

BONG HiTS 4 JESUS: STUDENT SPEECH AND THE  
“EDUCATIONAL MISSION” ARGUMENT AFTER *MORSE* v.  
*FREDERICK*

*Jeremiah Galus*

I. INTRODUCTION

On January 24, 2002, Joseph Frederick displayed a banner at the Olympic Torch Relay in Juneau, Alaska.<sup>1</sup> The banner, continuing in the tradition of high school humor, read “BONG HiTS 4 JESUS.”<sup>2</sup> Frederick’s attempt at humor during this “school-sponsored” and “school-supervised” event<sup>3</sup> proved to be an unwise decision, as his fourteen-foot banner was confiscated and he was suspended for ten days.<sup>4</sup> Apparently, the school principal, and presumably many others, did not find anything funny in Frederick’s cryptic banner.

The student speech concerns implicated by the banner, however, were much more important than understanding this particular high school student’s sense of humor. Joseph Frederick’s unfurling of his “BONG HiTS 4 JESUS” banner was the subject of one of the Supreme Court’s most high-profile cases in 2006.<sup>5</sup> Not surprisingly, Frederick’s banner, which was self-proclaimed by Frederick as being “meaningless and funny,”<sup>6</sup> quickly became a banner containing speech fraught with importance. The combination of *Morse* v. *Frederick*’s unique factual background and the unpredictable state of student speech law at the time offered hope that the Supreme Court would soon make students’ speech rights more certain. The Court’s narrow holding in *Morse*, however, seems to have left school administrations, students, and lower courts in no different a situation than the one they were in before the ruling. The importance of this apparent lack of guidance from the Court cannot be

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1. *Morse* v. *Frederick*, 127 S. Ct. 2618, 2622 (2007).

2. *Id.*

3. *Id.*

4. *Id.*

5. See, e.g., Robert Barnes, *Justices to Hear Landmark Free-Speech Case*, WASH. POST, Mar. 13, 2007, at A03, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/03/12/A R2007031201699.html>; Bill Mears, *High Court Takes ‘Bong Hits for Jesus’ Case*, CNN LAW CENTER, Dec. 1, 2006, <http://www.cnn.com/2006/LAW/12/01/scotus.bonghits/index.html>; *Of Banners and Bongs*, THE ECONOMIST, Mar. 22, 2007, [http://www.economist.com/world/na/displaystory.cfm?story\\_id=8892715](http://www.economist.com/world/na/displaystory.cfm?story_id=8892715).

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

underestimated.<sup>7</sup> Contradictory applications of the Supreme Court's student speech cases, *Tinker v. Des Moines Independent Community School District*,<sup>8</sup> *Bethel School District No. 403 v. Fraser*,<sup>9</sup> and *Hazelwood School District v. Kuhlmeier*,<sup>10</sup> have left school officials unsure about the scope of their authority, leading to either a lack of order and discipline in schools or unnecessary censorship of speech.<sup>11</sup> Careful review of recent student speech cases decided after *Morse* reveals that courts remain unsure about *Tinker*'s scope and the extent of *Fraser* and *Kuhlmeier*'s application. An appropriate interpretation, however, of the Court's majority opinion and Justice Alito's concurring opinion in *Morse* provides more guidance than recent court decisions may demonstrate. *Morse* explicitly reaffirms the principle that students maintain First Amendment rights,<sup>12</sup> and rejects the argument that student speech is proscribable simply because it is plainly "offensive."<sup>13</sup> In addition, Justice Alito's concurring opinion rejects the propriety of extending *Fraser* and *Kuhlmeier*'s exceptions to *Tinker* to include student speech contrary to the school's educational mission.<sup>14</sup>

This Note evaluates the impact *Morse v. Frederick*<sup>15</sup> has had, and should have, on student speech. Part II of this Note reexamines the Supreme Court's

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7. Prior to the Court's decision in *Morse*, the National Association of School Boards emphasized that school administrators, attempting to balance free speech, learning, discipline, and safety, were in desperate need of "guidance." Brief for National School Boards Ass'n et al. as Amicus Curiae supporting Petitioners at 3, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278).

8. 393 U.S. 503 (1969).

9. 478 U.S. 675 (1986).

10. 484 U.S. 260 (1988).

11. The lack of discipline in the public school system is a serious enough problem that state legislatures have considered enacting tougher disciplinary codes. See Troy Kehoe, *Indiana Lawmakers Consider Tougher School Discipline Code*, WSBT22, (Feb. 9, 2009), <http://www.wsbt.com/news/local/39116822.html>. Threats of legal challenges to teachers' disciplinary measures clearly are an impetus for such legislation. *Id.* ("We ask so much of our teachers already. It is just not tolerable to make them put up with misbehavior and insubordination, to say nothing of profanity, physical threats and the risk of legal harassment if they attempt to control the students under their authority." (emphasis added)). However, there are state legislators who believe school administrations have gone too far in censoring student speech. Don Michak, *LeBeau Bill Would Protect Students' Free Speech Rights on Internet*, JOURNAL INQUIRER (Jan. 29, 2009), available at <http://www.journalinquirer.com/articles/2009/01/29/connecticut/doc4981b30a77977090359819.txt> (highlighting a bill that would create a "bright line" where schools could not punish student speech over the Internet where the speech is not sent directly to the school or is not sent using school equipment).

12. See *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

13. *Id.* at 2629.

14. *Id.* at 2637–38 (Alito, J., concurring).

15. 127 S. Ct. 2618 (2007).

prior student speech cases. Part III will briefly describe lower courts' inconsistent application of Supreme Court precedent, highlighting the need for extracting guidance from the Court's opinion in *Morse*. Part IV will closely examine and analyze Chief Justice Roberts' majority opinion and Justice Alito's concurring opinion in *Morse* and explain how the Court's decision alters the student speech landscape. Additionally, Part IV of this Note will focus on decisions in recent student speech cases that have applied the Supreme Court's decision in *Morse*. Part IV will argue, in the context of these recent cases, for the proper application of student speech law in light of the Court's holding in *Morse*. Finally, Part V concludes.

## II. PRIOR SUPREME COURT STUDENT SPEECH CASES

The *Morse* Court relied on three Supreme Court student speech cases: *Tinker v. Des Moines Independent Community School District*,<sup>16</sup> *Bethel School District No. 403 v. Fraser*,<sup>17</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>18</sup> Although the Court in *Morse* ultimately applied a standard different from those articulated in *Tinker*, *Fraser*, and *Kuhlmeier*, familiarity with these cases is essential to understanding the ramifications of the *Morse* opinion.

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

In *Tinker*, a group of adults and students agreed to demonstrate their objections to the war Vietnam War by wearing black armbands.<sup>19</sup> The principals of the relevant schools became aware of the plan and adopted a policy that banned such a demonstration.<sup>20</sup> Nevertheless, three students decided to don the armbands to exhibit their opposition to the war.<sup>21</sup> All three students were promptly suspended from school.<sup>22</sup> The students filed suit, alleged First Amendment violations, and sought an injunction preventing the school district from disciplining the students for wearing black armbands.<sup>23</sup> Setting the stage for the Supreme Court's grant of certiorari, both the district

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16. 393 U.S. 503 (1969).

17. 478 U.S. 675 (1986).

18. 484 U.S. 260 (1988).

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

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

court and appellate court upheld the constitutionality of the school district's action.<sup>24</sup>

Justice Fortas, delivering the opinion of the Court, disagreed with the courts below. He reasoned that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>25</sup> In developing this point, however, Justice Fortas emphasized that the First Amendment rights available to students must be “applied in light of the special characteristics of the school environment.”<sup>26</sup> Even so, the Court argued that too much deference to school administrators would endanger students’ First Amendment rights.<sup>27</sup> Thus, the so-called *Tinker* standard implied that although school officials must be able to regulate some student speech, their authority cannot operate unfettered. *Tinker* established that while the First Amendment does not protect student speech and conduct that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,”<sup>28</sup> a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not enough to overcome a student’s right to freedom of expression.<sup>29</sup> This distinction makes clear that students cannot be limited solely to expression of views officially approved by the school.<sup>30</sup>

Consequently, the wearing of black armbands in *Tinker* fell within the confines of protected student speech as expressed by Justice Fortas.<sup>31</sup> The Court held that the students’ armbands were a passive expression of opinion that threatened no disorder or disturbance and did not intrude upon the work of the school or the rights of other students.<sup>32</sup> Furthermore, the Court held that the school’s action appeared to be predicated on avoiding the controversy that might result from the students’ expression.<sup>33</sup> As a result, the Supreme Court reversed the appellate court’s decision and held the school’s prohibition on armbands to be unconstitutional.<sup>34</sup>

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24. *Id.* at 504–05.

25. *Id.* at 506.

26. *Id.*

27. *See id.* at 506–07.

28. *Id.* at 513.

29. *Id.* at 508–09.

30. *Id.* at 511.

31. *Id.* at 514.

32. *Id.* at 508.

33. *Id.* at 510.

34. *Id.* at 514.

*B. Bethel School District No. 403 v. Fraser*

In *Bethel School District No. 403 v. Fraser*, the Supreme Court first faced the challenge of applying *Tinker* to a high school student's speech. In 1983, Matthew Fraser delivered a speech during a school assembly nominating a fellow student for student elective office.<sup>35</sup> During the speech, Fraser referenced his candidate "in terms of an elaborate, graphic, and explicit sexual metaphor."<sup>36</sup> Based on a disciplinary rule prohibiting the use of obscene language, the school suspended Fraser for three days and removed his name from the list of graduation speaker candidates for the school's commencement.<sup>37</sup> Fraser filed suit, and alleged a violation of his First Amendment right to freedom of speech.<sup>38</sup> Both the district court and court of appeals held that Fraser's speech was similar to the armbands in *Tinker* and, therefore, was not punishable because the speech did not have a disruptive effect on the educational process.<sup>39</sup> The Supreme Court disagreed with the lower courts' application of *Tinker*.

The Supreme Court reasoned that a political message displayed via an armband was entirely different from sexually explicit speech.<sup>40</sup> In evaluating the role and purpose of public schools, the Court determined that one objective of public education is to inculcate students with "fundamental values necessary to the maintenance of a democratic political system."<sup>41</sup> Therefore, the freedom to advocate unpopular views in school must be balanced against the equally important interest of teaching students to engage in "socially appropriate behavior."<sup>42</sup> Prohibiting students from using vulgar and offensive terms in public discourse was considered by the Court to be encompassed within public education's function of teaching appropriate behavior.<sup>43</sup>

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35. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986).

36. *Id.* at 677–78. Fraser described his candidate as being "a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel, is firm." *Id.* at 687 (Blackmun, J., concurring). Fraser also said that his candidate was "a man who takes his point and pounds it in" and "a man who will go to the very end—even the climax, for each and every one of you." *Id.*

37. *Id.* at 678.

38. *Id.* at 679.

39. *Id.*

40. *Id.* at 680.

41. *Id.* at 681.

42. *Id.*

43. *Id.* at 683.

Declining to apply *Tinker*'s "substantial disruption" standard directly to Fraser's nominating speech,<sup>44</sup> the *Fraser* Court emphasized that the penalties imposed on Matthew Fraser were, unlike the sanctions imposed on the students in *Tinker*, unrelated to any political viewpoint.<sup>45</sup> Because a school may determine that the "essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct,"<sup>46</sup> the Court concluded Matthew Fraser's First Amendment right to freedom of speech was not violated when he was punished for delivering a sexually explicit monologue during a school assembly.<sup>47</sup>

### C. Hazelwood School District v. Kuhlmeier

The Supreme Court faced another student speech case three years after it decided *Fraser*. In *Hazelwood School District v. Kuhlmeier*, a high school published a newspaper written and edited by a journalism class at the school.<sup>48</sup> Costs for the printing of the newspaper were paid by funds the Board of Education allocated from its annual budget.<sup>49</sup> At the time, the standard practice was for the journalism teacher to submit page proofs of every newspaper issue to the principal for his review prior to publication.<sup>50</sup> Before one of the newspaper's publications, the principal determined that one article's references to sexual activity and birth control were inappropriate for the younger students.<sup>51</sup> Additionally, the principal disapproved of another piece of writing because it did not provide those it portrayed negatively with an opportunity to respond or consent to the article.<sup>52</sup> Based on these concerns, the principal withheld from publication two pages containing the disputed articles.<sup>53</sup> The student writers filed suit, alleging that the principal's actions violated their First Amendment rights.<sup>54</sup> Following the district court's

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44. After some confusion among the lower courts following the Court's decision in *Fraser*, the Supreme Court confirmed, twenty years later, that the decision in *Fraser* did not employ *Tinker*'s "substantial disruption" analysis. See *Morse v. Frederick*, 127 S. Ct. 2618, 2626–27 (2007).

45. *Fraser*, 478 U.S. at 685.

46. *Id.* at 683.

47. *Id.* at 685.

48. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

49. *Id.*

50. *Id.* at 263.

51. *Id.*

52. *Id.*

53. *Id.* at 264.

54. *Id.*

determination that there was no First Amendment violation,<sup>55</sup> the Court of Appeals for the Eighth Circuit applied the *Tinker* standard in evaluating the students' claim.<sup>56</sup> The Eighth Circuit concluded the principal could not "reasonably forecast the censored articles . . . would have materially disrupted classwork or given rise to substantial disorder in the school."<sup>57</sup> The Eighth Circuit therefore held that the school violated the students' First Amendment rights by censoring the newspaper.<sup>58</sup>

The Supreme Court, on the other hand, specifically distinguished the facts in *Kuhlmeier* from those in *Tinker*. In doing so, the Court explained that the question of whether the First Amendment requires a school to *tolerate* student speech is different from whether the First Amendment requires a school to *endorse* student speech.<sup>59</sup> The first question concerns educators' abilities to regulate a student's personal expression that takes place on school premises, while the second question addresses educators' authority over school-sponsored publications and other expressive activities that the public might "reasonably perceive to bear the imprimatur of the school."<sup>60</sup> Educators, the Court concluded, are entitled to greater control over the latter form of student speech.<sup>61</sup>

The Court reasoned that this editorial control over student speech in school-sponsored expressive activities extends to actions insofar as they are "reasonably related to legitimate pedagogical concerns."<sup>62</sup> As such, a school, in its capacity as publisher of a school newspaper, may disassociate itself not only from speech that may create a substantial disruption, but also from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."<sup>63</sup> Since a school need not lend its name and resources to the distribution of student speech and the principal's actions in *Kuhlmeier* were "reasonably related to legitimate pedagogical concerns,"<sup>64</sup> the *Kuhlmeier* Court held that

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55. *Id.*

56. *Id.* at 265.

57. *Id.*

58. *Id.* at 266.

59. *Id.* at 270–71.

60. *Id.* at 271.

61. *Id.*

62. *Id.* at 273.

63. *Id.* at 271.

64. *Id.* at 273.

no violation of First Amendment rights occurred when the principal decided to delete two pages of the school newspaper.<sup>65</sup>

The Supreme Court's decisions in *Fraser* and *Kuhlmeier* changed the student speech landscape. *Tinker*, and its general rule providing broad protection to student speech, no longer stood alone. The introduction of *Fraser* and *Kuhlmeier* allowed courts to reevaluate the amount of discretion a school official has in punishing objectionable student speech. On one hand, some courts seemed to take the view that *Fraser* and *Kuhlmeier* significantly cut into *Tinker*'s rule. To these courts, the reasoning underlying the Court's decision in *Fraser* and *Kuhlmeier* provided additional avenues for censorship of student speech. In fact, some courts even questioned whether *Tinker* was still applicable after the Court's subsequent student speech cases. On the other hand, many courts approached *Fraser* and *Kuhlmeier* as narrow exceptions to *Tinker*'s general rule. Nonetheless, two results are certain from the Court's opinions in *Fraser* and *Kuhlmeier*. First, there are additional ways a school can lawfully silence speech other than requiring a substantial disruption of school activities.<sup>66</sup> Second, lower courts are unsure as to the proper application of student speech precedent.

### III. LOWER COURTS' INCONSISTENT APPLICATION OF SUPREME COURT PRECEDENT AND THE NEED FOR GUIDANCE

Lower courts' inability to consistently apply Supreme Court student speech precedent was a motivating factor for the Court to grant certiorari to *Morse*. Lower courts have been unable to apply the general rule articulated in *Tinker* with any desirable degree of consistency, and the lower courts' application of *Fraser* and *Kuhlmeier*'s exceptions to *Tinker*'s general rule has proven to be even more unpredictable and contradictory.

Although *Tinker* stands for the proposition that schools may not regulate student speech unless the speech results in a reasonable fear of or an actual substantial disruption of school activities, courts remain undecided about the scope of *Tinker*'s holding.<sup>67</sup> Undoubtedly, the unique facts of *Tinker* have led

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65. *Id.* at 276.

66. After *Fraser*, if a student speaks in a vulgar, lewd, or obscene manner, a school official can punish the speaker. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). After *Kuhlmeier*, any student speech that can possibly be viewed as "bearing the school's imprimatur," can also be controlled by the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

67. See generally *Bar-Navon v. Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at \*5–6 (M.D. Fla. 2007) (highlighting the disagreement among the Circuit Courts of Appeal as to whether *Tinker* applies to all regulation of student speech or only to viewpoint-based



to some of the confusion; the school policy at issue in *Tinker* was a viewpoint-based regulation developed in order to censor controversial political speech.<sup>68</sup> The disagreement, therefore, focuses on whether there “should be a distinction between school speech regulation that is viewpoint-hostile and school conduct regulation that only incidentally burdens student expression.”<sup>69</sup> In other words, it is not clear whether *Tinker* applies to all student speech not sponsored by schools, subject to the rule of *Fraser*, or whether it applies solely to political speech or to political viewpoint-based discrimination.<sup>70</sup> This uncertainty makes it difficult for school officials to comprehend the limitations on their authority in enforcing content-neutral rules and regulations.

Much of the confusion surrounding the scope of *Tinker* can be traced to the Court’s holding in *Fraser*. Opting not to apply the *Tinker* “substantial disruption” test to a student’s vulgar speech, the *Fraser* Court made clear that the “mode of analysis set forth in *Tinker* is not absolute.”<sup>71</sup> Although the scope of *Tinker* and student speech law may have received some clarity had lower courts agreed on the mode of analysis employed by the *Fraser* Court,<sup>72</sup> lower courts have been unable to do so. Some courts have reasoned that *Fraser* should be read to support the proposition that schools may regulate student speech that contains objectionable content that is contrary to a school’s educational mission.<sup>73</sup> Other courts, however, have held that *Fraser* only

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regulation). Compare *Pinard v. Clatskanie Sch. Dist.*, 6J, 467 F.3d 755 (9th Cir. 2006), and *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (applying *Tinker* as the basic standard of protection for all regulation of student speech), with *Blau v. Forth Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005), and *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001) (viewing the *Tinker* standard as applicable only for viewpoint-hostile regulation of student speech and expression).

68. See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (“The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment.”).

69. *Bar-Navon*, 2007 WL 3284322 at \*5.

70. *Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006).

71. *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007).

72. Determining whether *Fraser* is merely an exception to *Tinker*’s “substantial disruption” test, or whether *Fraser* stands for the much broader proposition that schools may censor speech contrary to the school’s educational mission, is important to understanding the scope of *Tinker*. If *Fraser* is read as a narrow exception to *Tinker*, then it seems as though the “substantial disruption” test should apply to all student speech, subject, of course, to the exceptions in *Fraser* (vulgar, lewd, or obscene speech) and *Kuhlmeier* (school sponsored speech or speech that may reasonably be viewed as bearing the school’s imprimatur). On the other hand, if lower courts read *Fraser* as permitting regulation of student speech contrary to a school’s educational mission, it seems as though *Tinker*’s “substantial disruption” test could only be reconciled to this broad rule by limiting it to political speech or speech that implicates concerns at the heart of the First Amendment.

73. See, e.g., *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000) (holding, under *Fraser*, that a student could not wear Marilyn Manson t-shirts because they contained “symbols and

permits regulation over the manner of student speech; only regulation, therefore, of student speech that is expressed in a lewd, obscene or vulgar manner is permissible.<sup>74</sup> The Second Circuit and Sixth Circuit, for example, adopted competing views on the appropriate interpretation of the Supreme Court's decision in *Fraser*.

The Second Circuit adopted the view that *Fraser* applies only to vulgar speech. In *Guiles v. Marineau*,<sup>75</sup> the Second Circuit held that school officials could not censor a student's t-shirt that displayed images of a martini glass, a man drinking from a bottle, and lines of cocaine.<sup>76</sup> Despite the school's interest in discouraging drug use,<sup>77</sup> the Second Circuit determined the school could not prohibit the student from wearing the t-shirt because the shirt was not vulgar, lewd or obscene.<sup>78</sup> In ruling this way, the Second Circuit limited *Fraser*'s application to cases involving vulgar, lewd, or obscene speech, and reiterated *Tinker*'s general rule that students maintain their First Amendment rights while in school.<sup>79</sup>

The Sixth Circuit, on the other hand, embraced the alternative view that *Fraser* permits school officials to limit student speech containing objectionable content. In *Boroff v. Van Wert City Board of Education*,<sup>80</sup> the Sixth Circuit held that the school acted in a reasonable manner in prohibiting a student, pursuant to the school's dress code, from wearing t-shirts featuring a particular rock singer and band.<sup>81</sup> Relying on *Fraser*, the court held that, because the t-shirts contained symbols and words contrary to the school's educational mission, school officials could prevent students from wearing the

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words" that promote values that are contrary to the school's educational mission); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185–86 (9th Cir. 2006) (dicta) (stating that a school may prohibit a student from "displaying a swastika or a Confederate flag" on a school day dedicated as one of racial tolerance), *cert. granted and vacated without opinion*, 127 S. Ct. 1484 (2007).

74. See, e.g., *Guiles*, 461 F.3d 320; *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (declining to extend *Fraser*'s analysis to prohibit the wearing of a pro-gun t-shirt despite the school's strong interest and educational mission to prevent gun violence); *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) (reasoning that *Fraser* does not extend to speech simply inconsistent with the school's educational mission).

75. *Guiles*, 461 F.3d 320.

76. *Id.* at 330.

77. The Second Circuit's opinion in *Guiles* would likely be decided differently following the Supreme Court's ruling in *Morse*. In *Morse*, the Supreme Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

78. *Guiles*, 461 F.3d at 330.

79. *Id.*

80. 220 F.3d 465 (6th Cir. 2000).

81. *Id.* at 470.

shirts.<sup>82</sup> The court held that *all* shirts representing this particular rock singer (regardless of the words and symbols on the shirts) were vulgar, offensive, and contrary to the educational mission of the school.<sup>83</sup> The court's decision was based on the school principal's statement that wearing this particular rock singer's t-shirts could be considered as approving of the views espoused by the rock singer, and these views are inconsistent with the school's mission.<sup>84</sup> Expanding on *Fraser*'s holding, the Sixth Circuit held that the content of a student's speech, rather than just the manner of delivery, is subject to school regulation.

Predictably, this interpretation of *Fraser* substantially carves into *Tinker*'s general rule that students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate."<sup>85</sup> Under this interpretation of *Fraser*, students' freedom of speech is subject to the personal preferences and views of school officials. The student's speech or expression need not be vulgar or obscene in order to be proscribed. Rather, any speech containing content deemed contrary to the school's educational mission would be subject to regulation.

The confusion produced by these inconsistent applications of Supreme Court student speech precedent has created a situation where guidance is desperately needed. It is likely that uncertainty in this particular area has contributed to some of our public schools' problems and shortcomings. Although it is unrealistic to think the Supreme Court's decision in *Morse* answered all the questions surrounding student speech law, a proper interpretation of the Court's decision provides more answers than some recent student speech cases demonstrate.

#### IV. *MORSE* v. *FREDERICK*: SOME GUIDANCE AND RECENT ATTEMPTS AT APPLICATION

##### *A. Factual and Procedural Background*

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska.<sup>86</sup> In the spirit of this historic event, the school principal of Juneau-Douglas High School permitted staff and students to participate in the

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82. *Id.*

83. *Id.* at 471.

84. *Id.* at 469.

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

86. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

Torch Relay, and students were allowed to leave class to watch the relay.<sup>87</sup> As the torchbearers and camera crews passed by the school, student Joseph Frederick unfurled a large banner bearing the phrase “BONG HiTS 4 JESUS.”<sup>88</sup> The principal of the school immediately demanded that the banner be taken down after it was unfurled.<sup>89</sup> Frederick refused to obey the principal’s demand, resulting in confiscation of the banner and a ten-day suspension.<sup>90</sup>

Frederick filed suit, alleging that the school board and principal violated his First Amendment rights by tearing down the banner and disciplining him for the banner’s display.<sup>91</sup> The district court granted the school board and principal summary judgment, ruling that they did not violate Frederick’s First Amendment rights.<sup>92</sup> The court held that the principal reasonably interpreted the banner as promoting illegal drug use, a message directly contravening the school’s policy related to drug abuse prevention.<sup>93</sup> On appeal, the Ninth Circuit reversed the district court’s decision.<sup>94</sup> Relying on the Supreme Court’s decision in *Tinker*, the Ninth Circuit held that Frederick’s First Amendment rights were violated because the school punished him without demonstrating that his “speech gave rise to a ‘risk of substantial disruption.’”<sup>95</sup>

#### *B. Justice Roberts’ Majority Opinion*

An early portion of Chief Justice Roberts’ majority opinion in *Morse* is dedicated to deciphering the meaning of Frederick’s banner.<sup>96</sup> After evaluating differing claims that “BONG HiTS 4 JESUS” was gibberish, political or religious speech, or pro-drug speech, the Court determined that a pro-drug interpretation of the banner was the only plausible interpretation.<sup>97</sup> With a pro-drug interpretation of the banner serving as a background, the majority opinion framed the issue presented as “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2623.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 2624–25.

97. *Id.*

speech is reasonably viewed as promoting illegal drug use.”<sup>98</sup> In attempting to answer this question, Chief Justice Roberts first revisited the past Supreme Court student speech cases of *Tinker*, *Fraser*, and *Kuhlmeier*.<sup>99</sup>

Justice Roberts reinforced that *Tinker* provides that student speech may not be suppressed unless school officials reasonably conclude it will “materially and substantially disrupt the work and discipline of the school.”<sup>100</sup> In reexamining *Tinker*, Chief Justice Roberts highlighted the “stark” political nature of the speech and reminds the reader that political speech is “at the core of what the First Amendment is designed to protect.”<sup>101</sup> Next, the majority opinion reexamined *Fraser*. As mentioned earlier in this Note, it is debatable whether *Fraser* permitted regulation of the student speech because of the content of the speech or its manner of delivery. The majority opinion in *Morse* documented the *Fraser* Court’s ambiguous mode of analysis that has led to inconsistent applications of *Fraser* in lower courts.<sup>102</sup> Chief Justice Roberts explained the unclear mode of analysis employed in *Fraser* by highlighting the *Fraser* Court’s shifting focus. According to Chief Justice Roberts, the *Fraser* Court initially seemed focused on the content of student speech in reaching its conclusion. This seemingly content-based approach was demonstrated in *Fraser* through the distinction made between the political message in *Tinker* and the sexual content of the speech in *Fraser*.<sup>103</sup> Nevertheless, Chief Justice Roberts pointed out that the *Fraser* Court also reasoned school officials have the authority to determine “what *manner* of speech in the classroom or in the school assembly is inappropriate.”<sup>104</sup> Such a statement creates the belief the *Fraser* Court was more concerned with the manner of the speech than its content. In constructing a narrow majority opinion, however, Chief Justice Roberts held that resolution of this debate about *Fraser* was unnecessary.<sup>105</sup> Instead, the majority held that it was enough to extract two basic principles from the case.<sup>106</sup> First, *Fraser* suggested that the

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98. *Id.* at 2625.

99. *Id.* at 2625–27.

100. *Id.* at 2626.

101. *Id.*

102. *Compare* *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000), with *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006).

103. *Morse*, 127 S. Ct. at 2626 (“The Court was plainly attuned to the content of Fraser’s speech, citing the ‘marked distinction between the political “message” of the armbands in *Tinker* and the sexual content of [Fraser’s] speech.’”).

104. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)) (emphasis added).

105. *Id.*

106. *Id.*

constitutional rights of students are not the same as adults.<sup>107</sup> Second, *Fraser* established that the Tinker standard does not apply in all student speech cases.<sup>108</sup>

But even after distilling these basic principles, Justice Roberts continued analyzing *Fraser* when he addressed an argument proposed by the *Morse* school district. Perhaps drawing on a similar interpretation of *Fraser* as used by the Sixth Circuit in *Boroff*, the school district urged the Supreme Court to hold that Frederick's speech was proscribable because it was plainly "offensive" in the *Fraser* context.<sup>109</sup> This argument was rejected. In doing so, the majority stated its belief that "this stretches *Fraser* too far" and that *Fraser* should not be read to encompass any type of speech that could conceivably fit under some definition of "offensive."<sup>110</sup> Continuing with its point, the majority reminded us "much political and religious speech might be perceived as offensive to some."<sup>111</sup>

Lastly, Chief Justice Roberts looked at what was then the Supreme Court's most recent student speech case, *Kuhlmeier*. The majority opinion in *Morse* went on to hold that *Kuhlmeier* concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>112</sup> Chief Justice Roberts reiterated the central holding of *Kuhlmeier* that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>113</sup> Because no one could reasonably believe that Frederick's banner bore the imprimatur of the school, *Kuhlmeier* was not controlling.<sup>114</sup>

The majority in *Morse*, however, did not end its evaluation with a review of student speech cases. The Chief Justice referenced *Veronia School District 47J v. Acton*,<sup>115</sup> *New Jersey v. T.L.O.*,<sup>116</sup> and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*<sup>117</sup> to

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107. *Id.*

108. *Id.*

109. *Id.* at 2629.

110. *Id.*

111. *Id.*

112. *Id.* at 2627 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

113. *Id.* (quoting *Kuhlmeier*, 484 U.S. at 273).

114. *Id.*

115. 515 U.S. 646 (1995).

116. 469 U.S. 325 (1985).

117. 536 U.S. 822 (2002).

demonstrate that deterring drug use by schoolchildren has been recognized as an important and compelling interest.<sup>118</sup> With these cases in mind, the majority opinion established that student speech celebrating drug use, such as Frederick's "BONG HiTS 4 JESUS" banner, poses a significant challenge for school officials attempting to protect students from the dangers of drug abuse.<sup>119</sup> As a result, the majority constructed a rule that it hopes will ease the burden school officials face in confronting the dangers of illegal drug abuse. Adding another exception to *Tinker*'s general rule, the Court held that "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."<sup>120</sup> Because the Court determined Frederick's banner could reasonably be regarded as promoting illegal drug use, the Court held that Frederick's First Amendment rights were not infringed upon when the principal confiscated the banner and punished Frederick for its continued display.<sup>121</sup>

### *C. Justice Alito's Concurring Opinion*

Justice Alito's concurring opinion (joined by Justice Kennedy) merits attention because it limits an already limited majority opinion. Because it provides the narrowest discussion provided by a Justice whose vote was necessary for the majority, the concurrence seems to provide the controlling legal rule.<sup>122</sup> Although Justices Alito and Kennedy joined the five-member majority, they did so only on the understanding that the majority opinion went no further "than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use" and "it provide[d] no support for any restriction that can plausibly be interpreted as commenting on any political or social issue."<sup>123</sup>

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118. *Morse v. Frederick*, 127 S. Ct. 2618, 2627–28 (2007) (citing *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

119. *Id.* at 2628.

120. *Id.* at 2629 (internal citations omitted).

121. *Id.*

122. See *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770 (5th Cir. 2007); Posting of Eugene Volokh to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2007\\_06\\_24-2007\\_06\\_30.shtml#1182830987](http://volokh.com/archives/archive_2007_06_24-2007_06_30.shtml#1182830987) (June 26, 2007, 12:09 a.m.). *Contra Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 673 (7th Cir. 2008) (arguing that Alito's concurrence in *Morse* was not "controlling" because he joined the majority opinion, not just the decision).

123. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

Moreover, Justices Alito and Kennedy joined the majority opinion on the understanding that the majority opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions not already recognized in the Court's holdings.<sup>124</sup> Justice Alito elaborated on this point by explaining his understanding of the Supreme Court holdings in student speech cases. According to Justice Alito, *Tinker* only permits regulation of student speech that threatens a substantial disruption of the school environment, *Fraser* allows "regulation of speech that is delivered in a lewd or vulgar manner," and *Kuhlmeier* permits a school to regulate speech that is essentially the school's own speech.<sup>125</sup> In addition, Justice Alito believed the decision in the present case, *Morse*, only permitted restriction of speech advocating illegal drug use.<sup>126</sup>

Justice Alito maintained that the opinion of the Court did not endorse the argument that the First Amendment allows school officials to regulate any student speech that interfered with a school's educational mission.<sup>127</sup> Justice Alito found it of utmost importance to reject this argument before it could be "manipulated in dangerous ways."<sup>128</sup> In explaining the danger inherent in the "educational mission" argument, Justice Alito wrote:

The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.<sup>129</sup>

The "educational mission" argument, Justice Alito reasoned, strikes at the very core of the First Amendment because it gives school officials authorization to stifle student speech on political and social issues based solely on disagreement with the viewpoint expressed.<sup>130</sup>

Justice Alito, therefore, concluded that any argument for limiting student speech cannot rest on a theory of delegation but must be based on the special characteristics of a school setting.<sup>131</sup> In this case, the special characteristic is

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124. *Id.* at 2637.

125. *Id.*

126. *Id.* at 2636.

127. *Id.* at 2637.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 2638.



the threat to the physical safety of students.<sup>132</sup> Because Justices Alito and Kennedy believed illegal drug use presented a very serious and unique threat to the physical safety of students, they concluded schools could prohibit speech that advocates illegal drug use.<sup>133</sup>

*D. Analysis of Recent Attempts to Apply Student Speech Precedent after Morse*

For the most part, recent applications of the Supreme Court's holding in *Morse* v. *Frederick* have not resolved the disputes surrounding the correct interpretation of Supreme Court student speech precedent. Courts continue to be unsure as to the proper scope of *Tinker* and have differed as to whether subsequent Supreme Court student speech decisions permit regulation of speech contrary to the educational mission of the school.<sup>134</sup> A proper interpretation of *Morse*, however, provides guidance.

The debate continues over whether *Tinker*'s general rule applies to all student speech, subject to the exceptions set forth in *Fraser*, *Kuhlmeier*, and *Morse*, or to student speech that is subject to content-based regulations. Some courts remain willing to abandon *Tinker* altogether when a content-neutral regulation is at stake. For instance, reaching its decision after the *Morse* opinion, a federal district court in Texas held that "viewpoint-neutral regulations are not evaluated under *Tinker* but under the *O'Brien* test for expressive conduct or the traditional time, place, and manner analysis."<sup>135</sup> Similarly, a district court in Florida held that *Tinker* does not apply to a content-neutral regulation of student speech or expression.<sup>136</sup>

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132. *Id.*

133. *Id.*

134. *Compare* *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213 (D. Conn. 2007) ("Under *Fraser*, then, schools are generally held to have the authority to censor on-campus speech that school authorities consider to be vulgar, offensive, or otherwise contrary to the school's mission to 'inculcate the habits and manners of civility' without the need to show a 'substantial disruption' under *Tinker*." (internal citations omitted)), *aff'd*, 527 F.3d 41 (2d Cir. 2008), with *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007) (pointing out that although the *Fraser* Court noted that school officials may punish student speech that undermines the school's educational mission, Justice Alito's concurrence in *Morse* clarifies that student speech may not be censored "under the rubric of 'interference with the educational mission' because that term can be easily manipulated").

135. *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 913 (S.D. Tex. 2007) (quoting *Canady v. Bossier*, 240 F.3d 437, 443 (5th Cir. 2001)).

136. *Bar-Navon v. Sch. Bd. of Brevard County*, 2007 WL 3284322, at \*7 (M.D. Fla. 2007) (refusing to apply the *Tinker* standard to a mandatory school uniform policy, but instead opting to apply the time, place, and manner balancing test to the content-neutral regulation).

Avoiding the “substantial disruption” standard, however, is not the only route courts have taken with content-neutral regulations. The Seventh Circuit recently demonstrated a willingness to weaken the “substantial disruption” test when a student challenges a content-neutral regulation.<sup>137</sup> In *Nuxoll v. Indian Prairie School District*, the Seventh Circuit, in evaluating whether a student could wear a t-shirt reading “Be Happy, Not Gay,” looked to *Morse* and *Fraser* to infer that a school could forbid speech that “will lead to . . . symptoms of a sick school.”<sup>138</sup> Although the court held that “Be Happy, Not Gay” was not negative enough to be censored,<sup>139</sup> the court indicated a willingness to permit the school to prohibit statements such as “homosexuals are going to Hell” or “homophobes are closeted homosexuals” under its general ban of derogatory comments.<sup>140</sup> This opinion from the Seventh Circuit is particularly notable for its reliance on *Morse* and *Fraser* in defining what is a “substantial disruption” when neither *Morse* nor *Fraser* applied *Tinker*’s substantial disruption test. Relying on cases that did not apply the “substantial disruption” standard to articulate the scope of that standard is improper.

Courts are understandably eager to apply a different standard than “substantial disruption” to content-neutral regulations. Maintaining order and discipline in schools requires broad school policies unrelated to viewpoint and content, and reasonable people can disagree as to whether it is wise policy to subject even content-neutral school rules to a “substantial disruption” analysis. Nevertheless, the Supreme Court has resolved this debate by being clear that the rule in *Tinker*, subject to a few exceptions, applies to *all* student speech regulations. The departure, therefore from *Tinker*’s general rule, especially after the Court’s decision in *Morse*, is misguided. Although the majority opinion in *Morse* does not explicitly address the issue, Justice Alito’s concurring opinion seems to advise against the results reached by these courts. After all, he and Justice Kennedy only joined the *Morse* majority under the impression that the opinion did not provide that the special characteristics of a public school justify any other speech restrictions not already recognized in the Court’s holdings in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*.<sup>141</sup> Justice Alito made clear that *Fraser* permits regulation of speech delivered in a lewd or vulgar manner; *Kuhlmeier* allows schools to regulate what is essentially the

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137. See *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 674 (7th Cir. 2008).

138. *Id.*

139. *Id.* at 676.

140. *Id.* at 674.

141. *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring). See also *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

school's own speech; *Morse* allows the restriction of student speech that advocates illegal drug use; and *Tinker* "permits the regulation of student speech that threatens a concrete and 'substantial disruption.'"<sup>142</sup> It is important to note that Justice Alito provided no additional qualification to *Tinker* based on whether the regulation is viewpoint-based, content-based, or content neutral. Any regulation (viewpoint-based or not), therefore, of student speech is subject to the general rule of *Tinker*. The only exceptions to this rule are the ones encompassed in *Fraser*, *Kuhlmeier*, and *Morse*.<sup>143</sup> Although the proper application of these exceptions is disputed,<sup>144</sup> it is undeniable that they do not propose anything resembling the *O'Brien* standard, a time, place, and manner test, or a weakened "substantial disruption" standard.

Unfortunately, even after the decision in *Morse*, many lower courts continue to question whether *Fraser* and *Kuhlmeier* permit a school to consider its pedagogical interests and educational mission regarding all types of regulation of student speech, not just speech that is school-sponsored. After *Morse*, at least one court has applied pedagogical concerns to circumstances other than school-sponsored speech. In *Nguon v. Wolf*, the district court held that a school's regulation of French kissing, making out, and groping did not violate a student's First Amendment rights.<sup>145</sup> In doing so, the court misinterpreted *Kuhlmeier* as applying to all student speech (even if not school-sponsored) and as permitting schools to censor student speech that conflicts with an educational mission.<sup>146</sup> Regrettably, the *Wolf* court overlooked *Morse*'s affirmation that *Kuhlmeier* only applies to school-sponsored speech and speech that could reasonably be viewed as bearing the school's imprimatur.<sup>147</sup> Moreover, the court in *Wolf* felt no need

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142. A majority of the circuit courts has accepted this interpretation of student speech law. See, e.g., *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1214 (11th Cir. 2004); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 614–15 & n.16 (5th Cir. 2004); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 255–57 (4th Cir. 2003); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923–24 (10th Cir. 2002); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 542–43 (6th Cir. 2001); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211–14 (3d Cir. 2001); *Henerey v. City of St. Charles*, 200 F.3d 1128, 1131–32 (8th Cir. 1999); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

143. See *Morse*, 127 S. Ct. 2618, 2637 (Alito, J., concurring). See also *Lafon*, 538 F.3d at 563–64 (holding that *Morse* does not change the basic framework where *Fraser* applies to vulgar, lewd, indecent, and plainly offensive speech, *Kuhlmeier* applies to school-sponsored speech, and *Tinker* applies to all other student speech).

144. For a discussion on the disputed application of the *Fraser* exception, see *supra*, Part III.

145. 517 F. Supp. 2d 1177, 1190 (C.D. Cal. 2007).

146. The court in *Wolf*, without referencing exception's limitation to school-sponsored speech, interpreted *Kuhlmeier* as permitting censorship of speech inconsistent with the basic educational mission of the school. *Id.* at 1190.

147. See *Morse*, 127 S. Ct. at 2627 ("*Kuhlmeier* does not control this case because no one would

to evaluate, let alone reference, Justice Alito's concurring opinion in *Morse* that rejected the "educational mission" argument. Although the *Wolf* court's desire to defer to the school's judgment is certainly understandable, it is unfortunate that this desire led to the court misinterpreting Supreme Court student speech precedent.<sup>148</sup> The kissing and groping present in *Wolf* obviously was not school-sponsored speech, nor could anyone reasonably believe it bore the imprimatur of the school. To hold otherwise required an application of *Kuhlmeier* and an expansion of the "educational mission" argument that the Supreme Court explicitly rejected in *Morse*.

Another court has reasoned that the *Morse* Court "extended *Fraser* to cover on-campus speech that school administrators could reasonably interpret as advocating the use of drugs."<sup>149</sup> This reasoning is especially startling because the decision in *Morse* was another exception to the general rule of *Tinker*, not an extension of *Fraser*.<sup>150</sup> In discussing the dispute involving the extent of *Fraser*, the majority opinion in *Morse* determined the Court "need not resolve this debate to decide this case."<sup>151</sup> Although there is no direct guidance from the majority opinion as to the proper application of *Fraser*, Justice Alito's concurring opinion is instructive.

Although courts are not bound by Justice Alito's concurring opinion, it is somewhat perplexing how, after reading the opinion, a court would maintain that *Fraser* should be read to permit censorship of student speech that

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reasonably believe that Frederick's banner bore the school's imprimatur.").

148. It is possible that the court in *Wolf* could have avoided the First Amendment question entirely, and the court could have reached the same result without offering its questionable interpretation and application of student speech precedent. In addition to citing *Kuhlmeier*, the *Wolf* court cites to *New Jersey v. T.L.O.* for the proposition that courts should defer to the judgment of schools in the promulgation of rules forbidding specific conduct that school officials have determined to be "destructive of school order or of a proper educational environment." *Wolf*, 517 F. Supp. 2d at 1190 (quoting *New Jersey v. T.L.O.* 469 U.S. 325, 342 n.9 (1985)). The court should have stopped there. The distinction between conduct and speech in the school environment cannot be overemphasized, and it is unfortunate the court did not realize its importance. In *Wolf*, the court would have been justified in deferring to the school's regulation of sexual conduct, such as "French kissing, making out, and groping." Instead, the court predicated its deference to the school on an incomplete interpretation of Supreme Court student speech precedent because it was "not prepared to hold categorically that French kissing, making out, and groping are forms of conduct which the First Amendment does not protect." *Id.* at 1189. By assuming that such sexual conduct is "expressive conduct," the court entered into a flawed First Amendment analysis that needlessly confuses post-*Morse* student speech law.

149. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213 (D. Conn. 2007), *aff'd*, 527, F.3d 41 (2d Cir. 2008) (emphasis added).

150. *See, e.g., DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 643 (D. N.J. 2007) (explaining the *Morse* Court did not interpret the student speech under *Fraser*, but instead decided to "carve out a new, independent exception").

151. *Morse*, 127 S. Ct. at 2626.

interferes with a school's "educational mission." Justice Alito and Kennedy explicitly joined the majority opinion on the basis that it does not endorse this argument.<sup>152</sup> Explaining the problem with the "educational mission" argument, Justice Alito stated, "[t]he 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the First Amendment."<sup>153</sup>

Although some courts have heeded the limitations *Morse* placed on a school's authority to censor student speech,<sup>154</sup> lower courts continue to "broadly interpret[] the scope of the *Morse* ruling and, ironically, the crucial Alito-Kennedy concurrence, to censor speech that has absolutely nothing to do with illegal drug use."<sup>155</sup> The danger in ignoring Justice Alito's proclamation that *Morse* "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use" is that schools may unnecessarily censor student speech. A good example of such censorship, and an application of *Morse* completely at odds with Justice Alito's interpretation of the opinion, is demonstrated in *Zamecnik v. Indian Prairie School District No. 204 Board of Education*.<sup>156</sup>

In *Zamecnik*, the court addressed the speech of students at Neuqua Valley High School (NVHS). Each year since 2003, the Gay/Straight Alliance at NVHS held activities at the school for a "Day of Silence."<sup>157</sup> The Day of Silence is a day intended to protest anti-gay discrimination to convey support for tolerance of gays.<sup>158</sup> Many students involved in the protest wear labels identifying them as Day of Silence Participants, remain silent during the day, and wear shirts in support of the cause.<sup>159</sup> A current and former student of NVHS, Alexander Nuxoll and Heidi Zamecnik respectively, however, professed Christian religious beliefs that condemn homosexual behavior as immoral.<sup>160</sup> In past years, some students promoted a "Day of Truth" to counter

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152. *Id.* at 2637 (Alito, J., concurring).

153. *Id.*

154. *See, e.g.,* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007).

155. Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Speech*, 32 SEATTLE U. L. REV. 1, 3 (2008).

156. *Zamecnik v. Indian Prairie Sch. Dist., No. 07 C 1586*, 2007 WL 4569720 (N.D. Ill. Dec. 21, 2007).

157. *Id.* at \*1.

158. *Id.*

159. *Id.*

160. *Id.*

the Day of Silence.<sup>161</sup> In 2006, Zamecnik remained silent on the day after the Day of Truth, and she wore a t-shirt that read, “Be Happy, Not Gay” on the back.<sup>162</sup> School officials required Zamecnik to cross off “Not Gay” because they “would not voluntarily permit negative statements that are derogatory of homosexuals.”<sup>163</sup> After Zamecnik graduated, Nuxoll filed suit, seeking an injunction that would allow him to present his views opposing homosexuality throughout the school year.<sup>164</sup>

Despite Justice Alito’s strong opposition to the “educational mission” argument in *Morse*, the court in *Zamecnik* reasoned that *Morse* is “not powerfully convincing precedent” that public schools should not be allowed to “take into consideration legitimate pedagogical concerns and the school’s basic educational mission when restricting student speech.”<sup>165</sup> Since it was part of NVHS’s basic educational mission to promote tolerance, the court held that promotion of that mission would be significantly harmed if Nuxoll’s request was granted.<sup>166</sup>

By not heeding Justice Alito’s warning about the “educational mission” argument, a district court permitted a school to take a side on an important and controversial social issue. By applying the “educational mission” argument the court allowed the school in *Zamecnik* to censor speech opposed to homosexuality while allowing student speech favorable to homosexuality. What is striking about the court’s decision in *Zamecnik* is that Justices Alito and Kennedy joined the opinion in *Morse* on the basis that it provided absolutely no support for a result such as the one in *Zamecnik*.<sup>167</sup> It is unfortunate that the *Zamecnik* court’s likely reason for finding *Morse* to be unconvincing precedent for rejection of the “educational mission” argument was its inherent manipulability.

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at \*2.

165. *Id.* at \*6.

166. *Id.* One commentator has argued that censorship of speech similar to Zamecnik’s could be obtained through application of *Tinker*’s second prong, which provides that non-disruptive speech is permitted so long as it doesn’t collide with the rights of others. See Martha McCarthy, *Student Expression that Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 EDUC. L. REP. 1 (2009).

167. See *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring) (“I join the opinion of the Court on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”). See also Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1182874917.shtml> (June 26, 2007, 1:13 p.m.).

## V. CONCLUSION

Courts have struggled with consistently applying Supreme Court student speech precedent. Consistency in application, however, is an important goal that must be achieved in order to ensure efficient operation of public schools. Coexistence of school discipline and freedom of speech for students, not to mention a healthy learning environment, is not attainable without some degree of reliability in interpretations of the Supreme Court's student speech holdings. Unfortunately, the Supreme Court's decision in *Morse* has not had an immediate impact in clarifying the differences of opinion surrounding these cases. The two main disputes, whether *Tinker* only applies to viewpoint-regulations and whether *Fraser* and *Kuhlmeier* provide support for the "educational mission" argument, still fragment the lower courts after *Morse*. Fortunately, the majority opinion and Justice Alito's concurrence offer some hope. A careful reading of these opinions provides the answer to both of these questions: *Tinker* applies to student speech regulations regardless of whether they are viewpoint-based, and it is illogical, unwise, and increases the likelihood of the unconstitutional suppression of student speech to extend *Fraser* and *Kuhlmeier* to support an "educational mission" argument.