The Genesis of Gangrenes in the Student Free Speech Taxonomy

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Introduction

The Free Speech Clause of the First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law … abridging the freedom of speech."[1] While this express language of the First Amendment reads only as a limitation on the powers of Congress, the United States Supreme Court has interpreted the First Amendment as applicable to the states (including public schools) through the Due Process Clause of the Fourteenth Amendment.[2] The Court has also stated that "[t]he First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. … By adjustment of rights, we can have both full liberty of expression and an orderly life."[3] It thus stands to reason that students, for ordered liberty, do not have an unfettered right to speak at public school when and how they choose. This is especially important given that schools have an educational mission and are integral to developing citizenry.[4] However, a distinct statement the Court reiterates in each of its student speech cases affirms the fact that students are not without free speech rights in schools: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [5] When the court first made this nepenthean statement, it welcomed students to express their views in school through a guarantee of constitutional protections. The singular limitation was that schools could regulate student speech only if there was a reasonable forecast of or actual material and substantial disruption from the

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[1] U.S. Const. amend. I.

[2] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985). The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life or liberty, or property, without due process of law." U.S. Const. amend. XIV, §1.

[3] Breard v. City of Alexandria, 341 U.S. 622, 642 (1951).

[4] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[5] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *Fraser*, 478 U.S. at 680; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Morse v. Frederick, 127 S.Ct. 2618, 2622 (2007).

speech – not an inconsiderable limitation on the power of schools over student speech.[6]

In attempting to identify student speech that can be censored, the Supreme Court has established the student speech taxonomy now comprised of four different tests. The first test, established in 1969, is known as the *Tinker* test, which allows schools to regulate student speech only if it is reasonably forecast to cause or actually causes substantial and material disruption of discipline or schoolwork.[7] The second test, known as the *Fraser* test (or the *Bethel* test), created in 1986, permits school officials to regulate student speech that is vulgar, lewd, plainly offensive or obscene, so as not to undermine the educational mission of the school.[8] The third test, known as the *Kuhlmeier* test (or the *Hazelwood* test), established two years after the *Fraser* test, authorizes school officials to regulate school-sponsored student speech if the school has a legitimate pedagogical concern.[9] The fourth test in the taxonomy (the *Morse* test or the *Frederick* test), created in 2007, gives schools authority to regulate student speech that advocates the use of illegal drugs.[10]

This Article discusses each of the constituent cases in the taxonomy. The discussion reveals the genesis of gangrenes[11] in the taxonomy, beginning with *Bethel School District No. 403 v. Fraser*[12] – the second case in the taxonomy, which sets a dangerous precedent for heightened deference to schools and content regulation of student speech.

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[6] *See generally Tinker*, 393 U.S. 503.
[7] *Id*.
[8] *Fraser*, 478 U.S. 675.
[9] *Kuhlmeier*, 484 U.S. at 273.
[10] *Morse*, 127 S.Ct. at 2618-20.
[11] Merriam-Webster's Online Dictionary defines gangrene as "local death of soft tissues due to loss of blood supply." http://www.merriam-webster.com/dictionary/gangrene. It is also defined in pertinent part as "necrosis or death of soft tissue due to obstructed circulation." http://dictionary.reference.com/browse/gangrene. The protection of students' free speech rights in *Tinker* was a soft tissue because as revealed in this article, it was pliable in *Fraser*, *Kuhlmeier* and *Morse*, so much so that the circulation of the protection was obstructed in those cases.
[12] 478 U.S. 675.

The Article is divided into two main sections. The first section discusses the *Tinker v. Des Moines Independent Community School District*[13] decision and the parturition of students' free speech. The second section presents the facts of *Fraser, Hazelwood School District v. Kuhlmeier*[14] and *Morse v. Frederick*[15] – the genesis of gangrenes in the student speech rights taxonomy.

I. *Tinker* and the Parturition of a Soft Tissue of Students' Free Speech Under the First Amendment

Tinker v. Des Moines Independent Community School District[16] was the first case in which the United States Supreme Court considered the free speech rights of students in schools. The facts surrounding this case began during the Vietnam War when a few students decided to wear black armbands to their schools to show their disapproval of the war.[17] At the time, the war was a matter of great national controversy and several draft card burning acts were taking place across the country.[18] When the principals found out about the students' plans, they instituted a policy forbidding students from wearing armbands to school and providing for the suspension of those failing to comply with the policy.[19] In spite of the policy, the students wore the armbands to school and refused to remove them; consequently, they were suspended.[20] The students filed suit in the United States District Court for the Southern District of Iowa, Central Division, seeking an injunction against the school officials and nominal damages.[21] The district court dismissed the complaint, ruling that school officials have wide discretion to regulate student speech so as to avoid disruption of

[13] 393 U.S. 503.
[14] 484 U.S. 260.
[15] 127 S.Ct. 2618.
[16] 393 U.S. 503.
[17] *Id*. at 504.
[18] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F.Supp. 971, 972-73 (S.D. Iowa 1966).
[19] 393 U.S. at 504.
[20] *Id*.
[21] *Tinker*, 258 F.Supp. 971.

discipline.[22] The students appealed to the United States Court of Appeals for the Eighth Circuit which, as an equally divided court, issued a per curiam decision affirming the district court decision.[23] The students sought review in the Supreme Court, which granted certiorari.[24]

The first step the Court took was to recognize the rights of students to speak in schools, making what has become the most important declaration repeated in nearly every case in the student speech jurisprudence: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25] The Court noted that the role of schools in "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."[26] While acknowledging that schools have "important, delicate, and highly discretionary functions,"[27] the Court iterated that these functions can be carried out "within the limits of the Bill of Rights."[28] The Court described the wearing of the armbands as "closely akin to pure speech which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[29] These statements from the Court finally established that those of our citizens in public schools – the future of our country – do have free speech rights.

The Court pointed out that "[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their

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[22] *Tinker*, 393 U.S. at 504-05.
[23] Tinker v. Des Moines Indep.Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967).
[24] 393 U.S. at 505.
[25] *Id.* at 506.
[26] *Id*. at 507 (quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943)).
[27] *Id.*
[28] *Id.*
[29] *Tinker*, 393 U.S. at 505-06.

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…"[30] Further, it is very critical to vigilantly protect constitutional freedoms in our schools.[31] This is especially so because the continued viability of our nation requires "leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."[32]

Sometimes, however, the rights of students and school policies conflict,[33] in which case a balance is needed to ensure that the schools can execute their "important, delicate, and highly discretionary functions"[34] "within the limits of the Bill of Rights."[35] This need for a balance and the need to limit the police power of schools over student speech lead the Court to establish the "material and substantial disruption" test for determining when schools can regulate student speech. This test – the *Tinker* test – essentially provides that school officials can only regulate student speech if the student speech is reasonably forecast to or actually causes substantial and material disruption of the school's work or other students' rights.[36] Specifically, the Court declared: "Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained."[37] In formulating the "material and substantial disruption" standard, the Court sought to ensure respect for the right of

[30] *Id.* at 511.
[31] *Id*. at 512 (quoting Shelton v. Tucker, 364 U.S. 479 (1960)).
[32] *Id.*
[33] *Id*. at 507-08.
[34] *Id.* at 507.
[35] *Id.*
[36] *Id.* at 508-09.
[37] *Id.* at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (1966)) (internal quotation marks omitted). The Court added that schools can regulate student speech inside or outside a classroom if substantially and materially disruptive due to the *time* of the speech, the *place* of the speech or the *type* of the speech. *Id.* at 513.

students to express themselves so that they are not shackled at the very place where their minds are to be awakened. The product of this test resulted in a heavy standard for schools to satisfy.

Language throughout the Court opinion reveals the broad scope of the free speech rights extended to students. For example, the Court ruled that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not an adequate ground for censorship.[38] The Court analogized regulation of student speech solely based on school disapproval of its content to the constitutionally-repugnant idea of creating a "homogeneous people" in our schools, fomenting school propaganda on students.[39]

The strength of protection afforded student free speech rights under the *Tinker* test is further evident in the following:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom-this kind of openness-that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[40]

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[38] *Id*. at 510. Neither is "an urgent wish to avoid the controversy which might result from . . . expression." *Id.*

[39] *Id.* at 511.

[40] *Id*. at 508-09 (internal citation omitted).

Indeed, the Court's statements throughout the case reveal that the decision was a great victory for public school students nationally. The parturition continued with the Court warning, "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."[41] Furthermore, "school officials cannot suppress expressions of feelings with which they do not wish to contend."[42] The protective integument in the case required schools to have specific rather than generalized evidence of constitutional grounds to regulate student speech.[43] Characterizing the political speech in the case as "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance,"[44] the Court found that the school failed to satisfy the "material and substantial disruption" test.[45] In this respect, the Court observed that the black armbands were worn by a small percentage of the 18,000 students, only five of whom were suspended.[46] Moreover, while a few students made antagonistic comments outside the classroom directed at students with the armbands, there was no evidence of threats or violence at the school.[47] The Court also found objectionable the fact that the school policy singled out the Vietnam War armbands while other symbols of political speech were allowed.[48] Such viewpoint- specific regulation of student speech is unconstitutional unless the "material and substantial disruption" test is satisfied.[49] Consequently, the Court reversed the decision of the lower court and remanded the case.[50]

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[41] *Id*. at 511.
[42] *Id.* at 511 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)) (internal quotation marks omitted).
[43] *Id.*
[44] *Id*. at 508.
[45] *Id.* at 508-09, 514.
[46] *Id*. at 508.
[47] *Id.*
[48] *Id.* at 510-11.
[49] *Id*. at 509, 511.
[50] *Id.* at 514.

The Court acknowledged the need for robust debate in the classroom, proclaiming that "[t]he classroom is peculiarly the marketplace of ideas."[51] Nevertheless, the *Tinker* test is not limited to the classroom:[52] the free speech rights of any student "do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."[53] Stressing this point, the Court declared that "we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."[54] Further, the right to free speech cannot be limited to "an area that a benevolent government has provided as a safe haven for crackpots."[55] These statements helped give some definition to the environs captured in the Court's reference to "schoolhouse gate."[56] The Court added that any school policy prohibiting students from discussing or expressing objections to the war, on school grounds other than as part of classroom work, is unconstitutional unless the policy satisfies the *Tinker* test.[57]

Essentially, *Tinker* recognized expansive free speech rights for students, creating a soft tissue of free speech rights which circulation could, it appeared, be obstructed only by reasonable forecast of or actual material and substantial disruption. However, in 1986, the necrosis of the soft tissue of constitutional protection extended in *Tinker* began with the Court carving out specific types of speech that schools can constitutionally regulate. The jurisprudence ebbed from an affirmative posture of what free speech rights students have –

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[51] *Id*. at 512 (internal quotation marks omitted).
[52] *Id.* at 512-13.
[53] *Id.* (citing *Burnside*, 363 F.2d at 749).
[54] *Id.* at 513.
[55] *Id*.
[56] 393 U.S. at 506.
[57] *Id.* at 513.

buttressed by the stringent "material and substantial disruption" test – to the negative posture of what free speech rights students do not have. In other words, the Court went from the *Tinker* approach of what schools *cannot* do to what schools *can* do – an affirmative franchising of censorship by school officials. This gangrene began with *Bethel School District No. 403 v. Fraser*.[58]

II. The Genesis of Gangrenes in Student Free Speech Taxonomy

A. Bethel School District No. 403 v. Fraser

In this case, a student addressed his high school assembly of about 600 students nominating one of his schoolmates for election using what the Supreme Court characterized as "elaborate, graphic, and explicit sexual metaphor" to describe his nominee.[59] Here is the student's speech:

> 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 ASB vice-president-he'll never come between you and the best our high school can be.[60]

The school had a policy against use of profane and obscene language or gestures.[61] Two teachers advised the

[58] 478 U.S. 675.
[59] *Id*. at 677-78.
[60] Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985).
[61] *Id*.

student that if he used such language, he could face "severe consequences."[62] The mandatory assembly was school-sponsored and designed to teach students self-government.[63] While the student was speaking at the assembly, a number of students graphically mimicked the sexual acts referenced in the speech, others seemed "bewildered and embarrassed" and some others "hooted and yelled."[64] After notice and an opportunity to be heard, the student was denied eligibility as graduation speaker and suspended for two days.[65] The student filed suit in the United States District Court for the Western District of Washington alleging a violation of his right to free speech.[66] The court granted the student monetary damages and an injunction enabling the student to speak at graduation.[67] On appeal, the United States Court of Appeals for the Ninth Circuit ruled for the student, finding that the school district failed to satisfy the *Tinker* test and consequently that the discipline of the student for his speech was a violation of his right to free speech.[68] The Supreme Court reversed.[69]

Instead of applying the *Tinker* test, which was essentially a positive protection of speech for students, the Court chose to carve out a type of speech which schools could have authority to regulate. Unlike in *Tinker*, the Court's main interest appeared to be a positive grant of constitutional license to schools to regulate student speech. Specifically, the Court held that schools can regulate student speech that is lewd, vulgar, obscene or plainly offensive.[70] The positive conferral of authority to schools relative to students is evident throughout the decision. For example, the Court emphasized

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[62] *Fraser*, 478 U.S. at 678.
[63] *Id*. at 677, 681.
[64] *Id*. at 678.
[65] *Id*. at 678-79.
[66] *Id.*
[67] *Id*. at 679.
[68] *Fraser*, 755 F.2d 1356.
[69] *Fraser*, 478 U.S. at 680.
[70] *See generally Fraser*, 478 U.S. 675. The Court distinguished *Fraser* from *Tinker* by characterizing the speech in *Tinker* as political speech and that in *Fraser* as vulgar, lewd, obscene or plainly offensive speech. *See id*. at 685.

that the role of public schools in educating students for citizenship and instilling the "fundamental values of habits and manners of civility" are important reasons for schools to retain control over student speech.[71] The Court reasoned that these fundamental values are critical to continued survival of our democratic system and must include teaching students to be tolerant of unpopular views with which they disagree.[72] However, the Court warned that this tolerance must be tempered by teaching students sensitivity to others.[73] The need for schools to "teach by example" and the function of older students as "role models" in educating students were also cited as justifications for greater school control over student speech.[74] According to the Court, "[c]onsciously or otherwise, teachers-and indeed the older students-demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."[75] These reasons lead the Court to fervidly conclude that "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[76] However, the reasons relied upon for giving vulgar, plainly, offensive and obscene speech to schools are at best equivocal and could be equally used to justify censoring a multitude of student speech, including speech about teenage pregnancy, bullying, sexuality, communism and alcohol. Withal, it was clear that the Court had begun the necrosis of the soft tissue of constitutional protection of student speech granted in *Tinker*.

The obstruction of the protection afforded students in *Tinker* continued with the Court ruling that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school

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[71] *Id*. at 681 (internal quotation marks omitted); *id*. at 683, 685-86.
[72] *Id*.
[73] *Id.* at 681.
[74] *Id.* at 683.
[75] *Id.*
[76] *Id.* at 683.

board."[77] The Court explained that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[78] The Court's characterization of the student – an academically successful student elected as graduation speaker[79] – as a "confused boy" without a psychological analysis based upon what appeared to be a lewd or vulgar speech shows a shift in the Court's regard for students' rights relative to the school.

Further tearing away at the soft tissue of *Tinker's* constitutional protection, the Court reasoned that the free speech rights of students should not necessarily be coextensive with that of adults who enjoy great constitutional protection.[80] In this regard, the Court stated: "It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."[81] Without defining the term "plainly offensive," the Court found the speech plainly offensive to students, teachers and "any mature person."[82] As evidence of this conclusion, the Court summarily cited the "acutely insulting" nature of the speech to teenage girls, the glorification of male sexuality, the potential of the speech to "seriously damag[e]" "its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality," as well as the pervasiveness of sexual innuendo in the speech.[83] In chiseling speech from the heightened protection the "material and substantial disruption" test afforded students, the Court failed to

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[77] *Id*. Indeed, the Court declared that "Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions." *Id*.
[78] *Id.*; *id*. at 685-86.
[79] *Id.* at 692 (Stevens, J., dissenting).
[80] *Id*. at 682.
[81] *Id.*
[82] *Fraser*, 478 U.S at 683.
[83] *Id*.

acknowledge that many high school students regularly engage in such speech as that of the student in *Fraser*. Indeed, "in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment."[84] Consequently, the Court should have exercised greater restraint in withdrawing student speech from constitutional protection. Even more so because once one exception was created, others were sure to follow, as demonstrated by *Hazelwood v. Kuhlmeier*.[85]

It would have been prudent for the Court to apply the *Tinker* test, which, as noted above, the court of appeals found was not satisfied. If the Court was determined to deny constitutional protection to the student in *Fraser* and anticipated that the *Tinker* test would not give the desired result, because there was no basis for finding the district court's findings of fact clearly erroneous, certiorari should have been denied. Even after accepting the case, to avoid weakening the fundamental import of *Tinker's* protection of students' free speech rights, the Court could have distended to find the hooting and yelling as well as the graphical mimicry as reasonably forecasting material and substantial disruption at the school. One thing was clear, with the precarious terms "vulgar, obscene, plainly offensive, indecent, and lewd" as the basis for regulation, the heyday of policing student speech had begun.

B. Hazelwood School District v. Kuhlmeier

In this case, school officials prevented students from publishing two articles in a newspaper produced as part of a journalism class.[86] Funding from the newspaper came from the local board of education and sales of the newspaper in the school and the community.[87] It was customary procedure for the principal to review page proofs of each issue of the

[84] *Id.* at 696 (Stevens, J., dissenting).
[85] 484 U.S. 260.
[86] *Id*. at 262.
[87] *Id.* at 262-63.

newspaper before its publication.[88] Students in the course wanted to publish an article on divorce and another on pregnancy, both of which the principal found objectionable.[89] The principal objected to the publication of the divorce article – examining the effect of divorce on the school's students – because he believed that the parents of the student identified by name in the story should be provided an opportunity to respond to the student's complaints in the article about her father.[90] His objection to the pregnancy article stemmed from his concerns that discussion of birth control and sexual activity were not appropriate for younger students and that the anonymity of a student in the article was not adequately protected.[91] Furthermore, he believed that there was insufficient time to address any of his concerns without risking non-publication of the entire issue of the newspaper.[92]

Student staff members of the newspaper at the time of the censorship filed suit in the United States District Court for the Eastern District of Missouri claiming a violation of their right to free speech and seeking declaratory relief and monetary damages.[93] The district court ruled for the school district, holding that the newspaper was an integral aspect of the curriculum, not an open or limited public forum and the principal's reasons for the censorship were reasonable.[94] On appeal, the United States Court of Appeals for the Eighth Circuit reversed, ruling that while the newspaper was part of

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[88] *Id.* at 263.
[89] *Id*.
[90] *Id.* The principal did not know that the student's name had been removed from the final version.
[91] *Id*.
[92] *Id.* at 264.
[93] Kuhlmeier v. Hazelwood Sch. Dist., 607 F.Supp. 1450 (E.D. Mo. 1985).
[94] *Id*. at 1465-66. *See Kuhlmeier*, 484 U.S. at 267 ("[S]chool facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations") (internal quotation marks and citations omitted). Furthemore, "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id*.

the curriculum, it was also a public forum "because it was intended to be and operated as a conduit for student viewpoint [and] it was a student publication in every sense." [95] Consequently, according to the court of appeals, the school could not censor student speech therein unless the *Tinker* test was satisfied. [96] Finding that the school failed to satisfy the test, the court ruled for the plaintiffs.[97] The Supreme Court, however, reversed the decision.[98]

The Court continued on the new trajectory laid out in *Fraser*; further expanding the control of schools over student speech and injuring the tissue of constitutional protection from *Tinker*. Indeed, the Court was adamant that the tenor of its *Fraser* decision, rather than the *Tinker* decision, governed this case.[99] Relying on *Fraser*, the Supreme Court reiterated that the free speech rights of students are not coextensive with that of adults.[100] In addition, the Court declared that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar [student] speech outside the school."[101]

The Court's analysis hinged on its finding that the newspaper was not a public forum.[102] As such, the Court agreed with the district court's finding that the newspaper was an integral part of the curriculum and a school-sponsored publication.[103] Moreover, the school religiously adhered to a policy of comprehensive faculty control over the newspaper and seldom consulted students in making decisions about the newspaper.[104] Whereas the district court findings of fact supporting the conclusion that the newspaper was not a public

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[95] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372 (8th Cir. 1986) (internal quotation marks omitted).
[96] *Id.* at 1374.
[97] *Id.* at 1375.
[98] *Kuhlmeier*, 484 U.S. at 266.
[99] *Id*. at 266-67, 270.
[100] *Id.* at 266.
[101] *Id*. (internal citation omitted).
[102] *See id*. at 267-70.
[103] *Id*. at 268-70.
[104] *Id.* at 268-69.

forum were not clearly erroneous, the Court ruled that the court of appeals should not have concluded otherwise.[105]

Given its conclusion that the newspaper was not a public forum, the Court ruled that the contents of the newspaper could be regulated "in *any* reasonable manner."[106] The *Kuhlmeier* test developed a very lenient standard for schools seeking to wield control over student speech: schools can censor school-sponsored student speech if the censorship is "reasonably related to legitimate pedagogical concerns."[107] The way to ascertain whether student speech is school-sponsored is based on an analysis of whether the speech could be "reasonably perceive[d] to bear the imprimatur of the school."[108] Most student speech in schools is under school supervision, and therefore such speech is perceived as endorsed by the school. Thus, the test enabled schools to seize on this guise to effectively broaden their censorship of student speech.

The Court's ostensible transfusion to school districts left room for no surprise when the Court concluded that the censorship in this case was reasonable and the principal's reasons for the censorship – stated above – were legitimate pedagogical interests.[109] In fact, the Court on its own volition identified other possible legitimate pedagogical interests for censorship in this case.[110] Specifically, the Court stated that:

> [The principal] *could* reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals

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[105] *Id*. at 268-70.
[106] *Id.* at 270 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46) (emphasis added).
[107] *Id*. at 273.
[108] *Id.* at 271.
[109] *Id.* at 274-75.
[110] *Id.* at 276.

> whose most intimate concerns are to be revealed in the newspaper, and the legal, moral, and ethical restrictions imposed upon journalists within [a] school community that includes adolescent subjects and readers.[111]

However, the principal never told the students that the censorship was a teaching exercise in any Court-recognized legitimate pedagogical interests or any other pedagogical interest for that matter;[112] ergo, the censorship never truly had a pedagogical end.[113]

As Justice Brennan pointed out in his dissenting opinion, the *Kuhlmeier* test permits sweeping censorship of student speech with the benign justification of a legitimate pedagogical interest in censorship.[114] For example, as farcical as it might read, the *Kuhlmeier* test appears to allow censorship of "[a] student who responds to a political science teacher's question with the retort, 'socialism is good.'" [115] According to the Court's line of reasoning, the student "subverts the school's inculcation of the message that capitalism is better."[116] Another example, noted by Justice Brennan in his dissent, is "the maverick who sits in class passively sporting a symbol of protest against a government policy."[117] This in fact was the situation in *Tinker* where the Court found the student speech was protected.[118] Likewise, *Kuhlmeier* seems to allow schools to censor "the gossip who sits in the student commons swapping stories of sexual escapade [because the student] could readily muddle a clear

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[111] *Id*. (emphasis added) (internal quotation marks omitted).
[112] *Id*. at 285 (Brennan, J., dissenting).
[113] *Id*.; *accord id.* at 289 (Brennan, J., dissenting) ("the censorship [actually] served no legitimate pedagogical purpose").
[114] *Id*. at 277-90 (Brennan, J, dissenting).
[115] *Id.* at 279 (Brennan, J., dissenting).
[116] *Id.*
[117] *Id*. at 280 (Brennan, J., dissenting).
[118] *Id.*

official message condoning the government policy or condemning teenage sex."[119]

It was pages into the opinion before the Court finally set forth its reason for creating another test in this case, instead of applying *Tinker* (the test applied by the district court),[120] *Kuhlmeier* asked whether schools are constitutionally mandated to "affirmatively . . . promote particular student speech."[121] The argument would be that to permit or tolerate something is to participate in it. However, it could be argued that *Tinker* likewise involved whether the school had to affirmatively promote the student speech expressed with the armbands. Therefore, an affirmative promotion of the message would have occurred had the school failed to censor the armband expression despite knowledge of it; especially if the other students were fully aware that the school had knowledge of the speech but failed to censor. This seems to indicate that there is no substantive difference in this regard between *Tinker* and *Kuhlmeier*.

The Court also justified its institution of a new test by revealing that the *Kuhlmeier* test involved giving "educators authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[122] *Tinker*, on the other hand, involved limitations on the authority of schools to regulate student speech.[123] This distinction rhymes with the declivity of the Court, beginning with *Fraser*, toward heightened regulatory authority for schools over student free speech rights. Further concentrating authority over student speech in school officials, the Court declared that student expressive activities reasonably viewed to have the school's imprimatur "may fairly be characterized as part of the school

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[119] *Id.*
[120] Since the *Fraser* test was not applicable, the only other test available at the time of the *Kuhlmeier* decision was *Tinker* which the district court applied.
[121] *Id*. at 270-71; *see also id*. at 271-72.
[122] *Id*. at 271.
[123] *Id.*

curriculum, *whether or not* they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[124] This created a wide schoolhouse gate for regulation of school-sponsored student speech.

The Court went out of its way to expressly authorize schools to justify censorship of school-sponsored speech on any of several broad grounds: (1) "to assure that participants learn whatever lessons the activity is designed to teach;"[125] (2) to ensure "readers or listeners are not exposed to material that may be inappropriate for their level of maturity;"[126] (3) to guarantee that "the views of the individual speaker are not erroneously attributed to the school;"[127] and (4) to divorce itself from student speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[128] It is quite puzzling that in *Fraser,* the school assembly was a school-sponsored educational program in self-government, yet the *Kuhlmeier* Court did not even acknowledge this fact in its decision.[129] A plausible explanation could be that, having created a specific type of speech to empower school censorship in *Fraser*, the Court had cornered itself so that it could not find a fit between the power to regulate "lewd, plainly offensive, obscene or vulgar" speech given to school districts in *Fraser* and this case. Consequently, it had to create another new type of speech to give to schools. Note that in the fourth justification listed above, the Court specifically identified profane or vulgar speech as speech from which schools could dissociate. Thus the *Kuhlmeier* reasoning could have sufficed in *Fraser*, since the cases were substantially similar. In other words, the *Fraser* case could have been

[124] *Id.* (emphasis added).
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] *Fraser*, 478 U.S. at 677-78, 681.

decided using the *Kuhlmeier* test without the need for the *Fraser* test.

Kuhlmeier also gave schools authority to create strict standards for student speech under its auspices.[130] The Court empowered schools to make such standards much tougher than those used by newspaper publishers outside the school context.[131] Student speech failing to comply with those standards can be censored.[132] Schools can arrive at censorship by deciding to dissociate from "any position other than neutrality on matters of political controversy."[133] Concluding "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicate[d], as to require judicial intervention to protect students' constitutional rights."[134]

Perhaps, hinting at other types of speech that might provide the future tests for the taxonomy, the Court stated that "school[s] must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order."[135] Speech advocating illegal drug use identified here would be the next category of speech carved out in *Morse*, discussed below. However, the *Morse* Court would establish it as a category independent of *Kuhlmeier*, because *Kuhlmeier* granted authority for schools to regulate school-sponsored speech and the speech in *Morse* was not school-sponsored. Essentially, *Kuhlmeier* held that schools must be accorded "substantial deference" when regulating school-sponsored

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[130] *Kuhlmeier*, 484 U.S. at 271-72.
[131] *Id*.
[132] *Id*.
[133] *Id*. at 272.
[134] *Id*. at 273 (internal citation omitted).
[135] *Id*. at 272. Indeed, the decision to identify specific types of speech herein is evidence in itself that the exercise of identifying speech types of student speech for constitutional censorship that began in *Fraser* was boundless once begun.

student speech.[136] According to the Court, schools are entitled to these broad powers over student speech so that they are not "unduly constrained" in their educational responsibilities.[137]

In addition, as Justice Brennan stated, *Kuhlmeier* was a "brutal censorship" of student speech.[138] Rather than the farce of "school-sponsorship" which could be beguiled to "brutally censor" student speech, creation of the *Kuhlmeier* test could have been avoided by merely requiring schools to issue or have students issue disclaimers where student speech reasonably appears to bear imprimatur of the school.[139] In that way, the audience of the speech would be cognizant that the speech belongs to the student, not the school. Alternatively, the school "could simply issue its own response clarifying the official position on the matter and explaining why the student's position is wrong."[140] Either alternative would ensure that students' minds are not inhibited but rather imbued with the essence of the marketplace of ideas that buoys our society. Instead, by its decision, the Court taught the students the wrong civics lesson.[141] As Justice Brennan eloquently expressed, the *Kuhlmeier* test "denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed."[142]

C. Morse v. Frederick

Morse, decided in 2007, is the latest case in the student speech taxonomy. In this case, a high school student filed suit claiming his free speech rights were violated after he was suspended for ten days for unfurling a banner with the words "BONG HiTS 4 JESUS" during what the Supreme Court characterized as "a school-sanctioned and school-supervised

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[136] *Id*. at 273, note 7.
[137] *Id*. at 272; *see also id*. at 273, note 6.
[138] *Id.* at 289.
[139] *Id.*
[140] *Id.*
[141] *Id*. at 291 (Brennan, J., dissenting).
[142] *Id.* at 290 (Brennan, J., dissenting).

event."[143] The student sought injunctive and declaratory relief as well as monetary damages.[144]

The school authorized students and staff to take part in the Olympic Torch Relay as it made its way by the school.[145] The relay was sponsored by various private sponsors, including Coca-Cola, and spectators included members of the community.[146] Students could watch on either side of the road in front of the school.[147] The plaintiff never made it to school before the event but did meet up with his friends at the relay.[148] During the procession of the torch, the plaintiff and his friends unrolled the banner, prompting the principal to cross the street to ask the students to furl it up.[149] The principal believed the banner promoted the use of illegal drugs and violated school board policy against such messages.[150] The policy provided in pertinent part: "The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors ...."[151] According to the plaintiff, the words on the banner were jabberwocky or gibberish designed for the television cameras.[152] Owing to the plaintiff's refusal to obey, the principal seized the banner.[153]

At the administrative appeal, the superintendent ruled for the school.[154] This ruling was partly based on his determination that the plaintiff was disciplined for his apparent advocacy of illegal drug use rather the principal's "disagree[ment] with his message."[155] The superintendent relied on *Fraser*, which essentially gave schools broad powers

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[143] 127 S.Ct. at 2622.
[144] *Id*. at 2623.
[145] *Id*. at 2622.
[146] Frederick v. Morse, 439 F.3d 1114, 1115-16 (9th Cir. 2006).
[147] *Morse*, 127 S.Ct. at 2622.
[148] *Id*.
[149] *Morse*, 127 S.Ct. at 2622.
[150] *Id*. at 2622-23.
[151] *Id*. at 2623.
[152] *Morse*, 439 F.3d at 1117-18.
[153] *Morse*, 127 S.Ct. at 2622.
[154] *Id*. at 2623.
[155] *Id*. (internal quotation marks omitted).

to police student speech that is "inconsistent with the school's educational mission" or "intrudes upon the work of the schools" to justify his decision.[156] The school argued that it was authorized to discipline the plaintiff for "attempt[ing] to belittle and undercut this critical mission of preventing use of illegal drugs by a sign that was a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs."[157] In its summary judgment, not only did the United States District Court for the District of Alaska rule that the plaintiff's free speech rights were not violated, it also ruled that the school and the principal had qualified immunity.[158] Indeed, the court held that the principal "had the authority, if not the *obligation*, to stop such messages at a school-sanctioned activity."[159] This holding appears congruent with the increased latitude granted to schools to police student speech in *Fraser* and *Kuhlmeier*.

On appeal, the United States Court of Appeals for the Ninth Circuit applied the more stringent *Tinker* test, reversing the district court.[160] Characterizing the speech as non-disruptive "off-campus speech by students during school-authorized activities," the court ruled that the *Tinker* test was not satisfied.[161] The court further ruled that schools are not authorized to censor student speech merely "because the speech promotes a social message contrary to the one favored by the school."[162] *Fraser* was not the applicable test because, unlike this case, *Fraser* involved sexual innuendo.[163] Moreover, "[t]he phrase Bong Hits 4 Jesus may be funny, stupid, or insulting, depending on one's point of view, but it is not plainly offensive in the way sexual innuendo is."[164] The

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[156] *Id*.
[157] *Morse*, 439 F.3d at 1118 (internal quotation marks omitted).
[158] *Morse*, 127 S.Ct. at 2623.
[159] *Id*. (emphasis added).
[160] *Morse*, 439 F.3d at 1118.
[161] *Id.* at 1118.
[162] *Id.*
[163] *Id.* at 1119. *See also id.* ("*Fraser* focuses upon the sexual nature of the offensiveness in the in-school speech that can be punished, as contrasted with the "political viewpoint" of the speech protected in *Tinker*").
[164] *Id*. (internal quotation marks omitted).

court reasoned that *Kuhlmeier* was likewise not applicable because the plaintiff's speech was neither school-sponsored nor curricular.[165] Likewise, the speech was not "part of an official school activity."[166] "*Kuhlmeier* might apply had [the student] insisted on making his Bong Hits 4 Jesus banner in art class, but that is not what the record shows. His display took place out of school while students were released so that they could watch a Coca-Cola and Olympics activity."[167] Arguably *Morse* was more akin to *Tinker*, which involved political speech, because in Alaska, where the case arose, marijuana legalization is a controversial political issue that comes up time and again.[168]

In fact, the court opinion agrees with this Article's thesis that *Fraser* and *Kuhlmeier* were inclined toward increased school authority for student speech censorship, whereas *Tinker* was focused on protecting the rights of students to speak. For example, the court observed, "the question is how far *Tinker* goes to protect such student speech as [the plaintiff's], and how far *Fraser* goes to protect school authority to censor and punish student speech that would undermine the school's basic educational mission."[169] The court warned that "[p]ublic schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself."[170] Concerned about the wide police powers schools could read into the *Fraser* decision, for instance, the court poignantly stated:

> There has to be some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of

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[165] *Id.*
[166] *Id.*
[167] *Morse*, 439 F.3d at 1119-20 (internal quotation marks omitted).
[168] *Id.* ("It is not so easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued"); *see also id.* at 1121-23.
[169] *Id.* at 1120 (internal quotation marks omitted).
[170] *Id.*

> *Tinker* that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Had the school in that case defined its mission as instilling patriotic duty or promoting support for national objectives, it still could not have punished the students for wearing the black arm-bands. All sorts of missions are undermined by legitimate and protected speech-a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime;* a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents.[171]

The court concluded that the speech took place on a public street and the relay was not part of a curricular function.[172] Additionally, "[n]o educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event" and the school failed to show a "risk of substantial disruption;"[173] therefore, the *Tinker* test was not satisfied.[174]

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[171] *Id.* (internal quotation marks and footnotes omitted).
[172] *Id*.
[173] *Morse*, 439 F.3d at 1120; *see also id*. at 1117 ("The school principal and school board do not claim that the display disrupted or was expected to disrupt any classroom work. They concede that their objection to the display, and the reason why the principal ripped down the banner, was not concern that it would cause disruption but that its message would be understood as advocating or promoting illegal drug use").
[174] *Id*. at 1120; *see also id*. ("No educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event. One can hypothesize off-campus events for which the students might be

Despite these efforts by the court of appeals to protect student speech rights and rein in school district censorship of student speech in the ninth circuit, its holding was short-lived as the Supreme Court would once again expand the police powers of schools over student speech. Consequently, the Supreme Court furthered the necrosis of the soft tissue of free speech rights extended to students in *Tinker*. Even though the principal and the school district implored the Court to rule based on the "plainly offensive" language of the *Fraser* test, it refused, instead choosing to create yet another kind of speech to add to the power coffers of schools.[175]

Indeed, right away, the Supreme Court characterized the plaintiff's speech in *Morse* as speech at "a school-sanctioned and school-supervised event."[176] The Court also described the relay as "a school event."[177] Evidently, that bespeaks wider latitude for schools compared to the court of appeals' characterization of the event as privately-sponsored.[178] While the Court fell short of calling the event school-*sponsored*, use of the terms "supervised" and "sanctioned" was deceitfully equated with the term "sponsorship." The Court stated that the event was sanctioned by the principal as an approved class trip or social event and took place during regular school hours.[179] The school district's policy provided that students are subject to its rules while on

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released that would be educational and curricular in nature and would be disrupted by speech such as [the plaintiff's]. For example, on a school field trip as part of the social studies curriculum to observe a court in session, it might be the case that the school could ban the wearing of Cohen's famous jacket. But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event") (internal citation and footnote omitted).

[175] *Morse*, 127 S.Ct. at 2629.

[176] *Id.* at 2622.

[177] *Id*. at 2625 ("The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at *a school event*, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may") (emphasis added).

[178] *See Morse*, 439 F.3d at 1120 (characterizing the event as "Coca-Cola sponsored"); *see also id*. at 1115 (stating that the event was privately-sponsored).

[179] *Morse*, 127 S.Ct. at 2624.

approved class trips or social events. The Court observed that during the relay, "[t]he high school band and cheerleaders performed" and "[t]eachers and administrators were interspersed among the students and charged with supervising them."[180] Not surprisingly, the Court ruled for the school.[181]

The Court effectively expanded the schoolhouse gate in declaring that "we agree with the superintendent that [the plaintiff] cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."[182] While the tenor of the Court since *Fraser* ensured that its agreement with the superintendent was not unexpected, the expansion of the schoolhouse gate was portent.[183] In its review of the other tests in the taxonomy, the Court conceded that the student in *Fraser* would have been protected under the First Amendment had he given the exact same speech "outside the school context."[184] Given the expansion of the schoolhouse gate, we know that what constitutes "outside the school context" is relatively insular compared to the copious schoolhouse gate granted to schools.

Although the plaintiff testified that the words on the banner were gibberish, the Court characterized them as "cryptic" but reasonably perceived as an advocacy of illegal use of drugs.[185] It reasoned that the words could be interpreted to advocate illegal drug use in at least two ways: (1) "as an imperative: '[Take] bong hits...'-a message equivalent … to 'smoke marijuana' or 'use an illegal drug;'"[186] and (2) "as celebrating drug use-'bong hits [are a good thing],' or '[we take] bong hits.'"[187] It concluded, however, that there was "no meaningful distinction" between the interpretations as both were pro-drug.[188] Instead of accepting the plaintiff's intended

[180] *Id.*
[181] *Morse*, 127 S.Ct. at 2622, 2625.
[182] *Id.* at 2624.
[183] *Id.* (internal quotation marks omitted).
[184] *Id*. at 2626.
[185] *Id*. at 2624.
[186] *Id*. at 2625.
[187] *Morse*, 127 S.Ct. at 2625.
[188] *Id.*

interpretation – gibberish – the Court sided with the school, stating that "[g]ibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its *undeniable* reference to illegal drugs."[189] Unlike the court of appeals, the Court found the plaintiff's speech was neither political speech nor akin to political speech, particularly because the plaintiff himself characterized the speech as gibberish.[190] It is ironic, however, that here the Court relied on the plaintiff's stated intent behind the words –gibberish – given its earlier dismissal of the plaintiff's declared intent and its judgment that the words were either an imperative to use or a celebration of illegal drugs.[191]

While neither the Supreme Court nor the court of appeals is accurate to interpret words intended as gibberish as political speech or other interpretation, it appears that at the very least, gibberish should be protected under *Tinker*. This is because, of the three existing tests at the time of *Morse*, *Tinker* was the only one that could be applied without undermining the integrity of the taxonomy: As the taxonomy existed before *Morse*, *Tinker* was ostensibly the de facto test where the types of speech carved out in *Fraser* and *Kuhlmeier* were inapposite.[192] Moreover, it appears that the *Tinker* category of speech dealt more with viewpoint-specific speech rather than merely political speech.[193]

In dismissing *Tinker* as the applicable test in *Morse*, the Court was explicit with its intent to create another type of speech to empower schools to police. Specifically, it stated,

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[189] *Id*. (emphasis added).
[190] *Id.*
[191] *Id.*
[192] *See, e.g*., Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992); Henerey v. City of St. Charles, 200 F.3d 1128, 1132 (8th Cir.1999).
[193] *Accord, e.g.*, Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442-43 (5th Cir. 2001).

"*Tinker* is not the *only* basis for restricting student speech."[194] It relied on language in its school search and seizure jurisprudence in concluding that "deterring drug use by schoolchildren is an important-indeed, perhaps compelling interest."[195] In consonance with this, the Court made its case for the censorship:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.[196]

The Court also cited statistics of escalating drug use in schools and the national increase in the number of school policies against illegal drug use, partially prompted by the knowledge "that students are more likely to use drugs when the norms in school appear to tolerate such behavior."[197] The Court seemed especially willing to defer to "established school policy" against speech advocating illegal drug use.[198] Having created this tableau of the censurable nature of illegal

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[194] *Morse*, 127 S.Ct. at 2627 (emphasis added). The italicized word gave this indication of the Court's willingness to expand the taxonomy so as to further empower schools.

[195] *Id.* at 2628 (internal quotation marks omitted) (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[196] *Id*. at 2628 (quoting *Acton*, 515 U.S. at 661-62).

[197] *Id.* The Court also relied on language from the Safe and Drug-Free Schools and Communities Act that schools have a coherent policy in their drug prevention programs about the danger of illegal drug use. However, that Act is not about regulating student *speech*. *See* 20 U.S.C. §§ 7114, 7115 (2002).

[198] *Morse*, 127 S.Ct. at 2629.

drugs in schools, the Court proceeded to give schools authority over student speech advocating use of illegal drugs.[199] While it is indisputable that illegal drug use is dangerous for students, *Tinker*'s holding could be extended to censor student speech about other dangerous subjects integral to the formative years of students. Unfortunately, nothing stops the Court in the future from following this illogical reasoning: first painting a picture of the dangers of the content of a particular kind of speech and then proceeding to subject that speech to the police powers of schools. Thus, *Morse*, like its predecessors *Fraser* and *Kuhlmeier*, obstructed circulation to the soft tissue of students' free speech rights extended in *Tinker*, propagating gangrene of students' free speech rights. In essence, what the Court positively gave students in *Tinker*, it systematically took away by positive conveyance of authority to schools in *Fraser*, *Kuhlmeier* and *Morse*.

Conclusion

As evident above, it took less than four decades for the Court to move from a stringent protection of student free speech rights to aggressive protection of school police powers over student speech. The Court could have avoided the abrogation of student free speech rights by deciding all student speech cases in the jurisprudence using *Tinker*. Nevertheless, based upon the current trajectory of removing student speech rights, it appears inevitable that this is the future of the jurisprudence. To avoid an even more muddled area of case law where increasingly more exceptions are carved out, leading to the eventual necrosis or quasi-necrosis of the right, the Court needs to return to *Tinker* and reaffirm its principles. In particular, the Court needs to readopt its stirring principle which recital in latter cases has been at best insincere: "It can

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[199] *Id.* at 2627-28. The Court concluded that "[t]he special characteristics of the school environment, and the governmental interest in stopping student drug abuse-reflected in the policies of Congress and myriad school boards, including JDHS[the high school in *Morse*]-allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Id.* at 2629 (internal quotation marks and citation omitted). This is the missive of the *Morse* test.

hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [200] The Court should return to the "material and substantial disruption" test and protect the ability of our children to express themselves, for with expression comes self-fulfillment, self-realization, discovery of truth and education itself.[201]

Students' free speech rights need to be protected by those who are in the position to judicially challenge infringements upon students' rights and are concerned for the continued viability of our democracy. If the polity is truly concerned with promoting the marketplace of ideas, it is better served by the Court erring on the side of protecting students' free speech rather than stifling speech. Indeed, rather than increasingly permitting schools to deny students' free speech rights, the Court should insist that schools find narrowly tailored alternatives such as the publication of disclaimers alluded to above, and other creative alternatives short of censorship.

Justice Holmes cautioned:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even

[200] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *Fraser*, 478 U.S. at 680; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Morse v. Frederick, 127 S.Ct. 2618, 2622 (2007).

[201] *See, e.g.*, Martin H. Redish, Freedom of Expression: A Critical Analysis (1984); Thomas I. Emerson, The System of Freedom of Expression (1970).

> more than they believe the very foundations of their own conduct that the 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, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required.[202]

I urge school officials, policymakers and the judiciary to reflectively and soberly consider these effulgent words when they limit the expressions of our citizenry's young members.

[202] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).