dilute' the educational process.⁴² In both cases, the focus was appropriately on the outcome of the speech even if the lower courts read the meaning of a "material and substantial disruption" rather broadly.

³⁹ *idid*

⁴⁰ *Bystrom ex rel. Bystrom v. Fridley High Sch.*, 822 F.2d 747, 754 (8th Cir. 1987)

⁴¹ *Trachtman v. Anker*, 563 F.2d 512 (2nd Cir. 1977)

⁴² *Eisner v. Stamford Bd. Of Educ.*, 440 F2d 803, 807 (2nd Cit. 1971)

The relaxed Brandenburg test offers another advantage in that it wouldn't severely limit political speech. In Frederick's case, he didn't intend to convey a political message, nor would a reasonable observer conclude that the banner presented an opinion on drug laws or attitudes towards illegal substances. In a broader sense, it is unquestionable that, "[r]estricting speech concerning illegal drug use or any advocacy of unlawful action in a school setting does not infringe on the same fundamental values as restricting political speech." The courts have a long history of applying the Brandenburg test to protect explicitly political speech that advocates unlawful action. For example, in *NAACP v. Clairborne Hardware*⁴³ the Court found that Charles Evers's support for a boycott "contained highly charged political rhetoric lying at the core of the First Amendment." They recognized that "strong effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases," and "an advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." Of course, this case dealt with adults in an open forum, so the scales would be tipped in schools more towards limiting these freedoms. Nevertheless, courts would still recognize that, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."⁴⁴

Any speech that doesn't advocate illegal action would still need to pass the Tinker standard of substantially disrupting students' educations before meriting

⁴³ 458 U.S. 886, 926-27 (1982)

⁴⁴ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)

ensorship. In this way, Tinker is a form of the Brandenburg or Whitney⁴⁵ standards applied to speech concerning non-illegal activity, and it appropriately avoids weighing the gravity of harm, given administrators potential for exaggeration. Instead, it more closely resembles a 'clear and present danger' test.⁴⁶ Once danger (in schools' cases, a disruption) is established, the school then needs to prove the likelihood of the speech resulting in a significant disturbance in students' educations.

Adopting a relaxed Brandenburg test would also assist schools in addressing Internet speech. With spoken words, the imminence from the perspective of the speaker and listener are the same; however, online communication creates a vexing delay. If imminence is determined to be from the perspective of the speaker, then it would be very difficult to apply the strict Brandenburg test to any communication other than instant messages. However, the relaxed test would permit schools more flexibility to address advocacy of illegal action in the digital world.

Lastly, the Court should affirm while applying the Brandenburg test that schools are not public forums. They are rather places where content-based, time, place and manner restrictions are more permissible. The designation as a non-public forum would permit schools to enforce their existing prohibitions on any messages concerning drugs, alcohol or tobacco. Courts have an obligation not to prevent educators from promoting even-handed regulations to advance tolerance.

⁴⁵ Whitney v. California's 'bad tendencies' test (274 U.S. 357 (1927))

⁴⁶ Schenck v. United States (249 U.S. 47 1919)

Non-disruptive, political messages would be still be permitted. With other forms of speech with lesser value that advocate illegal activity, the appropriate balancing of levels of immediacy, likelihood of danger and severity of the harm would preserve students' rights while supporting the school's interests in educating their young charges. By designating schools as non-public forums and adopting the relaxed Brandenburg test, the Court would go a long way towards supporting administrators.

Section D: Applying Commercial Speech Requirements

While commercial speech requirements wouldn't be an effective standard for all student speech, it could apply in this particular case because of certain aspects of Frederick's expression. It would be inappropriate to apply to all student speech advocating illegal activity because not all such expressions also include 'commercial' components, such as the banner's intended function and Morse's motivation for censorship (as will be explained below). Commercial speech requirements also permit very broad restrictions on misleading advertising and promote a weaker standard for balancing typically corporate rights with government's interests. Because of the banner's purpose, however, the Court could have applied this standard to support JDHS's prohibition of Frederick's sign.

In an often-overlooked facet of this recent case, Frederick intended his expression to get him on television. His aim was self-promotion, and while not explicitly aimed at generating direct financial compensation, fame and economic rewards often are interchangeable, especially in the minds of adolescence. (Unfortunately no one asked Frederick, "Why do you want to get on television?") The Court did not consider the consequences of Frederick's intent other than as a means to dismiss the speech as non-political; however, his self-advertising suggests that the speech could be treated similarly to other commercial endorsements. In addition, Morse's censorship concerned the possible negative depiction of JDHS in the mass media. The banner, in this light, could be potentially read as promotional material: "Come to Alaska's schools! We have pot!" Her restriction of the speech was

partially prompted by the economic implications of such a message to her school and students. This determination to apply commercial speech regulations has several particular advantages as outlined below.

Of course, there are limitations as well on the imposition of commercial speech laws in Frederick's case. First, his expression wasn't "related solely to the economic interests of the speaker and its audience" as defined in *Central Hudson*; however, that Court did acknowledge that commercial speech also often serves as a means to disseminate information. Frederick's banner certainly disseminated some, albeit ambiguous, information although his economic interests could only be inferred. Second, there was no evidence that Frederick was selling drugs, and thus his direct economic interests could only be connected to the benefit derived from his notoriety. Commercial speech laws would be easier to apply if Frederick was advertising a product he sold. Thus, the case is different, for example, from the oft-cited *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), which concerned advertisements of prescription drug prices. Nevertheless, the majority's perception that the banner lacked any political, social or religious intent distinguishes it from high value expressions, and Frederick's intent was to get on TV. Therefore, classifying it under the same standards, if not the same name, would be appropriate.

The limited protections afforded to commercial speech advocating illegal products are determined by the standards laid out in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York* (1980). According to this

case, government regulations concerning any commercial speech must meet certain criteria. First, courts must determine if a regulation addresses commercial speech. Second, the regulation must be tested to find a “substantial interest” of the government official plus a “proportion[al]” response “designed carefully” to “directly advance the state interest.” Lastly, these interests cannot “be served as well by a more limited restriction.”⁴⁷ However, if the speech concerns misleading advertising or the promotion of an illegal product or service, then the speech warrants no reasonable measuring of the regulation. In a more recent case, the standard was clarified stating that regulations affecting commercial speech do not violate the First Amendment if:

- “1. The regulated speech concerns an illegal activity,
2. The speech is misleading, or
3. The government's interest in restricting the speech is substantial, the regulation in question directly advances the government's interest, and the regulation is narrowly tailored to serve the government's interest.”⁴⁸

According to the Court’s assessment of the banner’s content, Frederick’s speech falls into the first category and therefore may be regulated in any manner the government determines. In *Central Hudson*, the Court supported this denial of protections by saying, “The government may ban forms of communication more likely to deceive the public than to inform it.” This regulation serves to protect the

⁴⁷ *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557

⁴⁸ *State Univ. Of New York v. Fox*, 492 U. S. 469 (1989) as cited in Linder, Doug. “Government Regulation of Commercial Speech” University of Missouri-Kansas City Law School (2009) <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/commercial.htm>

public from exploitative, deceptive messages such as those that promote illegal products.

In short, commercial speech is afforded a type of intermediate scrutiny currently granted to a category of 'low value' speech classified under *Chaplinsky v. New Hampshire*.⁴⁹ According to this original ruling, low value expressions "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." This category of speech is not totally unprotected, but the restrictions on such speech are subject to a cost and benefit analysis that would be inappropriate for higher value speech, such as messages commenting on political, religious or social matters.

In *Morse*, the majority was unwilling to rule against Frederic simply because it differentiated the banner's value from Tinkers' armband's relative worth. The Court has generally avoided assigning particular expressions higher or lower value. However, such a determination along with the advocacy of illegal activity and the commercial implications merit ruling in this case based on such a distinction. Schools make such a distinction on a daily basis; "unlike varying political viewpoints that cause growth and awareness of others in a 'marketplace of ideas' theory, speech advocating illegal drug use has no beneficial effect on the views or society whatsoever."⁵⁰ As Geoffrey Stone argued, "The low value theory, or some variant

⁴⁹ 315 U.S. 568 (1942)

⁵⁰ Penaro, 252

thereof, is an essential concomitant of an effective system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable.”⁵¹ Cass Sunstein echoed this assertion when saying, “It would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purpose of the free speech guarantee.”⁵² In the field of commercial speech, such distinctions in value are necessary to preserve core First Amendment protections without trivializing the law by extending equal rights to a sign reading, for example, ‘Free Drugs and Sex Here, Now.’ The Court has upheld these value distinctions by saying, “The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”⁵³ For these reasons, the Court should not be so leery of assigning self-promoting, non-political student expression to the category of commercial speech.

⁵¹ Shaman Jeffrey M. Constitutional Interpretation: Illusion and Reality Greenwood Publishing Group, 2001 p206

⁵² *ibid*

⁵³ *Central Hudson Gas & Elec. v. Public Svc. Comm'n*, 447 U.S. 557, 563 (1980)
Internal citations omitted

Sections E: Clarifying Tinkers Second Prong

At the outset of this last recommendation, it is necessary to acknowledge that it is highly unlikely that the Supreme Court with its current composition will support this change in the standard. Two cases at the district court level illustrate the religious, homophobic students they most aim to protect. In *Nixon v. Northern Local School District*, the Court held that a school couldn't prohibit a student from wearing a t-shirt that stated on the front "INTOLERANT. Jesus said... I am the way, the truth and the life. John 14:6" and on the back it read "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" The Court rejected the school's defense under *Tinker's* second prong. In *Chambers v. Babbitt*, another Court reached a similar conclusion regarding a "Straight Pride" sweatshirt. Likewise, students have won in three cases involving religiously-motivated speech opposing abortion. In the first and second, *Raker v. Frederick County Pub. Schs.*⁵⁴ and *M.A.L. v. Kinsland*⁵⁵, the Court allowed students to distribute anti-abortion literature to fellow students at schools. In the third, *K.D. Fillmore Cent. School District*⁵⁶, a student was permitted to wear a shirt saying "ABORTION IS MURDER" on the front and on the back "You will not silence my message. You will not mock my God. You will stop killing my generation. Rock for Life!" While it may seem surprising to some educators that schools must tolerate these intrusions, it shouldn't shock anyone familiar with the constitutional protections extended to

⁵⁴ 470 F. Supp. 2d 634

⁵⁵ 2007 U.S. Dist. LEXUS 6355

⁵⁶ 2005 WL 2175166

almost form of religious expression. Increasing numbers of cases regarding religious controversies in schools are being argued as free speech issues, and this trend is unlikely to abate.⁵⁷

Despite its improbability, schools would be well served if the Court reexamined Tinker's second prong. Similar to the relaxed Brandenburg standard's limitations on advocacy of illegal activity, this prong would need to balance the explicitly of an expression's high value content with another factor. In this case, that factor would be the potential for any particular speech to restrict the "rights of other students" to receive an education in a reasonably safe environment. As Alito acknowledged in *Morse*, "Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger." Relaxing Tinker's second prong would help grant schools the power to mitigate this danger, particularly when it comes in the form of harassment. While the first prong would effectively address potentially disruptive speech, this second prong would address derogatory expressions that primarily seek to insult or antagonize members of the school community.

Schools already have an obligation to protect students from peer harassment as defined by *Davis v. Monroe County Board of Education*⁵⁸ and Title IX of the

⁵⁷ Dunn, Joshua (U. of Colorado) "Talking about Religion: Separation, Freedom of Speech, and Student Rights" Conference: "From *Brown* to "Bong Hits": Assessing a Half-Century of Judicial Involvement in Education" Oct. 15, 2008. American Enterprise Institute. Available at: <http://www.aei.org/event1746>

⁵⁸ 526 U.S. 629 (1999)

Educational Amendments of 1972.⁵⁹ In cases of student-on-student harassment, a school cannot act “with deliberate indifference to known acts of harassment in its programs or activities” where the harm was “so severe, pervasive, and objectively offensive that it effectively bar[red] the victim’s access to an educational opportunity or benefit.” This includes harassment based on race, color, and national origin.⁶⁰ Schools also are liable for similar acts of teacher-on-student harassment.⁶¹ Some courts have also extended the holding in conjunction with the Equal Protection Clause to require schools to enforce policies to protect “homosexual and bisexual students in the same way they enforce those policies in the cases of peer harassment of heterosexual students.”⁶² Schools can even be held liable if they respond to each incident of harassment but do so with ineffective methods.⁶³ These requirements set schools on a collision course as they simultaneously attempt to avoid lawsuits from harassed students and those who bully them. In addition, teachers have also sued parents of students for defamation and negligent supervision in the absence of school regulations allowing them to appropriately address student speech.⁶⁴

⁵⁹ U.S.C. § 1681 et. seq.

⁶⁰ *Bryant v. Ind. Sch. Dist. No. 1-38 of Garvin County*, 334 F.3d 928, 934 (10th Cir. 2003)

⁶¹ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)

⁶² *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137-38 (9th Cir. 2003)

⁶³ *Patterson v. Hudson Area Sch.* (6th Cir. Jan 6, 2009)

⁶⁴ *Draker v. Schreiber* (2008). In this case, the Texas appeals court dismissed her

claim regarding the students’ intentional infliction of emotional distress.

To this end, the Court should permit restrictions on speech if an individual or groups of students are the targets of harassing speech that singles them out for abuse because of their innate, personal characteristics. This test would not just look at the abusive content of a speech, but also require schools to show that it is directed at a certain subset of the school's population. This would permit political or religious speech that comments on abortion or religious beliefs, because these matters involve an individual's choice. However, broader restrictions should be permitted on matters related to race, gender, disability, or sexual orientation. (On the latter point, the Court should be explicit in saying that an individual's sexual orientation is not a choice.) In applying this standard, a school could restrict a t-shirt saying, "Be Clean, Not Black," but not "Be Christian, Not Jewish," if they both posed a similar potential for disruption and were part of a similar pattern of harassment. Such a distinction would prevent Establishment Clause violations while addressing the many common forms of harassment.

In *Nuxoll* the 7th Circuit proposed a very similar, if broader, option. They evaluated a school's policy forbidding "derogatory comments...that refer to race, ethnicity, religion, gender, sexual orientation, or disability." The Court attempted to protect students' rights to receive an education in an atmosphere free of derogatory remarks targeting these particular characteristics. The Circuit did not support limiting all comments, but instead limited their holding explicitly to the most egregious abuses. For example, the standard would permit a shirt with the words, "It's called evolution, you monkey" but not "Creationists are retarded." In the past, courts have found that "people do not have a legal right to prevent criticism of their

beliefs or for that matter their way of life”⁶⁵ unless the speech targets an individual or is defamatory. However, the 7th Circuit appropriately concluded that schools may prohibit such derogatory remarks about “unalterable or otherwise deeply rooted personal characteristics about which most people, including – perhaps especially including – adolescent schoolchildren, are highly sensitive.” (By substituting ‘deeply rooted’ for the above proposed standard ‘innate’ characteristics, their standard envelopes religion.) They recognized that derogatory speech in schools always intends to target individual students, and the “special characteristics of the school environment” merit such regulations. It is possible this standard could also be employed to appropriately restrict the use of the Confederate flag in cases similar to *BWA v. Farmington R-7 School District*.⁶⁶

In reaching their conclusion, the Circuit also considered the severity of the remarks, the student’s intention for the expression to insult other students and cause a disruption, and its capacity to impede at least one other student’s ability to learn and succeed in school. They also considered the evenhandedness with which the school applied its policy: administrators had permitted the student to change his t-shirt from “Be Happy, Not Gay” to read “Be Happy, Be Straight.” While this test may restrict some religious and political speech, it would offer an appropriate degree of latitude while explicitly outlining the scales on which courts should weigh the potential dangers of an expression. For instance, in *Nuxoll*, the Court concluded that the shirt was only,

⁶⁵ *Nuxoll ex rel. Nuxoll v Indian Prairie School District No. 204* citing *R.A.V. v. City of St. Paul*, supra, 505 U.S. at 394; *Boos v. Barry*, 485 U.S. 312, 321 (1988)

⁶⁶ (8th Cir. Jan 30, 2009)

“tepidly negative; “derogatory” or “demeaning” seems too strong a characterization... it is highly speculative that allowing the plaintiff to wear a T-shirt that says “Be Happy, Not Gay” would have even a slight tendency to provoke [harassing] incidents, or for that matter to poison the educational atmosphere.”

If the school had presented a stronger argument showing a pattern of harassment targeting homosexual students, and the effects of such harassment on students, as they did in *Morse* with the effects of drugs, then the censorship could have been valid. This opportunity may still arise. This student is likely to reappear in court as his stated intention is to use any language short of ‘fighting words’ to denigrate homosexuals at the school in Neuqua Valley. In future cases, the school will again have an opportunity to show a more significant infringement on the rights of others.

Either of these two standards would help schools punish bullies and protect students from abuse. As the 3rd Circuit wrote in *Sypniewski v. Warren Hills Regional Board of Education* (2002)⁶⁷:

“Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully... Schools are generally permitted to step in and protect students from abuse.”

By expanding *Tinker*’s second prong, courts would have a stronger legal justification for supporting educators doing their job. Schools are already permitted “a pretty free hand” if the schoolchildren are very young or the speech is not of a kind that the First Amendment protects (i.e. low value speech).⁶⁸ Schools should not be required

⁶⁷ 307 F.3d 243 (3d Cir. 2002)

⁶⁸ *Nuxoll ex rel. Nuxoll v Indian Prairie School District No. 204* citing *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538-39 (7th Cir. 1996); *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 738 (7th Cir. 1994); *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 389 (6th Cir. 2005); *Walker-Serrano ex*

to show that other expressions will likely result in a ‘material and substantial disruption’ before they intervene on a student behalf. Bending the first prong of the Tinker standard to encompass harassment provides only a weak, poorly reasoned support for restrictions on derogatory speech. Courts should be granted the leeway to employ the second prong to protect students from targeted abuse.

rel. Walker v. Leonard, 325 F.3d 412, 416-17 (3d Cir. 2003); Lovell by Lovell v. Poway Unified School District, 90 F.3d 367, 373 (9th Cir. 1996)

Section F: Reassessing Viewpoint Discrimination

On a similar point, the Court should decide that viewpoint discrimination occurs in schools only when an administrator restricts one expression and not another with a contrary opinion for reasons only related to that official's political, social or religious views. For instance, if the administrator is acting to prevent a potential grave harm, than the censorship is motivated by something other than the speech's viewpoint, even if a less harmful alternative expression would be permitted. The administrator's motivation was not to promote his or her unique viewpoint on the issue. This distinction is supported by *Tinker*, where the Court held that the school "it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." If an administrator can show that his or her action was caused by a legitimate concern, then viewpoint discrimination did not take place.

This is a more narrow definition than is currently employed outside schools. The Court often uses the term to refer to *any* restrictions on speech when a differing opinion on the same subject is permitted. However, the strict scrutiny that usually prohibits such restrictions is unenforceable in schools. For example, the official seeking to prevent a potentially substantial harm by disciplining a student who supports anorexia shouldn't be prevented from acting merely because they would permit anti-anorexia messages to be displayed.

Thus throughout this thesis, the term viewpoint discrimination is used primarily to refer to those proscriptions based solely on the disagreement of public school educators with the ideas being expressed. Speech limited for more legitimate reasons (such as those described above or covered by *Tinker*, *Fraser* or *Hazelwood*) are thus considered more permissible and should not be subject to the strict scrutiny, which should be reserved for discrimination based on a school official's viewpoint alone. Only in the case, for example, of a principal requiring students to support a particular football team because of his or her personal loyalties, should the prohibition on viewpoint discrimination apply.⁶⁹

Kenneth Starr argued that much broader viewpoint discrimination should be permitted, and this would effectively erase any free speech protections in schools aside from explicitly political speech protected under *Tinker*. By allowing schools to define their own missions and then suppress speech inimical to that message, schools would have the license to restrict all forms of expression. Advocates for both the left and the right of the political spectrum have reason to fear this conclusion, as argued in the various amici for *Frederick*. In addition, Starr and the amici in support of *Morse* did little to clarify that they were primarily concerned with speech that lacked political content. Instead they reiterated frequently that they were worried about speech advocating drug use. If they had more explicit in their gradations of value between political speech and the advocacy of illegal activity, they could have found more support on the Court. In doing so, however, they were asking the Court

⁶⁹ This form of viewpoint discrimination is different from the facts in *Sonkowsky v. Bd. of Educ.*, 2002 WL 535078, (D. Minn. 2002).

to do something they have regularly avoided: denying protection for speech simply based on its perceived value. While low-value speech, such as the advocacy of illegal activity, may be granted the least protections, the Court was justifiably wary of allowing any government official power to restrict any speech not explicitly political. The danger in permitting restrictions on non-high value speech does not concern the merits of such speech as much as the potential danger of wonton censorship. Outside of schools, speech need not be political to be protected by the First Amendment: “It is immaterial whether the beliefs sought to be advanced... pertain to political, economic, religious, or cultural matters.”⁷⁰ The First Amendment protects not only the right to engage in political speech, but also any “expression about philosophical, social, artistic, economic, literary, or ethical matters.”⁷¹ Even low-grade, juvenile entertainment, such as a fraternity skit, is protected.⁷² Therefore, simply allowing viewpoint discrimination on anything other than explicitly high value speech would sharply jibe with the Courts jurisprudence.

As will be shown in the upcoming chapters, the burden should fall on schools to show that their motivation for censorship rests as Tinker requires on “something

⁷⁰ NAACP v. Alabama, 357 U.S. 449, 460 (1958)

⁷¹ Abood v. Detroit Board of Education (1978), see also Pinard v. Clatskanie School District, 446 F.3d 964, 973 (9th Cir. 2006) (school speech need not address a matter of public concern), Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98, 106 (2nd Cir. 2001)

⁷² Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993)

more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁷³

⁷³ Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969)

Part 2- Navigating Morse & Frederick Through Uncharted Waters

Section A: Frederick's Misbehavior: A Unique Case Challenges the Courts

"[S]tudents may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."⁷⁴

There are more pressing issues in public education than if an Alaskan student should have been allowed to hold up a banner proclaiming, "BONG HiTS 4 JESUS." Attention certainly needs to be directed to teacher compensation, curricular reform, and the inequities in funding. This individual incident could have easily remained an unremarkable blip in the long history of students' misbehavior. However, this otherwise unexceptional mischief recently became the central case in the latest incursion on students' speech rights by the Supreme Court. By adding a third exemption to Tinker, the Court did little to clarify the preexisting legal standards governing student speech, which inadequately attempt to paint a line between acceptable proscriptions and improper censorship. The divisions within the Court demonstrated how contentious and unresolved this field remains. Tracing the evolution of the case from the initial confrontation between Joseph Frederick and Principal Deborah Morse in 2002 to the Supreme Court's holding in 2007, it is apparent that neither students nor administrators benefit from the current ambiguity in the law.

Most of the essential facts of the event are firmly established; however, the disputed aspects of the case illustrate the difficulties in establishing clear guidelines

⁷⁴ Tinker v. Des Moines 393 U.S. (1969) at 511

for student speech rights. The fateful day began when Joseph Frederick, an eighteen-year-old senior, was late to school on January 24th, 2002. When he arrived he joined his peers, the majority of whom were also students at Juneau-Douglas High School. The students had been dismissed from class in order watch the Olympic Torch Relay pass their school. The school band was playing and cheerleaders performed alongside the road. The event was part of the 11,500-person chain of torchbearers who transported the torch along the 13,500-mile relay route to the Winter Olympics in Salt Lake City, Utah.

The events at the relay presented unique challenges to the courts because of six primary issues. First, Frederick did not enter school grounds prior to attending the relay and the event was not clearly in-school activity. This became very important when determining the extent of a school's authority. At the event, most of the students were on the school side of Glacier Avenue along which the relay processed, but others, including Frederick's friends, had left school grounds and crossed to the residential side of the road. Others chose to leave school altogether to go the local McDonald's, although Principal Morse claimed that students were not officially "released".⁷⁵ However, students filed affidavits saying that they were just allowed to leave, not required to stay together or with their teachers, except for the gym class, and "school administrators did not attempt to stop students who got bored and left."⁷⁶ In fact, after reaching the age of 16, Alaskan students have a legal right to attend school voluntarily, although schools may dismiss them for truancy or

⁷⁵ Joint Appendix to Writ of Certiorari (henceforth, Joint Appendix), p23

⁷⁶ 9th Circuit Appeal p2467

failing to complete their work. Because of the laissez-faire attitude amongst students and some faculty, there was dispute in numerous amicus briefs about whether the event was a “school sponsored” affair, “teacher supervised” activity and/or an “approved social event”⁷⁷; however, it was agreed by both parties that teachers released their students with the intention that they watch the relay.⁷⁸ Frederick joined his fellow students who were ‘at school’, and the school argued that he was subject to school regulations.

Second, Frederick’s banner didn’t pose a ‘substantial disruption’ to the event as the courts had previously interpreted these words, and other students who went unpunished were engaged in much more physical mischief. With so many students aimlessly milling about, it was inevitable that some would begin causing trouble. Coco-Cola, along with the U.S. Olympic Committee and Chevrolet, sponsored the event in Juneau and handed out samples in plastic bottles that students began throwing at each other. Some students also threw snowballs and others got into fights, none of whom were disciplined. Frederick and his friends didn’t participate in this unruly behavior, and instead they waited to unfurl their banner when the television cameras would appear. At an agreed upon time, Frederick and his friends noiselessly displayed their 14-foot banner of duct-tape on white sheets. This failure to satisfy the first prong of Tinker lead the school to seek other justification for the censorship.

⁷⁷ Mertz, Douglas. *Brief in Opposition to Certiorari*, September 27, 2006 p7

⁷⁸ Joint Appendix, p15

The third unique aspect of the case arose because of the banner's ambiguous language. In his affidavit, Frederick said that he had seen the slogan on snowboards and stickers, and he used the phrase to present a "humorous parody" of contemporary attitudes towards religion and drugs. He later learned that the words likely originated when partygoers mocked fundamentalist religious groups at the New Orleans Mardi Gras festivities.⁷⁹ He intended the banner to be 'pushy', 'controversial', and 'funny'. Aside from satirizing attitudes of evangelical Christians and drug users, he also intended for the words to lack any explicit meaning and for them to signify "whatever you wanted it to be, or nothing if you don't... It's just anything."⁸⁰ In other words, the banner was an edgy joke that Fredrick intended as an ambiguous statement with a potential political message. As a result of Frederick's intent to communicate something, even though the message was purposefully vague, the law categorized the action as speech.⁸¹

A major contention arose around the content of the banner and if it constituted the advocacy of drug use. Frederick explicitly claimed not to have been making a statement about drugs. Nor did he aim to advocate drug use. Although the cross-examiner in his deposition attempted to present the use of the phrase "bong hits" as an unambiguous drug reference (Frederick was repeatedly asked "What did you mean by "bong hits"?⁸²), the additional clause, "4 Jesus," effectively rendered the words meaningless. Even if the words 'bong hits' referenced drugs, its usage did not

⁷⁹ *ibid*, p28

⁸⁰ *ibid*, 66

⁸¹ see *Texas v. Johnson* 491 US 379 (404)

⁸² Joint Appendix, p62

constitute the advocacy of marijuana use. In his deposition, Frederick attempted to explain that “Bong hits for Jesus” carries no meaningful advocacy regarding Jesus or drug use. Although some Rastafarians believe in a spiritual use of marijuana to connect to Jesus,⁸³ there was no indication in any of the legal documents that this could have been the intent or reasonable interpretation.⁸⁴ There is no evidence that Frederick wanted people to smoke marijuana in Jesus’ name. Within the context that it was displayed, the phrase was, as Frederick said, nonsense and absurd.⁸⁵

Principal Morse ignored the satirical interpretation lampooning religion and drug use, and she argued that a reasonable person could interpret the words as the advocacy of drugs. When deciding on content-based or viewpoint-based restrictions on free speech, intent matters less than the interpretation of the speech by a reasonable person, but Frederick’s banner could have been interpreted as many things, not the first of which was the explicit advocacy of drug use. In fact, it would be reasonable to conclude that Frederick was rather successful in his intention to present a contentious joke.

The fourth unique and less debated aspect of this case concerned the urgency of Morse’s decision when censoring the banner and punishing Frederick. The Supreme Court conflated these two matters and claimed she made a reasonable ‘on the spot’ decision and thus should be given the utmost deference. In fact, the

⁸³ Hamid, Ansley [The Ganja Complex: Rastafari and Marijuana](#) 2002

⁸⁴ The courts ruled in *Guam v. Guerrero*, 290 F.3d 1210 (2002) that the Religious Freedom Restoration Act protects use of cannabis in spiritual practices, and the statement would have carried a more explicit political message had Frederick known this and reasonably assumed that his audience would as well.

⁸⁵ Poser, Bill “The Supreme Court Fails Semantics” *Language Log*. July 07, 2007 <http://itre.cis.upenn.edu/~myl/languagelog/archives/004696.html>

decision to censor was made posthaste; however, Morse had time to deliberate on Frederick's punishment. Upon first seeing the banner, Morse quickly crossed the street and ordered the students to drop it. Frederick responded by asking about his right to free speech, upon which Morse tore his end of the banner from his hands. After seeing this exchange, the other students dropped the banner, and she told Frederick to report to her office. Morse had time before Frederick reported to her office to consider the merits of the suspension and her right to punish Frederick for his banner. Any grant of qualified immunity should have acknowledged because future courts will likely find that other administrators can be afforded equal protections over both instantaneous decisions and also those judgments made after some reflection.

A fifth surprising attribute of this case regarded the distinction between the banner and Frederick's suspension. Morse claimed that she ordered him to return immediately to her office along with her, but he walked away instead. Frederick himself claimed that he went to his car to get his books having not received the immediate order, and he proceeded to his next class. There, he claimed, he told his teacher that he needed to report to the Principal's office. Morse claimed that an assistant principal went to go get him from his classroom. Frederick's purported disobedience on this matter contributed to his suspension, but the courts chose not to address the distinction between his censored banner and suspension or the inconsistencies of the record. Instead they questioned Frederick's initial right to display the banner. They ignored the fact that Frederick's suspension was not issued solely for the banner but for these other infractions as well. This matter became

relevant later when Breyer decided that the suspension might be upheld on non-speech grounds.

The sixth and final unique aspect of the case arose because of the school's unusual justification for the censorship and punishment. Morse did not defend her actions in accordance with *Tinker* and instead managed an end-run around the school's policies to invoke *Fraser*. The school's Discipline Plan specified that suspensions could only be assigned for Category I offenses, or "Infractions which constitute a significant danger to the health, safety and well being of the school population."⁸⁶ Thus suspensions would apparently require the *Tinker* standard to be satisfied, but the banner alone wouldn't have constituted any Category I offense such as theft, arson or violence. However, within the list of permissible infractions that merit lengthy suspensions, multiple lesser offenses (Category II) can constitute a justification for claiming a Category I violation. This was Morse's claim when assigning the suspension.⁸⁷ She alleged that Frederick was guilty of "Display[ing] of Offensive Material," "Refus[ing] to respond to staff directive regarding behavior," "Truancy/Skipping," "Defiant/Disruptive Behavior," and "Refus[ing] to cooperate/assist in investigation,"⁸⁸ and therefore he deserved the ten days out of school.

The first of these Category II offenses, displaying "offensive material," could only be a punishable offense through a loose interpretation of *Fraser*. The school

⁸⁶ Joint Appendix, p100

⁸⁷ *ibid*, p106

⁸⁸ *ibid*, p107

claimed that the decision allowed schools to restrict speech that contradicts the mission of the school. The designation of “offensive” would therefore apply to any speech that administrators interpret as contrary to their espoused educational objective. This issue became central to the case and many disparate organizations rallied together to oppose this interpretation of the law.

In assigning the suspension, five other disputes issue arose which illustrate courts’ difficulties in reviewing students’ and school officials’ actions. First, Frederick testified that, after receiving an initial 5-day suspension, he respectfully questioned her justification by quoting Thomas Jefferson asserting, “Free speech cannot be limited without being lost,” and in response Morse increased the suspension to ten days, the maximum penalty for Frederick’s Category II infractions. Morse denied this claim and cited her ten-day suspension notice, which argued that the suspension was for a “violation of the policy requiring obedience to reasonable staff directives and the policy against displaying offensive materials,” along with the abovementioned enumerated infractions on the suspension notice.⁸⁹ Such dubitable motivations for punishments are common in schools.

The second issue illustrating the difficulties of judicial oversight concerned the equity of the suspension when compared to other students’ punishments. Assistant Principal Dale Staley gave another student a five-day suspension for also holding the banner, but Morse attributes the discrepancy to Frederick’s additional

⁸⁹ *ibid*, p26

infractions, such as refusing to name the other students who held the banner. Morse also acknowledged that the two administrators didn't confer prior to reaching their independent judgments and this led to the differing punishments. This issue was also not address by the courts, and fairness in assigning punishments will certainly be an issue in schools into the foreseeable future. However, even more importantly for student speech rights, the question also remains about whether the courts should evaluate the judicious or unequal application of suspensions.⁹⁰

The third common difficulty for the courts exemplified by this case involved the use of lesser offenses to justify a harsher punishment, the malleability of the discipline guidelines, and the potential for inordinate penalties imposed on students. Frederick suggested that his suspension was partially the result of a previous incident in which he was punished for refusing to stand for the Pledge of Allegiance. Frederick described how he was given a ten-day suspension in abeyance for this "multiple category II [offense and his] Intimidation / Vendetta / Malicious intent."⁹¹ He claimed to have been told that, "Alaska Statutes require by law that everybody stand when they hear the Pledge of Allegiance."⁹² In the materials submitted to the Supreme Court, Morse did not contest his description of the earlier event, and this incident also alludes to the confusion amongst school officials about even well established legal matters. This event was on his record when he was issued his suspension for the banner.

⁹⁰ see *Goss v. Lopez* 419 U.S. 565 (1975) for student rights to appeal suspensions

⁹¹ Joint Appendix, 64

⁹² *ibid*, p64

The fourth difficulty for the courts came in determining the value of the banner's message within the 'marketplace of ideas.' The line between political (or high value) speech and less meritorious expression was significantly blurred by the ambiguity of the banner. In her testimony during the appeal before Superintendent Gary Bader, Morse conceded that she would not have taken down the banner if it advocated legalizing drug use. Such political speech, she agreed, would be protected. However, Frederick's speech did not clearly constitute a message concerning school policies or state laws. Rather it seemed to simply endorse an illegal activity without questioning the justification for the legal prohibition. Morse knew how important it was to make this distinction having taken an advance school law course "eight or nine years ago"⁹³ as part of her continuing education towards a superintendent's endorsement. She claimed to be familiar with Tinker, Hazelwood, and Fraser, even though she mistakenly referred to "Bethel [and] Frasier [sic]" as two separate cases.⁹⁴ In the appeal, Superintendent Bader concurred with Morse' determination that the banner advocated the use of illegal drugs and that Frederick didn't present "any other credible meaning" to bolster the banner's otherwise low-value content.⁹⁵ Although he treated certain infractions with lenience and reduced the suspension to eight days, he upheld all aspects of Morse's logic for suspending Frederick. Thus the courts were forced to either contradict both administrators or agree that the most reasonable interpretation of the banner's message was the advocacy of illegal substances.

⁹³ *ibid*, p77

⁹⁴ *ibid*, p77

⁹⁵ Brief for Petitioner Morse, p6

The fifth and final difficulty arose after the incident and concerned the school's shifting rationales for their actions. Often teachers act on a gut instinct of right and wrong adolescent behavior, and only later do they reasonably justify their actions. Such was the case at Juneau-Douglas High School. Principal Morse elaborated on her rationale in confiscating the banner and suspending Frederick in the subsequent depositions after the incident. She spoke about how she initially took the banner from Frederick because she thought it was encouraging illegal drug use. She did not acknowledge any political message inherent in the words and viewed the banner as an affront to the school's attempt to oppose drug use. In the District Court, Morse argued that,

“...failure to react to the display of such a banner at a school-sanctioned event would appear to give the District's imprimatur to that message and would be inconsistent with the District's responsibility to teach students the boundaries of socially-appropriate behavior.”⁹⁶

This language was clearly intended to invoke *Hazelwood v. Kuhlmeier*'s logic for restricting student speech in “school-sponsored expressive activities, so long as [school officials'] actions are reasonably related to legitimate pedagogical concerns.”⁹⁷ Such logic, however, required the school to have lent its name or resources to the expression, which was not the case. Thus this rationale didn't gain much traction in the courts.

However, Morse provided a second justification for her actions by citing *Bethel v. Fraser*, which said that, “A school need not tolerate student speech that is

⁹⁶ Joint Appendix, p109

⁹⁷ 484 U.S. 260 (1988) 261

inconsistent with its basic educational mission.” It was this holding that Morse most hoped to bring to her defense. The school’s mission includes the prevention of adolescent drug use, and she interpreted the banner as inconsistent with that duty.

Morse provided a third argument in defense of her actions by claiming that she was acting *in loco parentis*. This educational theory grants schools the parental duties and obligations to teach in a manner consistent with how parents are reasonably expected to treat their children. She also argued that,

“The district’s responsibilities as in loco parentis also require that messages advocating, or promoting use of illegal substances be removed, to the extent possible, from the learning environment, including the environment at school-sanctioned activities”⁹⁸ (underlining in original).

While the logic of *in loco parentis* had no basis in the past forty years of law, Justice Thomas in his concurrence used the same theory to dismiss all forms of student speech rights. Schools should have complete leeway, he argued, to restrict any speech they deem inappropriate because they are assuming a parental role in the lives of their students. While Fraser may have allowed schools to set their educational missions and then restrict speech that contradicts it, the Courts should just circumvent the two-step process by allowing complete administrative discretion.

Such rational, however, remains very controversial because it would remove most rights for students to seek a legal remedy to onerous school regulations. Also, many adults who send their children to public schools do not wish to bestow parental powers on school administrators. Because there is no universal agreement

⁹⁸ Joint Appendix, p110

on the extent of students' rights, erring on the side of administrative suppression has not garnered widespread support. Conferring expansive powers on educators could also allow for the censorship of legitimate forms of student expression. Many amicus briefs argued that this would have a chilling affect on the future of civic participation and American democracy.

As if foretelling the momentous debate around his actions, Frederick once and possibly twice or three times sounded the "First Amendment Bugle" during the eventful day. The first undisputed time was when he questioned Morse as she took the banner from him, and the second was when he claimed to quote Jefferson when given his suspension. Frederick also claimed, although Morse denied, that he asked Assistant Principal Staley when he received his suspension, "What about the Bill of Rights? Doesn't that still exist?" Staley said, "not until you graduate," and "not in schools."⁹⁹ Despite Morse's denial, such an incident seems entirely plausible given the ambiguities of students' constitutional protections. It was up to the courts, however, to ensure that some clear limits did exist on administrators' powers.

⁹⁹ *ibid*, p30

Section B: From the Principal's Office to the Courtroom

"...it is easy to assume a tempest in a teapot is trivial, unless you happen to be in the teapot."¹⁰⁰

As the case left the workaday world of JDHS, the legal ambiguity in student speech rights became quickly apparent. Beginning at the District level, the case quickly became seen as balancing the relative importance of a reasonable suppression of pro-drug speech with the protection of student speech rights. Given this uncertain ground, much of the judicial decisions in the federal courts reflect the personal politics of the participants and the relative importance they gave to each mandate. While the District Court found for Morse, the 9th Circuit concluded otherwise. Their differing rationales highlight the need for the Supreme Court to provide clear guidance.

The school met with much success in the early appeal process. After receiving his suspension notice, Frederick initially brought the case before the Superintendent and later the School Board, both of which upheld the decision to suspend him. In April, 2002 Frederick brought a suit against Principal Morse before the District Court for Alaska with John W. Sedwick¹⁰¹ presiding. A little over a year after receiving the case, Sedwick granted summary judgment in favor of Morse by first finding her immune from damages under federal and Alaskan law and then conferring legality to her proscription of the banner. On the former matter, he placed the burden on Frederick to show that Morse violated a law that a reasonable

¹⁰⁰ Pyle, 861 F. Supp. at 158.

¹⁰¹ Dartmouth College B.A. '68

person would have known. Failing to do so, he was willing to grant her qualified immunity. He gave considerable deference to the school interpretation of the banner as advocacy by writing that, “Frederick’s expression directly conflicted with the school’s deterrence of illegal drug use.”¹⁰² The majority in the Supreme Court also differed to the school in their interpretation of the banner as advocacy. In showing that it was “objectively reasonable for the defendants to believe that their actions were proper,”¹⁰³ Sedwick’s opinion argued against awarding damages. Even if the event was not school-sponsored, Sedwick was still willing to grant qualified immunity to Morse if it was reasonable to believe that “the statement was directed at students on campus.”¹⁰⁴ By granting summary judgment, he also decided that the disputed facts, such as the degree to which the event was “school sanctioned”, did not prevent him from making a ruling on the matter.

On the issue of the proscription’s legality, Sedwick found that Frederick’s speech was akin to Fraser’s. He didn’t agree with the plaintiff’s argument that Fraser is limited to lewd speech and quoted the earlier opinion saying that schools have the right to “determine what manner of speech... is inappropriate.”¹⁰⁵ He supported his ruling by citing the 9th Circuit’s *Chandler v. McMinnville*, which said Fraser broadly included proscriptions on “plainly offensive” speech,¹⁰⁶ and *Boroff v. Van Wert City Board of Education*, where the 3rd Circuit upheld a student’s punishment for

¹⁰² *Frederick v. Morse*, District Court p6

¹⁰³ *ibid* p5

¹⁰⁴ *ibid* p6, citing *Baker v. Downey City Bd. of Ed.*, 307 F.Supp. 517,526 (C.D.Cal.1969)

¹⁰⁵ *Bethel School District No. 403 v. Fraser* 478 U.S. at 683

¹⁰⁶ *Chandler v. McMinnville* 978 F. 2d 524

wearing a Marilyn Mansion t-shirt with anti-Christian messages.¹⁰⁷ Both cases invoked Fraser’s language to allow a school to act in defense of its “basic educational mission.” Sedwick argued that Tinker did not apply because that speech concerning the Vietnam War did not contradict the school’s mission; however, Frederick and Fraser’s speech both could be reasonably interpreted as a violation of school policy concerning drugs and decency, respectively. Sedwick also agreed with Morse’s argument that failing to act would “place the imprimatur of school approval on the message,” implicitly invoking *Hazelwood v. Kuhlmeier*. Both cases lent support for a schools right to restrict student speech.

In support of Morse’s interpretation of the banner as advocacy, Sedwick cited Frederick’s deposition in which he acknowledged that the terms ‘bong’ and ‘hit’ referred to drugs. By doing so, he dangerously conflated “advocacy” and “refer[ances] to drugs.”¹⁰⁸ By failing to differentiate between mere allusions and outright support, Sedwick’s decision granted substantially more deference to administrative judgments. In the eyes of the 9th Circuit, this was a particularly dangerous precedent to leave standing.

The case was successfully appealed to the 9th Circuit and overturned. Juneau attorney Douglas Mertz argued on Frederick’s behalf and served as his lawyer throughout the entire legal process. The 9th Circuit heard the case before Justices Hall, Kleinfeld, and Wardlaw. Kleinfeld, a contributor to the conservative National

¹⁰⁷ *Boroff v. Van Wert City Board of Education* 220 F. 3d at 469

¹⁰⁸ *Frederick v. Morse* District Court p12

Review,¹⁰⁹ wrote the decision. In March, 2006, the Circuit Court found Morse personally liable for violating Frederick's rights. They applied the standard set by the Tinker trilogy and found that the banner, although nonsensical, was a protected, lawful expression. Finally and most surprisingly, they found Morse potentially liable for damages.

The 9th Circuit's ruling began by immediately noting, "This is a First Amendment student speech case."¹¹⁰ They did not find an attempt to justify the suspension on non-speech grounds in the District Court or in any of the supporting briefs, and they did not attempt to do so themselves. Justice Breyer later rightfully questioned this logic. Within the first paragraph, Kleinfeld also accepted Frederick's explanation for his truancy, noting that he "never made it to school that morning because he got stuck in the snow in his driveway." This excused the first of the five enumerated violations listed on Frederick's suspension notice. The other four they attributed to or mitigated because of the illegitimacy of Morse's actions. Because Frederick's actions were constitutionally protected, the suspension was invalid.

The Court also felt it necessary in the beginning of their opinion to respond to Morse's attempt to legitimize her actions by citing the disruptions in the days after the banner. She personally had seen graffiti on school grounds of a bong with the words "4 Jesus" beneath it and other pro-drug "artwork."¹¹¹ Although she may have justifiably thought these events were "sparked" by Frederick's actions, "the

¹⁰⁹ Kleinfeld, Andrew J. & Judith S. "Freedom for Iraq?" *National Review* Sept. 24, 2003

<http://www.nationalreview.com/comment/kleinfeldkleinfeld200309240830.asp>

¹¹⁰ 9th Circuit Appeal Opinion, p2464

¹¹¹ Joint Appendix, p43

principal did not rip down the sign at the rally because she anticipated or was concerned about such possible consequences.”¹¹² Hence, her proscription was not in accordance with Tinker’s logic, which allowed administrators to only limit speech that poses a “substantial interference with school discipline or the rights of others.”¹¹³ She had no knowledge at the outset that such graffiti would arise, and *a posteriori* knowledge cannot justify *a priori* censorship. In other words, she limited the speech because of its content and viewpoint rather than its disruptive potential.

Most importantly, the Court made the crucial decision of choosing to apply the Tinker standard, rather than Fraser’s ambiguous “basic education mission” language. Evoking the latter, Morse had defended her actions because she ““felt that [the banner] violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs.”¹¹⁴ Sedwick had claimed that Fraser lent legitimacy to this decision. In contrast, the Circuit Court found that Fraser only dealt with sexual speech that was “plainly offensive” at an educationally significant school assembly. Frederick’s action contained no sexual innuendos nor was the event as important to the school’s curriculum. Similarly “distinguishable,” Kuhlmeier dealt with sponsoring speech rather than just tolerating it. Hence, neither case superseded Tinker’s earlier holding. Kleinfeld chose review the case *de novo*, disregard Fraser and Kuhlmeier, and apply Tinker’s reasoning to the case. As a result of this decision, he found Frederick’s speech permissible because it did not

¹¹² 9th Circuit Appeal Opinion, p2465

¹¹³ Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) p503

¹¹⁴ Joint Appendix, p25

pose a substantial disruption or infringe on other students' rights.

In a significant footnote, the opinion found that Alaskan law further undermined Morse's argument that Frederick advocated "illegal drugs." Alaska grants an explicit constitutional right to privacy that supersedes the state's attempt to regulate an individual's possession and consumption of marijuana in the home.¹¹⁵ Hence, marijuana is not clearly an "illegal" substance if a right to privacy protects its use. Within this contentious climate, "[any] messages about marijuana have a degree of political salience to them and might be understood as political advocacy."¹¹⁶ In other words, the Court argued that while Morse might have chosen to see the banner as the advocacy of marijuana, it might not have advocated an illegal activity. This lent support for the argument that it was entirely logical to view the banner as both a political statement and "a positive sentiment about marijuana use, however vague and nonsensical."¹¹⁷ This argument certainly stretched the meaning of political speech far beyond what the Framers likely intended to protect when they wrote the First Amendment.

Given the ambiguous legality of marijuana and multiple interpretations of the banner, the Court boiled down the case to a single question in regards to Tinker. The central issue that arose for the Circuit Court was,

"whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school."

¹¹⁵ *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975)

¹¹⁶ 9th Circuit Appeal Opinion, p2469

¹¹⁷ *ibid*, p2469

Their answer “under controlling, long-existing precedent is plainly ‘No.’” Before they could grant qualified immunity to Morse for overstepping the law, however, they needed to go further to address the constitutional protections of Frederick’s speech.¹¹⁸ This necessitated that the court affirm the principles behind the Tinker trilogy and why Frederick’s banner merited such protections. Justice Breyer later opposed this ‘order of batter’ because it causes courts to unnecessarily address contentious constitutional questions, as it did here. In fact Alito, writing for the majority, recently removed this requirement in *Pearson v. Callahan* and overturned *Saucier v. Katz*, which had required them to unnecessarily wade into controversial constitutional waters.

The Court began their inquiry by finding that Tinker forbids administrators from limiting speech simply because the expression advocates a position contrary to government policy. In Tinker, the government was engaged in a war, an endeavor of the highest importance; however, voicing opposition to the war was protected. Tinker rationalized such protections by citing *West Virginia v. Barnette*, which dealt with an adult burning the flag. In that case, Justice Jackson famously argued that free speech is akin to a “fixed star in our constitutional constellation” and no government official can prescribe or force orthodoxy of opinion. Although students’ rights are not coextensive with adults’ rights outside of schools, this set a high standard for proscription.

Thus, Fraser’s permissive language granting schools the power to restrict speech contrary to their “educational missions” certainly was inimical to Tinker’s

¹¹⁸ *Saucier v. Katz*, 533 U.S. 194 (2001).

holding. If schools were to ignore Tinker’s precedent and limit any discourse that undermined its mission, it could proscribe all sorts of legal and constitutionally protected speech:

“...a school’s anti-gun mission would be undermined by a student passing around copies of John R. Lott’s book, *More Guns, Less Crime*; a school’s anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school’s traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents.”¹¹⁹

These hypothetical situations could be allowed if Fraser’s “basic educational mission” were used as the standard rather than Tinker. For this reason, they explicitly “decline[d] to follow” the Boroff decision, in which Fraser was applied in this fashion. In contrast, when applying Tinker the Court found that, “No educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event.”¹²⁰ If the event were different in substance, perhaps a time, place and manner restriction would apply because the speech would be more disruptive; however, this was not the case here. The school could have also have restricted all banners, but this wasn’t the situation either, so they clearly had employed a form of viewpoint discrimination the Circuit found unacceptable.

The Court expressed serious dissatisfaction that Sedwick applied the 9th Circuit’s *Chandler v. McMinnville School District* to defend his decision. In McMinnville decision, the Circuit Court wrestled with students’ rights to wear buttons saying “Scab” while in classes taught by replacement teachers during a

¹¹⁹ 9th Circuit Appeal Opinion, p2473

¹²⁰ *ibid*, p2473

lawful strike. In the process of protecting the buttons, they restated their standard for determining the protections afforded to student speech:

“We have discerned three distinct areas of student speech from the Supreme Court’s school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude, as discussed below, that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*.”¹²¹

Applying this standard to *Frederick v. Morse* (as it was called on the appeal) they found that Frederick’s actions neither fell into the first or second category, and therefore it must be governed by the third. Therefore, the burden fell on the school to show that the speech would present a substantial disruption or infringe on the rights of others. Even if speech was clearly offensive to some listeners, as Sedwick argued, it still did not qualify as ‘plainly offensive’ unless it contains “vulgar, obscene, lewd, or sexual speech that, especially with adolescents, readily promotes disruption and diversion from the *educational curriculum*” (emphasis in original).¹²² In *McMinnville*, the buttons did not qualify for censorship because they did not disrupt coursework, and Frederick’s banner did not merit proscription for the same reason.

The Court cited numerous other circuit court decisions that applied this logic in a variety of circumstances. The 9th Circuit’s decision in *LaVine v. Blaine School District* addressed a school’s attempt to prevent a possible shooting. The school acted to avert a potential harm rather than to punish, and they were granted greater

¹²¹ *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992) 529

¹²² 9th Circuit Appeal Opinion, p2477

deference. In other words, the more substantial disruption of a school shooting merited more preemptive action from the school to protect students. However, Morse intent was to punish Frederick, and the school failed to demonstrate the substantial disruption or harm posed by the banner. The 9th Circuit ruled in *Burch v. Barker* that a school could not restrict a publication produced outside of school but distributed to students in school. The publication could not be interpreted as bearing school sponsorship and therefore fell into the third category. In the *Burch* opinion, schools could decide what is taught in classes, but “no similar content control is justified for communication among students which is not part of the educational program.”¹²³

Similar logic was used by the 4th Circuit in *Newsom v. Albemarle County School Board* when they ruled that a student could not be forced to change out of a t-shirt depicting “men shooting guns.” Because the shirt had not substantially disrupted school operations nor posed a potential harm, the censorship was not allowed. To rule otherwise would forbid a student from wearing a shirt in support of the military or even displaying their official state seal. If the t-shirt posed a substantial harm in the form of a school shooting or a disruption in the curriculum, only then could the school require the student to change clothing.

The 11th Circuit found in *Scott v. School Board of Alachua County* that displays of the confederate flag had posed a legitimate disruption because of a history of racial tension. The 2nd and 3rd Circuit reached a similar conclusion on the divisive flag in *Melton v. Young* and *West v. Derby Young Unified School Dist. No.*

¹²³ *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988) 1157

260, respectively. Other decisions, such as *Sypniewski v. Warren Hills Regional Board of Education* and *Castorina ex rel. Rewt v. Madison County School Board*, showed that inadequate justification for a particular censorship would result in decisions favoring students.

Kleinfeld's opinion did acknowledge that there still are aspects of student speech rights that need clarifying. In *Sypniewski*, the 3rd Circuit wrote that, "[t]here is no constitutional right to be a bully... Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school;" however, the line between 'abuse,' 'intimidation' and protected 'offense' was left unclear.¹²⁴ As Justice White wrote in reference, "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."¹²⁵ The courts have not uniformly resolved how White's defense of abusive speech applies given the "special characteristics of the school environment." Most opinions have required that 'abuse' pose a substantial disruption, as will be discussed later in relation to *Saxe v State College Area School District*. As has been argued earlier, the Supreme Court ought to clarify this matter.

In a brief hypothetical foray, the Court explored how it would apply Boroff's logic and the application of *Fraser*. In order to show how Boroff and *Fraser's* speech could be censored while they protected *Frederick's*, they needed to differentiate the current case. They distinguished *Frederick's* circumstances from *Fraser's* and Boroff's by noting that,

¹²⁴ Hussain Murad. "Freedom of Speech and Adolescent Public School Students" *J. Am. Acad. Child Adolesc. Psychiatry*, 47:6, June 2008

¹²⁵ *R.A.V. v City of St Paul*, 505 U.S. 377 (1992).

“Frederick’s banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school’s basic educational mission.”¹²⁶

This distinguished between events that are more related to a school’s primary function than others. That primary function was to be found in the classroom (Boroff) or school auditorium (Fraser) and not on the streets (Frederick). In a notable footnote to this comment, the Court ruled that, “We do not reach the question of whether the school could have prohibited Frederick from displaying his banner on school grounds or wearing a T-shirt that read ‘Bong Hits 4 Jesus.’”¹²⁷ According to this logic, the primary educational mission of schools was to be fulfilled class time, and outside of class students gained more freedoms. Student speech outside of a formal school setting received more protection because it wouldn’t interfere with the core mission. While this differentiation makes pedagogical sense (more freedoms are typically permitted outside the classroom), the Circuit Court’s palpable fear in Boroff’s application of Fraser was that it would put the courts on a track towards determining appropriate mission statements and how they should be pursued in different school venues. Wisely, the Court did not use this logic in their primary defense of Frederick’s banner.

Once the Court established that Frederick’s banner was protected, they needed to address the issue of Morse’s qualified immunity from damages. By established under Tinker that Frederick’s rights had been violated, they complete

¹²⁶ 9th Circuit Appeal Opinion, p2478

¹²⁷ *ibid*, p2478

the first test to determine Morse's eligibility. She had indeed broken the law. The second test was to see if the law contained ambiguities that would account for its misapplication. Despite having already spilt much ink attempting to explain how the case should be interpreted, they claimed that, "The law of which Morse was aware clearly established Frederick's constitutional free speech right."¹²⁸ This seems somewhat perplexing given the fact that the Sedwick, the district judge, apparently misinterpreted the law. If such a mistake is possible by a federal judge, the law could not have been so "clearly established." The Court claim that McMinnville, which Sedwick had used to reach an opposite conclusion, ensured, "that opacity in this particular corner of the law has been all but banished."¹²⁹ Undoubtedly this was not the case; however, the Court determined that the law was unmistakably in existence.

Despite the dubious second prong of the qualified immunity test, they moved from that conclusion to the third requirement for qualified immunity: to deduce that a Morse, a government employee familiar with the law, should have known that her actions were illegal. Given that the law was "clearly established" and that Morse had an educational and professional background in legal matters, the Court ruled that she should have known that her actions were in violation of Frederick's rights: "The law was clear, and Morse was aware of it."¹³⁰ Despite the substantial evidence against both these assertions, it was upon this logic that they found Morse ineligible for qualified immunity and remanded the case. These illogical aspects of the Court's

¹²⁸ *ibid*, p2480

¹²⁹ *ibid*, p2480

¹³⁰ *ibid*, p2481

denial of qualified immunity undoubtedly contributed to the Supreme Court's acceptance of the appeal.

In reaching this decision, the Circuit Court received a few Amicus Briefs on behalf of the two parties. Morse was supported by the Association of Alaska School Boards, which was joined by the California School Board Association, the National School Boards Association, the Alaska Council of School Administrators, the American Association of School Administrators and the Fairbanks North Star Borough School District. In their brief, they argued against "lumping speech into categories" set by the Tinker trilogy and urged the Circuit Court to uphold Sedwick's decision. They promoted an interpretation of the Tinker, Fraser and Kuhlmeier that broadly permitted officials to practice viewpoint discrimination on non-political speech. Tinker only applied, in their estimation, to political speech and only established a principle regarding school's responses to 'high value' expressions. Frederick's speech did not merit the application of Tinker and to do so would undermine the ability of devoted educators teach "good conduct and decent behavior."¹³¹ They stressed the importance of local controls on schools to support their orderly operation. They made a very strong argument that the Supreme Court would have been wise to heed.

Frederick received support separately from the Drug Policy Alliance, an organization that has advocated for the medicinal and religious use of marijuana, and the Student Press Law Center, which was joined by The First Amendment Project, Pacific Northwest Association of Journalism Educators, Thomas Jefferson

¹³¹ Association of Alaskan School Boards, Amicus Brief p33

Center for the Protection of Free Speech, and The Village Voice. The former advocated for strict scrutiny given that Frederick was not a minor and that the event was not on school property. If not granted strict scrutiny, which usually entails forbidding censorship, they advocated for protecting the speech under Tinker. They disagreed with Morse's argument that protecting Frederick's speech would undermine the school's anti-drug policies. Such zero-tolerance policies that punish students instead of promoting free communication "may even be counterproductive."¹³² While they did not advocate denying Morse qualified immunity, they did stress the need to protect students from overly zealous school officials.

The Student Press Law Center, et al., also directed the Court's attention to the fact that the speech was "completely off school grounds," and that the District Court's opinion could "chill all types of student speech and undermine the constitutional safeguards that have been ratified by the courts for more than thirty years."¹³³ They too did not address the issue of qualified immunity, but fought for Frederick's right to express a controversial message that might cause "discomfort and unpleasantness" because, as Tinker declared, "we must take this risk." The speech did not lead officials to forecast a substantial disruption, and thus the censorship fails under the test. This logic obviously had a substantial impact on the Court and led to their concurring judgment.

Given Sedwick's misapplication of McMinnville, it is not surprising that the

¹³² Amicus Brief by the Drug Policy Alliance to the 9th Circuit, p5

¹³³ Amicus Brief by the Student Press Law Center to the 9th Circuit, p5

Circuit Court accepted the appeal. Once the Circuit Court overturned the decision with their weak argument against qualified immunity, it again was foreseeable that the Supreme Court would agree to review the case. Had the Circuit Court found that the ambiguity of the banner's message and uncertainty of the law allowed them to grant Morse immunity, it would have been unlikely that the case would have been accepted. However, the Circuit Court didn't deny Morse immunity entirely. The Circuit reversed Morse's motion for summary judgment and upheld Sedwick's denial of Frederick's motion. They did not award Frederick damages. As a result the case would have been remanded to the district courts for a complete rehearing and a more substantial review of the facts.

Additionally, had the Circuit Court not made its foray into the application of Fraser and attempted to differentiate between more or less important school activities, the decision might still remain standing. If left standing this holding would open the door for future cases to question the educational merit of an event as a means of defending a student's speech rights. The courts would then play a larger role in determining the educational mission of schools and how they should go about educating their youth. This would involved the courts even more in the day-to-day workings of schools, a result nobody supported.

Lastly, the 9th Circuit's ruling left many logical school policies unsupported by the law. One such case was *Guiles v. Marineau*¹³⁴, in which a student was disciplined for wearing a t-shirt referring to the President Bush as "Chicken-Hawk-in-Chief" and including text and drawings alluding to his alleged past drug and alcohol abuse. The

¹³⁴ (2d Cir. Aug. 30, 2006) 461 F.3d

student was given the option three options: (1) turn the shirt inside out; (2) change shirts; or (3) cover the images of drugs and alcohol, including the word "cocaine." He chose instead to leave school and came back again the next day with the same shirt. The 2nd Circuit found that despite the school's content-neutral policy against any clothing displaying drugs or alcohol, the student was entitled to wear the shirt under Tinker. They based their holding on the 9th Circuit's decision in Morse, which ignored the fact that non-public forums outside schools permit such content-based restrictions. By requiring that schools strictly follow the Tinker standard, the 9th Circuit effectively made schools' legitimate oversight over student messages related to drugs and alcohol unenforceable.

Section C: Heading to the Supreme Court

“The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”¹³⁵

After the three-judge panel made their decision, Morse’s lawyer, David C. Crosby, petitioned on for the case to be reheard en banc by the 9th Circuit. He argued that if left standing, this case would be the first time that any court in the U.S. ever denied public school officials the authority to regulate “positive messages about illegal drug use.”¹³⁶ Given that Fraser had allowed limitations on offensive speech about sex, denying administrators the right to censor similar talk about drugs “trivializes the drug crisis in the nation’s schools.”¹³⁷ The defense also charged the panel with granting the courts the responsibility for defining the mission of schools. This was true to the extent that the opinion explored Frederick’s protections under Fraser and Boroff. The appeal resurrected Sedwick’s reading of Chandler v. McMinnville as well in hopes that the Circuit would favor the language of the “basic educational mission” over the Tinker standard. They also disagreed with the finding of the Court that the students were “released from school” at the time of the incident.¹³⁸ Lastly, they cited the disputed nature of student speech law and urged the court to not hold public school employees to a higher standard than federal judges when withholding qualified immunity. Although the Court denied the

¹³⁵ Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)

¹³⁶ Crosby, David C., Statement Required By Frap 35(B) (Rehearing En Banc), ii

¹³⁷ *ibid*, ii

¹³⁸ *ibid*, iii

rehearing en banc, these issues were resurrected upon the successful appeal to the Supreme Court.

With this final appeal, Morse and the school district enlisted powerful allies to support their cause. In May, 2006 Kenneth Starr, made famous by the Starr Report during the impeachment of President Clinton, and his law firm agreed to represent Morse and the Juneau School District pro bono. Starr was a powerful advocate for the school officials and knew how to favorably present the case to the Court. In contrast, Douglas Mertz, with assistance from the ACLU, continued to represent Frederick. Mertz was the former Assistant Attorney General for Alaska and had represented clients in his private practice on a broad array of issues before federal and state courts.¹³⁹ On his website, his statement of qualifications describes his specialty to be in “the areas of environmental and administrative law, permitting, and government relations.”¹⁴⁰ These fields do not encompass educational law, and he also had considerably less experience in Washington than Starr. While maintaining counsel was not uncommon and minimizes the volatility of the process for a petitioner or defendant, changing counsel can infuse new perspectives and energy along with bringing in professionals who regularly address the highest court. This was certainly the case with Starr, and his familiarity with the Supreme Court was apparent in the oral arguments. In addition, Edwin Kneedler, of the Department of Justice, also spoke in Morse’s defense adding to the school’s high-caliber defense.

¹³⁹ Douglas K. Mertz, Oyez. http://www.oyez.org/advocates/m/d/douglas_k_mertz/

¹⁴⁰ Statement of Qualifications, Law Offices of Douglas Kemp Mertz
<http://www.alaska.net/~dkmertz/>

Another case from the 9th Circuit on a similar subject reached the Supreme Court that term, and its result foreshadowed the ruling in *Morse*. The Supreme Court decided *Harper v. Poway*¹⁴¹ a few months before deciding *Frederick*. The Circuit Court's 2 to 1 opinion was written by Stephen Reinhardt, a liberal justice appointed by Jimmy Carter who holds the dubious claim to having among the highest number of decisions overturned by the Supreme Court.¹⁴² Notably, he is married to the Executive Director of the ACLU in Southern California¹⁴³, which strongly opposed his decision in an Amicus Brief to the Supreme Court.¹⁴⁴ Reinhardt's decision arrived at the Court as contrasting case to *Frederick's* and served to illustrate how broadly justices could interpret the existing law to allow schools to restrict speech.

In *Harper*, a student challenged a school's decision to prevent him from wearing a shirt that said, "'Homosexuality Is Shameful' and 'Be Ashamed, Our School Embraced What God Has Condemned.'" The Circuit heard this case after *Frederick's*, and they distinguished them in four ways: the banner didn't infringe on others' rights, *Morse* didn't attempt to demonstrate a 'substantial disruption', the banner did not occur in a classroom and *Frederick* received a harsher penalty (suspension) than the student in the other case (ordered to not wear the shirt). The

¹⁴¹ *Harper v. Poway USD*, 445 f3d 1166

¹⁴² Farnsworth, Ward. "The Role of Law in Close Cases: Some Evidence From the Federal Courts of Appeals", *Boston University Law Review* 86: 1083, 2006. p1090

¹⁴³ "Ramona Ripston, Executive Director, ACLU of Southern California Appointed to the State Commission on Judicial Performance". ACLU of Southern California (1998-07-20). Retrieved on 2006-06-14.

¹⁴⁴ ACLU. "ACLU Defends Controversial Speech In Public School." April 2, 2008 http://www.aclusandiego.org/news_item.php?article_id=000379

Court also acknowledged that Tinker did allow for viewpoint discrimination when the speech is materially disruptive or violates the rights of others.

The Circuit Court wisely decided in favor of the school protecting their power to prevent 'abusive' language in a manner reminiscent of the Sypniewski case. They found that protecting a minority group carried more of an obligation than the student's free exercise of religion and establishment claims. The shirt was not directed at any particular student, so it did not explicitly intend to violate an individual's rights; yet the Circuit Court cited research that showed that homosexual students' education could be hurt by anti-gay harassment. Hence, the shirt violated some unidentified students' right to learn in a safe atmosphere and to be "let alone." The research cited, however, did not suggest that that emotional harm was tantamount to physical threats or abuse. In addition, the school did not bring before the Court any student to testify that the shirt posed a substantial disruption to their education. This apparently was required because unfortunately the Supreme Court was not going permit schools to regulate non-tortuous speech under the "invasion of rights" prong.

As a result of the vagueness of the harm, this 'horizontal' concern for the relationship between students was too broad for the Supreme Court.¹⁴⁵ The Court overruled the lower court's decision without even granting a hearing indicating its willingness to adhere to the conventional interpretation of the Tinker standard. This was an unfortunate result for the many students who are the victims of homophobic harassment.

¹⁴⁵ Hussain, 6

In addressing Harper and Morse it would be also remiss to overlook *Saxe v State College Area School District*, in which Alito enumerated the conventional interpretation of *Tinker* prior to his nomination to the Supreme Court. The case was filed by religious students who felt that the anti-harassment policies would prevent them from expressing their beliefs. As can be seen in both *Saxe* and *Morse*, Alito and other conservative members the Court listen too intently to the free-speech concerns of evangelical Christian organizations. The State College's policy had banned,

“...any verbal or physical conduct that is based on an enumerated personal characteristic and that ‘has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.’”¹⁴⁶

Alito argued that the last portion of this policy permitted unnecessary viewpoint discrimination. In this opinion, Alito found that school policies prohibiting any offensive comment that denigrated a person's “values” were too broad. Under Title IX of the Education Amendments of 1972, schools had an obligation to limit harassment that, “objectively denies a student equal access to a school's education resources,” but not harassment that merely has malevolent intent. Thus, the policy would be deemed lawful only if the school removed the word ‘purpose’ and added that the speech must create an environment that is severely and pervasively “intimidating, hostile or offensive.”¹⁴⁷ Alito wrote that schools could not be held liable for “simple acts of teasing and name-calling” that were not “so severe,

¹⁴⁶ *Saxe*, p16

¹⁴⁷ Waldman, Emily Gold. “A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious or Otherwise)” *Journal of Law and Education* 37, p463 Oct. 2008 p475

pervasive, and objectively offensive” as to deny a student their equal access to an education.¹⁴⁸ However, from this logic he then disjointedly concluded that because they cannot be held liable, they do not have a compelling interest in regulating such speech. Thus, the competing obligations of protecting free speech and preventing harassment thus resulted in the constitutional protection of milder forms of harassment.

Alito wrote in *Saxe* that for a court to uphold an anti-harassment policy, the school needed to show that their rule was explicitly in response to a history of violence or disturbance in the school’s operations. If the school could show that harassment would lead to a substantial disruption, than the harassment was censorable under *Tinker*. Alito reaffirmed that standard set out by previous decisions:

“Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.”¹⁴⁹

This language was directly reminiscing of the 9th Circuit’s *Chandler v. McMinnville* opinion, which first enumerated these categories, and Alito reaffirmed *Tinker*’s requirement that censorship not be justified by “undifferentiated fear or apprehension of disturbance.” Hence all harassment policies were required to demonstrate that the school is not prohibiting speech that could be offensive to

¹⁴⁸ *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999)

¹⁴⁹ *Saxe*, p22

some abstract listeners; the administration must show that within the school's particular atmosphere the speech is so offensive as to lead to a substantial disruptions.

Unfortunately for school officials seeking to protect students from harassment, Alito's logic requires administrators to wait until a student lashes out violently against his or her tormentors before the school can restrict the antagonistic behavior without fear of litigation. A broader interpretation of 'substantial disruption' or 'infringing on the rights of others' could allow schools to restrict "abusive" student expression such as peer harassment and bullying. Abusive behavior could be viewed as a substantial disruption to another student's education. Similarly, abusive behavior could be argued to infringe on other students right to be "let alone," as Reinhardt argued in Harper. In light of the Supreme Court's decision to vacate his decision without even hearing the case, latter interpretation clearly isn't about to become law with the current composition of the Supreme Court. The former jurisprudence may yet arise, however, in some more liberal lower courts as more cases percolate regarding harassment. However, this would require a Supreme Court ruling on the matter before all Circuit Courts alter their narrow interpretation of the existing precedent. Fortunately for free speech advocates and unfortunately for those educators seeking to punish bullies, Frederick's case did not offer the clear opportunity for a broader interpretation of Tinker to allow schools to limit emotionally hurtful student-to-student speech. Instead, its questions dealt more explicitly with the right of schools to limit student speech concerning illegal activity, and the Court was not going out of its way to limit religious speech in

schools.

Starr knew that the Court's composition and tailored his argument for the school to avoid any potential discussion of religious speech; instead he trumpeted the dangers of drugs. Starr's petition for certiorari laid out his argument against the 9th Circuit's judgment. He portrayed the Circuit Court's decision as broadly requiring schools to "tolerate pro-drug messages in the face of threats of draconian civil damages lawsuits." Morse, in Starr's assessment, faced possible ruinous liability for enforcing a legitimate school policy of opposing messages that promote illegal drugs. In this appeal to the Supreme Court, he presented two questions to be decided upon:

"1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event."¹⁵⁰

In an attempt to dramatize the implications of the lower court's decision, he wrote that it was "wildly wrong" and that the Court's guidance was sorely needed, "[i]n light of the Ninth Circuit's double-barreled, destabilizing decision in this vital arena of our national life."¹⁵¹ He cited a Juneau newspaper's survey that showed that 60% of Juneau's students use marijuana before graduating suggesting that Morse was

¹⁵⁰ Starr, Petition for Certiorari pi

¹⁵¹ *ibid*, p1

responding to a very real threat to the wellbeing of her students. Starr took for granted that the banner constituted advocacy and thus violated the school board's policy. That policy was formulated in response to the dangers of illegal substances, and if left standing, the lower court's ruling would make such "commonplace school policies against pro-drug messages unenforceable."¹⁵² Indeed, the restrictions on promoting drugs and alcohol are common in school policies, and most schools in Texas, California, Wisconsin and Arizona prohibit any clothing even depicting tobacco products, alcohol, or drugs.¹⁵³ Such policies presuppose that courts would uphold the content-based restrictions because either any such words or images would be 'substantially disruptive' and proscribable under *Tinker* and/or contradict the educational mission of the school and be censorable under *Fraser*.

In addition, Starr correctly noted that the lower court established a dangerous precedent by holding Morse liable for the damages. He strongly argued that the Circuit's test for qualified immunity failed because 1) it relied on case law after the incident to show that Frederick's rights were violated, 2) the law was not "clearly established", and 3) Morse certainly did not know she was violating a Frederick's rights. On the second point, this ruling contradicted prior ruling that allowed schools to limit speech regarding illegal drugs. Some courts limited speech about drugs under *Fraser*¹⁵⁴, earlier cases ruled similarly applying *Tinker*¹⁵⁵, and

¹⁵² *ibid*, p11

¹⁵³ *ibid*, p19

¹⁵⁴ *Boroff v. Van Wert City Bd. of Educ.* 220 F.3d at 471, *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005), *Guiles v. Marineau*, 349 F. Supp. 2d 871, 881 (D. Vt. 2004), *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847,

still others even chose to invoke Kuhlmeier.¹⁵⁶ Starr didn't find any reason to differentiate Frederick's situation from these more disruptive, explicit, imprimatur-bearing, on-campus forms of advocacy.

859 (E.D. Mich. 2003), *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987)

¹⁵⁵ *Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980); cf. *McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1420-21, 1426 (W.D. Okla. 1992)

¹⁵⁶ *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004), *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991), *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920 (E.D. Mo. 1999)

Section D: Friends of the Court

“At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”¹⁵⁷

In deciding if they should hear the case, the Court received numerous amicus briefs by organizations that had a significant interest in the outcome. Fewer but equally, if not more, influential parties wrote briefs supporting Morse. These came from the US Department of Justice, National School Board Association (along with the American Association Of School Administrators, And National Association Of Secondary School Principals), and DARE America (with Drug Free America Foundation Inc., National Families In Action, Save Our Society From Drugs, and two former directors of the White House Office of National Drug Control Policy, Hon. William J. Bennett And General Barry R. Mccaffrey). These organizations’ concern about schools’ authority to limit pro-drug speech clearly had an impact of the majority’s opinion.

The US Department of Justice argued that First Amendment protections do not protect pro-drug speech in schools or any speech that is inconsistent with the school’s basic educational mission. Restrictions on the ability of schools to combat pro-drug advocacy would unnecessarily undermine their objective of protecting the nation’s youth. This case concerned the government because of the billions of dollars they spend to spread the message to young people that the use of illegal drugs is “wrong and harmful.”¹⁵⁸ Allowing a student to present an alternative

¹⁵⁷ *Aboud v. Detroit Bd. Of Educ.*, 431 U.S. 209, 234-235 (1977)

¹⁵⁸ 20 U.S.C. 7162(a) (Supp. III 2003)

message would jeopardize the success of many federal anti-drug programs. They made no exception for so-called high value speech such as political or religious expressions.

The brief relied on the reasonableness of the Superintendent's determination that the banner constituted advocacy because Frederick failed to provide "any other credible meaning for the phrase [bong hits]," and didn't intentionally promote the legalization of marijuana or any religious belief.¹⁵⁹ In other words, the brief argued that the failure to provide an alternative explanation inherently meant that the message constituted a form advocacy. Federal courts should not "second guess the judgment of school administrators," even when the meaning of a cryptic message is so opaque, because of the seriousness of the threat posed by drugs and the centrality of this issue in the school's mission. It was doubtful, however, that the Court would agree to differ completely to administrators, particularly regarding political or religious expression. Such powers could easily be transferred to other matters that posed serious threats to students. An extreme example would be proscriptions of pro-military messages, which support putting young people in harm's way. The Court wouldn't want to give schools the power to limit speech in favor of the armed forces.

Despite the obvious weaknesses in the Dept. of Justice's anti-drug logic, it allowed the government to extrapolate the need for the Court to tailor the law to favor Morse. The suggested means of doing this, the brief argued, would be to allow schools to limit speech contrary to its basic educational mission. Schools have the

¹⁵⁹ Pet. App. 61a

special obligation because students are “entrusted to its custody and care *in loco parentis*,” and, “illegal drug use poses one of the greatest threats to the health and safety of the Nation’s school children.”¹⁶⁰ While *Tinker* dealt with students protesting a war that the school had no official stance regarding, Frederick was contradicting a central tenant in the school’s mission. Furthermore the speech was part of a school function, not an off-campus event as the Circuit Court wrote, making strict scrutiny, which would grant greater protections, unnecessary.

The National School Board Associate promoted a similar view of *Fraser* that allowed schools to regulate speech that contradicted their basic educational missions. They also emphasized the responsibilities of schools to promote a “safe and effective learning environment.”¹⁶¹ Accordingly administrators should be able to lawfully regulate speech that interferes with the maintenance of this environment. They argued that *Fraser* granted administrators greater powers to support their mission and that *Tinker*’s second prong, the protection of the rights of other students, allowed schools to censor speech that infringes on the maintenance of an atmosphere conducive the learning. They urged the Court to clarify the existing jurisprudence in this manner inferring that any administrators who take unconstitutional actions should be granted qualified immunity because of the current ambiguity. Administrators should be granted the greatest leeway in cases regarding low value speech, such as *Frederick*’s. They also added that the 9th Circuit’s denial of qualified immunity would have disastrous effects of education. It

¹⁶⁰ US Brief, 7

¹⁶¹ National School Board Association, Amicus Brief, i

would impede educators from maintaining decorum, restrict experiential learning opportunities, and dissuades talented people from becoming principals.

DARE, not surprisingly, focused its brief on the dangers of drug use amongst youths, and they promoted the widest discretion for administrators. Their argument began by citing the seriousness of the issue: half of all high school graduates have used drugs, 21% of 8th graders have tried an illicit substance, 4.5% of students report using marijuana on school grounds within the last month.¹⁶² They also interpreted the banner as advocating illegal drugs. They claimed that despite the urgent threat posed by the banner in a community of youths, the 9th Circuit's ruling "forces schools to tolerate offensive speech"¹⁶³ regarding drug use. They hoped the Court would find that Frederick's banner was at least as 'plainly offensive' as Fraser's sexual innuendos. However, few decisions adopted Fraser's language proscribing "plainly offensive" speech, and instead more lower courts interpreted the ruling to only restrict a broader array of obscenities. DARE expressed considerable concern that schools were forced to allow 'offensive' speech under Fraser unless it was explicitly lewd.

Because the 9th Circuit's decision essentially reiterated the existing standard, DARE was really asking the Court to overturn the existing jurisprudence regarding student speech rights. They leveled a criticism that would have been equally applicable to Alito's opinion in *Saxe*: "A standard that treats a *successful* intervention

¹⁶² DARE, Amicus Brief,, 6

¹⁶³ *ibid*, ii

as proof that an intervention was *unnecessary* makes no sense.”¹⁶⁴ While this was a justifiable criticism of the law, it was not a problem restricted to school’s proscription of drug advocacy. Schools are forced to tolerate many forms of potentially harmful speech prior to demonstrating the disruption caused by the expression. Thus DARE hoped to move the standard of censorship to allow schools to restrict any ‘plainly offensive’ speech contradictory to their mission, even if it merely offends some abstract listeners. To do otherwise would put an undo burden on educators. Despite this impassioned plea, the Supreme Court ruling in this manner was highly unlikely given the lengthy history of allowing unpleasant speech for the preservation of America’s democracy. Granting schools the ability to restrict any speech inimical to its missions while schools were also free to independently define their missions amounted to no constitutional restriction at all.

Despite the breadth of DARE’s petition, at the heart of the brief they urged the Court to weigh the dangers of drug use as meriting the restrictions. This urgent message had a powerful impact on the resulting decision. If left standing, the lower court’s decision “threaten[ed] to make vital anti-drug policies unenforceable,”¹⁶⁵ and the Supreme Court would bear the moral responsibility for the scourge of drug use amongst the nation’s youth. No matter the reasoning, they argued, the Court had an ethical obligation to support the war on drugs and overturn the decision.

While the law promoted by the three briefs for the petitioners would likely

¹⁶⁴ *ibid*, 16

¹⁶⁵ *ibid*, 4

reduce litigation because it gave administrators greater leeway with discipline, it would drastically reduce students' rights. The wide array of civil rights organization joined Frederick in direct opposition to this possible conclusion. They feared the expansion of Fraser either by broadening the definition of "plainly offensive" speech or by allowing restrictions of speech contrary to its educational mission. They were also concerned that the Court could move towards granting officials the right to act *in loco parentis*. If any of this happened, it would profoundly undermine students' rights.

In opposition to the appeal and in defense of Frederick, the Supreme Court got briefs from (in alphabetical order) the Alliance Defense Fund, American Center for Law and Justice, Center for Individual Rights, Christian Legal Society, Drug Policy Alliance (who had also written an earlier brief to the 9th Circuit and were now joined by the Campaign for New Drug Policies), Lambda Legal Defense and Education Fund, Liberty Counsel, Liberty Legal Institute, National Coalition Against Censorship (joined by American Booksellers Foundation for Free Expression), Rutherford Institute, Student Press Law Center (also writing again and now joined by Feminists for Free Expression, The First Amendment Project, The Freedom to Read Foundation and the Thomas Jefferson Center for the Protection of Free Expression) and Students for Sensible Drug Policy. These amicus briefs presented many potential outcomes for the case, and they warned about how an unfavorable ruling would result in wide-ranging implications on the landscape of public education.

The Alliance Defense Fund's interest in the case arose from their desire to protect religious freedoms. Since 1994, they have filed hundreds of cases advocating

for religious speech in schools.¹⁶⁶ They began their brief by acknowledging Starr's two questions to the Court. They believed that allowing schools to prohibit certain messages and awarding qualified immunity to Morse would expand administrators' powers to infringe on the free exercise of religion. They disagreed with Morse's defense in the lower courts, which argued that Fraser allowed schools to limit speech that conflicted with its educational mission. They also disagreed with the interpretation of Tinker and Fraser that allowed schools to restrict any speech that is offensive or derogatory. Merely causing offense does not, in the Alliance's opinion, constitute an infringement on the rights of others. As the Court found in *Texas v. Johnson*:

“...if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁶⁷

Private, non-disruptive speech cannot be restricted because of its viewpoint. The only speech that infringes on the rights of others is speech that results in tortious liability for the school for failing in their responsibilities. Aside from these instances, courts have an obligation to protect the right of students to express a variety of views because,

“The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.”¹⁶⁸

¹⁶⁶ Holding, *Reynolds*. “Schools have come a long way since *Tinker v. Des Moines Ind. Comm. Sch. Dist.*” National School Board Association, Oct 21, 2008

¹⁶⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989)

¹⁶⁸ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)

The view of education they professed was one in which students learned to challenge one another's ideas and learn in a community with diverse viewpoints. Education is not merely information transfer but the inculcation of skills such as rhetoric and civic participation. They cited renowned constitutional scholar, Erwin Chemerinsky, on the subject: "[s]chools cannot teach the importance of the First Amendment and simultaneously not follow it."¹⁶⁹ According to this argument, schools teach civic virtues primarily by modeling their community around the same laws that govern adults. For the protection of religious speech, the Alliance Defense Fund argued that the Court ought to interpret *Fraser* and *Tinker* in a manner that protected the greatest amount of religious liberty. The great breadth of the freedoms they supported justifiably found no support from the Court.

The American Center for Law and Justice submitted their brief in a professed defense of "free speech." This claim disguised their more ardent support for Christian students' right to practice their faith in schools. The ACLJ was founded by Pat Robertson who, according to their website, "decided to act to undo the damage done by almost a century of liberal thinking and activism."¹⁷⁰ In the amicus brief, Chief Counsel Jay Alan Sekulow expressed his fear of a "suffocating blanket of political correctness upon the educational atmosphere."¹⁷¹ Sekulow opposed all

¹⁶⁹ Chemerinsky, Erwin, "Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of *Tinker*?" 48 *Drake L. Rev.* 527, 545 (2000).

¹⁷⁰ ACLJ "About" <http://www.aclj.org/about/abouta.asp> referenced at SourceWatch 12/17/08

http://www.sourcewatch.org/index.php?title=American_Center_for_Law_and_Justice

¹⁷¹ ACLJ Amicus Brief, p1

forms of viewpoint discrimination in schools because they posed a potential infringement on religious liberties, and therefore he argued that Frederick was entitled to display his provocative banner. If viewpoint discrimination was legal when applied to a cryptic, off-campus expression, then schools officials might have the discretion to limit students from proselytizing an explicit message on campus. The ACLJ's brief argued also that two other cases on the Court's docket would serve to make better law because they had fewer factual matters in contention: *Harper v. Poway* (which the court overturned) and *Marineau v. Guiles* (which the court refused to hear). Ultimately, the ACLJ's fear that the case would grant wider powers to schools was mitigated by the Court's decision to grant schools the ability only to regulate drug related speech, not other forms which may cause also harm. However, as discussed later in this thesis, lower courts still may expand the implications of this holding to allow schools to restrict other potentially harmful messages.

The Center for Individual Rights wanted to prevent any incursion into an individual's rights by the adoption of a new standard. They viewed the petitioner's argument regarding *Fraser* as too "expansive and vague." They posited a hypothetical situation under *Fraser*'s 'basic education mission' standard in which a school set out to combat the very real crisis in childhood obesity. The Center presented four peer reviewed studies that showed the life-threatening harm of improper nutrition. Given these dangers and the school's ardent mission, administrators could legally censor, "[a]n invitation to a birthday party at which

sweets and birthday cake will be consumed.”¹⁷² Clearly the Court did not want to permit government officials to practice such far-reaching forms of proscription. However, to agree with the petitioners would do just that. Similarly confounding conclusions arise when considering other expressions that a school could find inimical to its mission, such as a refusal to salute the flag (jibing with an education in patriotism) and discussions of sexuality (which could contradict abstinence-only education).

Additionally, the school’s argument only agreed with the “now-hoary proposition that students... do not ‘shed their constitutional rights... at the schoolhouse gate,” because youths lose them across the street before even coming on campus. The legerdemain in stretching the definition of a “school-sponsored activity” to encompass the off-campus relay involved ignoring the fact that no clear standard exists for where school proscriptions end. Do they extend to after-school football games if the pep band plays? What about if students are excused from campus during the day because of a natural disaster? In these circumstances, can an administrator claim that school rules still apply? This slippery slope puts students at risk for expressing themselves in venues traditionally considered to be public forums. Although the Center does not mention this, this strong argument appears particularly relevant to online speech, and this case will likely be cited to allow the restriction of any speech with an intended audience of students. For this reason, the

¹⁷² Center for Individual Rights, Amicus Brief, p11

Center requested that the Court support the Circuit's rejection of Morse's request for summary judgment.

The Christian Legal Society also urged the Court to affirm the judgment of the 9th Circuit. They served as the third of six Christian organizations to file briefs in support of Frederick. While these organizations did not support the message on his banner, they argued for his right to express himself. Like the other friends of the court, the Society found the logic advanced by the NSBA dangerous to students' religious liberties. The "divinely endowed" right to believe and practice a faith should not be infringed by educators for any pedagogical reason.¹⁷³ They responded point-by-point to the NSBA's argument showing how the standard they advanced could be used to justify infringements on legitimate expressions of religious beliefs. For instance, undue deference to public officials would "almost certainly" undermine people's freedoms. Regarding the NSBA's interpretation of the Tinker trilogy, it would be unwise to restricting speech that loosely "invades the rights of others," contradicts an "educational mission," or might be seen by some as bearing the "school's imprimatur." On this latter point, they aptly noted that schools certainly do not endorse everything they permit, and thus schools should allow students to speak even when they disapprove of its content. This argument, however, can only be taken so far before it becomes patently ridiculous.

In contrast to the religious motivations of many other briefs, the Drug Policy Alliance's concern dealt with the importance of permitting and encouraging a wide

¹⁷³ Christian Legal Society, p1

range of voices regarding illegal substances. While they found Frederick’s banner far from advocacy or incitement, they argued that government officials have long been prevented from suppressing advocacy speech merely because it challenges existing legal standards. The foundations of American democracy rest on the plurality of opinions regarding the law, they argued. The Court has held in multiple cases that speech that may weaken its audience’s willingness to comply with the law cannot be censored for that reason alone. Accusing speech of “bad tendencies” dangerously reinforces the status quo and disadvantages those who advocate change. For instance, a banner reading, “legalize marijuana,” would be censorable under the “bad tendency” theory. Other forms of political speech would similarly be under threat from overly zealous administrators. Both high and low value speech could be restricted because it could be seen as “plainly offensive,” contrary to a school’s mission or bearing the school’s implicit support.

The Alliance stressed that high school students are necessary participants in political process. Denying them their rights in the name of supposed pedagogical needs undermines their basic civil rights, contradicts prior rulings by the Court, and subverts the country’s democratic governance. While the Alliance acknowledged that schools have an obligation to prevent drug abuse, Frederick’s punishment bore no relation to that responsibility. The attempted suppression of all speech regarding drug use does not stop drug use but rather prevents students from learning the civic virtues. The Alliance argued that Frederick was in the ideal public forum, a sidewalk, and that viewpoint discrimination could not be justified by any “special characteristics” of the school environment. Indeed, the zero-tolerance, top-down

efforts by DARE have shown in government studies not to reduce drug usage amongst teens.¹⁷⁴ The failures have been attributed to schools not listening to students' voices and respond in an appropriate fashion. Adopting uniform policies across all schools denies students the meaningful opportunity to participate in their education. Prevention efforts are not universally futile, but censorship as a means of reducing drug usage is doomed. The suppression of student voices is inimical to the cause of reducing the use of illicit substances.

This argument certainly makes pedagogical sense in many circumstances (see Appendix A); however, there are times when discipline is the only appropriate option. Conversations are effective teaching tools and promote more democratic virtues than punishments. By involving students in a decision-making process, they learn that they have an important role to play in shaping their community. On the other hand, discipline also teaches lessons and some students respond better to clear limits. At other times, discipline can be necessary for the protection of a student own wellbeing as well as that of others. Thus, both have a place and schools need some leeway to restrict student speech when educating them.

While the Alliance's concern about broadening administrator's powers was largely limited to drug related speech, Lambda Legal worried that under a new standard schools could infringe on the rights of gay men, lesbians, bisexuals,

¹⁷⁴ Government Accountability Office, Rep. No. 06-818. *Contractor's National Evaluation Did Not Find That The Youth Anti-Drug Media Campaign Was Effective in Reducing Youth Drug Use* (Aug. 25, 2006) and G.A.O. Rep. No. 03-172R *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs 2* (Jan. 16, 2003)

transgendered people, and those living with HIV. The self-expressions of these groups have been at odds with religious conservatives, many of whom work in public education. They gave numerous examples, no all directly related to GLBT individuals, of how schools could defend illegitimate censorship under the NSBA's proposal. If schools could restrict speech contrary to their mission then Alaskan schools could silence Creationist students because the state guidelines say that schools should teach students about "how science explains changes in life forms over time."¹⁷⁵ Similarly, Californian schools could prevent students who challenge the state's definition of "true patriotism." Students in Florida who support acts of civil disobedience could be found in violation of the mission to teach a "respect for authority." Georgia and Alabama expect schools to teach "school pride" and many forms of behavior could run afoul with this mission. It would not be a large hurdle for schools to endeavor to teach the virtues of "traditional marriage" and punish students who promote marriages between two men. While character education inevitably happens at schools, allowing schools the broad power to silence students for merely expressing themselves unquestionably violates the core of the First Amendment. Some meaningful check ought to be in place.

Not surprisingly, Lambda Legal did wisely support the right of schools to restrict harassing speech under the second prong of Tinker (the infringement on the rights of other students); however, they do not see this case meeting that standard and thus supported Frederick. Although they didn't address the issue of qualified

¹⁷⁵ Lambda Amicus Brief, p21

immunity, their fear was that a verdict in favor of Morse could be future grounds for schools to prevent LGBT groups from remaining visible on campuses. For example, the Merrimack, New Hampshire School Board adopted a policy that broadly prevented “encouraging or supporting homosexuality as a positive lifestyle alternative.”¹⁷⁶ Implementing such a mission without legal protections for GLBT students would unquestionably impinge on their freedoms. Maintaining the strict requirements set by Tinker, Fraser and Hazelwood would protect these minorities from indignant, intolerant administrators and peers. Allowing schools to broadly restrict non-disruptive, non-curricular, non-lewd speech would open the floodgate on a plethora of forms of heterosexism and homophobia. While schools have a mandate to provide an education to all students and protect their personal safety, they do not have the right to enforce discrimination based solely on the viewpoint of a particular speech.

The Liberty Counsel, an organization usually anathema to the GLBT community, submitted their brief in agreement saying that subjective regulations on speech would result in infringement of students’ rights. While their concerns focused on the “advancing religious freedom, the sanctity of human life and the traditional family,”¹⁷⁷ they distrusted educators when it came to censoring student expression. Much of their criticisms have already been mentioned in the earlier briefs, such as the dangers of viewpoint discrimination and mission-based

¹⁷⁶ *ibid*, 24

¹⁷⁷ Liberty Counsel, Amicus Brief, 1

ensorship. Like the Alliance Defense Fund and other amici, the Counsel frequently cited Chemerinsky's scholarly work on this subject:

“School officials – like all government officials – often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech.”¹⁷⁸

The Counsel made a strong argument that the courts cannot shrink from their responsibility in protecting the rights of young people, even when it requires them to call into question the well-meaning attempts of committed educators. Just because a government official considers speech to be inappropriate does not provide sufficient merit for that speech to be restricted, inside or outside a school.

The Counsel went on to argue that the Court should consider the merits of upholding a government official's censorship of a private citizen in a public forum. The sidewalk typifies the public forum in American consciousness and in the Courts jurisprudence, and thus permissive public forum laws must apply. Given the mixed audience at the relay, Frederick's speech would not have even been associated with the school by many independent viewers; however, “By very publicly ripping the banner out of Mr. Frederick's hands and suspending him for ten days, Petitioners created the very controversy which they claim was caused by Mr. Frederick.”¹⁷⁹ The irony of Morse's intervention was that her actions drew attention to the banner, thus conferring greater attention to what would otherwise be an unremarkable

¹⁷⁸ Chemerinsky, p545 (2000)

¹⁷⁹ Liberty Counsel, Amicus Brief, p19

incident. This argument, however, relies on *a posteriori* knowledge of the outcomes and ignores that the event was not a model public forum but a school-related event.

The Liberty Legal Institute and the Liberty Counsel, writing together, had an religious agenda as alike as their names. They attempt to represent “all faiths” and defend their members’ right to self-expression. They worried that even “neutral” speech policies (content-based restrictions forbidding any discussion on an issue) could be used to restrict the expression of religious beliefs that are, by their nature, necessarily absent and arguably contrary to the mission of schools, which are prohibited from supporting a religion. The organization pointed out that in *Tinker* the school attempted to suppress references to the Vietnam War by using viewpoint “neutral” restrictions. They also disputed the interpretation of the sign as advocating illegal drug use and instead noted the many other possible readings that would be considered political speech and thus merit constitutional protections. Even if Court was to read the message as contradictory to the position of the school, the student does not automatically lose the right to self-expression. The standard set rightly requires a greater means of justification before schools can punish students for speaking up.

The Institute and Counsel proposed that the Court could carve out an exception for drug related speech. This advice, which clearly shaped the final decision, came alongside warning that it should be strictly defined so as to prevent schools from exploiting their missions as means of strangling democratic principles. The Court must be “very careful and explicit” and “narrowly confine” any exception

that they carve out.¹⁸⁰ Clearly this suggestion and warning had a strong influence on the Court.

The National Coalition Against Censorship (NCAC) and the American Booksellers Association for Free Expression (ABAFE) proposed another alternative for the Court to consider. They began their brief by questioning the legitimacy of applying students' rights law to Frederick's case. Because the speech took place off-campus at an event not school sponsored, the banner did not interfere with curricular activities. Granted the wider protections afforded to non-student speech, the banner would unquestionably be protected.

If the Court decided to consider the banner as student speech, the NCAC and ABAFE argued, then they should reject the petitioners' proposal for a broad reading of Fraser. The two organizations were concerned that a broad application of Fraser would result in more of such actions as the recent suspension of a boy for wearing a t-shirt with the anarchy symbol on the front. He had previously been suspended and "forced to remove shirts displaying peace signs, upside-down American flags, and an anti-war quote from Albert Einstein."¹⁸¹ Under Tinker, these t-shirts and Frederick's banner would be allowed because they neither disrupt school activities nor infringe on other students' rights. The unacknowledged difference, however, between the overt political content of the t-shirts and Frederick's banner was more apparent to the Court.

¹⁸⁰ *ibid*, 23

¹⁸¹ National Coalition Against Censorship, Amicus Brief, p3

Given the Tinker test, they argued that it is of no consequence that Frederick's banner may have advocated illegal drugs. Tinkers' armbands could similarly be interpreted as advocating draft dodging, burning draft cards, and other illegal activity. In other words, if Frederick's banner could be censored for advocating an illegal activity, Tinkers' armbands could have been forbidden under the same logic. Any broad revision of the Tinker standard such as this would amount to the abandonment of *stare decisis*. Given that Tinker has, in their assessment, effectively been applied in a variety of circumstance, a new standard would deeply undermine the existing relationship between public education and the courts.

These free-speech organizations didn't acknowledge the balance between the political value in advocating an illegal activity and potential for harm, as mentioned earlier in this thesis. While Tinker's armbands had clear value and posed little harm, Frederick's banner carried less value and advocated, in the eyes of the Court, a very dangerous illegal activity. Conflating the two ignores this important distinction.

Despite their conflation of Tinker and Frederick's actions, the NCAC and ABAFE's brief rightly promoted a vision of public education as more than an opportunity for the transmission of bookish knowledge. The civic values must be taught and learned in order for our society to challenge bad or harmful speech with more speech, and certainly,

"Nowhere is this principle more critical than in our nation's public schools, where young peoples learn by example and are taught to

engage in active reasoned decision-making rather than to become passive recipients of enforced thinking.”¹⁸²

Schools that only censor speech teach that censorship is the appropriate response by adults to unpleasant expressions. In choosing to restrict speech, students learn to regurgitate the official orthodoxy lest they become silenced themselves. West Virginia State Bd. Of Educ. V. Barnette had similarly warned about the necessities of protecting students’ Constitutional freedom, “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.”¹⁸³ Silenced students fail to gain their unique voice and become adults afraid to speak their minds. As a result, America’s democracy loses the benefit of an active citizenry, the backbone of accountability, freedom, and responsible governance.

The Rutherford Institute also backed Frederick in fear of the courts granting government officials boundless discursion when suppressing students’ first amendment rights. The organization is known for defending many forms of free expression and other civil liberties. They began by noting the many disputed facts in the case. First, they pointed out the unresolved ambiguity in the banner’s message. While the petitioners attempted to cast the meaning as unambiguous advocacy of illegal drugs, Frederick’s intent and other students’ reactions do not suggest that this was the predominate interpretation at the event. Second, many students disputed Morse’s assertion that the relay was “school sponsored/sanctioned,” a

¹⁸² *ibid*, 4

¹⁸³ 319 U.S. 624, 637 (1943)

prerequisite in the student handbook for when students are subject to the school's speech restrictions. In other words, Frederick's actions should not be judged by the Tinker trilogy but by the standards governing adult speech. If not within the purview of a school environment, there is no compelling state interest that allows any government officials to act as Morse did. The Institute argued that the Court was left to determine the legality of Frederick's banner on a public sidewalk in a lively atmosphere in which students and non-students were allowed to "express themselves in a variety of ways."¹⁸⁴ Simply because Frederick was a student did not give Morse the expansive powers to impose a viewpoint restriction on his off-campus expression. For any school-based restriction to apply, the state must prove that the expression was in a school environment and would cause a substantial disruption, neither of which was not the case. Frederick's banner was indeed off school property and not substantially interfering with the functioning of the school. However, the majority rightly decided that the event was akin to a fieldtrip, and Morse's actions were at least a reasonable response to the pro-drug banner.

The Student Press Law Center began with the same argument about the speech being independent expression fully protected by the First Amendment. Students do not lose their rights anywhere simply because they are students. Similarly, administrators cannot simply declare an event "school sanctioned" and impose speech restrictions. Nor can they determine the singular message at a public

¹⁸⁴ Rutherford Institute, Amicus Brief, p8

event and punish students who attempt to “change the subject.”¹⁸⁵ They cited former Justice Clark’s explanation of the judiciary’s role on this matter: “We have both compassion and understanding of the difficulties facing school administrators, but we cannot permit those conditions to suppress the First Amendment rights of individual students.”¹⁸⁶ They went further, however, to defend Frederick’s speech under the Tinker trilogy in case the Court found the speech to be subject to school-based restrictions. The SPLC argued that Tinker could not restrict the speech because it did not disrupt school activities, even though the speech wasn’t overtly political. Fraser didn’t apply because the speech wasn’t “offensively lewd and indecent” nor should schools be allowed to restrict speech that it deems controversial or contrary to its mission. Lastly Hazelwood only applied to school-sponsored speech and Frederick’s banner was not clearly endorsed by the school. This analysis agreed with the 9th Circuit’s ruling but failed to address the concerns about drug use that likely motivated the Court to accept the appeal.

Most troubling for the SPLC was their citation of a recent study that found 45% of students believe that “[t]he first amendment goes too far in the rights it guarantees.” Another 19% had no opinion.¹⁸⁷ The appreciation of a people’s rights is fundamental in ensuring the active protection of those liberties. While educators may feel that their job requires them to impose broad restrictions, if students are

¹⁸⁵ Student Press Law Center, Amicus Brief p14

¹⁸⁶ Nitzberg v. Parks, 525 F.2d 378, 384 (4th Cir. 1975).

¹⁸⁷ John S. and James L. Knight Foundation, “Future of the First Amendment: 2006 Follow-Up Survey”

http://www.firstamendmentfuture.org/report91806_student.php

taught that free speech only exists in principle but not in fact, they will forgo their role as necessary participants in civil society. Young people who do not value their rights are unlikely to ensure that those freedoms are passed down to future citizens.

Lastly, the Students for Sensible Drug Policy (SSDP) responded to the petitioners' briefs with three primary points. First, they agreed with the Student Press Law Center that students have a constitutional right to discuss issues related to drug policies. Students are often the subject of these policies, and they can provide valuable assistance in making anti-drug programs more effective. The existing government programs that DARE claimed would be rendered ineffective, such as the National Youth Anti-Drug Media Campaign and the D.A.R.E. program itself, are already failing to reduce drug use amongst minors.¹⁸⁸ They are failing because they neglect to meaningfully engage the young people they attempt to serve. They make a convincing argument that the pedagogical methods of DARE fail to limit drug use.

Second, SSDP argued that school administrators should not be permitted to engage in censorship just because they have a different viewpoint than students. The advent of medicinal marijuana shows that expanding restrictive measures and zero-tolerance attitudes towards illegal drugs fails to address the nuances of the debate. Other issues related to mandatory testing of student athletes similarly require an open and public dialogue in order for younger and older people to understand and support the programs.

¹⁸⁸ Students for a Sensible Drug Policy, Amici p20

While they were correct in the need for debate, schools need to have a right to restrict speech not necessarily because of its viewpoint but because of its likely effects on other students. Courts ought not to strike down a restriction merely because the opposite viewpoint would be permitted. Allowing one viewpoint and not another does not mean that viewpoint discrimination has occurred; another standard may be employed related to a school's compelling interest. For instance, schools should have the right to allow their students to say school shootings are bad while restricting students' speech which argues otherwise.

Finally the SSDP claimed that punishing Frederick's speech would have the effect of silencing legitimate voices within the debate on drug policies. DARE already reaches 80% of all public school districts with their strict, zero-tolerance policies and a quarter of high school students are given drug tests in their schools. Preventing students from even discussing their own school's drug policy would only undermine any attempts to prevent drug abuse.

To illustrate this how an opinion in support of Morse would do undermine productive discussions, SSDP drew a distinction between this case and *Williams v. Spencer*, in which a principal prevented a newspaper with an advertisement for illegal drug paraphernalia. In the latter, there was the "direct, unambiguous endorsement of illegal activity" with no literary, political or other form of value; the advertisement aimed solely to profit from an illegal activity. *Tinker*, the SSDP argued, already provides adequate discretion for schools to punish such speech. On the other hand, Frederick had other intentions, none of which were nearly as

explicit. Broadening schools' powers by allowing the proscription of Frederick's speech would allow schools to limit any vague or nonsensical sentiments rather than just clear and unambiguous statements that encourage students to engage in illegal activity. Contravening this important balance between protected and censorable student speech would frighten students into passivity regarding their drug policies. Such censorship would delegitimize the efforts to rationally and realistically reduce drug use. The country needs more, not less, discussions about these issues, and censoring such dissent as Frederick's sharply jibes with the Court's own jurisprudence on speech rights. While this argument appear compelling, the appropriate place for such discussions on drug policies is in a more formal setting where more explicit statements of political sentiment can be differentiated from the mere advocacy of an illegal activity.

Ultimately, the briefs failed to promote a productive outcome to this case. The expansive powers Morse's supporters asked for were clearly inimical to existing First Amendment jurisprudence in schools. In response, Frederick's defenders cried wolf at almost any greater restriction when some revision of the standard was clearly going to be necessary at some point. The six religious organizations in particular opposed any limitation on hurtful speech and only considered a subject specific drug-related exception to Tinker. This concern unquestionably weighed heavily on the Court's consciousness as they read the litigants' brief and heard oral arguments.

Section E: Litigants' Briefs and Oral Arguments

There is no definitive way to know why the Supreme Court decided to hear Frederick and Morse's case. Every year the Court receives approximately 10,000 appeals and hears only about 100.¹⁸⁹ The number dropped during the beginning of Robert's tenure on the Court, and by 2006 the justices were making an attempt to raise the number of cases they heard. However, there was still no clear reason for why the number decreased. One possible explanation concerns the nature of the cert process. Four justices are required to vote to hear a case and the votes remain secret from the public. With a divided court in which a justice cannot foresee attaining a majority for his or her ideological side, fewer contentious cases received the required four votes. This does not explain the drop in cases, however, because most cases are not ideologically divided. The drop could be attributed to the increasingly conservatively aligned lower courts with an ideology more agreeable to the Bush administration. Because the government has won more cases in these lower courts, the number of appeals brought by the government has dropped.¹⁹⁰ Whatever the explanation for the drop, the desire to hear more cases could have increased the Court's willingness to hear the Morse case.

It is possible that the case was accepted because of the clerk chosen to write the synopsis had a particular bias. At the time of the appeal, seven of the nine

¹⁸⁹ The US Supreme Court. "The Justices' Caseload"
<http://www.supremecourtus.gov/> Taken from a booklet prepared by the Supreme Court of the United States, and published with funding from the Supreme Court Historical Society.

¹⁹⁰ Greenhouse, Linda "Dwindling Docket Mystifies Supreme Court" The New York Times, December 7, 2006

justices were part of the cert pool, where a random clerk of theirs is assigned to summarize a case into a short memo circulated to all participating judges. This memo is meant to be objective, yet this clerk may have subtly presented the case to the conservative justices as an opportunity to assist educators in dissuading youths from drug use. Or the clerk could have appealed to the more left-leaning justices by suggesting that this would be the time to reaffirm Tinker's principles. The clerk also suggests whether to grant certiorari, and the recommendation may have influenced some justices. It was just as likely, however, that the justices recognized the inconsistencies between the circuits and wished to clarify the law. Whatever the reasoning for the affirmative vote, the Court decided to accept the case.

The appeal followed the standard course. On request by the petitioners, Justice Kennedy extended the time for filing of the appeal. Starr's Petition for Writ of Certiorari was submitted on August 28th, 2006, just over three years since the District Court first issued its opinion and five months since the Circuit Court released its decision. In his petition, Starr presented his abovementioned questions to the Court, and he stressed school districts' fear across the nation regarding the denial of qualified immunity. The decision held teachers to a higher standard than judges in terms of their knowledge of the law. He also asked the Court to clarify whether the First Amendment protects quasi-political messages regarding drugs.

On September 27th Mertz and the ACLU filed their opposition to the petition. They reworded the questions to the Court in a manner that stressed that the speech was non-disruptive, off school property and not supervised or sponsored. They argued that the case didn't present the facts necessary for the Court to make a ruling

on the questions initially presented by Starr. They also asserted that there was agreement among the circuits regarding the application of the Tinker trilogy, that there was no immediate need amongst schools and courts for a decision on this matter, and that the decision to deny qualified immunity followed directly in line with the Court's guidance in *Saucier v. Katz*.

On October 9th Starr responded with a powerfully worded Reply Memorandum emphasizing the "ever-cascading disarray" of First Amendment law in schools. He dismissed the respondent's claim to factual disputes. He pointed out that the 2nd Circuit already cited *Frederick v. Morse* when reversing the District Court in *Guiles v. Marineau*.¹⁹¹ In this case, the court refused to allow a school to extend *Fraser* and limit drug and alcohol images. Other decisions by the 4th and 6th Circuits that allowed schools to limit speech contradicting its educational mission are now "squarely at odds" with the 2nd and 9th's opinions.

Once the Court granted *Centuri*, the two parties filed their formal briefs. Submitted on January 16th, 2007, Starr's brief argued that *Tinker* only protects speech that "does not intrude on the work of the schools" and *Fraser* extended that allowance for the protection of a school's educational mission. *Frederick's* banner "interfered with decorum by radically changing the focus of a school activity," and that therefore allowed for proscription. Additionally *Kuhlmeier* allows restrictions "in school-sponsored activities when pursuant to legitimate pedagogical concerns," which protected *Morse* when she "properly disassociated the school from *Frederick's* pro-drug banner." Lastly if the Court was to find the expression

¹⁹¹ 461 F.3d 320, 328 (2006)

protected, they should at least acknowledge that the Circuit departed from the appropriate process when denying qualified immunity.

On February 20th, Mertz and the ACLU filed their Respondent's Brief describing their rights-favorable interpretation of the Tinker trilogy. They justifiably opposed granting a *per se* rule for a "previously unrecognized category of unprotected speech" regarding disruptive speech advocating illegal activities. They claimed that ideally the case should not even be treated as school speech because of the off campus aspects of the case, and Morse's viewpoint discrimination should not be protected under qualified immunity. These last two arguments, however, were going to be unlikely gains and may have been better omitted.

In his typically thorough fashion, on March 12th Starr submitted a Reply Brief responding to Mertz's arguments. He reasserted that this was indeed a school speech case. At this point, the amicus briefs for the petitioners had already been submitted, and he largely reiterated the argument for a broad interpretation of Fraser, which he claimed would not grant "unbridled discretion" for school officials but merely grant "judicial deference" to administrators carrying out their schools' educational mission.¹⁹² He pointed out that the respondents agreed that "advocating illegal drug use by minors is out of place in our nation's public schools," but they failed to grant educators the power to pursue this end. He also emphasized that in questionable situations, school administrators need the leeway to "reasonably interpret student expression in its context." Courts should not bind the hands of

¹⁹² Reply Brief, p3

school officials because of fears that schools will not allow a diversity of opinion. In fact, the Juneau School Board's Policy 1240 mandates that schools, "explore fully and fairly all sides of... controversial issues."¹⁹³ Starr contended that he had "no quarrel" with Tinker and hoped merely to affirm an interpretation of its principles that favor the limitation of speech that disrupts a school's educational mission. Through this legerdemain, Starr applied Tinker's "substantial disruption" test to permit restrictions of any speech a school disagrees with. In doing so, he claimed to aim only to allow "a fourth-generation teacher and second-generation principal who has devoted a decade of her teaching career to special education" to do her challenging job.

Oral arguments served as an opportunity for both the lawyers and justices to promote their logic before the Court. The hearing was set for 10:00 on March 19th, 2007. Thomas, as he is known to do, remained silent throughout the entire proceedings. Speaking first, Starr emphasized the threat of illegal drugs and warned about the "glorification of the drug culture." He attempted to present the classic cost-benefit analysis of First Amendment protections related to such speech. Kennedy, who had extended the time for filing this case, interrupted first by asking what rule Starr wanted the Court to adopt. Starr attempted to present his interpretation of Tinker as protecting only non-disruptive political speech. Non-political speech that disturbs the educational mission of the school is censorable.

¹⁹³ available at http://www.jsd.k12.ak.us/newdistrict/departments/boardofeducation/policymanual/_displayPolicy.php?recid=13

Hence Morse legitimately imposed a viewpoint discriminatory prohibition, acknowledging that an anti-drug banner would have been allowed, because the banner conflicted with the message the school wanted to promote. The support for any unchecked viewpoint discrimination, however, would find support only from Justice Thomas.

Souter then expressed his concern that this would allow schools to limit all speech, but Kennedy rejoined by offering Starr an opportunity to reassert the Tinker's protection of political speech. Sensing he was losing ground, Starr returned to the issue of drugs, but Ginsburg and Souter pressed Starr on the lack of disturbance caused by the banner and if he considered mere political disagreement a disturbance. Souter presented a hypothetical situation using Starr's logic in which the banner was overtly political and still was censorable because it disagreed with a school's mission and therefore was 'disruptive'. Scalia came to Starr's defense by dismissing the hypothetical because the current situation was only about a banner that meant, "Smoke pot."

Alito chimed in with what would ultimately be the Court's holding by offering a "*sui generis*" rule regarding drug speech. Starr jumped at this offer. Roberts expressed his willingness to join this holding as long as it didn't allow schools to broaden their missions in order to suppress legitimate expressions on other matters. Scalia offered an even broader option of schools being allowed to limit any speech that advocates unlawful activities. Such a rule would at least have been equitable and more in line with Brandenburg. Starr respectfully declined this option

because it would limit even listening to conscientious objections to the law such as Martin Luther King's speeches. In addition, he was hoping for an even bigger fish—the permission for schools to regulate any speech, not mere that which advocated illegal activity.

Stevens hoped to clarify if 15-foot signs with any message were forbidden; Starr rejoined that they weren't, only those with certain messages. Hence, this was perceived to be an unavoidable speech case regarding a content or viewpoint restriction. This didn't agree with Breyer, who likely was the intended target of this line of questioning, and he jumped in to defend Morse by interpreting her actions as a content neutral ban on banners. He was alone in promoting this limited interpretation, and he would be again when issuing his written opinion. Those to his ideological right intended to use this as an opportunity to carve out an exception to Tinker and those to his left hoped to affirm Tinker's requirement for a substantial disruption before permitting proscriptions. Souter and Ginsburg argued that no disruption was present, nor even a clear violation of the educational mission of the school. Starr responded that Morse disagreed and the Court should defer to her reasonable interpretation. At this point, Starr wisely asked to reserve his remaining time to offer a rebuttal to the respondent's presentation before the Court.

On behalf of the US as *amicus curiae*, Edwin Kneeler, the Deputy Solicitor General, used some of the petitioners' time to argue on their behalf. Similarly to Starr, he began his presentation by describing the necessity of supporting the war

on drugs. As the Court observed in *Vernonia School Dist. 47J v. Acton*¹⁹⁴ and *Earls*,¹⁹⁵ this concern merits granting schools the power necessary to combat this scourge. Alito voiced his strong disagreement with adoption the ‘basic educational mission’ language, as did Breyer, and Starr felt it necessary to interrupt to clarify that they weren’t arguing for a pro-drug prohibition, just an interpretation of *Tinker* and *Fraser* that allowed Morse to censor a non-political banner. However, Alito argued that Morse was engaged in a form of viewpoint discrimination that *Tinker* rather explicitly protected. Alito did not agree that *Tinker* dealt with only political, non-harmful speech. Kneeler again cast *Tinker* as only relevant to political speech, but Souter then reminded the Court that they ought to strictly scrutinize the speech, not just interpret it as Kneeler suggested: “an incitement to drug use.” Kneeler argued that deference to educators should outweigh the Court’s own scrutiny. Stevens expressed his concern that with this logic, “the principal’s judgment would always prevail.” In a way, this was exactly what Kneeler was saying:

“schools have a duty to inculcate matters of civility and to prepare students for citizenship, and not violating the law is an important part of that and teachers’ act *in loco parentis*. The act as guardians and they should be able to do... what a reasonable guardian would do.”

Although Ginsburg voiced her disagreement with Kneeler because she saw the event as not school-sponsored, this matter of fact did not affect the litigator’s logic so long as other justices applied the student speech laws as he interpreted them. By

¹⁹⁴ 515 U.S. 646, 655-656 (1995) Allowing random drug testing of athletes given demonstrated drug problems at school

¹⁹⁵ *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002), permitting suspicionless drug testing of students who participate in extracurricular activities

the end of the Kneeler's time, his argument for granting deference to educators was beginning to gain traction.

Mertz only was able to string two sentences together before Robert's interjected. The Chief Justice expressed his concern not about free speech or drugs, but about money. School officials around the country were afraid they may be personally liable for damages while attempting to do their jobs. Mertz asserted that the law was clearly established and qualified immunity shouldn't apply. Only content-neutral rules can prohibit non-disruptive, non-lewd and non-endorsed student speech in schools. This argument, however, did not convince the Court and the issue of qualified immunity was to arise again during his presentation.

Roberts and Scalia were uncomfortable with not allowing schools to regulate all drug related speech given that this is an important part of their mission. The idea that students can undermine the school's point of view seems to constitute a disruption in itself, as long as one requires students to be the unquestioning recipients of the school's curriculum. Mertz perceived education to serve a different purpose. Students should be granted freedoms to express themselves as long as it is "done in such a way that it doesn't interfere with the school's own presentation of its viewpoint." As Kennedy and Scalia point out, however, this may allow pins saying, "Rape is Fun," or "Extortion is Profitable." As long as there is no physical disruption to the school's educational program, these buttons would be allowed. This threw Mertz back to present the political aspects of the banner given the ongoing debate on drug laws, even though he tacitly agreed that such buttons could

be lawful if not they didn't infringe on other students' rights and weren't subject to hate-speech restrictions. Breyer expressed his discomfort with the outcome of ruling for either side, and Mertz pointed out that Tinker has "stood the test of time," despite "some narrow exceptions" in Fraser and Kuhlmeier.

Scalia then attempted to differentiate two forms of disruption: physically disrupting a lesson and "undermining" the general messages of the schools. Mertz argued that the latter is not akin to disruption and should be rightly called "allowing competing viewpoints." In fact, this is the kind of speech "that we must tolerate no matter how unwise it is." Time, place and manner restrictions can still allow school to regulate speech, as Ginsburg noted, but not viewpoint discrimination. Permitting content-neutral speech proscriptions does not mean schools do not teach a certain viewpoint, but only limits them from haphazardly regulating what expressions are suppressed or punished. School can still teach that one choice is better than another, but they cannot silence a student for merely questioning the school's message.

Scalia and Roberts felt this equated to making schools open forums and preventing them from effectively teaching. They cast Mertz as straw man saying that students can say anything they want at any time. Schools need to limit speech to protect their students from inappropriate messages and promote their healthy development. Failing to give them the necessary powers to do achieve these two ends would strip them of their tools as educators. Mertz retorted that certain places, such as the lunchroom, were open forums where schools should not prevent certain issues from being discussed. However, classrooms are arenas in which

schools can exercise more control in order to teach a particular subject because they could demonstrate that a particular speech was more overtly disruptive.

The idea that any part of campus is an open-forum, however, is particularly dangerous to educators who seek teaching opportunities outside the classroom. Schools should be allowed to prevent certain issues from being discussed in a lunchroom, such as the answers to an upcoming quiz or lewd, inappropriate subject matter. Such regulations are commonplace, and most schools have dedicated faculty whose job it is to monitor behavior during lunch and recess.

Mertz went on to argue, however, that his formal claim was that school speech rules should not even apply because Frederick was not at school. This assertion didn't gain much traction, took time to defend, and probably undercut his legitimacy. Breyer steered the Court to look at the Superintendent's assertion that he would uphold Frederick's suspension for his other offenses even if the speech was protected. Mertz agreed that he would not challenge such a suspension, satisfying Breyer's line of questioning. Robert's didn't follow Breyer's logic and appeared intent on clarifying the law rather than just dispensing with the case without ruling on the constitutional questions presented. The Chief Justice directed their attention to Starr's second question regarding qualified immunity. Given that the Court spent such time considering the legality of the proscription, the denial of qualified immunity seemed ridiculous. How could a principal know how to correctly apply the law when it took the Supreme Court almost an hour to decide on the same matter. Kennedy said that he could easily see the disruption to the "theme that the

school wanted to promote” posed by the banner. The majority was not going deny Morse qualified immunity.

Unfortunately for Mertz, his argument before the Court was significantly more humorous than he probably intended. While Starr elicited no laughs and Kneeler got one chuckle, there were five instances during the respondent’s presentation. Mertz himself got chortles for correcting Breyer’s comment on the 15-foot, rather than 14-foot, long banner. The triviality of response received laughs but undermined Mertz’s overall argument, which seemed to focus on similarly inconsequential reasoning for protecting the banner and denying Morse qualified immunity. On separate occasions, Souter, Kennedy and Scalia (twice) poked fun at the absurdities and humorous hypothetical situations that could arise when, for instance, truants can get away with more misbehavior than students who show up on time. This effectively sank Mertz’s argument that Frederick was not at school because he was tardy that day. Breyer also pointed out that the entire in or out-of-school argument was meaningless because it only mattered that Morse was reasonable in her belief given that Frederick was amongst his peers at a school-sanctioned event.

The justices also had a lot more to say during Mertz’s argument. Scalia in particular hammered away at Mertz’s logic by asking thirty questions of the defense in as many minutes. Roberts also asked seventeen questions of Mertz but only three of Starr and Kneeler. Breyer tried to cut through the ticket of complexities but his eighteen questions (in comparison to six for the petitioners) aimed at merely

dismissing the speech rights question and upholding the suspension on other grounds. Mertz didn't find many allies willing to help defend his argument from the bench. Stevens and Alito were silent throughout his presentation. Ginsburg attempted at the end to differentiate Mertz's two arguments about Frederick's free speech claim as an adult (which relied on the unlikely finding that he was not at school) and his right to self-expression as a student; however, the muddled logic did not get across during his time before the bench.

In Starr's remaining time, he emphasized Morse's entitlement to qualified immunity and the importance of preventing students from promoting drugs on campus. Tinker would still allow controversial issues to be discussed in schools, but endorsements of illegal drug use do not qualify as political speech. He argued, "We are light years away" from the Court casting "a pall of orthodoxy over the classroom." Ruling in support of the petitioner would not have disastrous affects. Like a tempting siren, he only asked the Court to just uphold his interpretation of Fraser for the betterment of our nation's schools.

Section F: The Opinions

"The law has always considered the relationship between teachers and students special."¹⁹⁶

The Court opinions on June 25, 2007 mostly skirted the issues discussed during the oral arguments. Unwilling to adopt Starr's requested interpretation of Fraser, the majority chose to carve out an exception to Tinker for pro-drug speech. Roberts delivered the opinion of the Court which Scalia, Kennedy, Thomas and Alito joined. Alito filed a concurring opinion that Kennedy joined. Breyer filed an opinion concurring and dissenting with various parts. Stevens filed a dissenting opinion which Souter and Ginsburg joined. The Court had numerous options in how they might rule, including:

- 1) ruling that students have no First Amendment rights in schools and permitting any viewpoint discrimination;
- 2) applying a broad application of Fraser's permissible proscription of speech that conflicts with a school's 'basic educational mission';
- 3) not commenting Frederick's right to display the banner but uphold the suspension on non-speech related grounds and grant Morse qualified immunity;
- 4) affirming the entire judgment of the 9th Circuit and send it back for a full hearing, which would likely result in Frederick's favor;
- 5) overturning turn the suspension but grant Morse qualified immunity;

¹⁹⁶ Justice Breyer's concurrence in *Morse v. Frederick*

- 6) carving out an exception to Tinker, which would govern only non-political speech, to allow schools to regulate pro-drug speech or any illegal activity, as a relaxed application of Brandenburg would allow;
- 7) allowing schools to suppress any speech that advocates an illegal activity, political or non-political;
- 8) deciding that Frederick's non-political speech was not protected by Tinker and was more akin to commercial speech, which would be governed by the Central Hudson test as mentioned earlier.
- 9) expanding the language of infringing the rights of others to permit the suppression of harmful speech;

This latter conclusion dealing with Tinker's second prong was very unlikely given the Court's actions in Harper, and the petitioners didn't pursue this logic themselves. If they had, they may have reasoned that the 'horizontal'¹⁹⁷ relationships between students' "to be secure and to be let alone,"¹⁹⁸ could be grounds for permitting broader proscriptions. The state's 'vertical' relationship with students could still be held accountable by the 'substantial disruption' test. In other words, the state must show that lessons cannot be effectively taught before a certain expression is censored unless that speech is abusive of other students. This logic regarding the expansion of Tinker's second prong was expounded upon earlier. This holding would necessitated, unfortunately, that the Court find that Frederick's

¹⁹⁷ Hussain, 6

¹⁹⁸ Tinker v. Des Moines, 508

banner violated someone's right to be secure and let alone, which wasn't clearly illustrated in the facts.

Robert's majority opinion opted to grant an exception to Tinker for pro-drug speech. This is the first time that the Court has ruled that a certain topic is off-limited in an atmosphere where other free expressions are more broadly permitted. His decision did not address the issue of qualified immunity because it found no violation of Frederick's rights. The decision left unresolved much of the concerns regarding Tinker, Fraser and the clarity of the law. Robert's mentioned that Tinker intended to primarily protect political speech, but he didn't explicitly say if it is limited to such purely civic expressions. With respect to Starr's logic, he acknowledged, "The mode of analysis employed in *Fraser* is not entirely clear," but "we need not resolve this debate to decide this case." One can easily imagine future cases saying the same thing regarding Morse. The only two important points the Court found in Fraser were that students' rights are not coextensive with those of adults and Tinker's mode of analysis is not absolute. Future decisions will have to decide to what extent schools have the power to determine what speech is inappropriate. For now, the Court held that Fraser does permit schools to restrict any speech they consider "offensive" to common standards of decency.

Robert's opinion largely defers to educators to determine what events are 'school-sanctioned', who is considered a student, and what a reasonable interpretations of the banner would be. This is particularly ironic given that moments after he read this opinion before the Court, he claimed in *FEC v. Wisconsin*

Right to Life, “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.” The majority granted Morse considerable leeway because she had to act “on the spot,” which wasn’t entirely true because the suspension was conferred in her office after the incident. The opinion also quotes the Superintendent’s decision at length in which he denies that the banner has any political message. Although the justices acknowledge that the message was ‘cryptic,’ they agreed that it was reasonable to interpret the sign as the promotion of illegal drugs and not a criticism of drug laws. They left the balance between political and non-political speech to educators to decide, and therefore any “undeniable reference to illegal drugs” merits suppression unless there is an explicit political message. Even if the banner is meaningless, the reference alone warranted censorship. This decision is in line with many reasonable policies that prohibit any message related to tobacco, alcohol or drugs unless sanctioned by the school.

The opinion did not specify that Morse show that there has been a history of drug use at her school. Schools must still show, however, that other treats pose a potential to disrupt in a given environment. Homophobic or racist speech cannot be currently restricted under the same logic, even if the widespread dangers of such speech are as manifest as the threat from pro-drug speech. The majority drew on their Fourth Amendment principles in *Vernonia School Dist. 47J v Acton*¹⁹⁹ and *New Jersey v. T.L.O.*²⁰⁰ to show that the threat of illegal drugs merits granting broader powers than what the usual ‘reasonableness’ would allow. Quoting *Vernonia*,

¹⁹⁹ 515 U.S. 646 (1995)

²⁰⁰ 469 U.S. 325 (1985)

schools' "custodial and tutelary responsibilities for children" include using tools that would not be legal if used by public officials outside of schools. The majority referenced many of the studies offered by the petitioners to show that drug use in schools poses a substantial threat, and they again referenced Earls to affirm that peer pressure is "the single most important factor leading schoolchildren to take drugs."²⁰¹ Because of the threat of drug use, "the danger here is far more serious and palpable" than in *Tinker*. The school is not attempting merely to avoid controversy or some "undifferentiated fear," as *Tinker* forbid. They were addressing the promotion of substance that would cause a demonstrated harm to their students.

At the end of his opinion, Roberts pointed out that the Stevens dissent disagreed with his interpretation of the banner but not the importance of allowing some viewpoint discrimination. Although they do not agree with the threat of pro-drug speech, they are willing to acknowledge that students do not need to promote "imminent lawless action" in order for school officials to act. Therefore, Roberts claimed that their disagreement boils down to a debate over whether the banner constituted the advocacy of illegal drugs, not constitutional principles. He ignored, however, the dissents unwillingness to carve out a drug-related exception from the First Amendment and their support for a relaxed application of the *Brandenburg* standard. This amounted to a very real disagreement about the law.

²⁰¹ Earls, *supra*, at 840 (Breyer concurring)

Thomas's concurrence went considerably further in extending administrators' powers. He argued as an 'originalist' that Tinker was "without basis in the Constitution." Looking back at the history of the first educational institutions in the country, he found that the First Amendment "does not protect student speech in public schools." Because 19th century schools and courts did not enforce these rights, they cannot be extrapolated from the Constitution. His opinion read more like a history paper than a judicial decision, and it argued for a return to a time when *in loco parentis* allowed schools complete authority to set their own rules. While prior to Tinker the law was unclear about excessive physical punishments, schools could otherwise regulate student conduct however they pleased. Tinker affected a "sea change" in the judiciary's role in schools, and since then the Court has found it necessary to scale back on its standards. However, as Black argued in his dissent in Tinker, schools today should not be bound by laws that prevent them from accomplishing their educational mission. If students or parents do not agree with the school's decisions, they can appeal to the school boards or local governments, opt for private or home schooling or "simply move." Judicial oversight should not act as a substitute for these democratic processes. Courts should play no role in determining pedagogy or what constitutes a disruption in schools. The courts should trust teachers and defer to their judgment.

The problem with this logic is similar to those of any argument favoring state or local controls over individual rights, rather than supporting federal constitutional protections. The potential for the oppression of minorities is rampant and democratic values get thrown under the bus of majoritarian rule. While this ruling is

tempting to support from an educational perspective, it would leave many students and parents with little reasonable recourse when buffeted by the whims of these new enclaves of totalitarianism, formerly called schools. There have been too many stories of overly vigilant administrators who, through policy or practice, trample on students' freedoms. The federal government must enforce some measure of control over public schools to protect America's youth.

Alito and Kennedy's concurrence joined the holding with an opposite concern to Thomas. They specified that they only were willing to grant public schools the power to "restrict speech that a reasonable observer would interpret as advocating illegal drug use." They intended to provide, "no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue," including the war on drugs. While they intended not to undermine any student's legitimately civic expression, the two holdings are mutually contradictory. The justices need look no further than the case at hand; the school interpreted Frederick's banner as "advocating illegal drug use," but it could also be plausibly interpreted as commenting on attitudes towards drug use and religion. To save the argument from its obvious fallacy, Alito implicitly differed to the majority's decision to defer to the school's interpretation only, and this could signal to lower courts that they can turn a blind eye to certain interpretations of student expression.

While Alito's opinion superficially appeared to limit the majority's opinion, it affirmed that *Tinker* does not present the only ground on which schools can restrict student speech. This can be seen as a possible foreshadowing of cases to come in which the Court grants additional leeway to schools to restrict speech on different matters for other reasons. For the time being, however, Alito explicitly refused to allow his vote to be considered a tacit endorsement of any other speech restrictions. He does not endorse the language advanced by the petitioners regarding restrictions based on perceived interferences with a school's educational mission. This logic was subject to easy "manipulation in dangerous ways." Indeed this formation would have allowed for the prohibition of *Tinker*'s armbands or conversely messages that support the Vietnam War. Such viewpoint discrimination based solely on the political and social values held by school administrators "strikes at the very heart of the First Amendment." No mentioned, however, were the many other examples provided in the religious amici briefs of how schools could similarly restrict matters of faith.

Regardless of the fears presented, Alito rejected the theory of *in loco parentis* by reaffirming that public schools are "organs of the State" and "do not stand in the shoes of the students' parents." Adults do not delegate their complete authority to schools, and it is a dangerous fiction to believe, as Thomas did, that most parents have other options when educating their children. The only restrictions merited by the "...special characteristics of the public schools..." were "threat[s] to the physical safety of students."

This language echoes both Tinker’s first and second prong: the first because these threats would constitute substantial disruptions in students’ education, and the second because Alito tacitly permitted schools to restrict speech that threatens the safety of other students. This latter right was be articulate as not being “compelled on a daily basis to spend time at close quarters with other students who may do them harm.” This “special danger” posed by schools may be the grounds on which future school arguments rest.

While he was arguing for a narrow reading, Alito may have been subconsciously reflecting on the threat of another school shooting and fingers being pointed at the Court for tying the hands of educators. While drug use presents a real threat, the possibility for violence in schools is even more an explicit danger to students’ wellbeing. Whether schools still need to demonstrate a history of violence as the result of a particular speech is still in question; however, given Alito’s opinion it is likely that lower courts will grant schools greater deference on this matter. If this was not Alito’s intention, as it appeared not to be at the outset of his opinion, he should have written less.

Breyer attempted to avoid the entire issue and epitomized the judicial restraint Roberts had trumped in his confirmation hearing. His opinion held that the Court should just grant qualified immunity to Morse and not address the constitutional question. Addressing the First Amendment issue would be “unwise and unnecessary.” He was willing to view Morse’s censorship as motivated by the

“context and manner” of the speech as well as the “content and viewpoint.” Neither *Tinker*, *Fraser* or *Hazelwood* govern this issue and therefore acknowledging the lack of clarity in the law should be enough to dispense with this cases. Although the grant of qualified immunity would shield Morse only from monetary damages, Breyer argued injunctive and declaratory relief would not be necessary because the suspension could be sustained on other grounds. If the Court was to avoid the constitutional issue and limit its ruling in this way, then the decision would be unanimous, as all justices at least support protecting Morse from liability. This certainly represented the narrowest holding.

The majority’s opinion, according to Breyer, set a dangerous precedent by authorizing a viewpoint-based restriction for pro-drug speech. Political speech is often inexorably mixed with the endorsement of violating the law that the speaker opposes. It is impossible to expect schools to limit pro-drug speech and not speech that questions laws against the same substances. The messages are often one in the same. Therefore, drawing “subject-matter-based” restrictions would only result in inconsistent lower court rulings as different judges view a particular utterance more political or more pro-drug.

Breyer was also concerned that the majority opinion left administrators as vulnerable to litigation on other matters as before. Drug use is not the only imminent threat to students’ wellbeing, and the judges ought to be able to differ more easily to well-intentioned school officials. As the law stands under *Saucier v.*

Katz,²⁰² courts still need to address the ‘order of battle’ prior to awarding qualified immunity. This will require lower courts to address complex questions of students’ constitutional protections prior to protecting a well-meaning educator from ruinous liability. If lower courts followed his opinion, however, they could be freer to award qualified immunity without having to resolve difficult questions and set confusing precedents.

While the dissent offered Breyer an opportunity to distance himself from the majority, he found other faults in their holding. He didn’t want to interfere with “reasonable school efforts to maintain discipline.” He understood how Morse could see the banner as “simply beyond the pale,” and requiring her action. Breyer was unwilling say that Morse should have justified her actions on other grounds because educators should not be required to know the “intricacies of our First Amendment jurisprudence.” Therefore granting qualified immunity is more appropriate than upholding her actions on judicially defined grounds.

Because of all this complexity, it is better “*not to decide* the issue unless we must.” Judicial opinions cannot replace the wisdom of a qualified educator, Breyer held. The majority does not offer any guidance for schools by saying, “that they may ‘take steps’ to ‘safeguard’ students from speech that encourages ‘illegal drug use.’” The particulars of these ‘steps’ are left unclear except that “BONG HiTS 4 JESUS” is now censorable. Although “no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office,” the majority’s holding will

²⁰² 533 U.S. 194 201-202

only result in more cases making “their way from the schoolhouse to the courthouse.”

Although Breyer attempted to avoid setting a dangerous standard by ruling on the constitutional question, he nevertheless supports the adoption of a somewhat hairy precedent. His ruling allows a principal the reasonable suppression of an expression with “any kind of irrelevant and inappropriate message” that doesn’t already fit into the Tinker trilogy’s lawful proscriptions. Administrators will be able to know that they will be granted qualified immunity by courts that view their actions as reasonable. Using Breyer’s methodology, the courts would not look further into the issue than just to see if the speech was already lawfully or reasonably censorable. For instance, a principal could tell a student to change a non-political, non-lewd inflammatory t-shirt because a reasonable administrator would do so. As Stevens mentioned in his dissent, both the majority and Breyer would have the courts then be responsible for determining on an ad hoc basis what is ‘reasonable.’ While the majority certainly expanded the limits of the ‘reasonableness’ test by differing to a third party (Morse) to determine the constitutional protections of the banner, Breyer also would have the same test effectively be the standard for protecting administrators from liability. This isn’t a fatal flaw in Breyer’s logic, but it illustrates the future need for another decision to clarify the standard for proscription.

Stevens, along with Souter and Ginsburg, dissented because Morse could be granted qualified immunity without establishing a new exception to Tinker. Qualified immunity applied because the student's intent was to get on television, and Morse's actions can be reasonably be interpreted as regulating the conduct of a student that would reflect nationwide on the JDHS student body. However, the First Amendment protects Frederick's banner because it "never meant to persuade anyone to do anything," and cannot be justifiably censored because it carried "an oblique reference to drugs." The Court should not allow the "nonsense banner" to be censored just because the schools interpreted it as "expressing a view with which it disagreed." It is a "remarkable conclusion" that the majority uses this case as an opportunity to broaden speech legal restrictions.

Instead, Stevens would have the student speech standard say, "the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." Permissible rules would be judged according to the Tinker trilogy and the second part of this new standard, which imports Brandenburg into schools. However, in this second clause Stevens relaxed the requirement so schools would not have to show that support for misbehavior would incite *immanent* lawlessness or harm. Instead the speech would only need to "expressly" (in other words, explicitly) advocate such misconduct. This could offer even broader leeway to administrators than the majority intended, as described earlier. The only difference then in the outcome between the dissent and the majority's opinion would be Stevens' interpretation of the banner as not directly advocating drug use and that it

should therefore be protected. His standard for proscription, however, would not judge merely future drug advocacy but any promotion of illegal activities. Stevens did not support Roberts and Alito's ambiguously justified subject matter exception carved out for pro-drug speech.

Part 3: Conclusion

In August of 2008, school officials at Mountain Grove Middle School in Montana suspended a 7th grader for dying her hair pink in remembrance of her father. The girl, Amilia Robbins, lost her father to brain cancer and believed the symbolic act would draw some attention to the common disease. She was told that she wouldn't be invited back to school until she changed the color of her hair. Administrators claimed that the color was distracting and violated school policy. In response Anthony Rothert, the Legal Director of the ACLU, sent a letter to the Superintendent on behalf of the parents reminding her that "students do not shed their constitutional rights at the schoolhouse door," citing *Tinker v. Des Moines*. The hair color, like the black armbands from the case, symbolized a form of "pure student speech" and deserved the highest form of protection from censorship. The hair didn't pose a "substantial disruption" or infringe on the rights of others, and therefore cannot legally be proscribed. Within the time limit set by the ACLU, the school relented and their attorney claimed that this was "all a big misunderstanding."²⁰³

Amilia's situation exemplifies the need for explicit protections of students' speech rights. Without legal recourse, this young girl's choice to commemorate her father would have resulted in a permanent blotch on her record. Instead of learning to channel her grief into a productive expression, Amilia would have been taught a

²⁰³ Morehouse, Paula. *Mountain Grove School District relents on girl's pink hair* KY3 News. August 25, 2008 <http://www.ky3.com/news/local/27378719.html>
Saavedra, Marie. *School suspends student over colored hair* KY3 News. Aug 21, 2008 <http://www.ky3.com/home/video/27200789.html>

lesson in censorship and undemocratic values. A recent report by Connecticut Voices for Children²⁰⁴ found that Amilia's situation is not uncommon. Out-of-school suspensions are assigned much more often than necessary. The study found that nearly two-thirds of suspensions were for relatively minor offenses, such as skipping school and showing disrespect. In addition, students in districts with the lowest socioeconomic indicators were nearly four times as likely to be suspended as students in other school districts. Compared to white students, black students were more than four times as likely, and Hispanic students more than three times as likely, to be suspended. Special education students were more than twice as likely to be suspended than their peers. Thus, suspensions disproportionately affect students that often need the most assistance from their schools. Given the frequency of such wonton abuses of authority, our society should not entirely trust teachers or officials to respect students' rights.

Because of the widespread misapplication of suspensions, there needs to be clearly defined limits on administrative discretion. Granting schools unchecked powers, in accordance with *in loco parentis*, would result in innumerable violations of First Amendment rights. The Supreme Court has declared a similar sentiment in *Tinker*: "...state-operated schools may not be enclaves of totalitarianism."²⁰⁵ The difficulty with imposing limits on teachers and school officials, however, became apparent in that first Supreme Court decision to establish student speech rights. The

²⁰⁴ Ali, Taby. Dufresne, Alexandra, J.D. "Missing Out: Suspending Students from Connecticut Schools" Connecticut Voices for Children, August 2008

<http://www.ctkidslink.org/publications/edu08missingout.pdf>

²⁰⁵ *Tinker V. Des Moines Sch. Dist.*, 393 U. S. 503 (1969) 511

Court knew that they needed to impose a restriction on administrative authority, but the standard they needed to enumerate was not explicitly clear. How much should the Court dictate what happens in the classroom? Is the courtroom even the appropriate place to negotiate the balance between rights and restrictions? These two questions lie at the center of the debate on student speech rights.

The first part of this thesis attempts to address these questions, but no matter their answers, it is undisputable that the Supreme Court has not effectively addressed the needs of the nation's public schools. Currently, 15% of teachers and 55% of administrators report having been threatened with a lawsuit. As a result, "career superintendents are taught to remain in a defensive crouch," according to Frederick M. Hess, the Director of Educational Policy Studies at the American Enterprise Institute.²⁰⁶

In addition to not meeting educators needs, the Supreme Court has not clarified how lower courts ought to consistently apply the law. Five lower court decisions subsequent to *Morse v. Frederick* illustrate this point. The first two cases, *Ponce and Boim*, concern physical threats in schools; the second two, *Harper and Nuxoll*, deal with potential psychological harm. These four cases found it necessary to ignore Alito's stern demand that his opinion only permit restrictions on pro-drug in order to bend the law to conform with schools' legitimate pedagogical demands. The last case concerns Internet speech and cites *Morse* as a justification for limiting

²⁰⁶ Walsh, Mark. "Scholars Weigh Courts Influence Over School Practices, Climate." *Education Week*, Oct. 22, 2008. Pg. 9 Vol. 28. No. 9

any expression that targets students, not just speech made on school grounds.

Together these cases illustrate the continuing evolution of the law.

Ponce v. Socorro uses Morse as a means of sidestepping the more rigorous protections of Tinker when there are physical threats to the safety of students. Tinker has commonly applied to cover all categories of speech, except those explicitly defined by Fraser and Hazelwood, and requires a school to reasonably forecast a disruption before imposing censorship. However, in cases of “speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole” then the “Morse analysis is appropriate.” Drawing on Alito’s opinion, the Ponce Court claimed “some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary.” Given this shockingly liberal interpretation of Morse, Ponce “ripped the narrow concurring opinion of Justices Alito and Kennedy from its factual moorings and took it for a judicial joyride down a slippery slope of censorship.”²⁰⁷ However, it was necessary for the Circuit Court to expand schools’ powers to avoid a Columbine-style attack.

In Boim v. Fulton County School Districts, the 11th Circuit similarly found that Morse legitimizes censorship on speech concerning violence. When reviewing Morse’s decision upholding restrictions on student expressions conflicting with a significant governmental interest, they found that “that same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school

²⁰⁷ Calvery, 15

violence.” Violent message that allegedly revealed the state of mind of a student in both these cases lead courts to uphold restrictions speech because of the potential for harm at least on par with the danger posed by Frederick’s banner.

After the Supreme Court overturned the 9th Circuit’s ruling in Harper v. Poway Unified School District, the case reappeared at the district level and that court found the new Morse decision applicable to psychologically harmful speech.²⁰⁸ Judge John Houston wrote that Morse,

“affirms that school officials have a duty to protect students, as young as fourteen and fifteen years of age, from degrading acts or expressions that promote injury to the student’s physical, emotional or psychological well-being and development which, in turn, adversely impacts the school’s mission to educate them.”

While the previous two cases addressed purely physical harms, Houston interpreted Morse as supporting regulations on speech that causes ‘emotional’ or ‘psychological’ injuries. His holding sweeps up any speech, “disparaging of, and emotionally and psychologically damaging to, homosexual students and students in the midst of developing their sexual orientation in a ninth through twelfth grade, public school setting.” Such an expansive ruling certainly does not limit Alito’s opinion to illegal drugs but applies it to any type of potential harm.

The case of Nuxoll ex rel. Nuxoll v Indian Prairie School District No. 204 also concerned psychologically harmful speech. Judge Posner used Morse’s permissive

²⁰⁸ Order Denying Plaintiff’s Motion for Reconsideration at 9, Harper v. Poway Unified Scho. Dist., Civ. No. 04CV1103 JAH, at 9 (S.D. Cal. Feb. 11, 2008)

language to permit restrictions on “derogatory comments...that refer to race, ethnicity, religion, gender, sexual orientation, or disability.” In doing so, he wrote:

“Imagine the psychological effects if the plaintiff wore a T-shirt on which was written “blacks have lower IQs than whites” or “a woman's place is in the home.” From Morse and Fraser we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school--symptoms therefore of substantial disruption--the school can forbid the speech.”²⁰⁹

In *Nuxoll*, the Court was willing to differ to schools whenever “[i]t seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way.” In addition, they gave orders to the District Court to

“to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity.”

Although assigning constitutional rights to such a campaign denigrates the intention of the First Amendment, their conclusion required an astonishing broad reading of Alito's opinion.

Given the uncertainty in the lower courts, almost any speech restriction seems possible at this juncture. In a humorous hypothetical foray, Clay Calvert suggests imagining a t-shirt with the words, “Thin People Stink” on the front side, and “Eat Trans Fats” on the back.²¹⁰ Either the emotional or psychological harm on the front or potentially physical harm on the back could merit censorship. However, a court could also apply *Tinker* and find a political message worthy of greater

²⁰⁹ *Nuxoll ex rel. Nuxoll v Indian Prairie School District No. 204*

²¹⁰ Calvery, 15

protection. In any case, this hypothetical situation clearly illustrates the confusion currently strangling the courts. The central problem is the disagreement regarding how to interpret *Morse*. While the above decisions have read the case broadly, others have restricted their interpretations to only apply it to cases regarding the advocacy of illegal drugs.²¹¹

Lastly, there is also an indication that the lower courts are employing *Morse* to defend punishments for Internet speech written outside schools. Roberts applied student speech regulations because Frederick “directed his banner towards the school, making it plainly visible to most students.” In *Wisniewski v. Board of Education of Weedsport Central School District*, the 2nd Circuit upheld “an eighth-grade student’s suspension for sharing with friends via the Internet a small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed.” Just as Frederick’s banner was directed at students, this Court found that any speech aimed at students can be regulated by administrators. Despite the fact that a police investigator and psychologist both concluded that the icon was meant as a joke and that the student posed no threat, the trend in courts is to give great deference to schools regardless of whether the speech is produced on or off campus.²¹² In response lawmakers in Connecticut have even gone so far as to propose legislation

²¹¹ *Doninger v. Niehoff*, 527 F.3d 41, 48 (2nd Cir. 2008); *Lowery v. Euverard*, 497 F.3d 584, 602 (6th Cir. 2007); *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, No. 07-C-1586, 2007 WL 4569720, at *5 (N.D. Ill. Dec. 21, 2007)

²¹² see *Doninger v. Niehoff* (2nd Cir. May 29, 2008). For a conflicting PA district court ruling, see *Layshock v. Hermitage Sch. Dist.* (July 10, 2007)

protecting students' rights to offensive online speech.²¹³ While Alito didn't warn explicitly against this interpretation, it is unlikely that he fully considered the implications of his decision to online expressions.

As the number of cases brought before the courts continues to rise²¹⁴, one can imagine a future case arising in which a student wearing a t-shirt (or posting an online message) quoting President Obama: "I inhaled frequently, that was the point." It may also state, "Honesty about smoking pot doesn't prevent you from becoming President." One possible reading of these messages is the advocacy of drug use; however, the message is also about social norms regarding illegal substances. The expression could be seen as commenting on the debate on decriminalizing marijuana use. Should schools be forbidden from restricting half this t-shirt but then have a pedagogical obligation to censor the advocacy of illegal substances? Under the Alito's current ruling, courts could justify ruling both for the student or school. Such ambiguity in the law does a disservice to educators and all those who support America's public schools.

²¹³ Abrams, Joseph "Lawmaker Presses for Free Speech in Foul-Mouth Student's Blog Case" February 05, 2009 Available at: <http://www.foxnews.com/politics/2009/02/05/lawmakers-press-free-speech-foul-mouth-blog-case/>

²¹⁴ Arum, Richard; Preiss, Doreet (New York U.). "From the Schoolhouse to the Courthouse: School Discipline and the Law" Conference: "From *Brown* to "Bong Hits": Assessing a Half-Century of Judicial Involvement in Education" Oct. 15, 2008. American Enterprise Institute. Available at: <http://www.aei.org/event1746>

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Appendix A: An Educator's Attempts to Supervise Student Speech

In researching this thesis, I have learned to see both sides of this debate. On one hand, most school administrators would be able to better educate the majority of their students if given more leeway to regular student speech. This utilitarian argument is very compelling, especially given the struggling state of many public schools. In addition, they may be able to better address an unruly student if they knew they didn't face a potential lawsuit. When educators are thinking about the law, they are not thinking about the unique needs of particular students.

However, I can also understand why some students will benefit from having constitutional protections of their speech rights. If a family moves to a new community and their child is thrown into an unfamiliar culture, they should not be required to hide their moral and political beliefs. This is antithetical to basic American values. The country has made great advancements through the outspokenness of a few individuals in an intolerant community. While schools are not an appropriate venue for confrontational debates, they are environments in which youths spend a large amount of their time. Thus, some forms of political, social and religious expression should be protected.

As an educator, I find a need to negotiate issues related to speech rights surprisingly often. Of course, my primary objective is typically to avoid confrontation. I teach tolerance and cross-cultural dialogue rather than highlight discord and difference. When things get heated, I keep a keen eye out for personal attacks and 'fighting words', as the Court refers to them. I attempt to apply the

Tinker standard of only restricting speech that would pose a substantial disruption or impose on the rights of others, although I protect the rights of others more often than the courts have. When I invite an open discussion, I try to prod the conversation in productive directions without reacting punitively.

There are times, however, when the debate gets heated between students on issues of governance, philosophical differences and other matters of educated opinion. The challenge requires that I help students learn to assail their opponents' arguments and not their character: logic and rhetoric are allowed, not factual or fallacious personal accusations. However, I want my students to do more than just recite arguments, I want them to *care*. Passionate, heated debates are important and have a necessary place in our society. In some cases I have to speak to students after class about their non-disruptive, non-rights infringing behavior (such as a lame personal attack on their opponent in a debate or an offensive t-shirt), but I have not faced a situation as a faculty member where a conversation didn't suffice. I see these moments as teaching opportunities.

As the faculty coordinator for all political events at my school, provoking student debates has been a particularly exciting venture as we approached the November 4th, 2008 election. The Republican and Democratic Clubs had hosted a few relevant events: debates, video screenings, and discussion forums. We encourage students to express themselves while closely moderating the proceedings. On one particular Thursday night in late September, an event took place that raised some eyebrows. The clubs had planned to sponsor a potentially

acrimonious debate on the Iraq War. This was the first year of the Democratic Club's existence, and already there had been negative remarks in the halls and cafeteria between the groups. It wouldn't be the first time that political partisans have misrepresented or slandered their opponents; however, the faculty wanted to ensure that students felt safe to ask questions in a respectful atmosphere whether in the cafeteria, classrooms, or on the athletic fields. Although it was a potentially rancorous situation, the students rose to the occasion and kept the affair civil. I believe that proper planning and faculty oversight kept students aware that they were expected to respect their peers of the opposing parties

Despite their differing ideologies, the two clubs ultimately found more in common with each other than they anticipated. We reminded them that they were both patriotic, and their political participation was necessary for the survival of our democracy. Unlike many Americans, particularly the forty percent that didn't vote in the 2004 election, these students took the time to educate themselves and act on matters of national importance. Although they differed in their conclusions, both sides also aimed to protect America from future terrorist attacks while maintaining the country's role as a model "City upon a hill", in John Winthrop famous words from 1630. We also stressed that their disagreement served an important political function in our democracy: without some discord, the marketplace of ideas would be a barren agora.

I often wonder about how to promote democratic values while maintaining an appropriate educational atmosphere. To what extent do we model the principles

we espouse when we teach the Constitution? If a student's political opinion can be construed to insult the beliefs of another student, do we restrict the speech or rely on a more a laissez faire approach to the marketplace of ideas? In my school's current mission statement, we claim to prepare students "for a lifetime of learning and active citizenship." What response to the contrarian student best serves this goal?

Ultimately my colleagues pursue a dialogue whenever possible to resolve these issues, and the process itself serves a vital educational function. In our democratic and justifiably argumentative society, our students need to learn to resolve disputes civilly. In planning upcoming events, we try to promote worthwhile discussions on the pertinent issues of our day. We sponsored a mock election prior to November 4th and hoped that this was would be an opportunity for students to learn to speak articulately on their beliefs and develop their skills as acute listeners. We showed the presidential debates and invited candidates for state offices to speak to our students so that we could provide a first-hand example of political wrangling. Students also wrote on national politics for the student magazine and learned how to craft an argument that wins converts. Most importantly, we continue to teach that democracy is a process that requires constant participation. We aim every day to prepare our students to be active participants.

At the debate on the Iraq War, our students performed admirably. They recognized the necessity of debate in diverse, pluralistic community. They responded to the civic challenge and held a contentious but thoughtful debate. The Republicans tied in their interdisciplinary learning to show parallels between the

Soviet invasion of Afghanistan and the Iraq War. The Democrats argued that the defense of the US occupation echoed the rhetoric of imperialism. Neither side passively relied on others to do the hard work of determining the best course of action on the national and international scene. Even in the most rancorous moments, the students directed their criticisms at the rival candidates' policies, and the students shook hands afterwards. As the students walked out together into the night, they were not Republicans and Democrats but students at the same school. They had come out to support our country's democracy, and we commended them for their courage to speak.

I've often asked myself how I would have acted differently if I were in Morse's shoes. As I've argued in this thesis, I believe that her proscription of the banner was reasonably justified because it detracted from the school's intention of the event: to give students an opportunity to witness a semi-historic event and enjoy the time outside. By using the time for self-promotion and displaying an edgy banner, Frederick was inappropriately drawing attention to himself. A 'no banner' rule would have sufficed, and Morse could have told Frederick that on the sidewalk. My agreement with her actions ends here. She acted with physical force when tearing the banner from the student's hands. This likely escalated the situation and didn't promote any mutual understanding. In addition, Frederick's punishment was excessive if it relied upon the banner's message for substantiation. Ten days of missed school is serious, and the suspension would affect Frederick's prospects for higher education. I would have tried to identify why Frederick displayed the banner and offered him an opportunity to explore his opinions in a more mature setting.

Such a conversation could actually be surprisingly productive and promote the interests of the school much more than any case before the Supreme Court.