University of Arkansas at Little Rock Law Review

Volume 30 | Issue 3 Article 5

2008

Constitutional Law—First Amendment & Freedom of Speech—Students May Be Regarded as Closed-Circuit Recipients of the State's Anti Drug Message: The Supreme Court Creates a New Exception to the Tinker Student Speech Standard. Morse v. Frederick, 127 S. Ct. 2618 (2007)

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CONSTITUTIONAL LAW—FIRST AMENDMENT & FREEDOM OF SPEECH—STUDENTS MAY BE REGARDED AS CLOSED-CIRCUIT RECIPIENTS OF THE STATE'S ANTI DRUG MESSAGE: THE SUPREME COURT CREATES A NEW EXCEPTION TO THE *TINKER* STUDENT SPEECH STANDARD. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

I. INTRODUCTION

On any given day in an American high school it would seem normal to see a student wearing a tee shirt stating, "Buddha is my homeboy," or to hear one student say to another, "I love my Aunt Mary." Likewise, most would not take special notice if a student shouted to a friend in the hallway, "I can't come over after school because I'm going to mow the grass." If a student known to have unconventional political views put a button on his backpack that said, "bring back the KGB," none would question the message's meaning. However, according to the President's Office of National Drug Control Policy (ONDCP), these statements all contain slang references to marijuana.[1]

In January 2002, Joseph Frederick, a high school senior in Juneau, Alaska, attended a parade in front of his school and made reference to another of ONDCP's slang marijuana terms.[2] Frederick held up a banner that said, "BONG HiTS 4 JESUS" and was suspended from school for ten days as a result.[3] He sued his principal and the Juneau School Board, claiming his First Amendment rights were violated, and the case was ultimately appealed to the United States Supreme Court.[4] The Court held, in *Morse v. Frederick*,[5] that schools may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[6] The Court also held that Frederick's constitutional rights were not violated because his banner could reasonably have been viewed as advocating illegal drug use.[7]

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1. Office of National Drug Control Policy, *Street Terms: Drugs and the Drug Trade*, http://www.whitehousedrugpolicy.gov/streetterms/ByType.asp?intTypeID=1 (last visited Nov. 15, 2007). "Buddha," "Aunt Mary," and "KGB (kind, green bud)" all refer to marijuana. "Mow the grass" is a slang reference to smoking marijuana.

2. Bill Mears, *'Bong Hits 4 Jesus' Case Limits Student Rights*, CNN.com, June 26, 2007, http.//www.cnn.com/2007/LAW/06/25/free.speech/index.html (last visited Nov. 15, 2007).

3. Mears, *supra* note 2.

4. *Id.*

5. 127 S. Ct. 2618 (2007).

6. *Id.* at 2625.

7. *Id.* at 2629.

This note will argue that the Supreme Court's decision in *Morse* significantly weakens students' free speech rights. The note asserts that the Court's opinion broadens schools' authority to regulate student speech in ways that are contrary to fundamental First Amendment values[8] and explicitly allows schools to engage in highly suspect viewpoint discrimination.[9]

The note will first examine some of the fundamental First Amendment values at stake in student speech cases.[10] Next, the note will discuss the Court's application of the First and Fourth Amendments to public school students.[11] The note will then summarize the facts that led to the Supreme Court's decision in *Morse* and will outline the Court's reasoning—examining each of the five opinions.[12] Finally, the note will argue that the Court erred in its decision in *Morse* by weakening student speech rights.[13] Classic justifications for free expression apply equally in public schools, and, as the dissent pointed out, "[t]he First Amendment demands more, indeed, much more" than the majority's holding provides.[14]

II. BACKGROUND

Prior to *Morse v. Frederick*,[15] the Supreme Court had only decided three cases directly related to public school students' First Amendment rights.[16] However, the topic has received considerable attention from lower courts and scholars.[17] This section will first address some of the basic First Amendment values that factor into the debate over student rights.[18] The section will specifically discuss Thomas Emerson's four main values of free speech and the Supreme Court's prohibition on viewpoint discrimination.[19] Further, the section will lay out the Supreme Court's treatment of public school students' rights under the Constitution.[20] It will address student speech rights, paying particular attention to the *Tinker* trilogy of cases.[21] Finally, the section will discuss the Fourth Amendment in a public school

8. *See infra* Part IV.A.
9. *See infra* Part IV.B.
10. *See infra* Part II.A.
11. *See infra* Part II.B.
12. *See infra* Part III.
13. *See infra* Part IV.
14. *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting).
15. 127 S. Ct. 2618 (2007).
16. *See infra* Part II.B.1.
17. *See infra* Part II.B.2.
18. *See infra* Parts II.A.1–2.
19. *See infra* Parts II.A.1–2.
20. *See infra* Part II.B.
21. *See infra* Parts II.B.1–2.

context because the *Morse* Court analogized from Fourth Amendment case law in holding that Frederick's First Amendment rights were not violated.[22]

A. First Amendment Values

The First Amendment[23] is one of the most fundamental and well known protections provided by the Bill of Rights.[24] Many legal commentators and philosophers have written extensively about the underlying value of the right to free expression in society.[25] This section will first briefly lay out a leading theory in support of free expression—Thomas Emerson's four fundamental values of the First Amendment.[26] Next, the section will demonstrate that viewpoint discrimination has historically been viewed as the most serious kind of First Amendment violation.[27]

1. *Emerson's Four Values of Free Speech*

While many scholars have written extensively about the theories underlying the First Amendment, Thomas Emerson has been one of the most consistently influential.[28] This section will lay out his theory of the four fundamental values of the First Amendment. Many scholars and courts have relied upon these basic values in justifying the importance of free expression in our society.[29]

First, Emerson argues that the First Amendment leads to individual self-fulfillment.[30] He observes that human beings are different from other animals because we are endowed with the ability to reason and to compre-

22. *See infra* Part II.B.3.

23. U.S. CONST. amend. I ("Congress shall make no law abridging the freedom of speech, or of the press.").

24. *See, e.g.*, David A. Strauss, *Freedom of Speech at the Common-Law Constitution,* ETERNALLY VIGILANT 33 (Lee C. Bollinger & Geoffry R. Stone eds., 2002) ("The First Amendment to the United States Constitution is the most celebrated text in all of American law.").

25. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, FREEDOM OF EXPRESSION: A COLLECTION OF BEST WRITINGS 135–214 (Kent Middleton & Roy M. Mersky eds., 1981); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

26. *See infra* Part II.A.1.

27. *See infra* Part II.A.2.

28. *See, e.g.*, Middleton & Mersky, *supra* note 25, at 133 ("One of the most productive and systematic First Amendment scholars is Thomas I. Emerson."); RUSSELL L. WEAVER ET AL., THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS 11 (LexisNexis 2006).

29. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 566–67 (1969). At the time of this writing, Emerson's article, *Toward a General Theory of the First Amendment*, *supra* note 25, had been cited 375 times according to Lexis Shepards Service.

30. Emerson, *supra* note 25, at 137.

hend abstract ideas.[31] Because of these attributes, Emerson urges that it is "an affront to the dignity of man" to suppress his freedom of expression.[32]

Second, Emerson asserts that the First Amendment is a vital tool in reaching the attainment of truth.[33] This value of free expression benefits not only the individual, but also the broader society.[34] The theory is based on the idea that society is more likely to reach the "most rational judgment" after "considering all facts and arguments which can be put forth on behalf of or against any proposition."[35] This theory has also been articulated, most famously by Justice Holmes, as the "marketplace of ideas."[36]

Third, Emerson argues that freedom of expression is important because it allows citizens to participate in decision-making.[37] According to Emerson, a democratic government cannot function effectively if its citizens are not able to participate in self-governance.[38] This is true, in part, because governments "must have some process for feeding back to it information concerning the attitudes, needs and wishes of its citizens."[39] Emerson argues that the more citizens in a democracy are able to freely express themselves, the more likely the government will be "brought to the will of its people, and the harder must it strive to be worthy of their support."[40] In this way, a democratic government "necessarily embraced the principle of open political discussion."[41]

Finally, Emerson argues that the First Amendment leads to a healthy balance between stability and change.[42] In Emerson's view, free expression leads to a "more adaptable, and at the same time more stable community."[43] This idea has been referred to by some scholars as the "safety-valve function."[44] Emerson reasoned that when individuals have an opportunity to express their views publicly, they are less likely to respond violently when the government or a group of individuals takes a different position.[45] Permitting citizens to express their views "results in a release of energy, a lessening of

31. *Id.*
32. *Id.*
33. *Id.* at 139.
34. *Id.*
35. *Id.*
36. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas–that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").
37. Emerson, *supra* note 25, at 140.
38. *Id.* at 141.
39. *Id.*
40. *Id.*
41. *Id.* at 142.
42. *Id.*
43. Emerson, *supra* note 25, at 142.
44. *See* WEAVER ET AL., *supra* note 28, at 11.
45. Emerson, *supra* note 25, at 143.

frustration, and a channeling of resistance into courses consistent with law and order."[46]

2. *Viewpoint Discrimination Has Historically Been Viewed as Antithetical to the First Amendment*

The Supreme Court has long recognized that it is contrary to the First Amendment for the government to discriminate against speech because its officials disagree with the viewpoint of the speaker.[47] According to the Court, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[48] For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[49] the Court held that the University of Virginia violated the First Amendment rights of a student organization by refusing to fund its newsletter on the grounds that "it promoted or manifested a particular belief in or about a deity or an ultimate reality."[50] This reason for refusing funding violated the prohibition on viewpoint discrimination, and the Court warned that "when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[51]

Three years before *Rosenberger*, in *R.A.V. v. City of St. Paul*,[52] the Court struck down a hate crime ordinance.[53] According to the Court, the city could constitutionally prohibit certain actions that one would know or have reason to know would arouse anger, alarm, or resentment in others; however, the city could not prohibit only those actions that caused these feelings "*on the basis of* race, color, creed, religion, or gender."[54] The fact that the ordinance discriminated against certain expression explicitly on the basis of

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46. *Id.*

47. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) ("The government may not regulate use [of speech] based on hostility—or favoritism—towards the underlying message expressed.").

48. *Rosenberger*, 515 U.S. at 828 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

49. 515 U.S. 819 (1995).

50. *Id.* at 827. Certain student organizations were registered as a "Contracted Independent Organization" (CIO) and, as such, were authorized to receive funding for the outside costs of the organization publications. University policy, however, prohibited such reimbursement for CIO if the publication conveyed certain religious messages. *Id.* at 824–25.

51. *Id.* at 829.

52. 505 U.S. 377 (1992).

53. *Id.* at 381.

54. *Id.* at 391–92 (emphasis added).

its viewpoint made the ordinance facially unconstitutional.[55] The Court concluded that the government could not "impose special prohibitions on those speakers who express views on disfavored subjects."[56]

As these cases illustrate, one fundamental tenet of the First Amendment is that citizens may not be coerced into agreeing with the Government's view of any particular issue.[57] Viewpoint discrimination undermines that protection because it "involves the government's choosing one side of an issue, promoting this position and prohibiting discussion of alternative points of view."[58] According to the Supreme Court, this kind of speech discrimination is adverse to the First Amendment because "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[59] Government regulation of speech based on viewpoint is such a serious constitutional violation that First Amendment scholar Erwin Chermerinsky asserted in 2000 that the Court had never upheld such restrictions.[60]

B. The Constitution and Public School Students

Although the Supreme Court has acknowledged that public school students are "persons under our Constitution,"[61] it has also held that their rights "are not automatically coextensive with the rights of adults in other settings."[62] The tension between students' Constitutional rights and the "special characteristics of the school environment"[63] has played out most directly in the context of the First and Fourth Amendments.[64]

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55. *Id.*

56. *Id.* at 391.

57. *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Majorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L. Q. 99, 100 (1996).

58. S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 151–52 (1995).

59. *Barnette*, 319 U.S. at 642.

60. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56 (2000).

61. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

62. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (holding that a school did not violate a student's First Amendment rights by suspending him following a sexually explicitly speech at a school assembly.).

63. *Tinker*, 393 U.S. at 506.

64. *See, e.g.*, Bd. of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 838 (2002) (holding that random drug testing was "reasonable" under the Fourth Amendment); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (requiring drug tests for students who participate in extracurricular activities did not violate the Fourth Amendment); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (holding school did not violate the First Amendment by censoring the content of a Journalism class's

This section will first discuss public school students' rights under the First Amendment.[65] Next, the section will address the application of the Court's student speech case law, pre-*Morse*.[66] The section will conclude with a brief discussion of the Court's treatment of the Fourth Amendment in the school context.[67]

1. *Student Speech—The Trilogy of Cases*

In 1969, the Supreme Court handed down its landmark student speech decision, *Tinker v. Des Moines Independent Community School District*.[68] The Court expressly held that students and teachers were entitled to First Amendment protection, but also acknowledged that their interests must be balanced against the "special characteristics of the school environment."[69] The *Tinker* Court reasoned that student speech is protected unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ."[70]

The *Tinker* test did not resolve all conflicts between student speech and school authority, however, and the Court revisited the issue in 1986 when it decided *Bethel School District No. 403 v. Fraser*.[71] In *Fraser*, the Court held that the First Amendment did not prevent a school administrator from punishing a student for giving a "sexually explicit monologue directed towards an unsuspecting audience of teenage students."[72] Two years later, in *Hazelwood School District v. Kuhlmeier*,[73] the Court decided its final case in what has come to be known as the "*Tinker* Trilogy."[74] In *Hazelwood*, the Court held that schools may "exercis[e] editorial control over the style and content

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newspaper); *Fraser*, 478 U.S. at 685 (holding school did not violate student's First Amendment rights when it punished him for giving a lewd and sexually explicit speech at a school assembly); *Tinker*, 393 U.S. at 514 (holding students' First Amendment rights were violated when school prohibited them from wearing armbands to protest the Vietnam war).

65. *See infra* Part II.B.1.

66. *See infra* Part II.B.2.

67. *See infra* Part II.B.3.

68. 393 U.S. 503 (1969); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000) ("*Tinker v. Des Moines Independent Community School District* is the most important Supreme Court case in history protecting the constitutional rights of students.").

69. *Tinker*, 393 U.S. at 506.

70. *Id.* at 513.

71. 478 U.S. 675 (1986).

72. *Id.* at 685.

73. 484 U.S. 260 (1988).

74. *See, e.g.*, Andrew. D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 628 (2002).

of student speech, in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[75]

Prior to the Court's decision in *Morse v. Frederick*,[76] the *Tinker* Trilogy provided lower courts and school administrators with a framework for addressing conflicts between student speech and school authority.[77] This section addresses each decision in turn,[78] and the next section turns to the application of the *Tinker* Trilogy.[79]

a. *Tinker v. Des Moines*[80]

In 1965, in the midst of the Vietnam War, three public school students in Des Moines, Iowa, decided to wear black armbands to school to protest the United States' involvement in the conflict.[81] The school administrators learned of the students' plans and instituted a rule prohibiting any student from wearing an armband.[82] John Tinker, Mary Beth Tinker, and Christopher Eckhardt wore the armbands despite the new policy and were suspended from school as a result.[83]

The three students filed suit in United States district court, claiming that their First Amendment right to free expression had been violated by the administrators' actions.[84] The district court dismissed the complaint on the grounds that the school acted reasonably in preventing a "disturbance of school discipline."[85] The students appealed the decision to the Eighth Circuit Court of Appeals, which divided evenly on the case.[86] The Supreme Court then granted certiorari.[87]

After asserting that the students' actions were protected by the First Amendment as "symbolic act[s],"[88] the Court went on to assert that they deserved "comprehensive protection under the First Amendment."[89] The *Tinker* Court began its analysis with a now famous declaration: "It can hard-

75. *Hazelwood*, 484 U.S. at 273.
76. 127 S. Ct. 2618 (2007).
77. *See e.g.*, Miller, *supra* note 74, at 628–34; *see also infra* Part II.B.2.
78. *See infra* Parts II.B.1.a–c.
79. *See infra* Part II.B.2.
80. 393 U.S. 503 (1969).
81. JOSEPH RUSSOMANNO, SPEAKING OUR MINDS: CONVERSATIONS WITH THE PEOPLE BEHIND LANDMARK FIRST AMENDMENT CASES 1 (2002).
82. *Tinker*, 393 U.S. at 504.
83. *Id.*
84. *Id.* at 504–05.
85. *Id.* at 505.
86. *Id.*
87. *Id.*
88. *Tinker*, 393 U.S. at 505.
89. *Id.* at 506.

ly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[90]

The Court relied, in part, on *West Virginia State Board of Education v. Barnette*,[91] which held that schools could not compel students to salute the flag in class.[92] The *Tinker* Court adopted the *Barnette* Court's view that, although boards of education have "important, delicate, and highly discretionary functions," there are "none that they may not perform within the limits of the Bill of Rights."[93] Given students' rights to be protected by the Constitution, and the need for administrators "to prescribe and control conduct in the schools,"[94] the *Tinker* Court defined its "problem" as "the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[95]

On the facts in *Tinker*, the Court resolved the issue in favor of the students.[96] It reasoned that there was no indication in the record that the students' protest disrupted the school's educational mission or interfered with the rights of other students.[97] The Court acknowledged the school administrators' argument that they feared such disruption would occur, however it determined that they needed more than an "undifferentiated fear."[98] The Court held that student speech could not be restricted at school unless it would "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school" or "collid[e] with the rights of others."[99]

The *Tinker* majority was also concerned that the school had not prohibited students from wearing all symbols of expression, and it noted that students were permitted to wear other political paraphernalia.[100] The Court asserted that it was violative of the First Amendment to prohibit the "expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."[101]

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90. *Id.*
91. 319 U.S. 624 (1943).
92. *Id.* at 644.
93. *Tinker*, 393 U.S. at 507 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
94. *Id.* at 507 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
95. *Id.*
96. *Id.* at 514.
97. *Id.* at 508.
98. *Id.*
99. *Tinker*, 393 U.S. at 513.
100. *Id.* at 510.
101. *Id.* at 511.

The Court affirmed that student speech could not be regulated merely because it expressed a position that was not "officially approved."[102] In some of the opinion's strongest language, the majority wrote that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[103] The Court cited to Justice Brennan's *Keyishian v. Board of Regents*[104] opinion that the protections of the First Amendment are especially important in public schools because "[t]he classroom is peculiarly the 'marketplace of ideas.'"[105]

b. *Bethel v. Fraser*[106]

The Supreme Court revisited the issue of public school students' First Amendment rights in 1986 when it decided *Bethel v. Fraser*.[107] In *Fraser*, the Court considered whether the school district violated a student's free speech rights by punishing him for using an "elaborate, graphic, and explicit sexual metaphor" while addressing a high school assembly.[108] The Court held that the school district's actions were permissible under the First Amendment.[109]

Although the *Fraser* Court reaffirmed that students retain constitutional protections while at school, it focused on public education's role in "inculcat[ing] fundamental values necessary to the maintenance of a democratic political system."[110] The Court emphasized that schools are charged with balancing students' rights to speak freely with "society's countervailing interest in teaching students the boundaries of socially appropriate beha-

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102. *Id.*
103. *Id.*
104. 385 U.S. 589 (1967).
105. *Tinker*, 393 U.S. at 512 (quoting *Keyishain*, 385 U.S. at 603).
106. 478 U.S. 675 (1986).
107. *Id.*
108. *Id.* at 678. Fraser gave his speech at a required student assembly, with 600 students in attendance. *Id.* The speech was in support of a friend who was running for student elective office. *Id.* The text of Fraser's speech was:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Jerry C. Chiang, Note, *Plainly Offensive Babel: An Analytical Framework for Regulating Plainly Offensive Speech in Public Schools*, 82 WASH. L. REV. 403, 409 n.49 (2007).
109. *Fraser*, 478 U.S. at 690.
110. *Id.* at 681.

vior."[111] The Court reasoned that socially appropriate behavior required Fraser to "take into account . . . the sensibilities of [his] fellow students."[112]

The Court relied on the school teachers' testimony that many students seemed "bewildered" by Fraser's comments.[113] The Court concluded that Fraser's speech was inappropriate for his fellow students and held that the school did not violate his First Amendment rights by punishing him.[114]

c. *Hazelwood v. Kuhlmeier*[115]

Two years after *Fraser*, the Supreme Court heard another student speech case, *Hazelwood v. Kuhlmeier*.[116] The Court addressed the issue of whether a high school principal violated students' First Amendment rights when he deleted two pages of the school's newspaper.[117] The principal deleted the pages from the newspaper because they included two articles that he believed were not appropriate for all of the paper's readers.[118]

In *Hazelwood*, the Court held that *Tinker* did not govern the case because the student newspaper was a nonpublic forum.[119] The Court reasoned that the school had not demonstrated a "clear intent to create a public forum" and that, instead, it "reserved the forum for its intended purpose . . . as a supervised learning experience for journalism students."[120] Accordingly, the Court held that the school could regulate the newspaper's content "in any reasonable manner."[121]

The Court went on to further distinguish the case from *Tinker* because, in *Tinker*, the speech was purely that of the individual students, while in *Hazelwood*, there was an element of school speech involved.[122] The Court held that the Constitution permited schools to exercise greater control over speech that others "might reasonably perceive to bear the imprimatur of the school."[123] The Court went on to hold that schools may "exercis[e] editorial

111. *Id.*
112. *Id.*
113. *Id.* at 683–84.
114. *Id.*
115. 484 U.S. 260 (1988).
116. *Id.*
117. *Id.* at 262. The newspaper, the *Spectrum*, was written and edited by the school's Journalism II class. *Id.* The printing of the *Spectrum* was funded through contributions from the Board of Education and newspaper sales. *Id.* The students in the Journalism II class received academic credit and were graded on their performance. *Id.* at 268.
118. *Id.* at 263–64. One article addressed the issue of teenage pregnancy, and the other was about the impact of divorce on students. *Id.* at 263.
119. *Id.* at 267–70.
120. *Id.* at 270.
121. *Hazelwood*, 484 U.S. at 270.
122. *Id.* at 269–72.
123. *Id.* at 271.

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."[124] In applying its standard, the Court held that it was reasonable for the principal to determine that the articles removed from the newspaper were not appropriate for publication in the school-sponsored newspaper.[125]

2. *The* Tinker *Trilogy's Legacy*

Following *Hazelwood*, commentators considered the meaning of the *Tinker* Trilogy, taken together, and most have concluded that *Tinker* was the high-water mark for student speech rights.[126] Some argued that *Fraser* and *Hazelwood* effectively overruled *Tinker*, while others maintained that *Tinker* survived as the basic framework for analyzing student speech cases and that *Fraser* and *Hazelwood* are exceptions to that basic rule.[127] Many have also written about the inconsistent way the cases have been applied in the lower courts.[128] This section will review the post-*Hazelwood* literature on student speech, focusing particularly on the question of whether the opinion implicitly allowed schools to exercise viewpoint discrimination over school-sponsored speech.

According to one prominent scholar, "in the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate."[129] Another scholar asserted post-*Hazelwood*, "there is a definite trend of judicial deference to school authorities in controlling school-sponsored expression."[130] According to Elizabeth Wilborn, "the deferential approach set forth in *Hazelwood* is a virtual abdication of the judicial obligation to protect the First Amendment rights of students."[131] Despite this scholarship, others have argued that although *Fraser* and *Ha-*

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124. *Id.* at 273.

125. *Id.* at 276.

126. *See, e.g.*, Miller, *supra* note 74, at 627; Susannah Barton Tobin, Note, *Divining* Hazelwood: *The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217 (2004); Janna J. Annest, *Only the News That's Fit to Print: The Effect of* Hazelwood *on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227 (2002); Chemerinsky, *supra* note 68, at 527; Samuel P. Jordan, Note, *Viewpoint Restrictions and School-Sponsored Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555 (2003).

127. *Compare, e.g.*, Chemerinsky, *supra* note 68, *with* Miller, *supra* note 74.

128. See Chemerinsky, *supra* note 68, Section IV for a good discussion of lower court opinions since *Tinker*; *see also* e.g., Clay Weisenberger, *Constitution or Conformity: When the Shirt Hits the Fan in Public Schools*, 29 J.L. & EDUC. 51, 55–56 (2000).

129. Chemerinksy, *supra* note 68, at 530 (emphasis added).

130. Martha M. McCarthy, *Post-*Hazelwood *Developments: A Threat to Free Inquiry in Public Schools*, 81 EDUC. L. REP. 685, 689 (1993).

131. Wilborn, *supra* note 58, at 154.

zelwood "defined the limits" of *Tinker*, it survives as the main framework for student speech cases.[132] Clay Weisenberger concluded, however, that "[r]egardless of *Tinker*'s continued viability, the exceptions may prove to swallow the rule."[133]

There also has been debate about whether the *Hazelwood* Court implicitly created an exception for school-sponsored speech to the requirement of viewpoint neutrality.[134] Most agree that the lower courts have applied *Hazelwood* inconsistently but disagree over whether viewpoint discrimination should be permitted with respect to school-sponsored speech.[135] Susannah Tobin argued that schools should not employ viewpoint discrimination, even for school-sponsored speech.[136] She emphasized that free speech is important in schools because students' "sense of the strength of the Bill of Rights develops in the hallways and classrooms of their schools."[137]

Janna Annest, on the other hand, argued that schools should not be required to be viewpoint-neutral with respect to school-sponsored speech because it "would paralyze them"[138] from "pursuing appropriate pedagogical goals."[139] Samuel Jordan took the view that schools should be permitted to employ viewpoint discrimination over school-sponsored speech, but argued that schools should be subject to heightened scrutiny by reviewing courts in such instances.[140]

3. *The Fourth Amendment and Students*

The Fourth Amendment generally requires that the state may only conduct "reasonable" searches of its citizens.[141] In most instances a government official must have probable cause and a warrant to meet the reasonableness requirement.[142] However, the Supreme Court has held that government officials may conduct warrantless searches without probable cause in a variety of circumstances in which "special needs, beyond the normal need for law enforcement make the warrant and probable-cause requirement impractica-

132. *See* Miller, *supra* note 74, at 673–74.
133. Weisenberger, *supra* note 128, at 56.
134. *See* Tobin, *supra* note 126, at 219; Jordan, *supra* note 126, at 1561; Annest, *supra* note 126, at 1239.
135. *See* Tobin, *supra* note 126, at 263; Jordan, *supra* note 126, at 1565–79; Annest, *supra* note 126, at 1239.
136. Tobin, *supra* note 126, at 263.
137. *Id.* at 218.
138. Annest, *supra* note 126, at 1256.
139. *Id.* at 1258.
140. Jordan, *supra* note 126, at 1579.
141. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).
142. *Id.*

ble."[143] The Court has found special needs in the context of searches by probation officers,[144] government employers,[145] school officials,[146] and government investigators searching pursuant to a regulatory scheme.[147]

With regard to public schools, the Court acknowledged that, although the constitutional protection against unreasonable searches and seizures exists for public school students, it has a different meaning than for adults in other contexts.[148] As a result, the Court found that "'special needs' . . . exist in the public school context."[149] This section will briefly discuss the Court's two main cases regarding students and the Fourth Amendment.

a. *New Jersey v. T.L.O.*[150]

In *New Jersey v. T.L.O.*,[151] the Supreme Court first addressed whether the Fourth Amendment prohibition against unreasonable searches and seizures applies to school officials.[152] The Court affirmed that it does and proceeded to determine under what circumstances a school official may conduct a reasonable search for the purposes of the Fourth Amendment.[153] The Court began its analysis by noting that "what is reasonable depends on the context within which a search takes place."[154]

The Court stated that Fourth Amendment analysis always requires a court to weigh "the individual's legitimate expectations of privacy and personal security . . . [with] the government's need for effective methods to deal with breaches of public order."[155] In the context of public schools, the Court reasoned that students maintain some reasonable expectation of privacy for Fourth Amendment purposes.[156] Student discipline problems and the school's interest in maintaining a safe learning environment, however, requires an "easing of the restrictions to which searches by public authorities are ordinarily subject."[157] The *T.L.O.* Court concluded that because of the special circumstances of public schools, officials are not required to obtain a

143. *See, e.g., Griffin*, 483 U.S. at 873; N.J. v. T.L.O., 469 U.S. 325, 351 (1985).
144. *Griffin*, 483 U.S. at 875.
145. O'Conner v. Ortega, 480 U.S. 709, 725 (1980).
146. T.L.O., 469 U.S. at 341–42.
147. Camera v. Mun. Ct., 387 U.S. 523, 538 (1987).
148. *See* Vernonia v. Acton, 515 U.S. 646, 656 (1995) ("[T]he nature of those [constitutional] rights is what is appropriate for children in school.").
149. *Id.* at 653.
150. 469 U.S. 325 (1985).
151. *Id.*
152. *Id.* at 332–37.
153. *Id.* at 336–37.
154. *Id.* at 337.
155. *Id.*
156. *T.L.O.*, 469 U.S. at 338–39.
157. *Id.* at 340.

warrant before searching a student at school and may conduct a search short of ordinary probable cause, so long as the search is reasonable.[158]

b. *Vernonia v. Acton*[159]

In *Vernonia School District v. Acton*,[160] the Court held that a school program requiring students participating in extracurricular activities to submit to random drug tests did not violate the Fourth Amendment.[161] In so holding, the Court emphasized the nature of public schools.[162] The Court explained that schools enjoy a "custodial and tutelary" power over their students that "permit[s] a degree of supervision and control that could not be exercised over free adults."[163] The Court made reference to its First Amendment student case law in reasoning that "Fourth Amendment rights, no less than First . . . Amendment rights, are different in public schools than elsewhere."[164]

The *Acton* Court also stressed schools' legitimate concern over student drug use.[165] The Court was satisfied that the school presented enough evidence of the seriousness of the student drug use problem.[166] The Court further emphasized that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[167] For these reasons, the Court held that the random drug testing program did not violate the Fourth Amendment in the context of public schools.[168]

III. THE CASE

In 2002, Joseph Frederick was a high school senior at Juneau-Douglas High School (JDHS) in Juneau, Alaska.[169] He was punished by the principal, Deborah Morse, for displaying a banner during the procession of the Olympic Torch Relay in front of JDHS.[170] These events led to the Supreme Court's recent decision on student speech rights in *Morse v. Frederick*.[171]

158. *Id.* at 340–42.
159. 515 U.S. 646 (1995).
160. *Id.*
161. *Id.* at 664–65.
162. *Id.* at 653–56.
163. *Id.* at 655.
164. *Id.* at 656.
165. *Acton*, 515 U.S. at 661–64.
166. *Id.* at 662–63.
167. *Id.* at 661.
168. *Id.* at 664–65.
169. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
170. *Id.* at 2622–23.
171. 127 S. Ct. 2618.

This section will first lay out the events that led to Frederick's suspension.[172] It will then address the procedural history of the case and how it came to be argued before the Supreme Court, outlining the lower courts' holdings and reasoning.[173] Next, the section turns to the Supreme Court's decision in *Morse*, outlining each of the Court's five separate opinions.[174]

A. Facts

This section will first describe the parade in question and Frederick's banner.[175] The section will also outline the events following the parade, including Principal Morse's suspension of Frederick.[176] The section will conclude with a summary of the procedural history of the case addressing, the Juneau School District's administrative affirmation of Frederick's punishment, the district court decision against Frederick in his civil suit, and the Ninth Circuit Court of Appeal's holding for Frederick.[177]

1. *The Parade*

On January 24, 2002, Juneau, Alaska hosted the Olympic Torch Relay as the torch made its way to Salt Lake City, Utah for the winter games.[178] The relay was sponsored by Coca-Cola and other private entities and was open to all members of the community.[179] The relay proceeded along the street in front of JDHS, and principal Deborah Morse permitted students and faculty to leave the school grounds in order to watch the procession.[180]

Joseph Frederick, a JDHS senior at the time, did not arrive at school during the morning of the relay.[181] When he got to the location of the relay, the JDHS students had already been released to watch the procession.[182] Frederick stood with a group of his friends and waited for the torch to

172. *See infra* Part III.A.1.
173. *See infra* Parts III.A.2.
174. *See infra* Parts III.B.1–5.
175. *See infra* Part III.A.1.
176. *See infra* Part III.A.1.
177. *See infra* Parts III.A.2.a–c.
178. Morse v. Frederick, 127 S. Ct. 1218, 2622 (2007).
179. Frederick v. Morse, 439 F.3d 1114, 1115–16 (9th Cir. 2006).
180. *Morse*, 127 S. Ct. at 2622. There is some dispute regarding the amount of supervision the students received during the relay. *Frederick*, 439 F.3d at 1116. Principal Morse contended that there was ample supervision, but Frederick alleged that there was little supervision, and that students left the event without objection from JDHS staff. *Id.*
181. *Morse*, 127 S. Ct. at 2622.
182. *Id.*

pass.[183] During this time, many students, other than Frederick and his group, became rowdy and threw plastic soda bottles and snowballs at each other.[184]

When the torch passed in front of JDHS, Frederick and his friends held up a fourteen-foot, paper banner that read, "BONG HiTS 4 JESUS."[185] When she saw what Frederick and his friends were holding, Principal Morse crossed the street and asked them to take down the banner.[186] When Frederick refused, Morse ordered him to meet her in her office, where she suspended him from school.[187] Morse indicated that she told Frederick to remove the banner because it violated a school policy against encouraging illegal drug use.[188] Frederick contended that his punishment was originally set at five days, but that Morse extended it after he quoted Thomas Jefferson to her.[189] Morse ultimately suspended Frederick for ten days.[190]

2. *Procedural History*

This section turns to the procedural history of the case. It will describe the Juneau School District's administrative review of Frederick's suspension and its reasoning in support of Principal Morse.[191] Next, the section will turn to the District Court's holding in favor of the school district[192] and will conclude by outlining the Ninth Circuit Court of Appeals reversal and holding that Frederick's First Amendment rights were violated by his suspension.[193]

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183. *Id.*

184. *Id.*

185. *Id.* Frederick's brief to the Supreme Court indicated that he displayed the banner "in the hopes of attracting the attention of the television crews covering the event." Brief of Respondent at 1, Morse v. Frederick, (S. Ct. Feb. 20, 2007) (No. 06-27).

186. *Morse*, 127 S. Ct. at 2622.

187. *Id.*

188. *Id.*

189. Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006). There is some indication that Morse and Frederick had a history of confrontation over student rights and school rules. Brief of Respondent, *supra* note 185, at 1–2. According to one report, "Frederick had been bothered in his senior year by the lack of attention to the issue of freedom of speech in the United States, and at his school in particular." Ariane de Vogue, *Supreme Court Rules Against 'Bong Hits 4 Jesus' Student: Ruling Narrows Student Rights to Free Speech*, ABCNEWS.com, June 25, 2007, http://www.abcnews.go.com/print?id=3306594 (last visited Nov. 15, 2007).

190. *Morse*, 127 S. Ct. at 2622.

191. *See infra* Part III.A.2.a.

192. *See infra* Part III.A.2.b.

193. *See infra* Part III.A.2.c.

a. Juneau school district administrative review

Frederick appealed his suspension to the Juneau School District Superintendent.[194] His appeal was unsuccessful, and the Superintendent agreed with Principal Morse that Frederick's banner violated the school's policy against encouraging illegal drug use.[195] The Superintendent did not find Frederick's speech to be political in nature and stated that the "common-sense understanding of the phrase 'bong hits' is . . . a reference to a means of smoking marijuana."[196]

The Superintendent found that Morse's actions passed constitutional muster on application of *Bethel School District No. 403 v. Fraser*.[197] He concluded that speech was not protected if it "intrudes upon the work of the schools."[198] The Superintendent reasoned that Frederick's banner intruded on the work of the school and, therefore, Morse was allowed to regulate such speech.[199] The Juneau School District Board of Education agreed with the Superintendent's reasoning and upheld Frederick's suspension.[200]

b. District court decision

After exhausting his administrative remedies, Frederick sued the Juneau School Board and Principal Morse on grounds that they violated his First Amendment rights by suspending him for displaying the "BONG HiTS 4 JESUS" banner.[201] The United States District Court for the District of Alaska granted summary judgment for the school board and Principal Morse.[202] The court applied *Fraser* and held that Frederick's First Amendment rights were not violated.[203] It believed that Morse was reasonable in interpreting Frederick's message as encouraging illegal drug use and reasoned that she "had the authority, if not the obligation, to stop such speech at a school-sanctioned activity" because the speech "directly contravened the Board's policies relating to drug abuse prevention."[204]

194. *Morse*, 127 S. Ct. at 2623.
195. *Id.*
196. *Id.* (quoting App. to Pet. for Cert. 61a–62a).
197. 478 U.S. 675 (1986) (holding that a school could punish a student for sexually explicit speech.).
198. *Morse*, 127 S. Ct. at 2623 (citing *Fraser*, 478 U.S. at 680).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006).
204. *Morse*, 127 S. Ct. at 2623.

c. Ninth Circuit review

The United States Court of Appeals for the Ninth Circuit reversed the lower court's decision and held that Frederick's banner was entitled to First Amendment protection.[205] The appellate court found that *Tinker v. Des Moines Independent Community School District*,[206] not *Fraser*, governed the case.[207] In applying *Tinker*, the Ninth Circuit held that the record did not support a showing that Frederick's speech risked substantial disruption to its educational mission because the banner "was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials."[208] The Court indicated further that the record failed to show that Frederick participated in any other potentially disruptive behavior.[209] Therefore, it found that the *Tinker* standard was not met and held in favor of Frederick.[210]

The School District and Principal Morse appealed the Ninth Circuit's decision in favor of Frederick. The Supreme Court granted certiorari[211] to decide whether Frederick had a First Amendment right to display his banner.[212]

B. Reasoning

In *Morse v. Frederick*,[213] a closely divided Supreme Court reversed the Ninth Circuit and held that Frederick's First Amendment rights were not violated by his suspension.[214] The majority first concluded that the words "BONG HiTS 4 JESUS" could reasonably be interpreted by Principal Morse as promoting illegal drug use.[215] Next, the majority applied the Court's First and Fourth Amendment jurisprudence with regard to students to the issue at hand.[216] In doing so, it held that school officials may constitutionally pro-

205. *Id.*
206. 393 U.S. 503 (1969) (holding that student speech can be constitutionally proscribed when it materially disrupts the work of the school or impinges on the rights of others).
207. *Frederick*, 439 F.3d. at 1123.
208. *Id.*
209. *Id.* at 1117 (stating that the record did not indicate that Frederick was involved in throwing soda bottles or snow balls with the other students).
210. *Id.* at 1123.
211. 127 S. Ct. 722 (2006).
212. *Morse*, 127 S. Ct. at 2624.
213. 127 S. Ct. 2618 (2007).
214. *Id.* at 2629.
215. *Id.* at 2625–26.
216. *Id.*

scribe student speech that can reasonably be viewed as promoting illegal drug use.[217]

This section will lay out how the majority reached its conclusion.[218] It will also briefly address Justice Thomas's concurring opinion that the doctrine of in loco parentis required the reversal of the *Tinker* student speech standard.[219] The section next discusses Justice Alito's concurrence, in which Justice Kennedy joined, defining his view of the limits of the majority's holding.[220] The section then briefly outlines Justice Breyer's opinion, concurring in part, and dissenting in part.[221] The section concludes with a discussion of the dissenting opinion, filed by Justice Stevens, in which Justices Souter and Ginsberg joined.[222] Justice Stevens contended that the majority's holding weakened student speech rights because it made it permissible for schools to engage in viewpoint discrimination.[223]

1. *Majority Opinion*

Chief Justice Roberts delivered the opinion of the court, in which Justices Scalia, Kennedy, Thomas, and Alito joined.[224] Chief Justice Roberts first briefly asserted the Court's view that this case was properly reviewed as a student speech case.[225] The opinion points to the fact that Frederick was at a school-sanctioned event when he unfurled the banner, that the event occurred during normal school hours, that Frederick was standing with other students, and that he displayed the banner in the direction of the school.[226] On those facts the majority found that Frederick was at school for the purposes of First Amendment analysis.[227]

Upon establishing that the case should be analyzed as a student speech case, the majority turned to the question of what the words "BONG HiTS 4 JESUS" could reasonably be viewed to mean.[228] The opinion acknowledged that the phrase could mean different things to different people.[229] However,

217. *Id.* at 2629.
218. *See infra* Part III.B.1.
219. *See infra* Part III.B.2.
220. *See infra* Part III.B.3.
221. *See infra* Part III.B.4.
222. *See infra* Part III.B.5.
223. Morse v. Frederick, 127 S. Ct. 2618, 2651 (2007).
224. *Id.* at 2622.
225. *Id.* at 2624. Frederick argued that the case should not be analyzed as student speech case because he was not on school grounds and had not signed in to school on the day in question. Brief of Respondent, *supra* note 185, at 33.
226. *Morse,* 127 S. Ct. at 2624.
227. *Id.*
228. *Id.* at 2624–25.
229. *Id.* at 2624 ("The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all.").

the majority concluded that it was reasonable for Principal Morse to view the phrase as promoting illegal drug use because there were at least two plausible interpretations—the words could mean "take drugs" or the words could operate as a celebration of illegal drug use.[230] According to the majority, the fact that Frederick did not assert that the phrase contained any political message and, in fact, failed to put forward any meaning for the words other than the banner was "meaningless and funny" supported its position.[231]

The opinion next focused on the central question of whether a school official may constitutionally restrict student speech that is reasonably viewed as promoting illegal drug use.[232] The majority concluded that restricting such student speech does not violate the First Amendment; the majority applied the Court's First and Fourth Amendment school case law to reach its conclusion.[233] The opinion began this analysis by setting out the fundamental rule that "student expression may not be suppressed unless the school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"[234] It pointed out that the students in *Tinker* were engaged in core political speech and their expression was a "silent, passive expression of opinion."[235]

Next the opinion discussed *Fraser*, in which the Court held it was constitutionally permissible for a school to restrict student speech that was offensively lewd and obscene and delivered to a school assembly.[236] The opinion acknowledged that the reasoning employed by the *Fraser* Court was somewhat ambiguous but determined that the uncertainty was immaterial to resolving the case at hand.[237] Instead, the majority opinion laid out two *Fraser* principles relevant to its analysis: first, the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and second, "the mode of analysis set forth in *Tinker* is not absolute."[238]

The majority then briefly discussed *Hazelwood School District v. Kuhlmeier*,[239] the third case in the *Tinker* trilogy of student speech cases.[240]

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230. *Id.* at 2625.

231. *Id.*

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

233. *Id.* at 2625–28.

234. Id. at 2626 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

235. *Id.* (quoting *Tinker*, 393 U.S. at 508).

236. *Id.*

237. *Id.*

238. *Morse*, 127 S. Ct. at 2626–27 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

239. 484 U.S. 260 (1988) (holding that a school was constitutionally permitted to restrict student-written articles published in a school-financed and directed newspaper).

240. *Morse*, 127 S. Ct. at 2627.

The opinion concluded that *Hazelwood* did not control the *Morse* case because the message on Frederick's banner could not reasonably be interpreted as the school's own speech.[241] The majority reasoned that *Hazelwood* was important to its analysis, however, because it "confirms that the rule of *Tinker* is not the only basis for restricting student speech."[242]

The majority also used the Court's Fourth Amendment school cases to support its conclusion that constitutional rights must be applied differently to public school students.[243] The majority reasoned that its Fourth Amendment school jurisprudence was particularly relevant to its current analysis because the cases recognized the pressing problem of drug use among the nation's teenagers.[244] According to the majority, the *Acton*[245] court relaxed Fourth Amendment standards in public school contexts, in part, because it recognized the important state interest in preventing drug use among public school students.[246] The majority also pointed to the *Pottawatomie County v. Earls*[247] opinion, decided in 2002, to illustrate that nationwide teenage drug use has not declined since *Acton* but has continued to rise.[248] The majority opinion supported this contention further by referencing a National Institutes of Health study concluding that the problem of teenage drug use is worsening in the United States.[249]

The majority opinion went on to acknowledge that legislative bodies around the country have recognized this urgent problem and have directed schools to educate students about the dangers of illegal drug use.[250] The majority cited congressional action in passing the Safe and Drug-Free Schools and Communities Act of 1994, which requires schools that receive federal funds to "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful."[251] The opinion also observed that thousands of school boards, including the Juneau School Board, have implemented policies aimed at sending students an anti-drug message.[252]

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241. *Id.* ("[N]o one would reasonably believe that Frederick's banner bore the school's imprimatur.").

242. *Id.*

243. *Id.* at 2627–28 (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Bd. of Ed. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002)).

244. *Id.* at 2628.

245. 515 U.S. 646 (1995).

246. *Morse*, 127 S. Ct. at 2628.

247. 536 U.S. 822 (2002).

248. *Morse*, 127 S. Ct. at 2628.

249. *Id.* (citing MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2005, SECONDARY SCHOOL STUDENTS, National Institute on Drug Use, National Institutes of Health (2006)).

250. *Id.*

251. *Id.*

252. *Id.*

The majority reasoned that the serious government interest in preventing teenage drug use and the Court's history of limiting students' constitutional rights in the school context combine to make it constitutionally permissible for school officials to restrict speech that can reasonably be viewed as promoting illegal drug use.[253] The school board had urged the Court to interpret *Fraser* as holding that schools may restrict all student speech deemed offensive.[254] The majority declined to do so, however, out of concern that such a rule would encompass too much speech, especially political and religious speech.[255]

The opinion concluded by asserting that the dissent's position is closer to the majority's than asserted.[256] The majority read the dissent to concede that there are times when a school can constitutionally proscribe speech that reasonably advocates illegal drug use.[257] The majority closed by suggesting that the real source of disagreement between it and the dissent lies in whether Frederick's speech could reasonably be viewed as promoting illegal drug use, not in whether schools can constitutionally restrict speech that does.[258]

Finally, the majority reiterated its admiration for the difficult and important job of public school principals.[259] It asserted that these educators often have to act quickly and make on-the-spot decisions regarding discipline in order to maintain a controlled environment for the students.[260] The majority also expressed its view that Principal Morse's actions were reasonable because, according to the opinion, if she had failed to punish Frederick, it would have "sen[t] a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use."[261] The majority concluded that the Constitution does not require school officials to ignore speech reasonably believed to advocate illegal drug use.[262]

2. *Justice Thomas's Concurring Opinion*

Justice Thomas wrote a concurring opinion in which he argued that the *Tinker* standard for judging student speech cases is without constitutional basis and should be overturned.[263] Justice Thomas supported his contention

253. *Id.* at 2629.
254. *Morse*, 127 S. Ct. at 2629.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Morse*, 127 S. Ct. at 2629.
261. *Id.*
262. *Id.* at 2629.
263. *Id.* at 2630 (Thomas, J., concurring).

by laying out the history of public education in the United States.[264] He made the case that, historically, students were afforded very few rights.[265] According to Justice Thomas, teachers had virtually complete authority over their students and could use virtually complete discretion to maintain order and decorum in the classroom.[266]

Justice Thomas argued that the traditional doctrine of in loco parentis, which makes teachers the substitute for parents while students are in school, should continue to govern public education.[267] Justice Thomas concluded that in loco parentis gives schools much broader authority to regulate speech than *Tinker* does and that the *Tinker* rule should be overturned.[268] Justice Thomas explained that, despite this view, he joined the majority's decision because it weakened *Tinker*.[269]

3. *Justice Alito's Concurring Opinion*

Justice Alito joined the majority opinion but wrote a separate concurrence in which Justice Kennedy joined.[270] Justice Alito's concurrence articulated that, given the serious nature of the problem of teenage drug abuse, schools must have the authority to regulate student speech that promotes illegal drug use.[271] However, the opinion also made clear that Justices Alito and Kennedy join the majority "on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . . ."[272]

Justice Alito emphasized that, although the school environment raises special circumstances that sometimes justify additional authority to regulate speech, schools are state actors.[273] He explicitly rejected Justice Thomas's argument and asserted that schools' authority to regulate speech that advocates illegal drug use comes from the special characteristics of the school setting, not because schools stand in loco parentis.[274] Justice Alito asserted that the school environment is unique because "[s]chool attendance can expose students to threats to their physical safety that they would not other-

264. *Id.* at 2630–31.

265. *Id.* Students were disciplined for "disrespectful or wrong" behavior, such as "idleness, talking, profanity, and slovenliness." *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring). "Schools required absolute obedience." *Id.* at 2631.

266. *Morse*, 127 S. Ct. at 2631.

267. *Id.*

268. *Id.* at 2635–36.

269. *Id.* at 2636.

270. *Id.* (Alito, J., concurring).

271. *Id.* at 2638.

272. *Morse*, 127 S. Ct. at 2636.

273. *Id.* at 2637.

274. *Id.* at 2637–38.

wise face."[275] It is this special characteristic of public schools, not a theory of delegated parental authority, that gives schools the constitutional right to regulate speech that could not otherwise be prohibited.[276]

Justice Alito concluded his concurrence by noting that, while *Brandenburg v. Ohio*[277] allows the government generally to regulate speech that incites imminent, lawless action, school officials must have more freedom in restricting dangerous speech before the danger becomes imminent.[278] He reasserted his position that the Court's holding should not reach political speech, however, and stated that schools' ability to regulate speech that advocates illegal drug use stands "at the far reaches of what the First Amendment permits."[279]

4. *Justice Breyer's Opinion, Concurring in Judgment and Dissenting in Part*

Justice Breyer would have reached only the qualified immunity question.[280] According to him, the Court's majority opinion fashioned too broad a rule on student speech when it was unnecessary to reach the First Amendment question.[281] He reasoned that the case could be decided by holding that Principal Morse was entitled to qualified immunity and, therefore, not subject to personal liability.[282] As a result, Justice Breyer argued that the Court should "adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions."[283]

Justice Breyer also expressed concern that the majority's opinion would authorize further viewpoint-based restrictions on student speech.[284] He worried that the majority failed to adequately define the speech that can be proscribed and would, therefore, leave other kinds of speech open to re-

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275. *Id.* at 2638.

276. *Id.*

277. 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

278. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

279. *Id.*

280. *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring). Frederick argued that Morse was not entitled to qualified immunity. *Id.*

281. *Id.*

282. *Id.* at 2640.

283. *Id.*

284. *Morse*, 127 S. Ct. at 2639. Justice Breyer expressed concern over the majority rule's possible application to speech that might reasonably be viewed as advocating illegal drug use but was mixed with political messages. *Id.*

striction.[285] Despite these concerns, Justice Breyer declined to join the dissenting opinion because he was concerned that it would unduly limit officials who are charged with reasonably maintaining discipline at school.[286] Justice Breyer worried that the dissenting opinion would prevent school administrators from disciplining student speech that "has gone too far."[287]

5. *Justice Stevens's Dissenting Opinion*

Justice Stevens, writing for a dissent in which Justice Souter and Justice Ginsburg joined, reasoned that the message on Frederick's banner was unclear, and that the school's actions violated his First Amendment rights.[288] According to the dissent, it was unreasonable for anyone to view Frederick's banner as "advocating illegal drug use" because Frederick did not intend to express such a message to his peers.[289] According to Frederick, "he just wanted to get the camera crew's attention."[290] The dissent argued that, because Frederick's banner was "nonsense," the school punished him because it disagreed with Frederick's view.[291] This, Justice Stevens wrote, is contrary to First Amendment principles.[292]

The dissent then outlined its understanding of the Court's *Tinker* decision.[293] Justice Stevens asserted that two foundational principles survive *Tinker*—first, viewpoint discrimination in a First Amendment context requires strenuous review, and, second, advocacy can only be restricted as conduct when it is "likely to provoke the harm the government seeks to avoid."[294] The dissent acknowledged that both principles might need to be modified in a school setting, but insisted that they remain important tenets of First Amendment student speech analysis.[295]

According to Justice Stevens and his fellow dissenters, the majority opinion insufficiently addressed both *Tinker* standards.[296] Justice Stevens reasoned that the majority's opinion will lead to "stark viewpoint discrimi-

285. *Id.* at 2639. Justice Breyer speculated that speech "encouraging underage consumption of alcohol," or "a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana," or "deprecating commentary about an antidrug film shown in school" might be restricted under the majority's rule. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 2643 (Stevens, J., dissenting).

289. *Morse*, 127 S. Ct. at 2643.

290. *Id.*

291. *Id.* at 2644.

292. *Id.*

293. *Id.*

294. *Id.* at 2644–45 (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).

295. *Morse*, 127 S. Ct. at 2645.

296. *Id.*

nation."[297] Furthermore, he argued, it upholds a punishment against Frederick based on Principal Morse's subjective understanding of his statement.[298] Justice Stevens also asserted that promoting illegal drug use does not rise to the *Brandenburg* standard of "incitement to imminent, lawless action."[299] Although morally disagreeable, the dissent explained, speech that advocates illegal drug use does not necessarily lead to illegal drug use.[300]

Next, the dissent addressed the majority's concern over the seriousness of the drug problem in the nation's public schools.[301] The dissent agreed that schools have an important interest in protecting students from the dangers of illegal drugs.[302] Justice Stevens also conceded that in some school circumstances it might be necessary to permit narrow viewpoint restrictions or to relax the rigid imminence requirement of *Brandenburg*.[303] In the dissent's view, however, Frederick's speech was different from the kind of advocacy that the First Amendment allows the government to restrict.[304]

The dissent also expressed concern that the majority view failed to articulate an adequate test for how a school official or a court should determine what can reasonably be viewed as advocating illegal drug use.[305] Justice Stevens suggested that parts of the majority opinion indicated a reliance on Principal Morse's subjective belief of the banner's meaning.[306] According to the dissent, this was an unconstitutional approach because a third party's reasonable or unreasonable interpretation of a speaker's meaning cannot determine whether the speech is proscribable.[307]

At other times, Justice Stevens wrote, the majority seemed to suggest that it believed Frederick's banner could reasonably be interpreted as advocating illegal drug use.[308] The dissent responded to this by asserting that "BONG HiTS 4 JESUS" is nonsense, and its most reasonable interpretation is not of advocating illegal drug use.[309] According to Justice Stevens, Frederick did not mean to encourage his peers to use illegal drugs, and the dissent

297. *Id.*
298. *Id.*
299. *Id.* at 2645.
300. *Id.* at 2645–46.
301. *Morse*, 127 S. Ct. at 2646.
302. *Id.*
303. *Id.*
304. *Id.* at 2646–47.
305. *Id.* at 2647.
306. *Id.* at 2647 (Stevens, J., dissenting).
307. *Morse*, 127 S. Ct. at 2647–48.
308. *Id.* at 2647.
309. *Id.* at 2649.

argued further that the message on the banner was unlikely to actually persuade the students who saw it to use such drugs.[310]

The dissent concluded by arguing that while illegal drug use among teenagers is a problem, there is a serious debate in the nation and in Alaska over the wisdom of the country's current drug policies.[311] Justice Stevens stated that in 1969, when *Tinker* was decided, many believed that the students' protest was treasonous and that the school had a right to prohibit their speech.[312] Justice Stevens also made reference to the prohibitionist movement in the 1920s and 1930s to show that public opinion and policy changed dramatically with regard to alcohol use.[313] The dissent urged that this history requires the Court to be especially vigilant in reviewing state action that limits unpopular speech.[314] Such speech, according to Stevens, requires the most protection.[315]

IV. ANALYSIS

The Supreme Court erred in *Morse v. Frederick* because its decision broadens schools' authority to regulate student speech in ways that are contrary to fundamental First Amendment values. First, this section will argue that the classic justifications for free expression apply in schools as well as in the broader society.[316] Next, the section asserts that *Morse* was wrongly decided because it explicitly allows schools to engage in highly suspect viewpoint discrimination.[317]

A. The Benefits of a Free Expression Are Enjoyed Equally in Public Schools

This section will argue that the Court's decision in *Morse* undermines the benefits of free expression, which are equally important in public schools. First, the section asserts that the freedom of expression is vital in American public education because students learn about the theory and practice of a democratic society at school.[318] Next, the section applies Emer-

310. *Id.* ("Admittedly, some high school students are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.").

311. *Id.* at 2650.

312. *Id.* at 2650–51.

313. *Morse*, 127 S. Ct. at 2651.

314. *Id.*

315. *Id.*

316. *See infra* Part IV.A.

317. *See infra* Part IV.B.

318. *See infra* Part IV.A.1.

son's four values of free speech to public schools and maintains that these classic justifications for free expression also apply to students.[319]

1. *Students Will Learn the Values of a Democratic Society Through Their School Experience*

In *Tinker*, the Court stated that, while students are afforded more limited free speech rights than adults in other contexts, the foundational reasons for allowing free debate and discussion in society at large apply equally, if not more, in a school setting.[320] In fact, the majority decision quotes Justice Brennan, who said that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. *The classroom is peculiarly the 'marketplace of ideas.*"[321]

For society to reap the benefits of open and robust dialogue on issues of communal importance, young students must learn to engage in such discussion with passion and respect. It is too much to expect that students will graduate from public high schools and automatically become participating actors in a representative democracy if, until that point, their views have been stifled. According to some educational researchers, "democratic values are taught to youth by more than formal instruction, particularly where the formal instruction is inconsistent with the students' observations and experience."[322] Other researchers suggest that "a more democratic family or school . . . predispose[s] children to democratic values."[323]

Although it is important that teachers inculcate societal values through formal curricula, "the way in which school administrators operate schools may have a more powerful influence on students than the lessons in the civics textbooks."[324] Mary Beth Tinker expressed this idea eloquently: when asked whether schools were appropriate places for students to express themselves, she said that public schools "hopefully are creating citizens in a democracy who are familiar with the concepts of democracy and free speech is one of the major foundations in our democracy. So I can't think of a better

319. *See infra* Part IV.A.2.

320. Tinker v. Des Moines, 393 U.S. 503, 512 (1969).

321. *Id.* (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)) (emphasis added) (citation and internal quotation marks omitted).

322. Betsy Levin, *Education Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1654 (1986) (citing R. WEISSEBERG, POLITICAL LEARNING, POLITICAL CHOICE, AND DEMOCRATIC CITIZENSHIP (1974) and R. DAWSON & K. PREWITT, POLITICAL SOCIALIZATION (1969)).

323. *Id.* at 1654 n.31 (citing R. HESS & J. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 93–115 (1967)).

324. *Id.* at 1649.

place . . . to learn those kinds of lessons and to have that kind of discourse."[325]

2. *Classic Justifications of Free Expression Apply to Students*

Many scholars and the Court have long recognized the benefits of freedom of expression in our society.[326] Students, as well as adults, enjoy the benefits of the First Amendment.[327] This section will apply Thomas Emerson's four values of free speech to the school setting.

Emerson argued that the freedom of speech aids in individual self-fulfillment.[328] Expressing ones views and opinions on various issues helps a person identify what their views and opinions are.[329] Adolescence is a uniquely important time for self-discovery and development.[330] It is during these years when many people begin to consider issues of local and national importance. Often public schools serve as the place where such discussions and debates begin to take place.[331] It is, therefore, uniquely important to public school students' individual self-fulfillment and discovery that they be given as much room to express their views and debate the issues of the day as possible.[332]

Emerson also suggested that freedom of speech leads to the attainment of truth.[333] Although in many core academic subjects the "truth" has already been attained, this purpose also has application in the context of public schools. As discussed above, schools are often an important forum for students to debate important issues of the day. Broad, open discussion can help all students arrive at a more complete understanding of particular issues. Open debate is especially important in situations like those in *Tinker* and *Morse*, in which the Government's official position on an issue will diminish the likelihood that the curriculum will present all sides of a topic. Student speech can aid in raising other issues and perspectives and lead other students to a fuller understanding of the matter in question.

The final two benefits on Emerson's view are that, in a democracy, free speech allows the speaker to participate in decision-making, and it also op-

325. RUSSOMANNO, *supra* note 81, at 6.

326. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("[The] use of such freedom [of expression] will ultimately produce a more capable citizenry and more perfect polity . . . ."); Emerson, *supra* note 25.

327. Robert Trager & Joseph A. Russomanno, *Free Speech for Public School Students: A "Basic Educational Mission"*, 17 HAMLINE L. REV. 275, 277 (1993).

328. Emerson, *supra* note 25, at 137–39.

329. *Id.*, *supra* note 25, at 137.

330. *See* Levin, *supra* note 322, at 1654 n.31.

331. *Id.*, *supra* note 322, at 1654.

332. *Id.*, *supra* note 322, at 1653–54.

333. Emerson, *supra* note 25, at 139–40.

erates as a safety-valve, preventing people from resolving their disagreements through other, more violent, means.[334] These purposes are intricately entwined. In the broader context of our democracy, citizens whose voices are heard and who believe there is a possibility that their expressed views can change the outcome of public policy are less likely to resort to violent demonstrations or revolution. Public schools do not operate, nor should they, as a democracy; however, students are more likely to respect the authority of their teachers and administrators if they feel their views are respected and heard. In this sense, the safety-valve function of free speech has special meaning in a school context.

B. Viewpoint Discrimination Is Equally Dangerous in a School Context

Morse v. Frederick[335] is the first case in which the Supreme Court explicitly condoned viewpoint discrimination in public schools.[336] Furthermore, according to one scholar, it is the first time the Court directly upheld a viewpoint restriction in any First Amendment speech case.[337] Given that the foundation of the First Amendment historically has been that the government may not regulate speech "based on hostility—or favoritism—toward the underlying message expressed,"[338] the decision in *Morse* is a significant development in the law of free expression.

The prohibition on viewpoint discrimination is at the heart of the First Amendment, which is designed to protect against government-controlled promotion or censorship of certain ideas. By permitting schools to punish students who make statements that advocate illegal drug use, the Court has allowed the government, through school administrators, to determine which statements regarding drug use are permissible and which are not. This is precisely the kind of viewpoint discrimination the Constitution prohibits.

This section asserts that there are three main reasons the Court should not have created a viewpoint-based exception to student speech law. First, unpopular speech, like Frederick's, is most deserving of protection from viewpoint discrimination.[339] Second, the Court's rule that allows schools to discriminate against student speech, that can reasonably be interpreted as

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334. *Id.*, *supra* note 25, at 140–44.

335. 127 S. Ct. 2618 (2007).

336. *See* Hans Bader, *Campaign Finance and Free Speech: BONG HiTS 4 JESUS: The First Amendment Takes a Hit*, 2006–07 CATO SUP. CT. REV. 133, 142 (2006/2007) ("The Court for the first time countenanced viewpoint-based restrictions on speech that would clearly be protected from punishment if the speech occurred among citizens in society at large.").

337. *See* Chemerinksy, *supra* note 60, at 56 ("Viewpoint restrictions have never been upheld.").

338. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

339. *See infra* Part IV.B.1.

advocating illegal drug use, is vague and unworkable.[340] Finally, schools do not need to repress student speech to advance the important interest of teaching students about the dangers of illegal drug use, and the Court's analogy to Fourth Amendment student speech cases is misguided.[341]

1. *Minority Speech Most Deserves Protection from Viewpoint Discrimination*

The First Amendment exists primarily to protect unpopular speech from being replaced with the government's position on controversial issues.[342] And, although it is hard to imagine that the framers of the First Amendment contemplated protecting statements like "BONG HiTS 4 JESUS,"[343] the frivolity of the statement, in some sense, makes its protection more important. At its core the First Amendment is intended to protect anti-majoritarian speech.[344]

Regardless of how abhorrent speech that advocates illegal drug use is to school officials in 2007, student speech that does not materially disrupt the work of the school must be protected. In *Tinker*'s time, there were those, including many educators, who believed that students needed to be protected from the pacifist, anti-war movement and should, instead, be instilled with patriotism and respect for the United States Armed Forces. The *Tinker* Court reminded public schools that, regardless of the majority view, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[345] This note does not attempt to predict the future of drug laws in this country, but points out that in many places, including Alaska, there exists significant debate about whether certain drugs should be legalized.[346]

Given the public debate about drug policy, it is especially important that we do not give public schools the power to set the agenda on a political issue and then suppress student speech that expresses a different position. According to Hans Bader, many schools "make it their mission to take sides in a host of thorny social issues, and it cannot be the case that merely by injecting themselves into a controversy, they get license to suppress oppos-

340. *See infra* Part IV.B.2.

341. *See infra* Part IV.B.3.

342. *See* Heins, *supra* note 57, at 100; Wilborn, *supra* note 58, at 151–52.

343. On Respondent's own admission, it was a meaningless, silly phrase, intended only to attract media attention for its oddity. Morse v. Frederick, 127 S. Ct. 2618, 2624 (2007).

344. Cohen v. California, 403 U.S. 15, 25 (1971) ("We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.").

345. Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 511 (1969).

346. *See Morse*, 127 S. Ct. at 2649 n.8 (Stevens J., dissenting) ("[T]he legalization of marijuana is an issue of considerable public concern in Alaska.").

ing viewpoints."[347] While Frederick's statement was not core political speech, it implicated a highly controversial political issue. By allowing the school to regulate it, absent material disruption, the Court has opened the door to much more serious First Amendment restriction on students.

Furthermore, while public schools may, and should, work hard to keep students from using illegal drugs, schools can take proactive, constitutional measures to teach students about the dangers of illegal drug use and can encourage anti-drug messages. Schools can also restrict the discussion of drug use to appropriate times and places. However, the responsibility to discourage drug use should not entitle schools to punish students merely for making statements that contradict that official, government-sponsored position.

2. *The Court's Holding Is Unclear and Unworkable.*

A rule that bans messages advocating illegal drug use not only violates important free speech principles forbidding viewpoint discrimination, but it is also unworkable and inconsistent. The *Morse* Court did not define a test for determining when statements advocate illegal drug use. Without a specific standard for determining when a statement is proscribable, students' free speech rights become contingent on the discretion of each individual teacher and administer. This school discretion prevents students from knowing in advance whether their speech is protected.[348]

There was, in fact, significant disagreement as to the meaning of the words at issue in this case. Frederick asserted that he was not advocating illegal drug use, but rather was trying to get the attention of the news cameras to be on television.[349] Given that the members of the Court could not determine what the meaning of the banner was, it is dangerous to adopt a rule that asks teachers and school administrators across the country to decide when a message "advocate[s] illegal drug use."[350]

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347. Bader, *supra* note 336, at 150.

348. See *Cohen*, 403 U.S. at 19. Cohen's conviction for using "offensive" language was overturned because "[n]o fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person . . . ." *Id.*

349. *Morse*, 127 S. Ct. at 2643.

350. For example, a student's statements during a social studies discussion that the United States should legalize marijuana may be considered speech that "advocates illegal drug use" Furthermore, a teacher who shows video of a Presidential debate in which one candidate discusses his support of such a measure could be reprimanded by school administrators.

3. *The* Morse *Court Mistakenly Relied on Fourth Amendment Speech Cases to Create and Exception to Viewpoint Neutrality*

The *Morse* Court analogized its First and Fourth Amendment case law with respect to students to support an exception to the viewpoint neutrality requirement in schools.[351] That analogy is misguided. The Court cited these cases in support of its assertions that students' constitutional rights must be applied in the context of the school environment and that deterring drug use is an important state interest.[352] Neither of these contentions, however, support the view that student speech regarding drug use should be restricted. Restricting students' Fourth Amendment rights in the school context directly implicates schools' interest in preventing drug use because it allows officials to search for and to seize drugs without a warrant or ordinary probably cause.[353] It is improbable, however, that restricting certain student expression regarding illegal drugs will lead to a reduction of student drug use.[354]

Furthermore, although the Court has frequently applied the Fourth Amendment "special needs" test in school and non-school contexts,[355] it has never created a general exception to the requirement of viewpoint neutrality.[356] The requirement that the government refrain from viewpoint discrimination has consistently been a mainstay of First Amendment jurisprudence.[357] On the other hand, the Court has made clear that the "special needs" exception to the Fourth Amendment applies in many circumstances.[358]

V. CONCLUSION

For many years the Court and scholars have recognized the important role that freedom of speech serves in our society. Although it is settled law that all of the First Amendment rights available to adults do not apply to students in a public school context, restrictions on student speech should be limited to certain, necessary circumstances. For that reason, prior student speech cases held that as long as student speech did not materially disrupt the work of the school, did not impinge on another student's rights, was not

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351. *See supra* Section III.B.1.

352. *Morse*, 127 S. Ct. at 2628.

353. *See* New Jersey v. T.L.O, 469 U.S. 325, 327–30 (1985).

354. See *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting) (arguing that Frederick's banner, "BONG HiTS 4 JESUS" would not cause students to use drugs. "The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.").

355. *See supra* Section II.B.3.

356. *See* Bader, *supra* note 336, at 142; Chemerinsky, *supra* note 60, at 56.

357. *See supra* Section II.A.2.

358. *See, e.g.*, *supra* notes 119–22 and accompanying text.

lewd or obscene in a sexual way, and could not be interpreted as the school's own speech, it was protected under the First Amendment.[359]

In *Morse v. Frederick*, the Supreme Court created another exception to student free speech rights. Although the Court paid lip service to students' rights by restating that students "do not shed their constitutional rights at the school house gates," its decision, in effect, weakens *Tinker*'s important holding that students are entitled to First Amendment protection. In doing so, the Court explicitly condoned viewpoint discrimination and further undermined individual students' rights to free expression in school. Even in the special context of public schools, the First Amendment is an important protection for students who deserve to learn the important democratic value of free speech by example.

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359. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 690 (1986); Tinker v. Des. Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 513 (1969).

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