# THE VARIOUS INTERPRETATIONS OF MORSE V. FREDERICK: JUST A DRUG EXCEPTION OR A RETRACTION OF STUDENT FREE SPEECH RIGHTS?

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## I. Introduction—First Amendment Rights Are Different For Students

When a student walks into a school yard or classroom, he or she is still protected by the First Amendment to the United States Constitution. Yet, a student is not afforded the same protection of the First Amendment as an adult is in a public space. Schools are simply different; students have different rights. A high school student in the classroom does not have the same rights as an adult on a public sidewalk. "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." With the recent case of *Morse v. Frederick* the United States Supreme Court flooded this foggy area of law with even more unanswered questions and ambiguity.

The speech rights of students in schools have changed several times since the first Supreme Court decision on this issue. The Court announced *Tinker v. Des Moines Independent Community School District*<sup>7</sup> in 1969, and held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Since then, student speech

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<sup>&</sup>lt;sup>1</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

<sup>&</sup>lt;sup>2</sup> See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

<sup>&</sup>lt;sup>3</sup> See, e.g., id.

<sup>&</sup>lt;sup>4</sup> See id.

<sup>&</sup>lt;sup>5</sup> *Id*.

<sup>6 127</sup> S. Ct. 2618 (2007).

<sup>&</sup>lt;sup>7</sup> 393 U.S. 503 (1969).

<sup>&</sup>lt;sup>8</sup> Id. at 506.

has become a controversial topic in the First Amendment realm. Following *Tinker* the Supreme Court announced two other opinions prior to *Morse*, both of which placed limitations on *Tinker*'s holding. <sup>10</sup>

Most recently, in *Morse*, the Court sided with the school, rejecting a student's First Amendment challenge.<sup>11</sup> In *Morse*, a group of high school students displayed a banner at a school-sponsored event.<sup>12</sup> The banner contained the following message: "BONG HiTS 4 JESUS."<sup>13</sup> When the principal noticed the banner, she immediately instructed the students to take it down.<sup>14</sup> All of the students complied except one senior, petitioner Frederick, who refused.<sup>15</sup> The principal suspended Frederick, and the superintendent and school board upheld her decision.<sup>16</sup> Frederick filed suit, claiming a violation of his First Amendment right to free speech.<sup>17</sup> The Supreme Court held, in a 5-4 decision, that the principal did not violate Frederick's First Amendment rights.<sup>18</sup>

This note discusses the significance of *Morse v. Frederick*. The Court stepped away from the original *Tinker* doctrine and limited a student's

<sup>&</sup>lt;sup>9</sup> See Melinda Cupps Dickler, The Morse Quartet: Student Speech and the First Amendment, 53 Loy. L. Rev. 355, 356–59 (2007) (discussing the various views of commentators).

<sup>&</sup>lt;sup>10</sup> See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) ("[T]he standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986) (There exists a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case . . . ."); see also infra Part II.

<sup>11</sup> Morse, 127 S. Ct. at 2629.

<sup>&</sup>lt;sup>12</sup> *Id.* at 2622.

<sup>&</sup>lt;sup>13</sup> *Id*.

<sup>&</sup>lt;sup>14</sup> *Id*.

<sup>&</sup>lt;sup>15</sup> *Id*.

<sup>&</sup>lt;sup>16</sup> Id. at 2622–23.

<sup>&</sup>lt;sup>17</sup> *Id.* at 2623.

<sup>&</sup>lt;sup>18</sup> *Id.* at 2629. Writing for the majority, Chief Justice Roberts held that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (citation omitted).

right to freedom of expression. <sup>19</sup> Yet, the meaning of its holding is unclear. The Court permitted a principal to restrict a student's speech while the student was on school grounds, <sup>20</sup> but the multitude of plausible readings of the *Morse* opinion leaves questions unanswered. Did the Court simply create a drug exception, or did the *Morse* facts fit within the exception already established in *Tinker*?

This article summarizes the *Morse* decision and its implications. First, the background section analyzes previous student speech cases that came before *Morse v. Frederick*. The discussion and analysis sections look specifically at *Morse*, detailing its facts and holding. Further, the discussion compares the dissenting opinion to the majority's holding. Finally, the analysis will scrutinize the opinion, evaluate each plausible reading, and consider *Morse*'s impact on the way federal courts approach student speech cases.

#### II. BACKGROUND

A. Tinker and Its Legacy—The Supreme Court Established a Student's Right to Free Speech and Announced the First Exception to Free Speech in Schools

The *Tinker* case is at the forefront of student speech doctrine.<sup>21</sup> *Tinker* was a ground breaking case in which the United States Supreme Court recognized a student's constitutional rights on school grounds.<sup>22</sup> *Tinker* upheld free speech rights for students,<sup>23</sup> but it did *not* expressly hold that these rights are co-extensive with the First Amendment rights of adults.<sup>24</sup>

The conflict in *Tinker* arose during the Vietnam War.<sup>25</sup> High school students protested the war by wearing black arm bands during school hours.<sup>26</sup> Administrators at the high schools learned of the plan prior to the

<sup>&</sup>lt;sup>19</sup> *Id*.

<sup>&</sup>lt;sup>20</sup> Id. at 2625.

<sup>&</sup>lt;sup>21</sup> See Andrew D.M. Miller, Balancing School Authority and Student Expression, 54 BAYLOR L. REV. 623, 626 (2002).

<sup>&</sup>lt;sup>22</sup> See Tinker, 393 U.S. at 506.

<sup>&</sup>lt;sup>23</sup> See id.

<sup>&</sup>lt;sup>24</sup> See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); *Tinker*, 393 U.S. at 514–15 (Stewart, J., concurring).

<sup>&</sup>lt;sup>25</sup> Tinker, 393 U.S. at 504 (majority opinion).

<sup>&</sup>lt;sup>26</sup> Id.

students' implementation of it.<sup>27</sup> In an attempt to preempt the students' plan the schools adopted a policy that prohibited armbands on school grounds.<sup>28</sup> When the students wore the armbands to class, the principals sent them home on suspension until they returned without the armbands.<sup>29</sup> In response, the students filed a complaint with the United States District Court, claiming a First Amendment violation.<sup>30</sup> The Supreme Court ruled in favor of the students, holding:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.<sup>31</sup>

*Tinker* recognized an exception to free speech for students: Students maintain their rights to free speech unless the speech "materially and substantially interfere[s]" with the school.<sup>32</sup>

B. Second Exception—In Fraser, the Court Distinguished Tinker and Allowed a School to Censor "Lewd and Vulgar" Speech

In 1986, the Supreme Court decided *Fraser*, another student speech case, in which it distinguished *Tinker* and introduced another speech restriction.<sup>33</sup> *Fraser* dealt with student speech at a school assembly.<sup>34</sup> The

<sup>&</sup>lt;sup>27</sup> *Id*.

<sup>&</sup>lt;sup>28</sup> *Id*.

<sup>29</sup> Id

<sup>&</sup>lt;sup>30</sup> *Id.* at 504–05. The students filed the complaint under 42 U.S.C § 1983, which allows an individual to bring a claim alleging that a constitutional right has been violated. *Tinker*, 393 U.S. at 504; *see also* 42 U.S.C. § 1983 (2000).

<sup>&</sup>lt;sup>31</sup> *Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>&</sup>lt;sup>32</sup> *Id*.

<sup>&</sup>lt;sup>33</sup> Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

<sup>&</sup>lt;sup>34</sup> *Id.* at 677–78.

student, in the process of nominating a friend for a student elective office, "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." The assistant principal suspended the student, a decision upheld by the school district. In response, the student filed suit, asserting a First Amendment violation. 37

In applying *Tinker* to these facts, the Court held that the school district did *not* violate the student's First Amendment rights.<sup>38</sup> The Court distinguished *Fraser* from *Tinker*: "Unlike the sanctions . . . in *Tinker*, the penalties imposed in [*Fraser*] were unrelated to any political viewpoint." The Court further stated, "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission." This exception permits principals and school administrators to limit student speech that is "vulgar and lewd."

The *Fraser* opinion was heavily criticized.<sup>42</sup> Critics focus on the lack of clarity in the Court's description of what constitutes "lewd and vulgar":

Bethel adds a murky category to the kinds of student speech that may be constitutionally prohibited. By ruling that lewd and indecent student speech will receive no [F]irst [A]mendment protection even without a distinct showing of material disruption and substantial interference, the Supreme Court established an elusive standard of impermissible student speech. 43

As will be seen in the coming pages, more exceptions to the *Tinker* doctrine followed *Fraser*. While *Tinker* remains "good law" in the sense that it has not been overturned, the Court continues to carve out exceptions to a student's right to free speech.

<sup>&</sup>lt;sup>35</sup> *Id*.

<sup>&</sup>lt;sup>36</sup> *Id.* at 678–79.

<sup>&</sup>lt;sup>37</sup> *Id.* at 679.

<sup>&</sup>lt;sup>38</sup> *Id.* at 685.

<sup>&</sup>lt;sup>39</sup> *Id*.

<sup>&</sup>lt;sup>40</sup> *Id*.

<sup>41</sup> Id.

<sup>&</sup>lt;sup>42</sup> See, e.g., Sara Slaff, Note, Silencing Student Speech: Bethel School District No. 403 v. Fraser, 37 Am. U. L. REV. 203, 221–22 & n.151 (1987).

<sup>&</sup>lt;sup>43</sup> *Id.* at 221–22 (footnotes omitted).

C. Third Exception—In Hazelwood the Court Distinguished Between School-Sponsored Speech and School-Tolerated Speech

After *Fraser*, the Supreme Court further distinguished *Tinker* in *Hazelwood School District v. Kuhlmeier*.<sup>44</sup> In *Hazelwood*, school officials deleted two student-authored stories from a school newspaper prior to publication.<sup>45</sup> One article described "students' experiences with pregnancy," while the other story dealt with divorce and its impact on students at the school.<sup>46</sup> The students sued the school, arguing it wrongfully restricted their rights to free speech.<sup>47</sup>

The Court in *Hazelwood* distinguished the case from *Tinker*. <sup>48</sup> Justice White, writing for the majority, created a new method of analysis. <sup>49</sup> He noted the difference between school-sponsored speech and school-tolerated speech, and he ruled that each ought to be subject to a different standard. <sup>50</sup> In *Tinker*, the schools attempted to limit a student's ability to portray his or her own beliefs. <sup>51</sup> In *Hazelwood*, the school did not limit a student's own expression, but instead limited a student's expression in a school-sponsored forum—the school newspaper. <sup>52</sup> The Court held that schools have *more control* over student speech when it is "school-sponsored" speech. <sup>53</sup> The Court stated:

[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a

<sup>&</sup>lt;sup>44</sup> 484 U.S. 260 (1988).

<sup>&</sup>lt;sup>45</sup> *Id.* at 262.

<sup>&</sup>lt;sup>46</sup> *Id.* at 263.

<sup>&</sup>lt;sup>47</sup> *Id.* at 264.

<sup>&</sup>lt;sup>48</sup> *Id.* at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech... is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.").

<sup>&</sup>lt;sup>49</sup> See id. at 270-73.

<sup>&</sup>lt;sup>50</sup> *Id.* at 270–71.

<sup>&</sup>lt;sup>51</sup> *Id.* (*Tinker* involved "educators' ability to silence a student's personal expression that happens to occur on the school premises.").

<sup>&</sup>lt;sup>52</sup> *Id.* (*Hazelwood* involved "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.").

<sup>&</sup>lt;sup>53</sup> Id

school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.<sup>54</sup>

The Court created two different rules for student speech. First, under the *Tinker* doctrine, if a school is merely tolerating the speech, then school administrators may *not* engage in viewpoint discrimination.<sup>55</sup> However, if the school sponsors the student's speech, the school has much more control, and the school *can* engage in viewpoint discrimination.<sup>56</sup> In the context of school-sponsored speech, the school may engage in viewpoint speech discrimination "so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>57</sup>

Read together, *Tinker*, *Fraser*, and *Hazelwood* established three exceptions to the general rule of free speech. Recently, the Second Circuit described the rules set out in the three decisions as follows:

We distill the following from *Tinker*, *Fraser*, and *Hazelwood*: (1) schools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent or plainly offensive speech; (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns"; and (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it

<sup>&</sup>lt;sup>54</sup> *Id.* at 272–73 (footnote omitted).

<sup>&</sup>lt;sup>55</sup> See id. at 270–71.

<sup>&</sup>lt;sup>56</sup> Id.

<sup>&</sup>lt;sup>57</sup> *Id.* at 273.

would materially and substantially disrupt classwork and discipline in the school.<sup>58</sup>

D. Critiques of the Supreme Court's Holdings on Student Speech Rights Leading up to the Morse Decision—How Fraser and Hazelwood Fail to Uphold a Student's First Amendment Right to Freedom of Speech

Some scholars criticize the *Hazelwood* Court's refusal to follow *Tinker*. <sup>59</sup> Others argue that in the Supreme Court's only considerations of student speech since *Tinker—Fraser* and *Hazelwood*—the Court essentially eliminated a student's right to First Amendment protection. <sup>60</sup>

In her Law Review Note, Shari Golub criticized the Court in *Hazelwood*. She argued that when the Court failed to follow *Tinker*, "the *Hazelwood* majority not only broke with applicable precedent, but also failed to give any weight to high school students' constitutional right to freedom of expression." Golub also outlined several cases since *Tinker*, all involving Constitutional rights for students. She noted *New Jersey v. T.L.O.*, where the Court limited the effect of the Fourth Amendment in schools. The *T.L.O.* Court held that the school does not need a warrant to search a student on school grounds. Then, Golub pointed to *Fraser*. Then, Golub pointed to *Fraser*.

<sup>&</sup>lt;sup>58</sup> Guiles *ex rel*. Guiles v. Marineau, 461 F.3d 320, 325 (2d Cir. 2006) (citations omitted).

<sup>&</sup>lt;sup>59</sup> See, e.g., Shari Golub, Note, Tinker to Fraser to Hazelwood—Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights: Hazelwood School Dist. v. Kuhlmeier, 38 DEPAUL L. REV. 487, 504–05 (1989) (The Hazelwood Court "conveniently evaded" the "appropriate balance" struck by the Tinker Court.).

<sup>&</sup>lt;sup>60</sup> See, e.g., Erwin Chemerinsky, Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?, 48 DRAKE L. REV. 527, 545 (2000) (Tinker's "themes have been totally absent from subsequent Supreme Court decisions...involving student speech.").

<sup>&</sup>lt;sup>61</sup> Golub, *supra* note 59, at 504–10.

<sup>&</sup>lt;sup>62</sup> *Id.* at 504.

<sup>&</sup>lt;sup>63</sup> *Id.* at 514.

<sup>&</sup>lt;sup>64</sup> 469 U.S. 325 (1985).

<sup>&</sup>lt;sup>65</sup> Golub, *supra* note 59, at 514 (citing *T.L.O.*, 469 U.S. at 341–42).

<sup>&</sup>lt;sup>66</sup> T.L.O., 469 U.S. at 340.

<sup>&</sup>lt;sup>67</sup> Golub, *supra* note 59, at 514 (noting "that school officials could discipline students for language the officials deemed offensive in the school setting").

Finally, Golub noted that the Court's holding in *Hazelwood* took another step away from *Tinker*. <sup>68</sup>

Both *Fraser* and *Hazelwood* limited the holding in *Tinker*. <sup>69</sup> "The Court... essentially nullified the broad constitutional rights of students which were delineated in *Tinker*." Erwin Chemerinsky compares *Hazelwood* and *Fraser* to the dissenting opinion in *Tinker*: "[*Fraser*] and *Hazelwood* are far more similar to Justice Black's dissent in *Tinker* which stresses the minimal protection for student speech and the need for great judicial deference to the expertise and authority of school officials." The Court did not overturn *Tinker* in either case, <sup>72</sup> but student free speech has less protection after *Fraser* and *Hazelwood*.

### III. DISCUSSION AND ANALYSIS

Since *Tinker*, *Fraser*, and *Hazelwood*, the Supreme Court announced another decision on student speech rights. In June of 2007, the Supreme Court, as it did in *Fraser* and *Hazelwood*, ruled in favor of the school, and allowed a principal to restrict a student's speech.<sup>74</sup> Writing for the majority, Chief Justice Roberts held that a school can permissibly restrict a student's speech when that speech promotes illegal drug use.<sup>75</sup> Yet, as will be explained, <sup>76</sup> the rule established by *Morse* is ambiguous and permits several plausible readings.

A. Discussion—A School Can Censor Student Speech That Promotes Illegal Drug Use

This section discusses the relevant facts and procedural history in *Morse*. Further, it outlines each opinion, including the concurring and dissenting opinions.

<sup>&</sup>lt;sup>68</sup> *Id.* ("The [*Hazelwood*] Court has essentially nullified the broad constitutional rights of students which were delineated in *Tinker*.").

<sup>&</sup>lt;sup>69</sup> See discussion supra Parts II.B, II.C.

<sup>&</sup>lt;sup>70</sup> Golub, *supra* note 59, at 514.

<sup>&</sup>lt;sup>71</sup> Chemerinsky, *supra* note 60, at 539.

<sup>&</sup>lt;sup>72</sup> See id. at 529 ("Tinker has never been overruled by the Court.").

<sup>&</sup>lt;sup>73</sup> Golub, *supra* note 59, at 514 ("The *Hazelwood* decision marks [another] step in the Supreme Court's obliteration of students' [F]irst [A]mendment rights.").

<sup>&</sup>lt;sup>74</sup> Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).

<sup>&</sup>lt;sup>75</sup> Id.

<sup>&</sup>lt;sup>76</sup> See infra Part III.B.2.

### 1. The Relevant Facts—"BONG HiTS 4 JESUS"

On January 24, 2002 (the year of the Winter Olympics in Salt Lake City, Utah), the torch relay passed through the city of Juneau, Alaska.<sup>77</sup> The torch was scheduled to pass Juneau-Douglas High School (JDHS) while school was in session.<sup>78</sup> The principal, Deborah Morse, allowed the staff and students of the high school to participate in the relay event.<sup>79</sup> The event was considered a school-sponsored event.<sup>80</sup> Morse permitted students and staff to leave the building to watch the relay in front of the high school.<sup>81</sup> "Teachers and administrative officials monitored the student[s]" during the relay event.<sup>82</sup>

Joseph Frederick was a senior at the high school when the event took place. <sup>83</sup> Upon his late arrival to school, Frederick "joined his friends . . . across the street from the school to watch the [relay]." <sup>84</sup> When torch bearers and camera crews went past the students' portion of the street, "Frederick and his friends unfurled a [fourteen]-foot banner bearing the phrase: 'BONG HiTS 4 JESUS.'" <sup>85</sup>

Principal Morse reacted to the banner, and instructed the students to take it down immediately. Each student complied with her command, except for Frederick, who refused. When Frederick failed to comply with the Morse's direction, the principal confiscated the banner and gave Frederick a ten-day suspension from school. The superintendent upheld the suspension, but shortened it from ten days to eight days. The school board upheld the superintendent's decision. Frederick then filed suit in

<sup>&</sup>lt;sup>77</sup> Morse, 127 S. Ct. at 2622.

<sup>&</sup>lt;sup>78</sup> *Id*.

<sup>&</sup>lt;sup>79</sup> *Id*.

<sup>80</sup> *Id*.

<sup>&</sup>lt;sup>81</sup> *Id*.

<sup>&</sup>lt;sup>82</sup> *Id*.

<sup>&</sup>lt;sup>83</sup> *Id*.

<sup>&</sup>lt;sup>84</sup> Id.

<sup>85</sup> *Id.* (emphasis added).

<sup>&</sup>lt;sup>86</sup> Id.

<sup>&</sup>lt;sup>87</sup> *Id*.

<sup>&</sup>lt;sup>88</sup> Id.

<sup>&</sup>lt;sup>89</sup> *Id.* at 2623.

<sup>&</sup>lt;sup>90</sup> Id.

the United States District Court for the District of Alaska. <sup>91</sup> In his complaint against the school board and principal Morse, Frederick claimed a violation of his First Amendment rights. <sup>92</sup>

2. United States District Court for the District of Alaska—Fraser's Application without Lewd Speech

At the district court level, Morse and the school board successfully filed for summary judgment. The defendants argued three versions of immunity. First, the defendants maintained that they were immune from damages under 42 U.S.C. § 1983 under the doctrine of qualified immunity. Second, the defendants argued that they were immune from liability under Alaska Law due to section 14.33.140 of the Alaska Statutes, which grants immunity to school officials. Third, they asserted that the school board was immune from punitive damages as a unit of local government. Furthermore, the defendants maintained that Morse did not violate Frederick's First Amendment rights.

Under the doctrine of qualified immunity, a government official has immunity while performing discretionary functions if his or her "conduct does not violate clearly established statutory or constitutional rights . . . ." Therefore, the defendants argued, in accordance with the Court's holding in *Fraser*, that the school was permitted to hinder speech if it intruded upon the work of the schools. The district court agreed with this argument, holding that "Morse reasonably believed that she could and should suppress speech that encourages drug use among students in light of the decision in *Fraser* and the Board's policies prohibiting such

<sup>&</sup>lt;sup>91</sup> *Id.*; Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689 (D. Alaska May 29, 2003), *vacated*, 439 F.3d 1114 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

<sup>&</sup>lt;sup>92</sup> *Morse*, 2003 WL 25274689, at \*1. Frederick sought "declaratory and injunctive relief, unspecified compensatory damages, and punitive damages...." *Id*.

<sup>&</sup>lt;sup>93</sup> *Id.* at \*6.

<sup>&</sup>lt;sup>94</sup> *Id.* at \*2–3.

<sup>&</sup>lt;sup>95</sup> *Id.* at \*2 (citing 42 U.S.C. § 1983 (2000)).

<sup>&</sup>lt;sup>96</sup> *Id.* at \*3 (citing ALASKA STAT. § 14.33.140 (2003)).

<sup>&</sup>lt;sup>97</sup> Id.

<sup>&</sup>lt;sup>98</sup> *Id.* at \*4.

<sup>&</sup>lt;sup>99</sup> *Id.* at \*2.

<sup>&</sup>lt;sup>100</sup> Id.

language." <sup>101</sup> The court granted summary judgment on the school's qualified immunity. <sup>102</sup>

Moreover, the court granted summary judgment on the school's immunity under Alaska law. The Alaska District Court spent little time discussing immunity under Alaska law, as the terms of the statute clearly applied to this situation. The court also upheld the defendants' third immunity argument, and the school board was not held liable for punitive damages. The court also upheld liable for punitive damages.

Next the district court addressed whether Frederick's speech was protected by the First Amendment. Because Frederick intended to convey a message, the court considered the speech protected. While the speech was protected speech, the district court granted summary judgment in favor of the defendants because it determined that the school rightfully suppressed Frederick's speech.

Frederick urged the district court to apply *Tinker*.<sup>109</sup> The defendants, on the other hand, advised the court to use *Fraser*.<sup>110</sup> The court sided with the defendants and applied *Fraser*, holding that "this is not a case like *Tinker* where students chose to make a statement of personal opinion that

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<sup>101</sup> Id.
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A teacher, teacher's assistant, a principal, or another person responsible for students is not liable for civil damage resulting from an act or omission (1) arising out of enforcement of an approved school disciplinary and safety program . . . and (2) arising out of and in the course of employment unless the act or omission constitutes gross negligence or reckless or intentional misconduct.

Alaska Stat. § 14.33.140 (2003).

 $^{105}$  Morse, 2003 WL 25274689, at \*3 (noting that a unit of government is immune from punitive damages, and that Frederick failed to name the individual members of the school board when he originally filed suit).

<sup>&</sup>lt;sup>102</sup> *Id.* at \*3.

<sup>&</sup>lt;sup>103</sup> *Id*.

<sup>&</sup>lt;sup>104</sup> Id. The Alaska Immunity Statute reads as follows:

<sup>&</sup>lt;sup>106</sup> *Id.* at \*4.

<sup>&</sup>lt;sup>107</sup> Id. at \*4 & n.28.

<sup>&</sup>lt;sup>108</sup> *Id.* at \*5–6.

<sup>&</sup>lt;sup>109</sup> *Id.* at \*4–5.

<sup>&</sup>lt;sup>110</sup> *Id*.

was unrelated to the school's mission. To the contrary, Frederick's statements directly contravened the Board's policies relating to drug abuse prevention." While Frederick tried to argue that *Fraser* only applied to lewd and vulgar speech, the district court refused to sustain this argument. The court maintained that it was up to the school to decide what constitutes inappropriate speech. Frederick appealed this decision to the Ninth Circuit. 114

### 3. The Ninth Circuit Attempted to Put Life Back into Tinker

The Ninth Circuit strongly and expressly overturned the District Court's holding and analysis. The appellate court articulated the key issue as "whether a school may, in the absence of concern about disruption of educational activities, publish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school." The court immediately answered this question: "The answer under controlling, long-existing precedent is plainly 'No."

The Ninth Circuit applied *Tinker* in holding that the principal violated Frederick's First Amendment right to free speech. The appellate court

There is no requirement that the speaker intend the message as one that violates school policy or that all the students understand it in that fashion. Rather, the determination of an administrator that a particular statement is in violation of school policy is generally not scrutinized so long as the administrator's interpretation is reasonable.

Id.

<sup>&</sup>lt;sup>111</sup> *Id.* at \*5 (footnote omitted).

<sup>&</sup>lt;sup>112</sup> *Id*.

<sup>&</sup>lt;sup>113</sup> *Id.* The District Court wrote:

<sup>&</sup>lt;sup>114</sup> Frederick v. Morse, 439 F.3d 1114, 1117 (9th Cir. 2006), *vacating* No. J 02-008 CV(JWS), 2003 WL 25274689 (D. Alaska May 29, 2003), *rev'd* 127 S. Ct. 2618 (2007).

<sup>&</sup>lt;sup>115</sup> *Id.* at 1117–20, 1123.

<sup>&</sup>lt;sup>116</sup> *Id.* at 1118.

<sup>&</sup>lt;sup>117</sup> Id.

<sup>&</sup>lt;sup>118</sup> See id. The Court emphasized that "[u]nder *Tinker*, a school cannot censor or punish students [sic] speech merely because the students advocate a position contrary to government policy." *Id*.

refused to apply *Fraser* or *Hazelwood*, finding them distinguishable. In *Fraser*, as was discussed above, the Supreme Court permitted schools to hinder student speech when such speech was "vulgar and lewd." The Ninth Circuit distinguished *Fraser* from these facts because the banner was not of a sexual nature. Moreover, the court noted that the speech in *Morse* was closer to political speech. The appellate court also distinguished *Hazelwood*, the student newspaper case. Here, the facts did not align with *Hazelwood* because the school was not promoting the student's viewpoint in any way. The Ninth Circuit noted that, had Frederick insisted on making this banner in an art class, then *Hazelwood* would likely have applied, and the school might have permissibly limited his speech.

The Ninth Circuit aligned with the Supreme Court's holding in *Tinker*, stating:

Leaving [Hazelwood] out of the analysis, because no sponsorship or curricular activity was involved, the question is how far Tinker goes to protect such student speech as Frederick's, and how far Fraser goes to protect school authority to censor and punish student speech that 'would undermine the school's basic educational mission.' There has to be some limit on the school's authority to define its mission in order to keep Fraser consistent with the bedrock principle of Tinker that students do not 'shed

<sup>&</sup>lt;sup>119</sup> Id. at 1118–20.

<sup>&</sup>lt;sup>120</sup> See supra notes 40–41 and accompanying text.

<sup>&</sup>lt;sup>121</sup> Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

<sup>122</sup> Morse, 439 F.3d at 1119.

<sup>&</sup>lt;sup>123</sup> *Id.* (noting that the issue of marijuana legalization is in constant contention in the state of Alaska).

<sup>&</sup>lt;sup>124</sup> *Id.* In *Hazelwood*, the Supreme Court distinguishes between school-sponsored speech and school-tolerated speech; the Court gives more deference to school officials when the speech is actually sponsored by the school. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988); *see also supra* notes 48–50 and accompanying text.

<sup>&</sup>lt;sup>125</sup> Morse, 439 F.3d at 1119.

<sup>&</sup>lt;sup>126</sup> *Id*.

their constitutional rights to freedom of speech or expression at the schoolhouse gate. 127

4. The Supreme Court Announced a Fragmented Opinion, Took Another Step Away from Tinker, and Gave Little Direction to Future Courts

The Supreme Court overturned the Ninth Circuit and sided with the principal. The majority opinion held that the principal did not violate Frederick's First Amendment rights. Chief Justice Roberts wrote for the majority, joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Thomas filed a concurring opinion. Justice Alito filed a concurring opinion in which Justice Kennedy joined. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Stevens wrote for the dissent, and was joined by Justices Souter and Ginsburg.

The Court granted certiorari on two key issues. First, the Court considered whether Morse violated Frederick's First Amendment rights when she forced him to take down the banner. The majority failed to consider the second issue—whether or not she was immune under the doctrine of qualified immunity. Instead, Roberts announced that Frederick did not have a First Amendment right to display the banner at a school event.

<sup>&</sup>lt;sup>127</sup> *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

<sup>&</sup>lt;sup>128</sup> Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).

<sup>129</sup> Id. at 2624.

<sup>130</sup> Id. at 2621-22.

<sup>&</sup>lt;sup>131</sup> Id. at 2629 (Thomas, J., concurring).

<sup>&</sup>lt;sup>132</sup> Id. at 2636 (Alito, J., concurring).

<sup>&</sup>lt;sup>133</sup> Id. at 2638 (Breyer, J., concurring in part, dissenting in part).

<sup>&</sup>lt;sup>134</sup> *Id.* at 2643 (Stevens, J., dissenting).

<sup>&</sup>lt;sup>135</sup> Id. at 2624 (majority opinion).

<sup>&</sup>lt;sup>136</sup> Id. at 2625

<sup>&</sup>lt;sup>137</sup> *Id.* at 2624 ("We resolve the first question against Frederick, and therefore have no occasion to reach the second.").

<sup>&</sup>lt;sup>138</sup> Id. at 2621–22.

a. Roberts, Scalia, Kennedy, Thomas, and Alito Join in the Majority, Holding that the Principal Did Not Violate the Student's First Amendment Right to Free Speech

Chief Justice Roberts delivered the opinion of the Court. <sup>139</sup> Roberts outlined the progression of school speech cases (*Tinker*, *Fraser*, *Hazelwood*). <sup>140</sup> He reiterated *Tinker*'s rule: "that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school." Roberts then proceeded to use *Tinker* in his analysis. <sup>142</sup> However, he expressly held that the *Morse* facts did not fall under *Fraser* <sup>143</sup> or *Hazelwood*. <sup>144</sup> Roberts refused to extend *Fraser*'s "vulgar and lewd" exception to anything that may be considered "offensive." Moreover, he held that *Hazelwood* "does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur."

Most important to Roberts was the fact that the banner arguably promoted illegal drug use. The Court recognized that the banner may be viewed in two different ways. The Court maintained, however, that both interpretations convey a "pro-drug" message. First, the banner could be viewed as promoting drug use: "[Take] bong hits...." On the other hand, it could be construed as a celebratory message. Again, either way

<sup>&</sup>lt;sup>139</sup> *Id*.

<sup>&</sup>lt;sup>140</sup> Id. at 2625–27.

<sup>&</sup>lt;sup>141</sup> *Id.* at 2626 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

<sup>&</sup>lt;sup>142</sup> Id. at 2629.

<sup>&</sup>lt;sup>143</sup> *Id.* at 2929.

<sup>144</sup> Id. at 2627.

<sup>&</sup>lt;sup>145</sup> *Id.* at 2629.

<sup>&</sup>lt;sup>146</sup> *Id.* at 2627.

<sup>&</sup>lt;sup>147</sup> Id. at 2628–29.

<sup>&</sup>lt;sup>148</sup> Id. at 2625.

<sup>&</sup>lt;sup>149</sup> *Id*.

<sup>&</sup>lt;sup>150</sup> *Id*.

<sup>&</sup>lt;sup>151</sup> *Id*.

the Court looked at the banner, it concluded that the message promoted illegal drug use. 152

Roberts held that neither the school board nor the principal violated Frederick's First Amendment rights. In its holding, the majority stated: "The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." Roberts also considered the guidance from the *Tinker* Court, which warned schools against hindering student speech to avoid "discomfort and unpleasantness . . . ." Roberts noted that "[t]he danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here . . . extends well beyond an abstract desire to avoid controversy."

b. Concurring Opinions—Each Opinion Expressed a Different Reason Why the Principal Properly Censored the Student's Speech

Justice Thomas, who joined Roberts but wrote a separate concurring opinion, agreed that the public school officials did not violate Frederick's right to free speech. Thomas, however, argued that the Constitution does not support the Court's opinion in *Tinker*. In his opinion, Justice Thomas outlined the history of public education, pointing out that students have never had a right to free speech in the classrooms. Thomas argued that the doctrine of *in loco parentis* gave schools the ability to regulate student speech. He further asserted that *in loco parentis* has only one

<sup>152</sup> Id.

<sup>153</sup> Id.

<sup>&</sup>lt;sup>154</sup> *Id.* at 2629 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

<sup>&</sup>lt;sup>155</sup> *Id.* (quoting *Tinker*, 393 U.S. at 509).

<sup>156</sup> Id

<sup>&</sup>lt;sup>157</sup> See id. at 2629–30 (Thomas, J., concurring).

<sup>&</sup>lt;sup>158</sup> *Id.* at 2630.

<sup>&</sup>lt;sup>159</sup> *Id.* at 2630–31. "In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order." *Id.* at 2631.

<sup>&</sup>lt;sup>160</sup> *Id.* at 2632. *In loco parentis* is a doctrine that stands for the idea that the teacher steps into the shoes of the parent when the student is at school. *Id.* at 2631–32. One court (*continued*)

limitation: "It merely limit[s] the imposition of excessive physical punishment." He later asserted: "As originally understood, the Constitution does not afford students a right to free speech in public schools." Thomas concluded his opinion by stating: "I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. . . . [T]he better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so." 163

Justice Alito also wrote a concurring opinion, which Justice Kennedy joined. Alito's concurrence, like Roberts's opinion, focused on the issue of drugs. Alito joined the majority

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 . . . . <sup>166</sup>

Alito considered the *Morse* decision to be one of the greatest constitutional restrictions on freedom of speech. According to Alito, the First Amendment stretches no further in the context of student free speech. 168

defines it as when "[t]he teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power." *Id.* (quoting State v. Pendergrass, 19 N.C. (2 Dev. & Bat.) 365, 365–66 (1837)); *see also* Wooster v. Sunderland, 27 Cal. App. 51 (Ct. App. 1915) (upholding the school's expulsion of a student for giving a speech before the student body that criticized the school administration); Vanvactor v. State, 113 Ind. 276 (1888) (upholding the corporal punishment of a student who breached "good deportment"); Deskins v. Gose, 85 Mo. 485 (1885) (upholding a rule forbidding cursing and fighting); Lander v. Seaver, 32 Vt. 114 (1859) (upholding the corporal punishment of a student who called a teacher "old jack Seaver").

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<sup>161</sup> Morse, 127 S. Ct. at 2633 (Thomas, J., concurring).
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(continued)

<sup>&</sup>lt;sup>162</sup> *Id.* at 2634.

<sup>&</sup>lt;sup>163</sup> *Id.* at 2636.

<sup>&</sup>lt;sup>164</sup> Id. (Alito, J., concurring).

<sup>&</sup>lt;sup>165</sup> Id. at 2636–38.

<sup>166</sup> Id. at 2636.

<sup>&</sup>lt;sup>167</sup> Id. at 2638. Alito concludes:

Justice Breyer, who both concurred and dissented, argued that the Court should have answered the second issue—that of qualified immunity—instead of attacking the "difficult" First Amendment problem. Furthermore, Justice Breyer expressed his concerns with the majority opinion, mainly in its ambiguity. Breyer maintained that if the Court had based its decision on qualified immunity, the decision would have been unanimous. He asserted that all of the Justices would agree that principal Morse "should not be held liable in damages for confiscating Frederick's banner," due to qualified immunity. The confiscating for the principal Morse "should not be mentally in the principal Morse" and the principal Morse "should not be held liable in damages for confiscating for the principal Morse" due to qualified immunity.

Under the doctrine of qualified immunity, a government employee is immune from liability "unless the employee's conduct violates 'clearly established statutory or constitutional rights of which a reasonable person

Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

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Id. 168 L
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The Court makes clear that school officials may "restrict" student speech that promotes "illegal drug use" and that they may "take steps" to "safeguard" students from speech that encourages "illegal drug use." Beyond "steps" that prohibit the unfurling of banners at school outings, the Court does not explain just what those "restrict[ions]" or those "steps" might be.

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Id. (citation omitted). <sup>171</sup> Id. at 2641.
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<sup>&</sup>lt;sup>169</sup> *Id.* (Breyer, J., concurring in part, dissenting in part).

<sup>&</sup>lt;sup>170</sup> See id. at 2640. Breyer argued that the Court failed to provide other courts with any guidance for future application, writing:

<sup>172</sup> *Id*.

would have known."<sup>173</sup> Breyer asserted that qualified immunity easily applied in this case.<sup>174</sup> To buttress his argument, he maintained that the law on student speech is not clear, as the *Tinker* doctrine has taken different turns with both *Fraser* and *Hazelwood*.<sup>175</sup> These unclear rules were exactly what made principal Morse immune under qualified immunity.<sup>176</sup> Breyer noted, "[t]he fact that this Court divides on the constitutional question . . . strongly suggests that the answer as to how to apply prior law to these facts was unclear."<sup>177</sup> The ease of the immunity question, coupled with Breyer's hesitation to uphold a viewpoint based restriction on speech, <sup>178</sup> led Breyer to conclude that only immunity necessitated review. <sup>179</sup>

# c. Dissenting Opinion—Stevens Expressed Concern for Fundamental Constitutional Rights

Finally, Justice Stevens authored the dissenting opinion, which Justices Souter and Ginsburg joined. The dissent argued that the Court's opinion took a giant leap away from *Tinker*. Justice Stevens wrote: "In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." The dissent argued that Principal Morse did violate Frederick's First Amendment rights under *Tinker*. 183

The dissent outlined two First Amendment principles expressed in *Tinker*. <sup>184</sup> The first principle concerned viewpoint based discrimination,

<sup>&</sup>lt;sup>173</sup> *Id.* at 2640 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The defense ought to protect "all but the plainly incompetent or those who knowingly violate[] the law." *Id.* (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)).

<sup>&</sup>lt;sup>174</sup> *Id.* at 2641.

<sup>&</sup>lt;sup>175</sup> *Id.* at 2640–41.

<sup>&</sup>lt;sup>176</sup> See id. at 2641.

<sup>&</sup>lt;sup>177</sup> *Id*.

<sup>&</sup>lt;sup>178</sup> *Id.* at 2639.

<sup>&</sup>lt;sup>179</sup> *Id.* at 2643.

<sup>&</sup>lt;sup>180</sup> *Id.* (Stevens, J., dissenting).

<sup>&</sup>lt;sup>181</sup> See id. at 2645.

<sup>&</sup>lt;sup>182</sup> *Id.* at 2644.

<sup>&</sup>lt;sup>183</sup> Id.

<sup>184</sup> Id. at 2644-45.

which is "subject to the most rigorous burden of justification..." Second, the dissent emphasized that the promotion of illegal conduct can only be hindered "when the advocacy is likely to provoke the harm that the government seeks to avoid." The dissent's greatest concern with the Court's opinion was that it "trivialize[d]" these two basic principles. <sup>187</sup>

# B. Analysis—Morse Will Lead to a Mixed Bag of Opinions on Student Speech Rights

The weakness of the *Morse* majority opinion is that it failed to provide a sound rule for future courts to apply. Just prior to *Morse*, one appellate court said of student speech law: "[t]his case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents." Yet, given Roberts's unclear opinion, courts will get little guidance from *Morse*. As one critic noted, "this area of law continues to be an intellectual puzzle, and *Morse* gives only limited clarity to a doctrine in desperate need of it, solving few of school districts', administrators', and scholars' questions." Another scholar noted that "[t]he decision and reasoning of the Court in *Morse* only amplifies the confusion." I maintain that lower courts can interpret this opinion in at least four different ways. The idea that there are four potential interpretations of *Morse* eliminates any hope for uniformity among the lower courts.

Lower courts can interpret *Morse*'s majority opinion in several ways. Did the majority opinion simply create a drug exception or did it modify the exception announced in *Tinker*? Another possibility is that *Morse* 

<sup>&</sup>lt;sup>185</sup> *Id.* at 2644.

<sup>&</sup>lt;sup>186</sup> *Id.* at 2645 (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam)).

<sup>&</sup>lt;sup>187</sup> *Id*.

<sup>&</sup>lt;sup>188</sup> Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006).

<sup>&</sup>lt;sup>189</sup> Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 222 (2007).

<sup>&</sup>lt;sup>190</sup> Justin Lee Bell, Note, Morse v. Frederick: *A Dubious Decision Shows a Need for Judicial Restraint by the Supreme Court*, 53 S.D. L. REV. 100, 129 (2008). Bell argues that the Court announced another confusing decision when it was not required to do so. *Id.* at 134–38. He maintained, like Justice Breyer in his opinion, that the Court would have been unanimous if decided based on qualified immunity. *Id.* at 134–35. Bell also argues that "it is unclear what standard the Court now employs to determine the constitutionality of speech restrictions in a school setting." *Id.* at 129.

gutted *Tinker* of all of its strength, even though Roberts refused to expressly overrule the 1969 decision. Finally, some may read *Morse* to give all of the authority to school principals, thereby allowing the schools to determine which types of student speech are and are not permissible.

### 1. What Morse Did Not Do

Before considering all of the possible interpretations of *Morse*, it is vital to recognize what the holding did *not* do. First, Roberts's majority opinion did not overrule *Tinker*. <sup>192</sup> Furthermore, *Morse* did not expand the *Fraser* exception of "vulgar and lewd" speech to include any "offensive" speech. <sup>193</sup> Finally, the *Morse* opinion did not eliminate protection of political speech in schools. <sup>194</sup>

### a. Morse Did Not Expressly Overrule Tinker

While it is unclear whether the *Morse* opinion gutted *Tinker* of much of its strength in protecting student speech rights, the majority did not expressly overrule *Tinker*.<sup>195</sup> Roberts reaffirmed *Tinker's* famous line when he wrote: "Our cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Roberts also used *Tinker* throughout his opinion, citing its language and exceptions to explain why Frederick's speech was not protected. <sup>197</sup> *Morse did not* overrule *Tinker*.

<sup>&</sup>lt;sup>191</sup> Morse, 127 S. Ct. at 2629.

<sup>&</sup>lt;sup>192</sup> *Id*.

<sup>&</sup>lt;sup>193</sup> *Id*.

<sup>&</sup>lt;sup>194</sup> See id.

<sup>&</sup>lt;sup>195</sup> *Id*.

<sup>&</sup>lt;sup>196</sup> *Id.* at 2622 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); *see also* Lowry v. Watson Chapel Sch. Dist., 508 F. Supp. 2d 713, 722 n.3 (E.D. Ark. 2007) ("While 'the mode of analysis set forth in *Tinker* is not absolute,' *Tinker* has not been reversed and therefore still controls on the present issue . . . ." (quoting *Morse*, 127 S. Ct. at 2627)).

<sup>&</sup>lt;sup>197</sup> See Morse, 127 S. Ct. at 2625–26, 2629.

b. Morse Did Not Expand Fraser to Include All "Offensive Speech"

The Petitioners in *Morse* (Principal Morse and the school) urged the Court to judge student Frederick's banner under the *Fraser* analysis. <sup>198</sup> Again, *Fraser* established a "vulgar and lewd" exception to a student's right to free speech. <sup>199</sup> However, Roberts quickly clarified that *Fraser* did not hold that any "offensive" speech is unprotected in the school context. <sup>200</sup> Roberts wrote: "[T]his stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'... The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use." While the expression "bong hits for Jesus" may be offensive to some, the *Fraser* exception of "vulgar and lewd" requires more than an offensive statement. <sup>202</sup> Roberts refused to extend the *Fraser* exception in this way.

c. Morse Did Not Eliminate Political Speech Protection in Schools

Morse did not announce a rule that eliminated protection of political speech in the classrooms. Roberts expressly noted that Frederick did not intend to convey a political message with his banner. He wrote, "[T]his is plainly not a case about political debate over the criminalization of drug use or possession." Moreover, when Roberts refused to expand Fraser to include "offensive" speech, he noted that "much political and religious speech might be perceived as offensive to some." Roberts considered any limits on political or religious speech as being against the very

<sup>&</sup>lt;sup>198</sup> *Id.* at 2629 ("Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*.").

<sup>&</sup>lt;sup>199</sup> Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

<sup>&</sup>lt;sup>200</sup> Morse, 127 S. Ct. at 2629.

<sup>&</sup>lt;sup>201</sup> *Id*.

<sup>&</sup>lt;sup>202</sup> Id.

<sup>&</sup>lt;sup>203</sup> *Id*.

<sup>&</sup>lt;sup>204</sup> *Id*.

 $<sup>^{205}</sup>$  *Id.* at 2625.

<sup>&</sup>lt;sup>206</sup> Id.

<sup>&</sup>lt;sup>207</sup> *Id.* at 2629.

foundation of the First Amendment and *Tinker*.<sup>208</sup> The Court did not intend to limit future protection of political speech. It simply refused to consider this a political speech case.

This notion is shown by looking at a Second Circuit decision from 2006—just prior to the Supreme Court's opinion in *Morse*. The Second Circuit held that a school violated a student's free speech rights when the school prohibited a student from wearing a t-shirt that depicted George W. Bush and drug related items.<sup>209</sup> The t-shirt expressly criticized the President.<sup>210</sup> Further, the t-shirt contained images and words that depicted alcohol and drugs.<sup>211</sup> When the student wore the shirt, the school punished him and prohibited him from wearing the shirt so long as the drug and alcohol images were visible.<sup>212</sup>

The Second Circuit, in relying on the Ninth Circuit's decision in *Morse* stated, "[i]t is further instructive on this point that the Ninth Circuit's recent opinion in *Frederick* refused to uphold a school's disciplinary action against a student who displayed a clearly pro-drug banner, which read 'Bong Hits 4 Jesus." The fact that the controversial speech involved drugs did not alter the Second Circuit's decision in *Guiles*, whereas it clearly altered the Supreme Court's decision in *Morse*. 215

[I]n [Guiles], the Second Circuit applied Tinker, rather than Fraser, to the decision by school officials to prohibit a student from wearing a t-shirt to school bearing images of drugs and alcohol. Although the school argued that the images were offensive and in contravention of the school's policy against drugs, the Second Circuit held that in the context of the overall anti-Bush message of the shirt, the images constituted political speech more appropriately analyzed under the

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<sup>&</sup>lt;sup>208</sup> See id. at 2625–26.

<sup>&</sup>lt;sup>209</sup> Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 331 (2d Cir. 2006).

<sup>&</sup>lt;sup>210</sup> Id. at 322.

<sup>&</sup>lt;sup>211</sup> *Id*.

<sup>&</sup>lt;sup>212</sup> Id. at 322–23.

<sup>&</sup>lt;sup>213</sup> *Id.* at 328 (quoting Frederick v. Morse, 439 F.3d 1114, 1123 (9th Cir. 2006)). Specifically, the *Guiles* court relied on the following wording by the Ninth Circuit: "The phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo is." *Id.* (quoting *Morse*, 439 F.3d at 1119).

<sup>&</sup>lt;sup>214</sup> *Id.* at 331.

<sup>&</sup>lt;sup>215</sup> The U.S. District Court of Connecticut noted:

The key difference between *Morse* and *Guiles* is that the student's t-shirt in *Guiles* expressed a political message along with its promotion of drugs. As discussed above, it is clear from Chief Justice Roberts's opinion that *Morse* was not a political speech case. If student Frederick had advocated a political viewpoint, the case likely would have been decided differently. If

2. Morse Created Several Potential Rules, and Roberts Made it Impossible for Lower Courts to Consistently Apply its Precedent

Roberts's majority opinion did not help clarify the law on student speech rights. Instead, I argue that he took an already murky area of law and made it even more confusing for the lower courts. I further maintain that the Court presented at least four potential rules that lower courts may ascertain from the opinion. It is possible that Roberts created a very narrow drug exception. Another potential reading of the *Morse* majority is that Roberts simply placed the *Morse* fact pattern under *Tinker*. Roberts may have modified *Tinker* to include drugs as a material and substantial disruption" to schools. Third, *Morse* may provide school administrators with the authority to decide what is and is not a constitutional restriction on speech in a school setting. Finally, I argue that while *Morse* did not overrule *Tinker*, it may have gutted *Tinker* of its strength in protecting student speech rights.

a. Did Roberts Create a Drug Exception to Tinker?

One interpretation is that the Court created a "drug exception" to free speech in schools. It is certainly arguable that *Morse* simply added to the

Tinker framework. For the reasons discussed above, the Court believes the facts of the current case to be distinguishable from those of *Guiles* in several material respects. Also, *Guiles* expressly relied on the Ninth Circuit's decision in *Morse*, which the Supreme Court has since reversed. Of course, unless and until the Second Circuit says otherwise, the Court will assume *Guiles* remains good law.

See Doninger v. Niehoff, 514 F. Supp. 2d 199, 217 n.12 (D. Conn. 2007) (citations omitted).

<sup>&</sup>lt;sup>216</sup> Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007).

<sup>&</sup>lt;sup>217</sup> See id. at 2636 (Alito, J., concurring).

<sup>&</sup>lt;sup>218</sup> See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969).

exceptions established by *Fraser* and *Hazelwood*. The District Court of New Jersey recently described the *Morse* decision by stating that "[*Morse*] does not change this basic framework, or the applicable analyses for the trio [of *Tinker*, *Fraser*, and *Hazelwood*]. Instead, *Morse* adds a third exception to *Tinker*, allowing a school to censor speech that is 'reasonably viewed as promoting illegal drug use.'"<sup>219</sup> This district court saw *Morse* as establishing a drug exception, allowing principals and school administrators to restrict speech that promotes illegal drug use.<sup>220</sup>

At several points in his opinion, Roberts indicated that *Morse* extended only to drugs.<sup>221</sup> Roberts considered the key issue to be whether a school may restrict speech within the confines of the First Amendment "when that speech is reasonably viewed as promoting illegal drug use."<sup>222</sup> Roberts held that a school *can* restrict speech when the speech "promot[es] illegal drug use."<sup>223</sup> According to Roberts, the distinguishing fact was drugs.<sup>224</sup> Therefore, it is plausible that Roberts announced a drug exception to the general rule that students do retain some free speech rights in schools.

Roberts's extensive discussion of the threat of drugs is still further evidence of a "drug exception." Roberts spent several paragraphs of his opinion relaying statistics and prior commentary on the risks that drugs pose to students in the United States. He noted the damage that drugs cause young people. He also emphasized the seriousness of the problem

<sup>&</sup>lt;sup>219</sup> DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 639 (D.N.J. 2007) (citing *Morse*, 127 S. Ct. at 2625) (footnote omitted).

<sup>&</sup>lt;sup>220</sup> Id. at 639–40.

<sup>&</sup>lt;sup>221</sup> See Morse, 127 S. Ct. at 2625, 2628–29.

<sup>&</sup>lt;sup>222</sup> Id. at 2625.

<sup>&</sup>lt;sup>223</sup> *Id.*; see also Lowery v. Euverard, 497 F.3d 584, 602 (6th Cir. 2007) (Gilman, J., concurring). In *Lowery*, the parties argued the case in April of 2007, before the Court announced the *Morse* opinion. *Id.* at 584 (majority opinion). The Sixth Circuit did not decide *Lowry* until after the *Morse* decision. *Id.* The majority opinion applied *Tinker* and held that the school did not violate a group of students' constitutional rights. *Id.* at 587–601. In his concurring opinion, Judge Gilman outlined the *Morse* opinion and characterized it as "narrow." *Id.* at 601–03 (Gilman, J., concurring). In his description of the *Morse* opinion, Judge Gilman noted that the *Morse* Court emphasized drugs in its analysis. *Id.* at 602.

<sup>&</sup>lt;sup>224</sup> *Morse*, 127 S. Ct. at 2629.

<sup>&</sup>lt;sup>225</sup> Id. at 2628.

<sup>&</sup>lt;sup>226</sup> *Id.* Roberts explained that drugs are most harmful to growing youth, whose development is disrupted both mentally and physically by the use of drugs. *Id.* 

in high schools and the role that Congress has imposed on schools.<sup>227</sup> In holding for the school, Roberts wrote that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers [of illegal drug use]."<sup>228</sup>

If *Morse* instituted a "drug exception," then a strict interpretation of this holding will restrict district courts. A "drug exception" means that *Morse* only applies to cases that involve illegal drugs and district courts cannot apply the case to other facts. However, given that *Morse*'s holding is very difficult to interpret, the more likely outcome is that the holding will be broadly applied in the future. The Harvard Law Review introduced a similar argument:

In its eagerness to allow schools to prohibit pro-drug speech, the Court failed to provide any contained or compelling justification for its newly created exception to the First Amendment. As a result, schools and courts will have wide latitude not only in deciding how and when to apply [Morse] to student drug-related speech, but also in deciding what other viewpoints are simply outside a student's right to freedom of expression. 229

While a "drug exception" reading is certainly plausible, it is unlikely. Courts will apply *Morse* outside the world of illegal drugs.

<sup>&</sup>lt;sup>227</sup> See id. ("Congress has declared that part of a school's job is educating students about the dangers of illegal drug use.").

<sup>&</sup>lt;sup>228</sup> Id. at 2629.

<sup>&</sup>lt;sup>229</sup> See The Supreme Court, 2006 Term: Leading Cases: Constitutional Law—Freedom of Speech and Expression—Student Speech, 121 HARV. L. REV. 285, 296 (2007) [hereinafter LEADING CASES]; see also Hans Bader, BONG HiTS 4 JESUS: The First Amendment Takes a Hit, 2006–2007 CATO SUP. CT. REV. 133, 147–50. Bader argues:

Allowing viewpoint discrimination because it serves an important government interest sets a dangerous precedent, because of the vast range of interests that the courts have accepted as important, and the judiciary's concomitant unwillingness to second-guess the wisdom of just about any government objective or mission.

b. Did Morse Modify Tinker and Categorize Drugs as a "Material and Substantial" Disruption to Schools?

Another possible interpretation of *Morse* is that its facts fit neatly into the one restriction expressed in *Tinker*—a school may not restrict student speech *unless* it will "materially and substantially disrupt the work and discipline of the school." Because of Roberts's lengthy discussion of harmful drugs, *Morse* may stand for the rule that—because drugs pose such an extreme threat to education and the work of the school—speech which promotes drugs "materially and substantially disrupt[s]...school." <sup>231</sup>

In *Tinker*, the Supreme Court established that, in order to meet the "materially and substantially interfere" exception, it was not enough that the school feared a "disturbance" or did not want to confront an uncomfortable situation.<sup>232</sup> The *Morse* majority followed this line of analysis in regards to illegal drug use. When he announced the Court's holding, Roberts wrote:

Tinker warned that schools may not prohibit student speech because of 'undifferentiated fear or apprehension of disturbance' or 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.' The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy,

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . .

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

<sup>&</sup>lt;sup>230</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

 $<sup>^{231}</sup>$  Id

<sup>&</sup>lt;sup>232</sup> *Id.* at 508–09. The majority in *Tinker* wrote:

extends well beyond an abstract desire to avoid controversy. 233

Chief Justice Roberts used *Tinker* when he implied that drugs do "materially and substantially interfere." Drugs pose a special threat. They "materially and substantially interfere" with the operation of a school. Moreover, because of the significant government interest in stopping drug use, a school can satisfy *Tinker* by "show[ing] that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

c. Did Morse Give Principals the Power to Decide What Types of Speech the School can Constitutionally Censor?

Another reading of *Morse* is that schools will have the authority to determine which speech is unprotected. All schools have rules and regulations. It might be possible, under *Morse*, for a school to permissibly restrict speech if the restriction aligns with a formal school policy. The majority opinion emphasized the fact that the school had a strict policy aimed at preventing drug use.<sup>236</sup> Given this emphasis, *Morse* conceivably held that censorship is acceptable if the school seeks to uphold a formal policy.

If courts apply the *Morse* holding in this way, principals and other disciplinarians will have far too much power to limit student speech. In a recent law review article, one scholar noted a concern for what she called a "slippery slope." In her article, Kaufman argued that Roberts used an "in loco parentis" argument. She emphasized that the majority opinion

<sup>&</sup>lt;sup>233</sup> Morse, 127 S. Ct. at 2629 (quoting *Tinker*, 393 U.S. at 508–09).

<sup>&</sup>lt;sup>234</sup> *Id.* at 2626, 2629.

<sup>&</sup>lt;sup>235</sup> Tinker, 393 U.S. at 509.

<sup>&</sup>lt;sup>236</sup> Morse, 127 S. Ct. at 2628–29. Roberts noted: "The 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Id.* at 2629 (citing *Tinker*, 393 U.S. at 506).

<sup>&</sup>lt;sup>237</sup> Andrea Kayne Kaufman, What Would Harry Potter Say About BONG HiTS 4 JESUS? Morse v. Frederick and the Democratic Implications of Using in Loco Parentis to Subordinate Tinker and Curtail Student Speech, 32 OKLA. CITY U. L. REV. 461, 473 (2007). <sup>238</sup> Id.

in *Morse* gives schools too much power to decide what is and is not a constitutional restriction on free speech.<sup>239</sup> She stated, "The problem with this argument is that it creates a slippery slope, which enables school administrators, under the pretext of *in loco parentis*, to regulate almost anything they reasonably perceive as dangerous."<sup>240</sup> Principals and other school administrators should not have sole discretion to regulate student speech. The courts must provide guidance.

### d. Did Morse Gut Tinker of Its Strength?

In his concurring opinion, Justice Thomas stated that "[he] join[ed] the Court's opinion because it erodes *Tinker*'s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard."<sup>241</sup> Given Thomas's explanation of the majority opinion's consequences, it is reasonable to interpret *Morse* as stripping *Tinker* of its strength. While the majority did *not* overrule *Tinker*, the holding did restrict a student's speech at school in a way that had not been done before. As I discussed above, one plausible interpretation of *Morse* is that the majority fit drugs into *Tinker*'s "material and substantial disruption" exception.<sup>242</sup> If this is the case, then, *Morse* arguably did not restrict speech in a new way, it simply applied precedent. However, I believe a totally separate interpretation exists—that Roberts gutted *Tinker* of its strength without overruling it.

Justice Alito's concurrence further demonstrates that the majority opinion lacks clarity. "[He] join[s] the opinion of the Court with the understanding that the opinion does not endorse any further extension" beyond regulating "speech advocating illegal drug use." Alito, joined by Justice Kennedy, maintained that *Tinker* was *not* extended and that majority opinion strongly reaffirmed the holding in *Tinker*. Alito, unlike Thomas, emphasized the few restrictions on school speech that are valid

<sup>&</sup>lt;sup>239</sup> *Id*.

 $<sup>^{240}</sup>$  Id

<sup>&</sup>lt;sup>241</sup> *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring). Justice Thomas went on to say that "[he] think[s] the better approach is to dispense with *Tinker* altogether, and given the opportunity, [he] would do so." *Id.* 

<sup>&</sup>lt;sup>242</sup> See supra Part III.B.2.b.

<sup>&</sup>lt;sup>243</sup> *Id.* at 2638 (Alito, J., concurring).

<sup>&</sup>lt;sup>244</sup> *Id.* at 2636–37.

under the Constitution. Alito's opinion suggests that any further restrictions on speech outside of the recognized exceptions found in *Tinker, Frazer, Hazelwood*, and *Morse* are impermissible. Alito wrote: I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.

Again, it is plausible to argue that Roberts's opinion stripped *Tinker* of its strength. One scholar argued that the Court, in *Morse*, applied the school-sponsored speech standard from *Hazelwood* to speech that was not school-sponsored.<sup>248</sup> Greenband noted that "[t]he Court mistakenly deviated from both *Tinker* and *Fraser* by placing a restriction on student speech that allows schools to censor speech based on the speech's content . . . ."<sup>249</sup> If this is what the Court did, such an application of *Hazelwood* is not in line with *Tinker*. However, in light of the powerful concurring opinion by Alito and Kennedy, *Morse* did not eliminate the *Tinker* doctrine.

<sup>245</sup> Alito wrote:

But I do not read the [majority] opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; [Fraser] permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and [Hazelwood] allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ.

Id. at 2637 (citations omitted).

<sup>&</sup>lt;sup>246</sup> See id.

 $<sup>^{247}</sup>$  Id

<sup>&</sup>lt;sup>248</sup> Jennifer W. Greenband, Note, Morse v. Frederick: *The United States Supreme Court Applied the Standard for School-Sponsored Speech to Independent Student Speech*, 41 CREIGHTON L. REV. 481, 508 (2008).

<sup>&</sup>lt;sup>249</sup> *Id.* at 513.

3. Ramifications of the Morse Holding—The Impact on Other Forms of Speech and How District Courts have Taken the Ambiguous Morse Opinion and Applied It to Student Speech Cases

Even though *Morse*'s rule is not perfectly clear, it is vital to consider its potential future ramifications. First, we must consider the possible effect of *Morse* on other types of speech. These types may include the promotion of violence, religion, politics, or civility. Does *Morse* also give school officials free range to decide what is and what is not an appropriate viewpoint to express?<sup>250</sup> Can a school restrict speech that promotes unpopular political viewpoints? What about issues involving tobacco, alcohol, guns, or sex? Some questions can be answered by a plain reading of *Morse*'s majority opinion coupled with the concurring opinions. For other questions, it is helpful to contemplate lower court decisions that have emerged since *Morse* in June of 2007.<sup>251</sup>

a. Will Lower Federal Courts Uphold School Limitations of Political Speech?

The *Morse* opinion clarifies that the First Amendment ought to protect a student's right to express political views. Roberts refused to consider this a political speech case. As such, a plain reading of his holding does not affect the protection of political speech. The majority opinion clearly states that *Morse* is plainly not a case about political debate over the criminalization of drug use or possession. Protection of political speech was further evidenced when Roberts refused to expand *Fraser* to include "offensive" speech. He reasoned that "much political... speech might be perceived as offensive to some."

<sup>&</sup>lt;sup>250</sup> See LEADING CASES, supra note 229, at 296 (arguing that it does).

<sup>&</sup>lt;sup>251</sup> See, e.g., Zamecnik v Indian Prairie Sch. Dist. No. 204, No. 07 C 1586, 2007 WL 4569720, at \*5 (N.D. Ill. Dec. 21, 2007). In reference to *Morse*, the *Zamecnik* court stated: "Two of the opinions make clear that the only issue decided is that student speech promoting illegal drug use may be restricted and leave open whether any other speech may be restricted beyond what had previously been held in prior Supreme Court precedents." *Id.* 

<sup>&</sup>lt;sup>252</sup> Morse, 127 S. Ct. at 2625.

<sup>&</sup>lt;sup>253</sup> *Id*.

<sup>&</sup>lt;sup>254</sup> Id. at 2629.

<sup>&</sup>lt;sup>255</sup> Id.

Therefore, according to Roberts, such extension of *Fraser* would be excessive because the First Amendment must protect political speech. <sup>256</sup>

Justices Alito, joined by Justice Kennedy, supported this view in his concurring opinion. Although both Justices joined the majority opinion, Alito's concurrence clearly emphasized the limits of the majority opinion. Alito wrote that he joined the majority with 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...." Students retain their rights of free political speech under *Morse*—that much seems to be clear.

One question that remains unanswered is whether a school may limit a student's speech if the speech represents political advocacy for drugs. For example, if a student held up a sign that said "Legalize Marijuana for Medical Purposes," could the principal constitutionally punish the student? Technically, this speech does promote drug use, which may arguably fit under the *Morse* rule. Yet the sign in this example also includes a political message. Under Alito's analysis, the Court would not uphold a restriction of a political message. And as noted above, even Roberts firmly stated that the *Morse* case did *not* involve political speech. Still, some may argue that even a political message, if it promotes drugs, may be censored in schools. This is one concern that arises from *Morse*'s ambiguous

<sup>256</sup> Id

<sup>&</sup>lt;sup>257</sup> *Id.* at 2636 (Alito, J., concurring).

<sup>&</sup>lt;sup>258</sup> *Id.* at 2636–37.

<sup>&</sup>lt;sup>259</sup> *Id.* at 2636.

 $<sup>^{260}</sup>$  Id. at 2629 (majority opinion) (Roberts concluded that schools are allowed "to restrict student expression that they reasonably regard as promoting illegal drug use."). Id.

<sup>&</sup>lt;sup>261</sup> See Greenband, supra note 248, at 513–514. Greenband wrote: "The Court's holding in Morse did not leave room for political speech about illegal drug use because a school official could interpret a student's speech concerning the legalization of marijuana as advocating illegal drug use and therefore, under the Court's holding, constitutionally proscribe the student's speech." Id.; see also Joanna Nairn, Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools, 43 HARV. C.R.-C.L. L. REV. 239, 251–52 (2008) (Roberts attempted to limit the holding by stating that "[t]hese efforts to limit the content-based regulation Morse endorses are unlikely to succeed. Despite the strong language of Justice Alito's concurrence, the Court left ample room for lower courts to infer that speech on similar topics, as well as arguably political pro-drug speech, may (continued)

majority opinion. Lower courts may stretch *Morse* and allow schools to discriminate against political messages. <sup>262</sup>

b. District Courts Have Applied Morse in Different Ways, Which Shows that the Opinion Gives No Guidance to Lower Federal Courts

The Court announced the *Morse* decision in June of 2007.<sup>263</sup> Since then, several lower courts have cited the decision and have applied its holding to student speech cases.<sup>264</sup> If we examine some of these cases, we see partly how *Morse* may affect the future of constitutional rights for students. Moreover, this section further demonstrates that lower courts will apply the *Morse* holding inconsistently because of its ambiguities.

In November of 2007, the Fifth Circuit extended *Morse* to speech that threatens school violence. In *Ponce*, a high school student kept a notebook in which he described his plan to organize a pseudo-Nazi group and in which he described the group's actions. The notebook also expressed plans to commit a shooting at the school. The school suspended the student and recommended that he be transferred to an alternative education program. The student and his parents filed a claim against the school, alleging, among other things, a First Amendment violation.

also be subject to viewpoint discrimination."). Nairn argues that the *Morse* holding "will likely extend beyond the intended context of non-political, pro-drug speech." *Id.* at 246.

<sup>&</sup>lt;sup>262</sup> See Bell, supra note 190 at 132 (Morse "left open situations where an individual's motive for speech was political or religious, but at the same time, the message could be reasonably interpreted as promoting illegal drug use."). Bell argued that the majority is not clear on this issue. *Id.* at 132–33.

<sup>&</sup>lt;sup>263</sup> Morse, 127 S. Ct. at 2618.

<sup>&</sup>lt;sup>264</sup> See, e.g., Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007); Boim v. Fulton County Sch. Dist., 494 F.3d 978 (11th Cir. 2007); Cuff v. Valley Cent. Sch. Dist., 559 F. Supp. 2d 415 (S.D.N.Y. 2008); Nguon v. Wolf, 517 F. Supp. 2d 1177 (C.D. Cal. 2007); Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007).

<sup>&</sup>lt;sup>265</sup> See Ponce, 508 F.3d at 772.

<sup>&</sup>lt;sup>266</sup> *Id.* at 766.

<sup>&</sup>lt;sup>267</sup> Id.

<sup>&</sup>lt;sup>268</sup> *Id.* at 767.

<sup>&</sup>lt;sup>269</sup> Id.

On appeal, the Fifth Circuit ruled in favor of the school.<sup>270</sup> In doing so, the Court extended the *Morse* reasoning—that drugs pose a special threat to schools—to the context of violence.<sup>271</sup> The court noted:

If school administrators are permitted to prohibit student speech that advocates illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students," then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.<sup>272</sup>

Of course, there is great concern when a student promotes school-directed violence. Like drugs, violence in schools poses a special threat to the safety and welfare of students. This analysis is not meant to suggest that students should have freedom to threaten acts of school violence. Instead, this analysis stands to emphasize the point that *Morse* did not clearly express its limits. Yet again, the Court creates another exception to *Tinker*'s general rule that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Threats of violence require restriction, but we do not know the limits of *Morse*.

<sup>&</sup>lt;sup>270</sup> *Id.* at 772.

<sup>&</sup>lt;sup>271</sup> *Id.* at 771–72; *see also* Cuff v. Valley Cent. Sch. Dist., 559 F. Supp. 2d 415, 417, 422 (S.D.N.Y. 2008) (holding that a fifth grade student's threats against the school were not protected by the First Amendment).

<sup>&</sup>lt;sup>272</sup> *Ponce*, 508 F.3d at 771–72 (quoting Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring)); *see also* Boim v. Fulton County Sch. Dist., 494 F.3d 978 (11th Cir. 2007). The *Boim* court stated:

Recently, in *Morse*, the Supreme Court broadly 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." That same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.

Id. at 984 (quoting Morse, 127 S. Ct. at 2629)).

<sup>&</sup>lt;sup>273</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

A case from California involved two students who were punished for engaging in expressive conduct—homosexual kissing in public.<sup>274</sup> The district court held, after a discussion of *Morse*, that the restriction was not viewpoint based.<sup>275</sup> While the restriction in *Nguon* was not viewpoint based, the court's discussion of *Morse* further demonstrates the concern about *Morse*'s ambiguities. The *Nguon* court cites *Morse* when it states "what may be appropriate on a spring afternoon in a public park or on a public beach, may not be appropriate on the grounds of a public high school, and that was the case here."<sup>276</sup> It is unclear, however, how this is an appropriate summary of *Morse*. But again, this shows the difficulty that lower courts can face when interpreting the ambiguous *Morse* opinion.

In late August of 2007, the U.S. District Court of Connecticut ruled on a case involving student speech.<sup>277</sup> In *Doninger*, a student posted an "inappropriate" message on a computer blog.<sup>278</sup> The message negatively portrayed the school and a school administrator.<sup>279</sup> Upon reading the blog,

The Court finds that the discipline here did not represent impermissible regulation of the viewpoint, namely expression of gay sexuality. To be sure, the record establishes that regulation of IPDA [inappropriate public displays of affection] was not entirely uniform, with some instances of IPDA between heterosexual [couples] going undisciplined, and some instances of IPDA between [the plaintiffs] going undisciplined.

#### Id. at 1190.

<sup>276</sup> *Id.* (citing *Morse*, 127 S. Ct. at 2626–27).

"[J]amfest is cancelled due to douchebags in central office . . . . basically, because we sent [the original Jamfest email] out, Paula Schwartz is getting a TON of phone calls and emails and such . . . . however, she got pissed off and decided to just cancel the whole thing all together, anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do[,] it is going to be after the talent show on may 18th."

Id. at 206.

<sup>&</sup>lt;sup>274</sup> See Nguon v. Wolf, 517 F. Supp. 2d 1177, 1190 (C.D. Cal. 2007).

<sup>&</sup>lt;sup>275</sup> *Id.* at 1190–91. The court stated:

<sup>&</sup>lt;sup>277</sup> Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007).

<sup>&</sup>lt;sup>278</sup> *Id.* at 202.

<sup>&</sup>lt;sup>279</sup> The posting stated:

the school prohibited the student from running in an election for a student government seat.<sup>280</sup> The district court sided with the school and concluded that *Fraser* and *Morse* permitted the punishment:

Fraser and Morse teach that school officials could permissibly punish [the student] in the way that they did for her offensive speech in the blog, which interfered with the school's "highly appropriate function... to prohibit the use of vulgar and offensive terms in public discourse," and to encourage the values of civility and cooperation within the school community, by removing her from the ballot for Senior Class Secretary. However, Morse rightly emphasized that it would "stretch[] Fraser too far... to read [that case] to encompass any speech that could fit under some definition of 'offensive." "281

The *Doninger* court clearly stated, with little analysis, that *Morse* supported the school's punishment.<sup>282</sup> The court does not, however, articulate how the court applied the *Morse* opinion. Once again, it is not clear how courts will apply *Morse*.

Courts have applied and will continue to apply the *Morse* opinion in different ways. The district court and appellate court cases summarized above indicate that the federal courts are not synchronized on the issue of student speech rights. As one court described it, "[t]he five separate opinions in *Morse* illustrate the complexity and diversity of approaches to this evolving area of law."<sup>283</sup>

#### IV. SIGNIFICANCE

Morse v. Frederick is an extremely significant decision. Only time will reveal the outer limits to which courts will extend the Morse holding. While some argue that Morse is simply a "drug exception" to Tinker, there

<sup>&</sup>lt;sup>280</sup> Id. at 207.

<sup>&</sup>lt;sup>281</sup> *Id.* at 217 (citing *Morse*, 127 S. Ct. at 2629; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

<sup>&</sup>lt;sup>282</sup> Id. at 217–18.

<sup>&</sup>lt;sup>283</sup> Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007). In *Layshock*, the district court did not apply *Morse* because the speech under controversy in *Layshock* was out-of-school student speech. *Id*.

is evidence that lower level federal courts are willing to extend the rule set out in *Morse*. <sup>284</sup> One scholar expressed the *Morse* decision in this way:

Because Morse's holding is so specific, it appears to carve out only a narrow exception to *Tinker*. Yet, *Morse* is not entirely confined to its facts.... [T]he *Morse* Court reconfirmed the strength of the "school is different" premise. Additionally,... *Morse* did not foreclose the possibility that the Court's student speech cases can be read together to permit some viewpoint discrimination.<sup>285</sup>

The *Morse* decision, in essence, is a step backwards because it creates more ambiguity for lower courts. I outlined four potential readings of the *Morse* majority. Each interpretation may lead to a different result in the lower courts, depending on the fact pattern and the court's chosen interpretation. Moreover, a court may choose to interpret *Morse* in an alternative manner that does not align with my analysis. The *Morse* majority opinion will lead to more questions before it will lead to answers or continuity.

### V. CONCLUSION

The majority in *Morse* held that a school, its principal, or its administrators *can* restrict a student's speech "that they reasonably regard as promoting illegal drug use." Yet Roberts failed to clearly express the limits of such holding. Because the Roberts opinion promotes several plausible readings, *Morse* will confuse the lower federal courts and lead to a variety of inconsistent opinions on student speech rights.

<sup>&</sup>lt;sup>284</sup> See supra Part III.B.3.b.

<sup>&</sup>lt;sup>285</sup> Bowman, *supra* note 189, at 220 (footnotes omitted).

<sup>&</sup>lt;sup>286</sup> See supra Part III.B.2.

<sup>&</sup>lt;sup>287</sup> Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).