

The Supreme Court’s 2007 Decision in *Morse v. Frederick*: The Majority Opinion Revealed Sharp Ideological Differences on Student Speech Rights Among the Court’s Five Justice Majority

JOSHUA AZRIEL, PHD *

Introduction.....	427
II. Recent Commentary on Supreme Court Student Speech Decisions.....	430
III. A Fragmented Court Tackles “BONG HiTS 4 JESUS”	436
A. Support for School Authorities to Set Student Speech Standards:.....	437
B. One Vote to Overturn Tinker:	438
C. Support for the Tinker Standard:.....	441
IV. The Court’s First Student Speech Controversy	443
V. Conclusion.....	449

Introduction

In the last 40 years, the U.S. Supreme Court has issued four decisions on student-speech rights in public schools. Rather than provide an explicit ruling that delineates a free speech framework for students, the Court has approached the issue in a piece meal fashion. In 1968 the Court ruled in *Tinker v. Des Moines* that students do not shed their First Amendment rights at the doors of a school and have a right to political expression.¹ In 1986 the Court in *Bethel v. Fraser* decided that students do not have a constitutional right to utter plainly offensive remarks.² Two years later in *Hazelwood v.*

* Assistant Professor of Communication at Kennesaw State University.

¹ *Tinker v. Des Moines*, 393 U.S. 503 (1969).

² 478 U.S. 675 (1986).

Kuhlmeier it ruled that public school students do not possess an unrestricted freedom of press and speech in curriculum-based school activities.³ In 2007, to further complicate the issue of student speech rights, the Court in *Morse v. Frederick* ruled that students cannot advocate illicit drug use.⁴

The Court's recent decision in *Morse* stemmed from an incident seven and a half years ago when the Olympic Torch Relay traveled through Juneau, Alaska on its way to its final destination in Salt Lake City, Utah for the 2002 Olympic Winter Games.⁵ The relay event made its way past Juneau-Douglas High School (JDHS).⁶ Viewing the torch relay was a sanctioned high school event.⁷ However, the high school's principal, Deborah Morse, granted permission for students to watch the event outside the school building.⁸

As the relay event unfolded across from the high school, JDHS senior Joseph Frederick unfurled a 14 foot banner that proclaimed "BONG HiTS 4 JESUS."⁹ He displayed the banner when the torchbearers and local television camera crews were positioned in front of the high school.¹⁰ Principal Morse immediately confiscated the banner fearing it promoted a pro-drug message.¹¹ Frederick was subsequently suspended for 10 days in violation of an anti-drug Juneau School Board Policy.¹²

The fact that the banner was displayed at an outdoor event off high school property did not matter. A second Juneau School Board Policy states that "pupils who participate in approved social events and class trips" are subject to the

³ 484 U.S. 260 (1988).

⁴ *Morse v. Frederick*, 2007 U.S. LEXIS 8514 (2007).

⁵ *Id.* at *9.

⁶ *Id.*

⁷ *Id.* at *10.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *8.

¹² *Id.* at *11. The policy states, "The Board specifically prohibits any assembly or public expression that advocates the use of substances that are illegal to minors."

same student conduct rules that apply during regular on-campus school events.¹³ Since the high school principal had granted permission for the students to leave the high school building for the school sanctioned viewing of the Olympic torch, high school behavior policies still applied to the outdoor, off campus event.¹⁴

Frederick objected to Principal Morse's actions on free speech grounds. He argued that "BONG HiTS 4 JESUS" was a meaningless message to grab the attention of the television cameras.¹⁵ In other words, it was a high school student's attempt to gain notoriety and be broadcast on television. Frederick filed suit alleging that Principal Morse and the school board violated his First Amendment rights.¹⁶

What Frederick did not realize at the time was that he also unfurled a new First Amendment controversy related to student speech rights. He maintained that he had a constitutional right to express a message that he believed had no obvious or hidden meaning.¹⁷ Frederick insisted that it was not a pro-illegal drug message.¹⁸ Meanwhile, the Juneau School Board, along with Principal Morse, persisted that "BONG HiTS 4 JESUS" was a message intended to promote illicit drug use.¹⁹ In 2007, the U.S. Supreme Court sided with the school board and ruled that student speech rights do not include advocating the use of illegal drugs.²⁰

This article will show that the Court's overall majority in *Morse v. Frederick* was fragmented about the current legal status of student speech rights in public schools. While five Justices agreed that students cannot advocate illicit drug use, within that majority there are three distinct doctrinal

¹³ Juneau School Board Policy No. 5850.

¹⁴ *Id.* at *11.

¹⁵ *Morse*, 2007 U.S. LEXIS 8514, at *16.

¹⁶ *Id.* at *13.

¹⁷ *Id.* at *16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 17.

approaches about student First Amendment speech rights.²¹ This article analyzes the three legal approaches provided by Justices John Roberts, Clarence Thomas, and Samuel Alito. Each of the Justices holds a different perspective on the larger First Amendment issue related to student speech rights in public school. Part Two of this article provides a review of contemporary scholarly analysis of the Court's previous decisions on student speech. Part Three analyzes the majority and concurring opinions in *Morse* and how they reflect distinct legal and philosophical approaches to the speech rights of students. Part Four reviews the Court's previous decisions on speech in public schools beginning with its 1969 *Tinker* decision. It includes an analysis of the *Fraser* and *Kuhlmeier* decisions. The Conclusion, Part Five, argues that in *Morse* the Court has left several unanswered questions about student speech rights. Instead of clarifying the students' First Amendment right to freedom of speech, the Court issued a decision based on specific content.

II. Recent Commentary on Supreme Court Student Speech Decisions

In 2002, Vanderbilt University Law School First Amendment Professors David Hudson and John E. Ferguson wrote that many school administrators actively try to silence student expression deemed controversial or offensive.²² The authors advocated that many courts approve of school administrators limiting students' free speech rights by granting them the room to enforce various speech restrictions.²³ They believed that the result has been a reduced level of constitutional protection for student expression.²⁴

²¹ Chief Justice John Roberts wrote the Court opinion that Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Thomas filed a concurring opinion, and Justice Alito filed a concurring opinion that was joined by Justice Kennedy.

²² David L. Hudson and John E. Ferguson, *A First Amendment Focus: The Courts Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181 (2002).

²³ *Id.* at 182.

²⁴ *Id.*

According to Hudson and Ferguson, despite the strong headway the Court's *Tinker* ruling had on protecting students' rights in 1969, the mid 1980s brought a more conservative U.S. Supreme Court and the "devolution of student's rights."²⁵ With the Court's 1986 ruling in *Fraser* that high school student Matthew Fraser's speech was offensive, the authors pointed out that the Court issued its decision despite the fact that his speech was at a school assembly related to political expression.²⁶ Fraser was nominating a classmate for student government office.²⁷ Hudson and Ferguson said that the lower federal courts have applied the *Fraser* ruling in two ways.²⁸ First, some courts determine whether the speech in question was a part of an official school function such as an assembly.²⁹ If it was, then the courts tend to support school administrators' decision on speech acts before judging whether the speech act itself was offensive.³⁰ Other courts, however, focus on the offensive nature of the speech in question regardless of whether it was expression at a school-sponsored event.³¹ Yet, Hudson and Ferguson pointed out that other federal courts have broadened the prohibition on speech to include offensive ideas.³²

Hudson and Ferguson asked what would happen to students who wear t-shirts to class that says "Censorship Sucks."³³ The authors maintained that the statement on the t-shirt is a classic example of political speech and an affirmation of the value of the First Amendment.³⁴ Yet, school officials might argue that the term is simply inappropriate in the school environment and can be prohibited under *Fraser* as an offensive remark. Hudson and Ferguson argued that the freedom to advocate unpopular and controversial views in

²⁵ *Id.* at 187.

²⁶ *Id.* at 190.

²⁷ *Id.*

²⁸ *Id.* at 191.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 200.

³⁴ *Id.*

schools and classrooms is balanced against society's interest in teaching students the boundaries of socially appropriate behavior.³⁵ Consequently, the boundaries of socially appropriate behavior “trump” any legal protection for expressions of socially and politically important messages.³⁶

In 2002, Attorney Andrew Miller wrote that while school administrators generally try to teach students about constitutional freedoms in the United States, at the same time they also prohibit a great deal of student expression.³⁷ He said the attitude verges on “do as I say, not as I do.”³⁸ Miller also acknowledged that school officials need to maintain discipline because of the proliferation of drugs and violence in schools across the country.³⁹ He said it is a balancing act of allowing students to engage in free expression even if at times that expression is inappropriate.⁴⁰ According to Miller, schools are supposed to teach students about “societal values.”⁴¹

Miller posited that the Court's *Fraser* and *Kuhlmeier* decisions did not overrule *Tinker*. Instead, the two latter decisions defined the preexisting speech limits set forth in *Tinker*.⁴² The Court's *Tinker* decision never provided students with an absolute First Amendment right to free speech.⁴³ The Court said there were limits to student expression when it includes potential disruptions to the classroom environment. Miller pointed out that the *Fraser* decision limited lewd, offensive behavior.⁴⁴ *Kuhlmeier* involved speech that was sponsored by a classroom, curriculum based activity.⁴⁵ Thus, the Court's *Fraser* and *Kuhlmeier* decisions do not redefine *Tinker*. Having written this article prior to the 2007 *Morse v.*

³⁵ *Id.* at 201.

³⁶ *Id.*

³⁷ Andrew Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 625 (2002).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 626.

⁴¹ *Id.*

⁴² *Id.* at 643.

⁴³ *Id.* .

⁴⁴ *Id.*

⁴⁵ *Id.* at 644.

Frederick ruling, Miller concluded, “What remains is student speech that is neither lewd or obscene nor school-sponsored, and this type of speech can be regulated only if the school can pass *Tinker's* substantial and material interference test.”⁴⁶

A similar perspective on student speech is that the U.S. Supreme Court has sanctioned limiting students’ rights at schools in the name of discipline and safety.⁴⁷ In 2003 Attorney Louis Nappen asked what limits on student expression are reasonable, fair, or necessary.⁴⁸ Despite the Court’s *Tinker* ruling, Nappen pointed out courts have been inconsistent in applying *Tinker*, and as a result, students have been punished for political speech. He cited an example from early 2003 when Dearborn Heights, Michigan high school authorities ordered a student to not wear to class an anti-George W. Bush t-shirt that displayed a picture of the President with the words “International Terrorist.”⁴⁹ Nappen used another example from 2002 when a Bensonhurst, New York student was ordered to remove a pin of the Palestinian Flag and was informed that pro-Palestinian stickers were prohibited.⁵⁰ Yet, Nappen said that in that same year, the New Jersey Supreme Court upheld the right of a student to wear a shirt with the image of a Confederate flag.⁵¹ The U.S. Court of Appeals for the Third Circuit ruled that the controversial image of the Confederate flag would not cause an automatic substantial disruption to the school environment.⁵²

Nappen advocated that school officials should consider a student's mens rea as it exists outside the school environment.⁵³ He recommended that school officials should

⁴⁶ *Id.*

⁴⁷ Louis Nappen, *School Safety v. Free Speech: The Seesawing Tolerance Standards for Students' Sexual and Violent Expressions*, 9 TEX. J. C.L. & C.R. 93 (2003).

⁴⁸ *Id.*

⁴⁹ *Id.* at 112.

⁵⁰ *Id.*

⁵¹ See *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 264-69 (3d Cir. 2002).

⁵² *Id.*

⁵³ Nappen, *supra* note 47 at 126.

consider whether students believe their expression might be a problem.⁵⁴ Educators ought to strictly penalize a student only if there is a likelihood of an actual harmful act, not just a symbolic act of speech.⁵⁵

Attorney Justin Peterson in 2005, discussed a case from 1995, involving a student who showed Civil War memorabilia to his friends during lunchtime at a Volusia County, Florida high school.⁵⁶ Wayne Denno showed his friends a four inch by four inch Confederate Flag from his Civil War memorabilia collection. The high school's principal ordered Denno to put it away. Denno sued the school district after he was punished for arguing with the principal. Peterson said the U.S. Court of Appeals for the Eleventh Circuit ruled in favor of the principal's right to punish the student but the court also commented that the Supreme Court's *Tinker* and *Fraser* decisions when analyzed together, were confusing and, therefore, the high school principal did not understand the legal limits to student expression.⁵⁷

Peterson wrote that when reading *Tinker* and *Fraser* together, the Denno case did not involve lewd speech because the Confederate flag, as a symbol, does not contain a sexual message.⁵⁸ From an objective perspective, Peterson said the flag was not outrageously offensive in and of itself because its display can have multiple meanings to different people.⁵⁹ There was also no indication that according to the *Tinker* standard, the display of Denno's flag would have led to a material and substantial disruption to the school in the form of violence.⁶⁰ Peterson also said that nothing in this case indicates that the display of the Confederate flag "retarded"

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Justin Peterson, *School Authority Versus Student's Rights: Is Subjectivity Strangling the Free Mind at Its Source?* 2005 MICH. ST. L. REV. 931, 958 (2005).

⁵⁷ See *Denno v. School Board of Volusia County*, 218 F.3d 1267, 1270 (11th Cir. 2000).

⁵⁸ Peterson, *supra* note 56 at 959.

⁵⁹ *Id.*

⁶⁰ *Id.*

the educational process. There was no history of racial unrest in this incident caused by the flag because it was small in size, four inches by four inches.⁶¹ The student did not affirmatively indicate any racist viewpoints, and Peterson said high school students were of an age to understand the difference between memorabilia and actively affirming a racist position.⁶² Peterson explained that this case is an example of why the Supreme Court needs to provide clarity on student speech rights. The *Fraser* decision “has effectively turned students' rights to free speech into a privilege.”⁶³

In 2007 Jerry Chiang posited that student speech can be restricted under three categories: if it is (1) substantially disruptive, (2) plainly offensive, or (3) school-sponsored.⁶⁴ Chiang noted that the U.S. Supreme Court's *Tinker* decision allowed schools to restrict speech that “substantially” disrupts school discipline or invades the rights of other students.⁶⁵ Essentially, school officials bear the burden of demonstrating that the challenged speech substantially disrupts school discipline or invades the rights of other students.⁶⁶

Chiang said that in *Fraser* the Court granted schools the right to restrict speech that is plainly offensive.⁶⁷ He said the Court did not explicitly define what “plainly offensive” means. Yet, the content, context, and consequence of the speech are three factors that must be taken into consideration to determine if the speech in question is offensive.⁶⁸ When Mathew Fraser used sexually offensive terms at the school assembly, the Court emphasized that not only did his speech take place in a curricular context, but it also had a disruptive

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 977.

⁶⁴ Jerry C. Chiang, *Plainly Offensive Babel: An Analytical Framework For Regulating Plainly Offensive Speech in Public Schools*, 82 WASH. L. REV. 403, 407 (2007).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 409.

⁶⁸ *Id.*

effect on the assembly, as evidenced by other students yelling, gesturing, or appearing confused and embarrassed.⁶⁹

Chiang posited that the Court distinguished *Tinker* from *Fraser* based on the degree of disruption in the school environment.⁷⁰ The Court first acknowledged that different First Amendment analyses were applied in *Tinker* than in *Fraser*. In *Tinker*, the Court required "substantial" disruption, but in *Fraser* the Court discussed the disruption that occurred at the assembly and recognized school officials' ability to prevent speech that would undermine their educational mission.⁷¹ According to Chiang, the Court in *Fraser* did not use the adjective "substantial" or any comparable term to denote the degree of disruption required.⁷² The disruption standard in *Tinker* is a greater threshold for school officials to meet than it is in *Fraser*.⁷³ He concluded that the Court's *Tinker* ruling appeared to impose a higher burden of proof on school officials than it did in *Fraser*.⁷⁴

III. A Fragmented Court Tackles "BONG HiTS 4 JESUS"

In June 2007 the Court, in a five to four vote, ruled that students do not have a constitutional right to display pro-drug use messages.⁷⁵ The majority in *Morse* included two separate concurrences. Chief Justice John Roberts wrote the Court's opinion, but Justices Clarence Thomas and Samuel Alito each wrote a concurring opinion that starkly diverged from Roberts' perspective.

In the majority opinion, the legal philosophy that Chief Justice Roberts advocated is that school boards should set the parameters for student speech rights. This contrasted with Justice Thomas who supported overturning the Court's 1969 *Tinker* decision and posited that First Amendment speech rights do not pertain to students in public schools. Yet Justice

⁶⁹ *Id.* at 411.

⁷⁰ *Id.* at 412.

⁷¹ *Id.* at 414.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Morse*, 2007 U.S. LEXIS 8514.

Alito embraced the third approach that grants students rights to political expression as long as it does not disrupt the classroom or campus environment. He also argued that the special characteristics of the school setting can determine what speech restrictions should be implemented to keep students safe.

A. Support for School Authorities to Set Student Speech Standards:

In the court opinion, Chief Justice Roberts said that the Court's previous *Tinker* and *Fraser* decisions have been at odds with another. While *Tinker* was about the right of students to engage in political speech, Roberts pointed out that in *Fraser* the Court said school boards have the authority to determine what manner of speech in the classroom or school assembly is inappropriate.⁷⁶ He admitted that the two decisions can, therefore, be interpreted as being at odds with one another. Yet, he also seemed to embrace two principles from *Fraser*. The first is that students do not have the same constitutional rights as adults "in other settings."⁷⁷ Secondly, the *Fraser* holding established that the *Tinker* philosophy of students having fundamental speech rights is "not absolute."⁷⁸

The Chief Justice noted that despite the inconsistencies between the two cases, *Morse* was not the opportunity to clarify any overall framework for student speech.⁷⁹ Instead, he approached this case as simply deciding the issue of students advocating the use of illegal drugs based on the *Fraser* doctrine that school boards should determine the appropriate manner of student speech.⁸⁰

In analyzing the facts in *Morse*, Chief Justice Roberts admitted that the message on Frederick's banner could be "cryptic."⁸¹ While many people might interpret "BONG HiTS

⁷⁶ *Id.* at *20-21.

⁷⁷ *Id.* at *21-23.

⁷⁸ *Id.* at *23.

⁷⁹ *Id.*

⁸⁰ *Id.* at *22.

⁸¹ *Id.* at *16.

4 JESUS” as a meaningless message, he wrote that it was also reasonable that the high school’s principal believed that the banner promoted drug use.⁸² He said that “BONG HiTS” could be interpreted as “[Take] bong hits,” “smoke marijuana,” or “use an illegal drug.”⁸³ Alternatively, he noted that the banner could also mean “bong hits [are a good thing]” or “[we take] bong hits.”⁸⁴

Chief Justice Roberts dismissed the possibility that there could be any alternative meanings to the banner. While he stated that a “gibberish” meaning is possible, “dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.”⁸⁵ He agreed with the student, Joseph Frederick, that the banner did not convey a political message about the criminalization of drug use or possession.⁸⁶ Since the banner did not contain a political message, the Chief Justice said that school authorities may restrict student speech that is reasonably viewed as promoting illegal drug use.⁸⁷

B. One Vote to Overturn *Tinker*:

In his concurrence, Justice Thomas wrote that he supported overturning the Court’s 1968 *Tinker* decision eliminating any First Amendment student speech rights.⁸⁸ He did not accept the constitutionality of the *Tinker* holding: “the standard set forth in *Tinker v. Des Moines Independent Community School District*...is without basis in the Constitution.”⁸⁹ Citing the Court’s decisions in *Chaplinsky v. New Hampshire*⁹⁰ and *Cox v. Louisiana*,⁹¹ Thomas said the

⁸² *Id.* at *17

⁸³ *Id.* at *16.

⁸⁴ *Id.*

⁸⁵ *Id.* at *18.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at *34.

⁸⁹ *Id.*

⁹⁰ 315 U.S. 568 (1942). In *Chaplinsky* the Court said there are certain well-defined and narrowly limited areas of speech that could be banned without violating the First Amendment. Speech can be restrained if it is lewd, obscene, profane, libelous, and involves fighting words. Specifically, “fighting words” tend to incite violence and cause injury.

First Amendment does not permit all types of speech.⁹² In his view, there are categories of speech that are outside the boundaries of the First Amendment including student speech.⁹³

Thomas noted, “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”⁹⁴ He posited that if students in 19th Century American public schools had free speech rights, then we would now have a body of jurisprudence supporting their rights.⁹⁵ The Justice’s concurrence included a detailed analysis of the history of public school education in the United States dating as far back as the colonial era.⁹⁶ Thomas said that in early U.S. public schools, teachers did not simply rely on the power of ideas to persuade students; they also relied on discipline to keep an orderly learning environment.⁹⁷

In addition to reviewing the history of behavioral discipline in American public schools, Justice Thomas discussed the legal concept, *in loco parentis*.⁹⁸ Simply stated, this is defined as the supervision of a young adult by an administrative body.⁹⁹ It dates back to English common law and was embraced as part of American law in the early 19th Century.¹⁰⁰ Thomas wrote that *in loco parentis* allowed

⁹¹ 379 U.S. 536 (1965). The Court held that a state or municipality could not require people who wished to disseminate ideas to present them first to police authorities for their consideration and approval.

⁹² *Morse*, 2007 U.S. LEXIS 8514, at *35.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at *32.

⁹⁶ *Id.* Justice Thomas said that “During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand.” He also noted that “...teachers instilled ‘a core of common values’ in students and taught them self control.” *Id.* at *33.

⁹⁷ *Id.* at *35-36.

⁹⁸ *Id.* at *37.

⁹⁹ BLACK’S LAW DICTIONARY 631 (7th ed. 2000).

¹⁰⁰ *Morse* at *37.

schools to regulate student speech.¹⁰¹ He cited two separate cases from the late 19th and early 20th Centuries where state courts upheld restrictions on student speech based on *in loco parentis*.¹⁰² Essentially, it did not impose any restrictions on school authorities to set rules on student conduct including expression.¹⁰³

Justice Thomas said that in his view the Court's *Tinker* decision conflicted with the traditional role the judiciary had in upholding school policies on student behavior that were based on *in loco parentis*.¹⁰⁴ Since that 1969 decision, Thomas believed that the Court recognized its error and has since scaled back its *Tinker* ruling in an ad hoc manner.¹⁰⁵ He wrote that the outcome from *Fraser* was that school authorities can regulate "indecent student speech."¹⁰⁶ Similarly in *Hazelwood v. Kuhlmeier* the Court made another exception to *Tinker* regarding student expression at school sponsored activities.¹⁰⁷ Thomas noted that in *Kuhlmeier* the Court "expressly refused to apply *Tinker's* standard."¹⁰⁸ It had created a new speech standard based on legitimate concerns for the educational process.¹⁰⁹

With the Court's *Morse* decision, Justice Thomas said it created another exception in student speech related to advocating illegal drugs. He said the result is the Court further distancing itself from *Tinker* and causing confusion about the parameters of student speech:

¹⁰¹ *Id.* at *38.

¹⁰² *Id.* at *40. See *Wooster v. Sunderland*, 27 Cal. App. 51 (1915). The California Court of Appeal upheld the expulsion of a student for giving a speech before the student body that criticized the infrastructure of the school building. See also *Deskins v. Gose*, 85 Mo. 485 (1885). The Missouri Supreme Court upheld a school board policy that forbade profanity and fighting as a means of keeping order in the schools.

¹⁰³ *Id.* at *41.

¹⁰⁴ *Id.* at *46.

¹⁰⁵ *Id.* at *47.

¹⁰⁶ *Id.* at *48.

¹⁰⁷ *Id.* *49.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

“I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don’t -- a standard continuously developed through litigation against local schools and their administrators.”¹¹⁰

Thomas maintained that the easiest way to avoid future litigation over student speech rights is for the Court to embrace the philosophy that the Constitution does not afford students any right to free speech in public schools.¹¹¹

C. Support for the Tinker Standard:

While Justice Thomas advocated overturning *Tinker*, Justice Samuel Alito, with whom, Justice Anthony Kennedy joined, said the Court’s holding is narrow:

I join the opinion of the Court on the understanding that (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.’¹¹²

The two Justices embraced the narrow holding of the Court and re-affirmed the *Tinker* position that students have First Amendment speech rights on political and social issues.¹¹³

In Justice Alito’s concurring opinion, he wrote that he voted with the majority on the understanding that the opinion does not mean that public schools do not have any special

¹¹⁰ *Id.* at *49-50.

¹¹¹ *Id.* at *50

¹¹² *Id.* at *55-56.

¹¹³ *Id.* at *56.

characteristics as institutions of learning that automatically justify speech restrictions.¹¹⁴ In a rejection to Thomas's concurrence, Alito advocated that public schools are "organs of the state" and when they regulate student speech, they act as "agents of the state."¹¹⁵ Alito rejected *in loco parentis*, stating that schools "do not stand in the shoes of the students' parents."¹¹⁶ He said that it is a "dangerous fiction" to believe that parents simply delegate their authority to public school authorities about what their children may say and hear.¹¹⁷ Furthermore, Alito said it is wrong to treat public school authorities as private, nongovernmental agents standing *in loco parentis*.¹¹⁸

In determining what the rules on student speech should be, Justice Alito said they must be based on the special characteristic of the school setting.¹¹⁹ School attendance can expose students to threats to their physical safety they might not otherwise face.¹²⁰

He supported the ban against advocating drug use because of the possibility that using drugs could lead to violence against students.¹²¹ Citing the Court's 1969 *Brandenburg v. Ohio*¹²² decision, Justice Alito said that school

¹¹⁴ *Id.* at *57.

¹¹⁵ *Id.* at *59.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *59-60.

¹²⁰ *Id.* at *60.

¹²¹ *Id.*

¹²² 395 U.S. 444 (1969). In a per curiam opinion, the Court ruled in *Brandenburg* that when speech incites to imminent violence, it can be restricted. In that case the Klu Klux Klan in Ohio had advocated violence against the U.S. government in violation of a state ban on criminal syndicalism. In *Brandenburg* the Court provided a three part test to determine when speech loses its First Amendment protection: In the first part of the test, *advocacy* (words that inform an audience about the speaker's hopes and beliefs and might include the "mere abstract teaching" of political reform) is legal. The second part of the *Brandenburg* test is whether words direct or lead to incitement. If they do, then they lack any First Amendment protection. The third part is whether the words lead to an imminent act of violence. The violence must occur nearly immediately

officials “must have greater authority to intervene before speech leads to violence.”¹²³ He noted that in the Court’s 1969 *Tinker* ruling, a “substantial disruption” permits school officials to take action to prevent any violence.¹²⁴

According to Justice Alito, speech advocating illegal drug use poses a threat to student safety that is serious even if it is not immediately obvious.¹²⁵ Illegal drug use can pose a threat to the physical well safety of students.¹²⁶ He remarked this was the reason why he voted with the majority based on a narrow holding.¹²⁷ His support for the majority opinion rested on assurances that student political speech is protected by the First Amendment.¹²⁸

IV. The Court’s First Student Speech Controversy

Nearly 40 years ago prior to its recent *Morse* ruling, the Court first decided the broader issue of student speech rights when two Iowa high school students and one junior high school student wore black armbands in 1965 to protest the Vietnam War.¹²⁹ In *Tinker v. Des Moines Independent Community School District*,¹³⁰ the Court in 1969 ruled that the students had a right to wear the black armbands to protest the Vietnam War as a symbol of free speech as long as their actions did not disrupt the classroom or the school campus at large.¹³¹ Writing for the Court, Justice Abe Fortas stated that

after the actual spoken words or at the speech’s conclusion, meaning “right now.”

¹²³ *Morse*, 2007 U.S. LEXIS 8514, at *61.

¹²⁴ *Id.* at *56.

¹²⁵ *Id.* at *61.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at *54-55.

¹²⁹ *Tinker v. Des Moines*, 393 U.S. 503 (1969). 15 year old John Tinker and 16 year old Christopher Eckhardt attended high school in Des Moines, Iowa. 13 year old Mary Beth Tinker attended junior high school. The three students wore their black armbands on December 16, 1965. All three students were suspended for wearing the armbands.

¹³⁰ 393 U.S. 503 (1969).

¹³¹ *Id.* at 514. The Court stated that the school system imposed the ban on black arm bans because it wanted to avoid the controversy based on the nation’s growing opposition to the Vietnam War. The Court pointed out

neither “students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹³² He explained that a student’s speech rights go beyond classroom activity and extend to the cafeteria, the “playing field,” and other areas of school property.¹³³ Students may engage in political speech as long as they do not interfere with school operations and the rights of other students, faculty, and administrators.¹³⁴

In the opinion, Justice Fortas said that when the students wore the arm bands it was “pure speech.”¹³⁵ They did not cause any actual or potentially disruptive conduct.¹³⁶ He wrote that in order for the state to justify prohibiting a particular expression or opinion, it must be able to show that its action was caused by more than trying to avoid the discomfort that comes with an unpopular or minority viewpoint.¹³⁷ When the students wore the armbands, that action did not interfere with the work of the administration or the students.¹³⁸

Justice Fortas said that when the principals of the Des Moines, Iowa public schools found out about the plan to protest the Vietnam War, they sanctioned the students to avoid controversy about the war.¹³⁹ He wrote that Des Moines school authorities did not prohibit the wearing of all symbols.¹⁴⁰ Students wore buttons related to different political campaigns and parties.¹⁴¹ The school district’s order to ban

that the school never prohibited the wearing of all symbols of political controversy or significance, just the black armbands. It ruled that the school system did not have a constitutionally valid reason to regulate the students’ speech.

¹³² *Id.* at 506.

¹³³ *Id.* at 513.

¹³⁴ *Id.*

¹³⁵ *Id.* at 505.

¹³⁶ *Id.*

¹³⁷ *Id.* at 509.

¹³⁸ *Id.* at 508.

¹³⁹ *Id.* at 510.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

the black armbands, however, did not extend to these other political symbols.¹⁴²

In its decision the Court ruled that banning one form of political expression while not banning others was not constitutionally permissible.¹⁴³ A school cannot ban a form of expression to simply avoid controversy that could result from expression.¹⁴⁴ Controversy does not mean an automatic disruption in the classroom teaching environment.¹⁴⁵

One of the most important parts of the decision is how the Court delineated students' free speech rights. It ruled that state-operated schools were not "enclaves of totalitarianism."¹⁴⁶ In other words, school officials do not possess absolute authority over their students. Justice Fortas explained that under the law students in and out of school are "persons" under the Constitution.¹⁴⁷ The state must respect their fundamental rights and cannot be confined to the expression of sentiments approved by school authorities: "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."¹⁴⁸

Seventeen years after its *Tinker* ruling, the Court again ruled on student speech in *Bethel v. Fraser*.¹⁴⁹ Instead of examining symbolic political speech, the Court in 1986 had to decide if students could utter sexually offensive remarks in school at a sanctioned event. Matthew Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech at a school sanctioned event in which he nominated another student for a position in the school's student government.¹⁵⁰ His speech contained several sexual

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 513.

¹⁴⁶ *Id.* at 511.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 478 U.S. 675 (1986).

¹⁵⁰ *Id.* at 677.

innuendos about his classmate.¹⁵¹ Fraser was suspended for three days in violation of the high school's rule prohibiting the use of obscene language.¹⁵² After his appeal to revoke the suspension was denied, Fraser sued the school alleging his First Amendment right of free speech had been violated.¹⁵³

In a seven to two ruling, the Court upheld the high school's disciplinary decision. Writing for the Court, Chief Justice Warren Burger said schools have the right to determine which expressions are lewd, indecent or offensive.¹⁵⁴ Part of a school's education mission is teaching in an environment that fosters "civil, mature conduct."¹⁵⁵ He wrote that while students have the freedom to advocate unpopular and controversial views in school, classrooms "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."¹⁵⁶

Chief Justice Burger pointed out that what made the Court's ruling in *Fraser* different than in *Tinker* was that Matthew Fraser's expressions were not political viewpoints.¹⁵⁷ The First Amendment does not prevent school administrators from prohibiting lewd and vulgar speech that is contrary to a school's basic educational mission.¹⁵⁸ He noted that a high school assembly or classroom is not the environment suitable for sexually explicit speech directed toward a captive audience.¹⁵⁹

This parallels the Court's 2007 decision in *Morse* where the Court ruled that schools are not the proper venue for

¹⁵¹ *Id.* at 677-78. The speech referred to the student candidate in terms of sexual metaphors such as "he's firm in his pants...his character is firm," "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."

¹⁵² *Id.* The school's rule stated "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

¹⁵³ *Id.* at 679.

¹⁵⁴ *Id.* at 683.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 681.

¹⁵⁷ *Id.* at 685.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

advocating illegal drug use.¹⁶⁰ As in *Morse*, the Court's decision in *Fraser* was narrowly tailored. Its ruling stated that schools have the right to prohibit the use of sexually offensive material in student speeches. It also reaffirmed its support for the 1968 *Tinker* ruling that students' have basic political speech rights.¹⁶¹

In his concurring opinion, Justice William Brennan echoed the narrow holding of the Court. He said that the Court only affirmed the authority of school officials to restrict a high school student's use of disruptive language in a high school assembly.¹⁶² Justice Brennan emphasized that school authorities do not have a "limitless" right to regulate speech.¹⁶³

Two years after its *Fraser* decision, the Court in 1988 decided that student speech, as part of the school's educational curriculum, could be restricted.¹⁶⁴ In *Hazelwood School District v. Kuhlmeier*, the Court ruled that a St. Louis County, Missouri high school principal had the authority to edit his school's newspaper.¹⁶⁵ Since the student newspaper, the *Spectrum*, was a part of the educational curriculum of the Hazelwood East High School, Principal Robert Reynolds did not violate students' First Amendment rights when he pulled two articles from it in May 1988.¹⁶⁶ The *Spectrum* was a part of the curriculum for the high school's Journalism II course.¹⁶⁷ The St. Louis County Board of Education also financially supported the course.¹⁶⁸

¹⁶⁰ 2007 U.S. LEXIS 8514, at *18-19.

¹⁶¹ *Fraser*, 478 U.S. 675 at 681.

¹⁶² *Id.* at 688-89.

¹⁶³ *Id.* at 689.

¹⁶⁴ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 276. Principal Reynolds withheld a story on teenage pregnancy out of concern the identity of the pregnant girls would be known despite the story's use of false names. He also pulled a story about the impact of divorce on a girl's family out of a belief that the parents should have the right to respond to remarks made about them by their daughter. *Id.* at 263.

¹⁶⁷ *Id.* at 262.

¹⁶⁸ *Id.*

In the Court's five to three opinion, Justice William Brennan wrote that since the newspaper was funded by the school board and was part of the high school's curriculum, it was not a forum for uncensored public expression.¹⁶⁹ According to Brennan, public schools may be considered public forums if school authorities have opened the premises for "indiscriminate" use by the general public including student organizations.¹⁷⁰ Since the *Spectrum* was published in a classroom learning environment, the principal had the right to censor it.¹⁷¹

In its opinion, the Court said that classroom educators are entitled to exercise a large amount of control over student speech that is directed to a captive, student-based audience:

A school must be able to set high standards for the student speech that is disseminated under its auspices – standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world – and may refuse to disseminate student speech that does not meet those standards.¹⁷²

With sensitive subject material, Justice Brennan also wrote that schools have the authority to take into account the emotional maturity of the intended student audience.¹⁷³

In an interesting prelude to its *Morse* decision, the Court in *Kuhlmeier* also ruled that schools have the authority to refuse to sponsor student speech that advocates drug or alcohol use.¹⁷⁴ While this statement was related to student run publications or presentations, it, nonetheless, gave the Court precedence for its recent decision in *Morse*. Justice Brennan was also careful to point out in *Kuhlmeier* that the free speech standards the Court established in *Tinker*, which determined

¹⁶⁹ *Id.* at 267.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 271-72.

¹⁷³ *Id.* at 272.

¹⁷⁴ *Id.*

when a school may punish student expression, did not determine when a school may decide to withhold its name and financial resources on curriculum sponsored student speech.¹⁷⁵ He said school administrators are not violating the First Amendment when they exercise “editorial control” over the style and content of student speech in school sponsored “expressive” activities.¹⁷⁶ Brennan noted that editorial control must be related to “legitimate pedagogical concerns.”¹⁷⁷

V. Conclusion

While the facts before the Court differed in *Tinker*, *Fraser*, and *Kuhlmeier*, the Court has consistently said that students have political or “pure” speech rights. It has also restricted students’ speech in areas outside the zone of political speech. It has consistently maintained that any speech that disrupts the classroom or overall school environment can be restricted. That was the Court’s justification in *Fraser*. In *Kuhlmeier*, the Court justified a principal’s right to censor a school newspaper because the publication was not a public forum.¹⁷⁸ As a publication that is part of the school’s curriculum and funded by the school board, it can be censored by school authorities. In *Kuhlmeier*, the Court extended this censorship to school-sponsored student speech that advocates illegal drug use.¹⁷⁹

The Court in *Morse v. Frederick* continued this line of reasoning. While stating that students are entitled to political speech rights, it also ruled that school authorities have the right to prohibit speech that advocates illegal drug use.¹⁸⁰ Chief Justice John Roberts advocated a perspective that school administrators should determine for themselves the best policies to maintain school discipline, including matters related to student expression.¹⁸¹ In his view, Joseph

¹⁷⁵ *Id.* at 272-73.

¹⁷⁶ *Id.* at 273.

¹⁷⁷ *Id.*

¹⁷⁸ 484 U.S. 260 (1988).

¹⁷⁹ *Id.* at 272.

¹⁸⁰ *Morse*, 2007 U.S. LEXIS 8514, at *8.

¹⁸¹ *Id.* at *20.

Frederick's banner, "BONG HiTS 4 Jesus," could be reasonably interpreted to encourage drug use and, therefore, the Juneau School Board had the right to implement policies to safeguard against this danger.¹⁸²

In his concurrence, Justice Samuel Alito with the support of Anthony Kennedy emphasized the narrow holding of the Court's opinion. They clearly said their support for the decision included upholding students' right to express themselves on political or social issues.¹⁸³ For example, the two Justices said they would support student speech that commented on the "drug war" or legalizing marijuana for medicinal use.¹⁸⁴ Both Justices reaffirmed their support for the Court's 1969 *Tinker* ruling that students have fundamental speech rights in public schools on political and social matters.¹⁸⁵

In the other concurring opinion by Justice Clarence Thomas, he supported overturning *Tinker*. He maintained that the First Amendment does not apply to students in public schools based on *in loco parentis*.¹⁸⁶ School administrators and teachers act as substitutes for parents in the school environment, and this includes the need to maintain order and discipline.¹⁸⁷ Justice Thomas wrote that in its *Fraser*, *Kuhlmeier*, and *Morse* decisions the Court has steadily backed away from its support of student expression on political or "pure" speech issues.¹⁸⁸

With the Court's *Fraser*, *Kuhlmeier*, and *Morse* decisions, student speech can be censored if it is offensive, advocates an illegal drug use, and is sponsored by the school either in the classroom or at a school-wide event. Given the Court's last three decisions, it would not be surprising that school administrators could prohibit student speech in other subject areas where students discuss underage drinking,

¹⁸² *Id.* at *19.

¹⁸³ *Id.* at *56.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *44.

teenage sex, and smoking. Students might only be able to discuss these issues in a political context without endangering their free speech rights.

While the Court provided a decision about censoring student expression that supported drug use, the five justice majority did not provide an overall framework for student rights of expression in public schools. It continues to approach this important issue in a viewpoint specific manner. The fragmented nature of its *Morse* ruling does not give any guidance to school administrators about how the First Amendment, in terms of expression, fundamentally applies to students in public schools.