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Bong Hits 4 Jesus and Tinkering with Tinker

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**WINNER 2008 "BEST PAPER" AWARD BY THE
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BONG HITS 4 JESUS AND TINKERING WITH *TINKER*

EDWARD J. SCHOEN*
JOSEPH S. FALCHEK**

I. INTRODUCTION

In *Morse v. Frederick* (hereinafter referred to as *Morse*), the U.S. Supreme Court ruled that suspending a student from school for unfurling a banner during a high school sponsored and supervised event did not violate the First Amendment.¹ The event was the 2002 Olympic Torch Relay. On its way to the winter games in Salt Lake City, Utah, the parade passed through Juneau, Alaska, and along the street on which the high school was located.² The high school, Juneau-Douglas High School, declared the Torch Relay to be an approved event, and permitted its students, monitored by faculty and staff, to leave class to watch the parade on both sides of the street.³ The student, Joseph Frederick, unfurled a 14-foot banner containing the phrase "Bong Hits 4 Jesus" just as the Torch Parade and camera crews went by.⁴ The high school principal, Deborah Morse, confiscated the banner, ordered Frederick to report to her office, and suspended him from school for ten days, because she thought the sign encouraged illegal drug use in violation of school policy.⁵ The Juneau School District Superintendent upheld the suspension, because the banner appeared to advocate the use of illegal drugs.⁶

In deciding that the suspension imposed on Frederick did not violate the First Amendment, the U.S. Supreme Court determined that it was reasonable for principal Morse to conclude that the banner promoted illegal drug use contrary to school policy and that her failure to act would be construed by the students as a lack of commitment by the school to its policy combating illegal drug use.⁷ "The First Amendment," the Court said, "does not require schools to tolerate at school events student expression that

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¹ *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

² *Id.* at 2622.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 2622-2623.

⁶ *Id.* at 2623.

⁷ *Id.* at 2629.

contributes to those dangers.”⁸ Hence public school administrators can now curtail student expression whenever they reasonably conclude student speech undermines an “important interest,” such as deterring drug usage by school children.⁹

Morse is the third and most significant departure from the First Amendment protections accorded public school students in *Tinker v. Des Moines Independent Community School District* (hereinafter referred to as *Tinker*).¹⁰ In order to assess the impact of *Morse*, this article seeks in Part II to examine the First Amendment protection provided by *Tinker* and to explore in Parts III and IV how the two intervening decisions, *Bethel School District v. Fraser* (hereinafter referred to as *Fraser*)¹¹ and *Hazelwood School District v. Kuhlmeier* (hereinafter referred to as *Kuhlmeier*),¹² facilitated the *Morse* decision. Part V returns to *Morse* and analyses the majority, concurring and dissenting opinions to ascertain how they might be applied in future cases. Finally, in Part VI, this article seeks to determine whether the purpose of public school education still plays a role in resolving First Amendment issues in public school speech disputes.

II. *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

In order to demonstrate their opposition to the war in Vietnam and their support for a truce to end the hostilities, a group of adults and students in Des Moines, Iowa, decided to wear black armbands during the 1965 holiday season.¹³ Two families, the Tinkers and the Eckhardts, chose to participate.¹⁴ Learning of the plan to wear armbands, the principals of the Des Moines schools “met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”¹⁵ Three students, John Tinker, age 15, Christopher Eckhardt, age 16, and Mary Beth Tinker, age 13 (hereinafter referred to as Petitioners), wore armbands to school, were suspended from school, and returned to school after the planned period for wearing armbands expired.¹⁶ Petitioners’ fathers filed an action on their behalf under 42 U.S.C. § 1983 to obtain an injunction preventing the school district from taking disciplinary action against Petitioners.¹⁷ Concluding the school district’s disciplinary action was reasonably necessary to prevent disruption of school discipline, the District Court after an evidentiary hearing dismissed the complaint.¹⁸ The Court of Appeals for the Eighth Circuit heard the case en banc, but was equally divided in its opinion, thereby affirming the District Court.¹⁹

⁸ *Id.*

⁹ *Id.* at 2627 (“detering drug use by schoolchildren is an ‘important – indeed, perhaps compelling’ interest”).

¹⁰ *Tinker v. Des Moines Independent Community Sch. Dist.*, 89 S. Ct. 733 (1969).

¹¹ *Bethel Sch. Dist. v. Fraser*, 106 S. Ct. 3159 (1986).

¹² *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).

¹³ *Tinker*, 89 S. Ct. at 735.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The Eighth Circuit declined to follow a contrary decision by the Fifth Circuit, which ruled in *Burnside v. Byars*, 363 F.2d 744, 749 (1966), that wearing armbands cannot be prohibited under the First Amendment unless that activity “materially and substantially interfere[s] with the requirements of appropriate discipline on the operation of the school.”

The U.S. Supreme Court reversed the District Court's decision,²⁰ noting that, under "the unmistakable holding of this Court for almost 50 years,"²¹ "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²² The Court based its decision on three interrelated factors: the purpose of public education, the nature of the expression, and the absence of any disruption to school activities. The Court determined that, because public education is designed to prepare students for citizenship, it is imperative that school activities be conducted within the limits of the Bill of Rights.²³ Protecting constitutional freedoms in schools, the Court said, teaches young minds not "to discount important principles of our government as mere platitudes."²⁴

Petitioners wore their armbands in school without any accompanying disruptive conduct, and their expression constituted "direct, primary First Amendment rights akin to 'pure speech,'"²⁵ which is "entitled to comprehensive protection under the First Amendment."²⁶ By silently and passively wearing the armbands, Petitioners created no disorder or disturbance, did not interfere with school activities, and did not impinge on

²⁰ *Tinker*, 89 S. Ct. at 741.

²¹ *Id.* at 736

²² *Id.*

²³ *Id.* at 737.

²⁴ *Id.* (citing *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943) for the proposition that students in schools may not be compelled to salute the flag).

²⁵ *Tinker*, 89 S. Ct. at 737.

²⁶ *Id.* The notion of "pure speech" arose when the focus in resolving First Amendment matters was on the so called "speech-action dichotomy," under which courts determined that speech alone was absolutely protected by the First Amendment, but the actions undertaken to communicate the speech could be regulated. See Donald M. Gillmor et al, *MASS COMMUNICATION LAW: CASES AND COMMENTS*, at 80 (6th ed. (1998) ("A generation ago, the distinction between speech and action was important to understanding the scope of First Amendment Protection. Under this approach, speech was absolutely protected while action could be regulated."). In *Tinker*, the silent and passive wearing of armbands by school students produced no reaction or disturbance; hence, the speech was "pure speech" which could not be restricted or regulated under the First Amendment. A precursor to this approach appears in *Stromberg v. California*, 51 S. Ct. 532 (1931), in which the U.S. Supreme Court ruled that a statute, which prohibited the passive display of a flag in a public place as a sign of opposition to organized government, was unconstitutional, because it prohibited peaceful and orderly opposition to government by legal means. A more recent application of the "pure speech" doctrine occurred in *Spence v. Washington*, 94 S. Ct. 2727 (1974), in which the U.S. Supreme Court ruled that the First Amendment prohibited prosecution of the defendant for misusing a flag, when he affixed a peace symbol to the American flag and displayed it upside down in his window to protest the invasion of Cambodia. Because there was no evidence any people reacted to the inverted flag or even noticed it, the speech was "pure speech" which the government cannot regulate. A similar result occurred in *Cohen v. California*, 91 S. Ct. 1780 (1971). In *Cohen*, the defendant was convicted of disturbing the peace for walking through a municipal courthouse wearing a jacket on which the words "Fuck the Draft" were plainly visible. The U.S. Supreme Court overturned the conviction, determining that he wore the jacket to express his opposition to the war in Vietnam and the draft, that he did not thrust his message at viewers, that viewers could easily avert their eyes from the message, and that there was no evidence anyone was angered or disturbed by the message. The U.S. Supreme Court refused to apply the "pure" speech theory in *United States v. O'Brien*, 88 S. Ct. 1673 (1968). In *O'Brien*, the defendant was convicted for publically burning his draft card to encourage others to join him in his antiwar efforts, contrary to the 1965 amendment to the Universal Military Training and Service Act of 1948 which proscribed the deliberate destruction of Selective Service registration certificates. The U.S. Supreme Court determined that the 1965 amendment supported an important government interest (maintaining an efficient draft system) and prohibited conduct, not expression, and upheld the conviction.

the rights of other students.²⁷ As such, Petitioners engaged in pure speech, which cannot be regulated by the government.²⁸

The District Court had concluded that the suspension of Petitioners by the school officials was reasonable, because the school officials feared that the wearing of armbands in school would create disturbance.²⁹ That justification, however, was deemed by the U.S. Supreme Court to be woefully insufficient to prohibit the expression of opinion, because the expression of any opinion which differs from the views of others always creates the risk of triggering a disturbance.³⁰ Under the First Amendment, school officials cannot prohibit expression merely because they “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”³¹ Rather, limitations may be placed on students’ expression only when that expression “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”³² The District Court made no such finding, and the record lacked any indication that the wearing of armbands “would substantially interfere with the work of the school or impinge on the rights of other students.”³³ Further, school officials permitted other students to wear other symbols on their clothing (e.g., political campaign buttons and a symbol of Nazism) in school, thereby singling out protests against the war in Vietnam for disciplinary action.³⁴ Punishing the expression of one particular opinion without any evidence that it is “necessary to avoid material and substantial interference with schoolwork or discipline” violates the First Amendment.³⁵

The *Tinker* decision is important in two major respects. First, *Tinker* holds school officials to a tough standard in disciplining student expression. They can do so only when “it is necessary to avoid material and substantial interference with schoolwork or discipline.”³⁶ Secondly, *Tinker* boldly provided First Amendment protection to student expression in schools, and insisted that public school education should expose students to more viewpoints than those the State officially approves:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.³⁷

²⁷ *Tinker*, 89 S. Ct. at 737.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 738 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

³³ *Tinker*, 89 S. Ct. at 738.

³⁴ *Id.* at 739.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 740.

III. BETHEL SCHOOL DISTRICT V. FRASER

The Bethel Hill High School scheduled a school-wide assembly during which students gave, and the 600 attending students listened to, nominating speeches for candidates for student government offices.³⁸ In endorsing his candidate, Matthew Fraser employed “an elaborate, graphic, and explicit sexual metaphor” that inspired some students to hoot and yell, some to employ graphic gestures reflecting the sexual activities in his speech, and some to experience embarrassment or bewilderment.³⁹ Fraser had discussed the content of his speech with two of his teachers, both of whom discouraged him from making it and warned him of the potential consequences.⁴⁰ The next morning, the assistant principal called Fraser to her office, and told him his speech violated a Bethel High School rule prohibiting profane language.⁴¹ Fraser admitted making and deliberately using sexual innuendo in the speech, and the assistant principal suspended him from school for three days.⁴² Fraser’s suspension was upheld by the School District’s hearing officer, and his father, as guardian *ad litem*, initiated a claim under 42 U.S.C. § 1983 for violation of his son’s First Amendment rights.⁴³

The District Court determined that Fraser’s suspension from school violated his First Amendment rights, and the Court of Appeals for the Ninth Circuit affirmed, rejecting the school district’s determinations that speech, unlike the passive wearing of an armband, had a disruptive effect on educational activities, and that the school district had “an interest in protecting a essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school.”⁴⁴

The U.S. Supreme Court reversed the Court of Appeals.⁴⁵ Two main factors supported the Supreme Court’s decision: the nature of public education and the importance of protecting children from exposure to vulgar and offensive language. The Supreme Court stated that the purpose of public education is to prepare students to be citizens by inculcating “fundamental values necessary to the maintenance of a democratic political system” and that “the habits and manners of civility” were included in those values.⁴⁶ Just as legislative bodies have adopted rules limiting the use of offensive and indecent expressions in political debates, so too can schools teach students “the boundaries of socially appropriate behavior”⁴⁷ and “prohibit the use of vulgar and offensive terms in public discourse.”⁴⁸

³⁸ Bethel Hill Sch. Dist. v. Fraser, 106 S. Ct. 3159, 3161, 3166 (1986).

³⁹ *Id.* at 3162. In his concurring opinion, Justice Brennan reveals the nature of the metaphor by quoting the speech as follows: “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.”

Id. at 3166.

⁴⁰ *Id.* at 3162.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 3166.

⁴⁶ *Id.* at 3163.

⁴⁷ *Id.* at 3163-3164

⁴⁸ *Id.* at 3164.

The Court noted that the sexual innuendo in Fraser's speech was offensive to both students and teachers and possibly injurious to younger students in the audience.⁴⁹ This permitted the Court to apply two previous decisions to support Bethel Hill school officials' efforts to shield school children from vulgar and offensive language in public discourse. The first upheld restrictions on selling sexually oriented materials to children,⁵⁰ and the second protected minors from exposure to vulgar and offensive spoken language in radio broadcasts.⁵¹ The Court stated:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'⁵²

The Court decided that the School District acted properly in suspending Fraser from school because of his offensive speech. School officials may properly determine that "vulgar and lewd" speech undermines the school's basic educational mission, and that sanctions should be imposed to demonstrate that such speech "is wholly inconsistent with the 'fundamental values' of public school education."⁵³

Fraser creates an important exception to *Tinker*. Public school officials may impose sanctions on students for engaging in sexually explicit speech that undercuts the school's effort to teach them that vulgar speech is highly offensive or threatening to others, contrary to the accepted rules of public discourse.⁵⁴ School officials may do so in

⁴⁹ *Id.*

⁵⁰ *Id.* at 3165 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a statute banning the sale of sexually oriented material to minors, even though the material was entitled to First Amendment protection with respect to adults)).

⁵¹ *Id.* (citing *FCC v., Pacifica Foundations*, 438 U.S. 726 (1978) (upholding the imposition of penalties on a broadcaster for broadcasting indecent language at a time when children were undoubtedly in the audience)).

⁵² *Id.* at 3164.

⁵³ *Id.* at 3165.

⁵⁴ See *Island Trees Union Free Sch. Dist. v. Pico*, 102 S. Ct. 2799, 2810 (1982), in which the U.S. Supreme Court in a plurality decision recognized the school board's discretion to remove books from the school library when it deemed them excessively vulgar. The Court stated: Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioner's decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if

order to show that vulgar speech and lewd conduct are inconsistent with the fundamental values of public education and undermine its educational mission.⁵⁵

Three aspects of *Fraser* should not be overlooked. First, unlike *Kuhlmeier* and *Morse*, the two exceptions to be discussed later in this article, Fraser completed his speech before sanctions were imposed. Second, Fraser's offensive and lewd speech was directed at young students, and such speech is not entitled to First Amendment protection.⁵⁶ Third, Fraser's endorsement of his candidate for the office of student government vice-president triggered raucous reaction from some students and embarrassment and bewilderment in others, all of which were disruptive to the educational activities within Bethel High School. In contrast, the pure speech in *Tinker* triggered neither student reaction nor disruption of educational activities.⁵⁷

Fraser facilitated the *Morse* decision, because it enabled the *Morse* court to deduce two principles: (1) students may have the right to do and say things off campus that they do not enjoy First Amendment protection to do or say at school; and (2) "[t]he 'substantial disruption' standard of *Tinker* is not 'absolute,' and there may be other justifications besides substantial disruption that school authorities may properly invoke to restrain harmful speech."⁵⁸ Those principles, as developed more fully below, provide the foundation for the *Morse* decision.

it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. (Emphasis in original). See Justin T. Peterson, *School Authority v. Students' First Amendment rights: Is Subjectivity Strangling the Free Mind at its Source*, 2005 MICH. ST. L. REV. 931, 937-939.

⁵⁵ The danger inherent in denying First Amendment protection to sexually explicit, lewd or vulgar speech contrary to the accepted rules of public discourse is the lack of clarity in defining such speech. See Sarah Slaff, *Silencing Student Speech: Bethel School District No. 403 v. Fraser*, 37 AM. U. L. REV. 203, 221-22 (1987) ("*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 first amendment protection even without a distinct showing of material disruption and substantial interference, the Supreme Court established an elusive standard of impermissible student speech. The Court's decision, as Justice Fortas warned against in *Tinker*, threatens to transform students into "closed-circuit" recipients of state-selected communication. In the future, hoots and yells by students to a rendition of Henry IV may prompt censorship if the reaction is deemed to materially disrupt or substantially interfere with the educational process. A student who comprehends the brilliance of Melville's symbolism may now be prohibited from delivering a speech to his classmates on the sexual nuances of *Moby Dick* for fear of damaging the student audience's sexual development. *Bethel* has realized Cohen's worst fear by suggesting that debate in a public high school must be cleansed "to suit the most squeamish among us.")

⁵⁶ See *Ginsberg* and *Pacifica Foundation*, *supra* notes 50 and 51. Hence, *Fraser* may be viewed as a decision withholding First Amendment protection to lewd and vulgar speech directed at young students, rather than as an exception to *Tinker*.

⁵⁷ Courts have subsequently interpreted *Fraser* broadly or narrowly. The former interpretation treated the *Fraser* standard as an exception to *Tinker*, and therefore as an independent standard without the need to demonstrate disruption of school work or discipline. The latter interpretation treated the *Fraser* standard as a modification to *Tinker*, and therefore required that the lewd or vulgar speech could not be controlled by school officials unless it also caused disruption of school work or discipline. See David L. Hudson, Jr. and John E. Ferguson, Jr., *A First Amendment Focus: The Court's Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181 (2002).

⁵⁸ Vikram Amar, *The Court and the Schools in the 2006 Term*, 8 ABA PREVIEW, August 6, 2007, at 442. See Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L. J. 685, 691-692 ("Seen from the perspective of *Hazelwood*, *Fraser* was an important transitional case that signaled the Court's willingness to read *Tinker* more narrowly than many lower courts had read it. By 1986, the Court could perhaps see that broad interpretations of *Tinker* had, along with other factors, reduced schools' institutional authority in

IV. HAZLEWOOD SCHOOL DISTRICT V. KUHLMIEER

Students enrolled in the Journalism II course offered by Hazlewood East High School wrote and edited the *Spectrum*, a newspaper published and distributed every three weeks during the school year to students, school staff, and community members.⁵⁹ The teacher assigned to the Journalism II course submitted page proofs of the May 13th edition to the principal for review prior to publication.⁶⁰ The principal objected to two stories in the newspaper; one described the experiences of three Hazelwood East students with pregnancy, and the other discussed the impact of divorce on Hazlewood East students.⁶¹ The principal was concerned that the identity of the three pregnant students might be inferred from the first story and that references to birth control and sexual activities might be inappropriate for younger students in the school.⁶² The principal was also concerned that the students' family members did not have the opportunity to respond and would be embarrassed by the student's comments about the effects of divorce.⁶³ Pressed by a two-day deadline for printing the paper and not wanting the paper to be distributed beyond the school year, the principal deleted the last two pages of the edition, omitting not only the two articles in question but also additional stories covering teenage marriage, runaways, juvenile delinquency, and teenage pregnancy.⁶⁴

Complaining that the principal had violated their First Amendment rights, three Hazlewood East students who served as staff members for the *Spectrum* commenced an action in Federal District Court.⁶⁵ The Federal District Court determined (1) that school officials may impose restrictions on student speech in activities (including publication of the *Spectrum* in a journalism class) that are an integral component of the educational function, and (2) that the principal acted reasonably under the circumstances in omitting the last two pages of the May edition.⁶⁶ The Court of Appeals for the Eighth Circuit reversed, holding that the *Spectrum* was a public forum for student viewpoints, that school officials were prohibited from censoring its contents except when confronted by a material and substantial interference with school work or discipline, and that there was no evidence in the record from which the school officials might reasonably forecast disrupted class work or substantial disorder in the school.⁶⁷

In reversing the Court of Appeals,⁶⁸ the U.S. Supreme Court first rejected the notion that the *Spectrum* was a public forum, offering two reasons for its conclusion: (1) school facilities are deemed to be public forums only when they have been exclusively dedicated for use by the public, and (2) the *Spectrum* was an activity embedded in the Journalism II course, subject to the control of the teacher assigned to the course and the

ways that undermined their educational effectiveness. Thus, *Fraser* revealed the Court's desire to shore up school authority—a desire that *Hazelwood* confirms with a concrete and relatively broad new rule.”)

⁵⁹ *Hazlewood Sch. Dist. v. Kuhlmeier*, 1208 S. Ct. 562, 565 (1988). More than 4,500 copies of the *Spectrum* were distributed during academic year 1982-1983. The East Hazlewood School District Board of education allocated funds from its budget for the printing costs of the *Spectrum*.

⁶⁰ *Id.* at 565.

⁶¹ *Id.* at 566.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 567.

⁶⁸ *Id.* at 573.

principal in performing his final review, and school officials never deviated from that policy.⁶⁹

The Court then differentiated between the expression of students that happens to occur on school premises and speech-related activities that are supervised by faculty members and undertaken as part of the school's curriculum (e.g., school-sponsored publications, theatrical productions, and expressive activities).⁷⁰ In the former situation, as in *Tinker*, the First Amendment issue is whether the school is required to tolerate the speech or can silence the speech.⁷¹ In the latter situation, the First Amendment issue is whether school officials are permitted to exercise control or authority over the student expression and activities.⁷²

The Court determined that educators are permitted to exercise control over curriculum-embedded student expression in order to ensure (1) desired learning objectives are attained, (2) audiences are not exposed to materials inappropriate to their age and maturity, and (3) the school may disassociate itself from expression that does not meet its educational standards.⁷³ Thus, for example, schools may withhold expression that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane or unsuitable for immature audiences," or refuse to support expression that associates the school with any political position other than neutrality or promotes drug or alcohol use or sexual activities inconsistent with the educational objectives of the school.⁷⁴ Hence, the Court concluded, "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."⁷⁵

The Court examined the conduct of the principal in reviewing the page proofs of the *Spectrum* and concluded he acted reasonably in omitting the articles appearing in the last two pages, given his concerns about the anonymity of the pregnant students, the impact of the article's references to birth control and sexual activities on younger students, and the journalistic fairness of the divorce article.⁷⁶ Because the principal acted reasonably under the circumstances as he understood them, he did not violate the students' First Amendment rights.

Under *Tinker*, school officials could not regulate student speech unless it was disruptive of educational activities. Under *Kuhlmeier*, school officials are not required to tolerate speech that is inconsistent with its educational mission. Hence, *Kuhlmeier* is an important decision that restores authority to school officials to control student expression in curriculum-based activities, and replaces *Tinker* as the controlling authority in high school newspaper law.⁷⁷

⁶⁹ *Id.* at 568-569.

⁷⁰ *Id.* at 569-570.

⁷¹ *Id.* at 570.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 571.

⁷⁶ *Id.* at 572.

⁷⁷ See DONALD M. GILLMOR ET AL., MASS COMMUNICATION LAW: CASES AND COMMENTS, at 657 (6th ed. (1998)). In response to *Kuhlmeier*, seven states—Arkansas, California, Colorado, Iowa, Kansas, Massachusetts and Oregon—have passed statutes that limit the impact of *Kuhlmeier* in those states and preserve greater freedom on the part of student editors. See Student Law Press Center, *Understanding student free-expression laws: Renewed push to pass state laws as courts chip away at First Amendment rights in schools* at http://www.splc.org/report_detail.asp?id=1351&edition=43 at 1 (last visited Dec. 6, 2007; author retains copy). Illinois subsequently passed legislation "to bolster the First Amendment rights of students working for college newspapers." Elizabeth F. Farrell,

There are, however, some important limitations to *Kuhlmeier*. First, *Kuhlmeier* does not apply to public forums. That means any school newspaper that has been established as a public forum for student speech or whose student editors have clearly been given final authority to determine what will be printed in the newspaper will remain free from school official censorship.⁷⁸ Second, the regulated speech must be school sponsored: supervised by teachers, designed to achieve particular learning outcomes, supported financially by the school, or identified with the name of the school.⁷⁹ That means that “[u]nderground, alternative and even extracurricular student publications still retain much stronger *Tinker* protections,”⁸⁰ if they are not financially supported by the school.⁸¹ Third, the restriction on speech must be coupled with genuine pedagogical concerns or designed to disassociate the school from the student speech, and must be implemented in a reasonable manner. That means school officials will be prohibited “[w]hen the censorship has ‘no valid educational purpose,’”⁸² and that, when school officials exercise their authority to control student expression, they should do so in a content-neutral manner.⁸³

Kuhlmeier facilitated *Morse* because it permitted school officials to censor student speech within the school even though similar speech could not be censored outside of the school, established a standard of reasonableness in reviewing the school officials actions, and acknowledged that *Tinker* was not the sole basis for restricting student speech.⁸⁴ In effect, *Kuhlmeier* added the school’s educational mission as a third basis for school official regulation of student speech, supplementing the substantial disruption basis in *Tinker* and the lewd and indecent speech basis in *Fraser*.⁸⁵

Illinois Lawmakers Approve Bill to Protect Rights of Student Journalists at College newspapers, THE CHRONICLE REVIEW: TODAY’S NEWS, June 1, 2007, at <http://chronicle.com/daily/2007/06/2007061106n.htm> (last visited June 11, 2007; author retains copy).

⁷⁸ See Student Law Press Center, *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision* at <http://www.splc.org/legalresearch.asp?id=4> at 3 (last visited Dec. 6, 2007; author retains copy).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 5.

⁸² *Id.* at 4.

⁸³ See *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (1991). The court stated: “‘Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’ The schools’ refusal to publish Planned Parenthood’s advertisements was viewpoint neutral. Planned Parenthood’s advertisements were rejected, and schools enacted guidelines excluding advertising that pertains to ‘birth control products and information,’ in order to maintain a position of neutrality on the sensitive and controversial issue of family planning and avoid being forced to open up their publications for advertisements on both sides of the ‘pro-life’ – ‘pro-choice’ debate. In addition to believing the copy and Planned Parenthood to be controversial, some principals felt that parents would object to the advertisement. The school district also viewed Planned Parenthood’s advertisements as implicating its statutorily prescribed sex education curriculum and sought to avoid conflict with the state requirements regarding the manner sex education is presented to students.” (citations omitted)

⁸⁴ See *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007).

⁸⁵ Amar, *supra* note 58, at 442. One commentator reconciled *Tinker*, *Fraser* and *Kuhlmeier* as follows: “The great majority of courts have interpreted *Fraser* far more broadly and have read the case, along with *Tinker* and *Kuhlmeier*, together to create one rule. Essentially, the rule states: (1) If the speech involved is lewd, vulgar, or plainly offensive, then school officials may censor it no matter where, when, or how it occurs; (2) if the speech is school-sponsored, then school officials have broad discretion to regulate it if their regulations are related to legitimate educational concerns; and, finally, (3) all other speech is protected and school officials may not censor it unless they can

V. MORSE V. FREDERICK

As noted in the Introduction, the U.S. Supreme Court ruled in *Morse v. Frederick* that suspending a student from school for unfurling a banner during a high school sponsored and supervised event did not violate the First Amendment, because his expression promoted illegal drug usage contrary to school policy, and the school officials did not want the school to be associated with speech contrary to its policies. Chief Justice Roberts authored the majority opinion, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Alito filed a concurring opinion, in which Justice Kennedy joined. Justice Stevens filed a dissenting opinion, in which Justices Souter and Ginsburg joined. In order to assess the future of *Morse*, each of these opinions should be analyzed.

In his majority opinion, Chief Justice Roberts quickly disposed of two issues, ruling that Frederick's banner was school speech⁸⁶ and that its cryptic message promoted the use of illegal drugs.⁸⁷ The Court then assessed the impact of *Fraser* and *Kuhlmeier* on *Tinker*. In the Court's view, *Fraser* appended two basic principles to *Tinker*: (1) students' constitutionally protected rights of speech in public schools are not automatically coextensive with the rights of adults in other settings,⁸⁸ and (2) *Tinker* is not the only test applied in resolving student speech questions.⁸⁹ Likewise, in the Court's view, *Kuhlmeier* established an important justification for school official censorship, namely that "the public might reasonably perceive" that student expression bears "the imprimatur of the school."⁹⁰ To avoid this perception, schools may disassociate themselves from the student speech, "so long as their actions are reasonably related to legitimate pedagogical concerns."⁹¹ In the Court's view, *Kuhlmeier* also underscored the principle that schools may regulate some speech which, outside of the school, the government cannot regulate.⁹²

Having described its understanding of *Tinker*, *Fraser*, and *Kuhlmeier*, the Court built its case that "detering drug use by school children is an 'important—indeed, perhaps

show the speech has or will cause a material and substantial disruption. Unfortunately, the courts have not given definition to what lewd, vulgar, or plainly offensive speech is in the school environment. Instead, most courts have deferred to school officials to provide substance to those terms. Most courts will only apply the material and substantial disruption test if they find student expression does not fall into the lewd, vulgar, or plainly offensive category." Peterson, *supra* note 54, at 942-43.

⁸⁶ *Morse*, 127 S. Ct. at 2624.

⁸⁷ *Id.* at 2625.

⁸⁸ *Id.* at 2626-2627 ("Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, *Fraser*'s First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'")

⁸⁹ *Id.* at 2627 ("... *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.") (citations omitted)

⁹⁰ *Id.* ("Our most recent student speech case, *Kuhlmeier*, concerned 'expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'")

⁹¹ *Id.*

⁹² *Id.* The Court reinforced its view that speech within school can be regulated differently than speech outside of school by citing the following cases which permit a less stringent application of Fourth Amendment protections in schools in an effort to combat illegal use of drugs by students: *Vernonia Sch. Dist. 47 v. Acton*, 115 S. Ct. 2386 (1995); *New Jersey v. T. L. O.*, 105 S. Ct. 733 (1985); and *Board of Education v. Earls*, 122 S. Ct. 2559 (2002).

compelling interest,"⁹³ by citing various national studies and the congressional policy reflected in the Safe and Drug-Free Schools and Communities Act of 1994⁹⁴ and noting that "[t]housands of school boards throughout the country . . . have adopted policies armed at effectuating this message."⁹⁵ The Court then coupled the special nature of public school education to the compelling interest in combating drug usage by children to add support its decision.⁹⁶

The principles the Court elicited from *Tinker*, *Fraser*, and *Kuhlmeier*—speech inside school can be treated differently than speech outside school, *Tinker* is not the exclusive principle governing school speech, and schools can censor speech to achieve their academic mission—coupled with the national policy of preventing drug usage by

school children, drove the decision reached by the Court in *Morse*,⁹⁷ and gave the Court the opportunity to add an expression of sympathy for the difficult job school principals have:

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributed to those dangers.⁹⁸

The concurring opinion of Justice Alito raised three important points. First, the concurring opinion advocates that *Morse* should be restricted solely to student speech

⁹³ *Id.* at 2628. The Court used language in the Fourth Amendment cases cited *supra* note 92 to buttress its position that deterring illegal drug use in schools is a compelling interest.

⁹⁴ *Id.* See 20 U. S. C. § 7114(d)(6) (2000 ed., Supp. IV).

⁹⁵ *Id.*

⁹⁶ *Id.* (The '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.)

⁹⁷ *Amar, supra* note 58, at 441-442 ("The key justification in this case, said the majority, was the overwhelming need to discourage and deter illegal drug use. Congress, as well as past precedents of the Court, wrote Chief Justice Roberts, made clear that school suppression of speech—even content- or viewpoint-based suppression—was permissible when the 'speech is reasonably viewed as promoting illegal drug use.' In the present case, while the banner was cryptic to be sure, its reference to 'Bong Hits' could easily and reasonably be understood as a celebration or advocacy of illegal drug use.")

⁹⁸ *Morse*, 127 S. Ct. at 2629. See Student Press Law Center, *Chipping Away: U.S. Supreme Court's decision in Morse v. Frederick leaves narrow hole in landmark Tinker standard* at http://www.splc.org/report_detail.asp?id=1366&edition=43 at 2 (last visited Dec. 6, 2007; author retains copy). ("The 18-page opinion of the court . . . sympathizes with school officials and the 'difficult' and 'important' job they have in shielding students from drug advocacy. Drawing on an educator's duty to deter drug use, the majority decision said it would give school officials legal cover to strike down student speech that can be 'reasonably regarded' as encouraging illegal drug use.")

that encourages drug usage by school students,⁹⁹ and eschews the application of the “special characteristics of the public schools” to any other speech restrictions.¹⁰⁰ Second, the concurring opinion warns that a policy permitting school officials to censor any student expression simply because it interferes with a school’s educational mission can readily be “manipulated in dangerous ways,” particularly because “some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by members of these groups.”¹⁰¹ Third, the concurring opinion rejects the notion that parents have conferred authority on public school officials to act *in loco parentis* to regulate student speech.¹⁰²

Justice Stevens’ dissenting opinion concedes that, given the custodial relationship between schools and students in which there is the need for some degree of supervision and control that cannot be exercised over adults, it “might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting.”¹⁰³ Nonetheless, the dissenting opinion maintains, a bedrock principle underlying the First Amendment is that the government may not restrict the expression of an idea simply because society may disagree with the speech or find it disagreeable.¹⁰⁴ Rather, there must be some demonstration that student speech advocating the use of drugs has some “meaningful chance” of actually accomplishing its objective before school officials can censor the speech.¹⁰⁵ Because the banner made only “a slanting drug reference” (rather than

⁹⁹ *Morse*, 127 S. Ct. at 2636 (“I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medical use.’”)

¹⁰⁰ *Id.* (“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.”)

¹⁰¹ *Id.* at 2337.

¹⁰² *Id.* at 2637-2638 (“It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private nongovernmental actors standing *in loco parentis*.”)

¹⁰³ *Id.* at 2646.

¹⁰⁴ *Id.* at 2645 (citing *Texas v. Johnson*, 109 S. Ct. 2533 (1989)) (The state’s interest in preventing breaches of the peace was insufficient to justify the defendant’s conviction for burning the flag where no disturbance of the peace occurred or threatened to occur.). See *Terminiello v. Chicago*, 69 S. Ct. 894 (1949) (Defendant’s conviction for disorderly conduct for giving a speech inside the meeting hall that stirred members of the public to protest outside the meeting hall was unconstitutional under the First Amendment. Freedom of speech must be protected unless the expression is likely to produce a clear and present danger beyond public inconvenience, annoyance, or unrest.)

¹⁰⁵ *Morse*, 127 S. Ct. at 2647. See *Abrams v. United States*, 40 S. Ct. 17 (1919) (Holmes, J. dissenting) (the government may punish speech only when it creates a clear and imminent danger that it will cause a substantive evil the restriction seeks to prevent); *Gitlow v. New York*, 45 S. Ct. 625 (1925) (Holmes, J. dissenting) (speech advocating the overthrow of the government can be punished only when there is a present danger of an attempt to overthrow); *Whitney v. California*, 47 S. Ct. 641 (1927) (Brandeis, J. concurring) (supporting the punishment of defendant not for mere advocacy of overthrowing the government, but for taking a preparatory step toward that end); *Thomas v. Collins*, 65 S. Ct. 315 (1945) (restriction of the liberties guaranteed by the First Amendment can be justified only by clear and present danger to the public welfare);

actually advocating the use of illegal drugs)¹⁰⁶ and because the school district did not show that there was a meaningful chance Frederick's banner would actually make students experiment with illegal drugs,¹⁰⁷ Frederick's suspension from school was an unconstitutional suppression of speech.¹⁰⁸

The combination of Justice Alito's concurring opinion and Justice Kennedy's dissenting opinion has provided comfort to free-speech advocates.¹⁰⁹ Justice Alito's concurring opinion restricts *Morse* solely to student advocacy of illegal drug use. Justice Kennedy's dissenting opinion rejects the use of school official censorship except in cases in which student speech advocates the use of drugs and there is a meaningful chance the speech succeeds. Together, the concurring and dissenting opinions garnered five votes for rejecting future attempts to censor student speech that advocates something other than illegal drug use by students.¹¹⁰

Reaction to the *Morse* decision has been mixed. Some commentators have expressed fear that the decision, which permits school officials to censor public school newspapers whenever they reasonably feel the student expression undermines the educational mission or wish to avoid the school's association with the student expression,¹¹¹ will open the door to restrictions on student speech that is controversial.¹¹² Others are more sanguine, and have concluded *Morse* will not have a

Brandenburg v. Ohio, 89 S. Ct. 1827 (1969) (a statute which punishes mere advocacy without creating a clear and present danger of inciting unlawful conduct violates the First Amendment); and Cox v. Louisiana, 85 S. Ct. 453 (1965) (defendant's constitutional rights cannot be denied simply because of hostility to their assertion or exercise).

¹⁰⁶ *Morse*, 127 S. Ct. at 2649 (describing Frederick's banner as "a nonsense message, not advocacy," causing one commentator to question whether the First Amendment should protect nonsense). See Amar, *supra* note 58, at 442 ("Interestingly, Justice Stevens never explains why, if the message was itself nonsense, the First Amendment should protect it so vigorously in the first place.") The authors of this article disagree. If the speaker's speech is rendered incomprehensible because of a stroke, the First Amendment should nonetheless protect the speaker's right to mount a soapbox and speak gibberish.

¹⁰⁷ *Morse*, 127 S. Ct. at 2649 ("[M]ost students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it.")

¹⁰⁸ *Id.* at 2649, 2651. See Amar, *supra* note 58, at 442 ("[The dissenting opinion] assumed without deciding that schools could ban speech advocating illegal drug use without demonstrating that such speech would meet *Tinker's* 'substantial disruption' standard but then concluded that the school must show at least that 'Frederick's supposed advocacy stands a meaningful chance of making otherwise [law abiding] students try marijuana.' The school could not do this, the dissenters believed, because the banner was essentially nonsensical, and did not contain any discernable message advocating anything, much less illegal drug use.")

¹⁰⁹ See Student Press Law Center, *Advocates counting on Alito, Kennedy concurrence to limit decision's scope* at http://www.splc.org/report_detail.asp?id=1370&edition=43 at 1 (last visited Dec. 6, 2007; author retains copy).

¹¹⁰ *Id.* ("Many of the nation's free-speech advocates focused on what they call the silver lining of the *Morse* decision. Relying on Associate Justice Samuel Alito's concurring opinion, in which Associate Justice Kennedy joined, they believe the Court ensured that the new restriction allowing censorship of speech advocating the use of illegal drugs does not extend to political or religious speech. Adding Alito and Kennedy's votes to the three dissenters . . . created a fragile five-justice majority for rejecting a broad school-censorship ruling.")

¹¹¹ *Morse*, 127 S. Ct. at 2629.

¹¹² See Student Press Law Center, *Chipping Away: U.S. Supreme Court's decision in Morse v. Frederick*, *supra* note 98, at 4 ("[The Journalism Education Association] an organization of journalism teachers and advisors based at Kansas State University . . . released a statement warning educators not to treat the decision as an invitation to restrict student expression that they think is controversial.")

broad impact on students' free speech rights.¹¹³ Still others have criticized the Court for not going further to restrict student expression on the national level.¹¹⁴ Finally, one commentator expressed concern about the unusual level of deference accorded to school officials. The Court determined that Frederick's banner might adversely affect other students solely because of the principal's opinion that it would do so. Likewise, the record was devoid of evidence showing Frederick's banner was likely to increase illegal drug usage among the students. Rather the Court deferred to the school official's "predictive sense."¹¹⁵

VI. EVOLVING IMPORTANCE OF THE ROLE OF PUBLIC EDUCATION

It is interesting to observe how the U.S. Supreme Court's reliance on the role of public education has evolved in its public school speech cases. The clearest statement about the importance of the role of public education in resolving student speech cases appears in *Tinker*:

Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.¹¹⁶

¹¹³ Student Press Law Center, *Chipping Away: U.S. Supreme Court's decision in Morse v. Frederick*, *supra* note 98, at 4 ("Matthew Staver, the founder and chairman of the Liberty Counsel, which also filed a friend-of-the-court brief supporting Frederick, said his organization is satisfied with the outcome, despite being momentarily displeased with Frederick's loss. 'We were concerned about this decision because it had the potential to undo free speech,' Staver said. 'But it appears that the free-speech rights of students are still intact.'")

¹¹⁴ *Id.* at 5 ("Some groups that supported Deborah Morse have criticized the Court for not going far enough to limit student speech on a national level. Tom Hutton, the National School Boards Association senior attorney, said he was somewhat disappointed that the decision, like *Fraser*, has made only a single addition to the categories of speech that schools can regulate. 'This is a very *ad hoc* approach that doesn't give anybody as much clarity and guidance as might be helpful to avoid future litigation,' he said. 'We would have liked a little more discretion for school officials.'")

¹¹⁵ Amar, *supra* note 58, at 443. The U.S. Supreme Court has deferred to the judgment of school officials in operational decisions, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), and *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982), but the Court has not been reluctant to intervene in school board actions affecting speech. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statute prohibiting the teaching of evolution in public school without also teaching "creation science" was unconstitutional); *Island Trees Union Free Sch. Dist. v. Pico*, *supra* (school board cannot direct the removal of library books because they disliked the ideas expressed in the books); *Epperson v. Arkansas*, *supra* (statute prohibiting the teaching of Darwin's theory of evolution in public schools was unconstitutional); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (public school students cannot be compelled to salute the flag); and *Mayer v. Nebraska*, 262 U.S. 390 (1923) (state statute banning the teaching of foreign languages in public schools violated the First Amendment).

¹¹⁶ *Tinker*, 89 S. Ct. at 737.

In other words, schools will not succeed in teaching students to be vigilant about protecting First Amendment rights if school officials throttle the exercise of those freedoms in public schools.

The Supreme Court's description of the role of public education shifted in *Fraser*. The Court stated that public education prepares students to be citizens by developing in them the "habits and manners of civility," which are indispensable to "the practice of self-government"¹¹⁷ and which include tolerance for the viewpoints of others, consideration of the sensibilities of others, and socially appropriate behavior.¹¹⁸ In other words, schools fulfill their role if they teach students to avoid the use of vulgar, offensive, or threatening terms in their public utterances.

The majority opinion in *Kuhlmeier* does not address the role of public education in resolving the First Amendment issues. Rather, the role of public education appears only in the dissenting opinion of Justice Brennan: "Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of our democratic republic."¹¹⁹

There was no mention of the role of public education in *Morse*. Hence, the role of public school education has possibly been eliminated as a justification in the latest iteration of protected student speech. Some have suggested that the declining role of public education in resolving student speech cases is the result of what has occurred in public schools since the Columbine shootings in 1999:

Since the 1999 Columbine shooting in Jefferson, Colo., which left 12 students, one teacher and the two shooters dead, officials have become much more proactive in seeking out and disciplining student speech that contains violent thoughts. Following the shooting, many schools enacted zero-tolerance policies on speech or writing that appeared to express a violent intent.¹²⁰

Those policies "have banned students from wearing clothing or posting signs that focus on drugs, guns or incendiary topics such as homosexuality, abortion and religion,"¹²¹ and has prompted school officials to become "much more aggressive in this era."¹²² One First Amendment scholar opines "that the landscape for student speech has changed significantly since the *armand* case in 1969," and that "some judges have been particularly influenced by Columbine and have cited it 'explicitly in their opinions' supporting school officials, while others have more broadly interpreted student rights under the 1960 ruling."¹²³ Indeed, the Columbine tragedy was explicitly cited by the Fifth Circuit Court of Appeals as the basis for its decision upholding the transfer of a student to another school upon discovering language in the student's journal threatening a "Columbine-style attack" on the school, holding that the student's threatening language is not protected by the Fifth Amendment, and expressly deferring

¹¹⁷ *Fraser*, 106 S. Ct. at 3164.

¹¹⁸ *Id.* at 3163, 3164.

¹¹⁹ *Kuhlmeier*, 108 S. Ct. at 574.

¹²⁰ See Student Press Law Center, *Sensitive speech: High schools react to violent expression after Virginia Tech massacre*, at <http://www.splc.org/printpage.asp?id=1365&tb=reports&edition=432> at 1 (last visited Dec. 8, 2007; author retains copy).

¹²¹ Joan Biskupic, *High court case tests limits of student speech rights*, USA TODAY, March 1, 2007, at 1A.

¹²² See Student Press Law Center, *Sensitive speech: High schools react to violent expression after Virginia Tech massacre*, *supra* note 122, at 1.

¹²³ Biskupic, *supra* note 121, at 2A (quoting David Hudson, an attorney with the First Amendment Center at Vanderbilt University, Nashville, TN).

to school administrators' judgment to "act quickly and decisively to address a threat of physical violence against their students."¹²⁴ In the future, the deference of the U.S. Supreme Court to the judgment of public school officials permitted by *Morse* will likely replace the role of public education in resolving public school speech issues.¹²⁵

VII. CONCLUSION

The U.S. Supreme Court has decided four major cases dealing with the First Amendment rights of public school students. In the first, *Tinker*, the Court boldly recognizes that public school student speech is protected by the First Amendment and holds school officials to a tough standard in disciplining student speech: "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,'"¹²⁶ These rights were protected, the Court said, to expose students to more viewpoints than those the state officially provides and to let students appreciate First Amendment rights by experiencing them.

In the second decision, *Fraser*, the Court retreats and upholds the suspension imposed of a student for including an explicit sexual metaphor in his nomination speech. The Court justifies its decision on the grounds that younger students should be protected from vulgar language and schools are supposed to incubate civility in school children. In short, the Court added a second test for permitting school regulation of student speech: schools are permitted to discipline students if their speech is lewd and indecent. This test is designed to support the school's role to teach students to be polite and courteous in discussing matters with others, rather than permitting students to exercise their First Amendment rights so that they appreciate their importance, as advocated in *Tinker*.

In the third decision, *Kuhlmeier*, the Court upholds the right of school officials to censor the student newspaper to ensure learning objectives are met, audiences are not exposed to materials inappropriate to their age and maturity, and the school is able to disassociate itself from expression that does not meet its educational standards. Hence, the Court removes student speech that is inconsistent with the school's educational mission from the First Amendment protection provided by *Tinker*.

Finally, in *Morse*, the Court holds that suspending a student from school for unfurling a banner during a high school sponsored and supervised event did not violate the First Amendment, because his expression promoted illegal drug usage contrary to school policy, and the school officials did not want the school to be associated with speech that was contrary to the policies it was trying to promote. While *Morse* may be limited to student speech promoting illegal drug usage in the future, there is little doubt in this post-Columbine era that *Morse* permits far greater deference to school officials' efforts to curtail student speech, and that the historic role of public

¹²⁴ *Ponce v. Socorro Independent Sch. Dist.*, 508 F.3d 765, 771, 772 (2007) ("We do hold . . . that when a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling 'fire' in a crowded theater, and such specific threatening speech in a school or its population is unprotected by the First Amendment. School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance") (citations omitted).

¹²⁵ See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (2001) ("[W]e live in a time when school violence is an unfortunate reality that educators must confront on all too frequent basis.")

¹²⁶ *Tinker*, 89 S.Ct. at 739.

school education in protecting student speech has been diluted. At the very least, *Morse* shows how the U.S. Supreme Court operates under Chief Justice Roberts. The Court effected a conservative result in a bare majority opinion without overturning precedents while avoiding sweeping and expansive language in its holding.¹²⁷ *Morse* also extends a pattern of the Court in hearing, deciding and reversing a disproportionate number of cases from the Ninth Circuit Court of Appeals.¹²⁸

¹²⁷ Amar, *supra* note 58, at 442-443.

¹²⁸ *Id.* at 443 (“*Morse* reversed [a] Ninth Circuit [ruling], and that was a common occurrence this term. The Ninth Circuit was reversed 19 times – as many times as the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits combined – this year. This extraordinarily high number of reversals is really attributable to the fact that the Court reviewed 21 cases from the Western Circuit, a disproportionately high number even taking into account that the Ninth Circuit processes the most cases of any circuit. This year, as in many recent years past, the Court seems to be particularly interested in reviewing decisions from the Ninth. And perhaps more important than the reversal rate of 19/21 is the Ninth Circuit’s propensity to be reversed lopsidedly or unanimously. This term 8 of 21 Ninth Circuit decisions were reversed unanimously. Overall, Ninth Circuit rulings garnered less than 2 votes (out of a possible 9) to affirm when they arrived at the high Court. That compares to an average of all the other circuits combined of over 3 ‘justice-votes-to-affirm-per-case reviewed,’ a metric I think is superior to simple reversal rates for evaluating circuit relationships with the Supreme Court.”)