TINKERING WITH ALITO'S CODE TO *MORSE*'S LIMITS: WHY ALITO'S CONCURRENCE IS CRUCIAL TO PRESERVING *TINKER* AND STUDENTS' RIGHT TO FREE SPEECH

INTRODUCTION

Does freedom expand or contract with time, or does it oscillate? The natural starting point to look for the answer is past experience, but we ask the question because we are interested in the future. Naturally, we want this year to be better than the last. We want life to be better for our children than it has been for us. Freedom and progress are often considered together. This Note does not answer, not even for the subject of student free speech, whether we are becoming or are destined to become freer with the passage of time. Rather, it works from the assumption common in the American psyche and experience that freedom is never free from encroachment by foe or well-meaning friend, nor is its progress guaranteed; freedom must be sought and maintained each generation.

In 1969, the Supreme Court, in *Tinker v. Des Moines Independent Community School District*, declared in broad terms that First Amendment[1] freedom of speech applies to public school students.[2] Since then, the Supreme Court has found three exceptions to this broad articulation of student free speech[3] that do not apply to the general adult population.[4] These expectations are: speech that is lewd or indecent,[5] speech that could reasonably be seen as school-sponsored,[6] and speech that could reasonably be understood as advocating illegal drug use.[7] Whether the Supreme Court was right in stating these exceptions, it is

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[2] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[3] Hardwick v. Heyward, 711 F.3d 426, 435 (4th Cir. 2013); *see also* Morse v. Frederick, 551 U.S. 393, 410, 417–18 (2007) (Thomas, J., concurring) (identifying *Morse* as creating a third exception to the *Tinker* standard).

[4] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (stating that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

[5] *Id.* at 685–86.

[6] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). Any regulation of student speech justified by *Kuhlmeier* must be for pedagogical reasons. *Id.*

[7] *Morse*, 551 U.S. at 397.

unmistakable that the 1969 articulation of broad free speech rights for students has been steadily scaling back.

Particularly, there are concerns that the analysis in the most recent exception, *Morse v. Frederick*,[8] opened the door to further erosion of the *Tinker* standard.[9] While *Morse* is most naturally read as pertaining only to student speech advocating illegal drug use,[10] the analysis could arguably be used to analogize "advocating illegal drug use" to other issues, thereby expanding *Morse*'s application[11] and reducing the breadth of student free speech. However, there is hope that Justice Alito's controlling concurring opinion, stating that *Morse* should be read narrowly, will preserve the *Tinker* standard as it was before *Morse*.[12]

This Note argues that *Morse* should be applied narrowly, according to Alito's concurrence, to protect student speech under the First Amendment as articulated in *Tinker*, and qualified no further than the narrow holdings in *Tinker*'s progeny. Part I sets the context by reviewing *Tinker* and its progeny. Part II examines the problem by considering the concerns flowing from *Morse*, looking at cases from federal courts to illustrate these concerns. Finally, Part III looks at the solution in Alito's concurring opinion, why this opinion controls the limits of *Morse*, and other reasons why *Morse* should be applied narrowly.

I. CONTEXT: *TINKER* AND ITS PROGENY

A. Tinker v. Des Moines Independent Community School District

In *Tinker*, the Supreme Court ruled against a school policy prohibiting students from wearing armbands to protest the Vietnam War.[13] After being suspended, the students sued the school district.[14] In its decision, the Court stated, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to

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[8] *Id.*

[9] *See id.* at 422, 425 (Alito, J., concurring); Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 21–22 (2008); *cf. Morse*, 551 U.S. at 422 (Thomas, J., concurring) ("I join the Court's opinion because it erodes *Tinker*'s hold in the realm of student speech . . . .").

[10] *Morse*, 551 U.S. at 397 (holding "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"); *see also* Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 357 (2007) ("By its plain language, *Morse*'s holding is narrow in that it expressly applies only to student speech promoting illegal drug use.").

[11] *Morse*, 551 U.S. at 425 (Alito, J., concurring); Chemerinsky, *supra* note 9, at 21–22.

[12] *See infra* Part III.A.

[13] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[14] *Id.* at 504.

teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] The Court expounded that wearing the armbands for this purpose "was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[16] The Court also recognized "the need for affirming the comprehensive authority . . . of school officials . . . to prescribe and control conduct in the schools,"[17] but this must be done "consistent with fundamental constitutional safeguards."[18] The Court clarified that the issue in *Tinker* did "not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."[19] Despite the technical anachronism in terminology,[20] the issue in *Tinker* dealt only with content-based speech.[21]

The Court adopted the substantial disruption standard to determine whether the school officials violated the students' right to free speech.[22] Essentially this standard provides that schools cannot restrict student speech except when it can be reasonably forecast that the speech would cause a substantial disruption to "the requirements of appropriate discipline in the operation of the school."[23] In applying the test, the Court found, "There is here no evidence whatever of petitioners' interference . . . with the schools' work or of collision with the rights of other students . . . ."[24]

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[15] *Id.* at 506.

[16] *Id.* at 505–06.

[17] *Id.* at 507.

[18] *Id.*

[19] *Id.* at 507–08.

[20] *See* DANIEL A. FARBER, THE FIRST AMENDMENT 21 (2d ed. 2003) ("The content distinction found its first clear expression in [1972].").

[21] *Tinker*, 393 U.S. at 508 ("Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"); *see also* Geoffrey A. Starks, Tinker*'s Tenure in the School Setting: The Case for Applying* O'Brien *to Content-Neutral Regulations*, 120 YALE L.J. ONLINE 65, 71–72 (2010), http://yalelawjournal.org/images/pdfs/901.pdf (arguing that *Tinker* applies only to student content-based speech).

[22] *Tinker*, 393 U.S. at 509, 514. A similar standard had been articulated in *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

[23] *Tinker*, 393 U.S. at 509. In some formulations of the standard, the Court seemed to add a "rights of others" prong. *Id.* at 508, 509, 513. In *Saxe v. State College Area School District*, then-Judge Alito wrote that "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear," and that "at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress." 240 F.3d 200, 217 (3d Cir. 2001); *see also* Bowler v. Town of Hudson, 514 F. Supp. 2d 168, 176 (D. Mass. 2007).

[24] *Tinker*, 393 U.S. at 508. While Justice Black in the dissent disagreed, finding in the record that students were distracted because of the armbands and that one class's

The Supreme Court criticized the district court's rationale that the school officials acted reasonably because they had "fear of a disturbance."[25] For "school officials to justify prohibition of a particular expression of opinion, [they] must be able to show that [the] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[26] They must be able to show that the action prohibiting the speech meets the substantial disruption standard.[27] Since it was not met, the school officials' actions violated the students' right to free speech.[28]

The Court also found it "relevant that the school authorities did not . . . prohibit the wearing of all symbols of political or controversial significance" but allowed symbols from political campaigns, as well as symbols associated with Nazism.[29] However, the Court would have reached the same result even without the viewpoint discrimination.[30] Furthermore, prohibiting even *viewpoint-based* speech would be permitted if "it is necessary to avoid material and substantial interference with schoolwork or discipline," but not because of the viewpoint expressed.[31]

The Court then described the extent of its holding in the school setting: it is not confined to classroom discussion but extends to "the cafeteria, or on the playing field, or on the campus during the authorized hours."[32] The Court reasoned, "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."[33] So broad did *Tinker* construe students' right to free speech that Justice Stewart thought the majority was assuming students' First Amendment rights were "co-extensive with those of adults," an assumption he could not share despite joining the majority.[34]

"lesson period [was] practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration,'" *id.* at 517–18 (Black, J., dissenting), the majority was evidently satisfied that these instances of disruption did not rise to the level of substantial disruption.

[25] *Id.* at 508 (majority opinion).

[26] *Id.* at 509.

[27] *Id.*

[28] *Id.* at 514.

[29] *Id.* at 510.

[30] The Court articulated the substantial disruption test four times before considering this factor. *See id.* at 505, 508, 509.

[31] *Id.* at 511.

[32] *Id.* at 512–13.

[33] *Id.* at 513.

[34] *Id.* at 514–15 (Stewart, J., concurring).

One final point is called for to fully explain the substantial disruption standard: the *same speech* could pass or fail the test depending on the circumstances. This is illustrated by comparing *Burnside v. Byars*[35] with its companion case, *Blackwell v. Issaquena County Board of Education*.[36] Both cases were decided by the same court on the same day and dealt with the same kind of speech, but the results were different because the facts were different. In *Burnside*, there was no substantial disruption when students wore "freedom buttons," but in *Blackwell* there was "much disturbance" caused by students harassing other students who were not wearing the buttons.[37]

B. Bethel School District No. 403 v. Fraser

It was seventeen years before the Court took up its next significant student speech case in *Bethel School District No. 403 v. Fraser*.[38] At a mandatory school assembly, a high school student delivered a speech consisting of "an elaborate, graphic, and explicit sexual metaphor."[39] In reaction, "[s]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech."[40] Furthermore, "[o]ne teacher . . . found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."[41] The student was suspended and removed from consideration to speak at graduation.[42]

Despite the effects of the speech, neither the district court nor the Ninth Circuit found that the speech caused a substantial disruption under *Tinker*, ruling instead that the school officials "violated respondent's right to freedom of speech."[43] The Supreme Court reversed but not by applying *Tinker*.[44] Instead, while maintaining "that students do not 'shed their constitutional rights to freedom of speech or expression

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35 363 F.2d 744 (5th Cir. 1966).

36 363 F.2d 749 (5th Cir. 1966).

37 *Tinker*, 393 U.S. at 505 n.1 (discussing both cases).

38 478 U.S. 675 (1986).

39 *Id.* at 678.

40 *Id.*

41 *Id.*

42 *Id.* However, following an injunction from the district court, the student was again allowed for consideration to speak at graduation. *Id.* at 679.

43 *Id.*

44 The Court in *Hazelwood School District v. Kuhlmeier* explicitly said that its holding in *Fraser* was not based on the *Tinker* analysis. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988).

at the schoolhouse gate,'"[45] the Court stated "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[46] Thus, the Court ruled that schools have the discretion to prohibit "offensively lewd and indecent speech,"[47] even though adults would not necessarily be prohibited from expressing the same speech elsewhere.[48]

C. Hazelwood School District v. Kuhlmeier

Only a year and a half after its decision in *Fraser*, the Court issued its next significant student speech decision in *Hazelwood School District v. Kuhlmeier*.[49] In *Kuhlmeier*, a principal deleted two pages from a school-sponsored student newspaper before it went to press because he had concerns about two articles dealing with teen pregnancy and divorce.[50]

The district court found the students' free speech rights had not been violated.[51] The Eighth Circuit disagreed, holding that the newspaper could not be censored except as necessary under *Tinker*, finding "no evidence . . . that the principal could have reasonably forecast that the censored articles . . . would have . . . given rise to substantial disorder in the school."[52]

The Supreme Court reversed.[53] While affirming that students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[54] the Court drew the distinction that the question in *Tinker* was "whether the First Amendment requires a school to tolerate particular student speech."[55] The question it now faced was "whether the First Amendment requires a school affirmatively to promote particular student speech."[56] The Court held that schools may

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[45] *Fraser*, 478 U.S. at 680 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[46] *Id.* at 682.

[47] *Id.* at 685.

[48] *Id.* at 682.

[49] 484 U.S. 260 (1988). The short form is sometimes seen as "*Hazelwood*," but this Note uses "*Kuhlmeier*."

[50] *Id.* at 262–64. The principal was concerned that the articles did not provide sufficient anonymity or a chance for the other side to respond when people were named. Rather than allow corrections, the principal deleted the pages because he believed there was no time for such corrections to be made. *Id.* at 263–64.

[51] *Id.* at 264–65.

[52] *Id.* at 265 (internal quotation marks omitted).

[53] *Id.* at 266.

[54] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[55] *Id.* at 270.

[56] *Id.* at 270–71.

exercise "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."[57] This includes "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[58]

D. Morse v. Frederick

It was not until nearly twenty years after *Kuhlmeier* that the Court decided its next student speech case in *Morse v. Frederick*.[59] Joseph Frederick and a few other high school students displayed a fourteen-foot-long banner that read "BONG HiTS 4 JESUS" at a school event to watch the Olympic torch go by the school.[60] Principal Morse saw the banner and demanded the students take it down.[61] Frederick refused and was suspended.[62]

The district court found that Morse did not violate Frederick's right to free speech since she "reasonably interpreted the banner as promoting illegal drug use—a message that 'directly contravened the Board's policies relating to drug abuse prevention.'"[63] The Ninth Circuit reversed, applying the *Tinker* substantial disruption standard and finding that Frederick's right to free speech had been violated, since he was punished without a showing "that his speech gave rise to a 'risk of substantial disruption.'"[64]

As in *Kuhlmeier*, after the court of appeals applied the substantial disruption test, the Supreme Court reversed.[65] Although the Court reaffirmed that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[66] the Court also stated that students' rights in school[67] are not coextensive with

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[57] *Id.* at 273.

[58] *Id.* at 271.

[59] 551 U.S. 393 (2007).

[60] *Id.* at 397.

[61] *Id.* at 398.

[62] *Id.*

[63] *Id.* at 399 (citation omitted).

[64] *Id.* (citation omitted).

[65] *Id.* at 410.

[66] *Id.* at 396 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[67] The Court found that, since the Olympic torch event was a school-sanctioned event, Frederick could not "claim he [was] not at school," even though he was not on school property when he displayed the banner. *Id.* at 401.

those of adults.[68] Instead, "the rights of students must be applied in light of the special characteristics of the school environment."[69]

With the tension of these two principles, the Court moved forward to discuss the points relevant to reach its holding. First, Frederick's banner could reasonably be understood as advocating illegal drug use, even if he did not so intend.[70] Second, the school had a policy against expression in support of "the use of substances that are illegal to minors."[71] Third, the Court found that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest,"[72] since "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people" and that "[t]he problem remains serious today."[73] Fourth, Congress has said that "part of a school's job is educating students about the dangers of illegal drug use" and has provided funding for this purpose to those schools that "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful."[74] Therefore, "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[75] The Court concluded that Morse did not violate Frederick's First Amendment rights, holding that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[76]

II. REASONS FOR CONCERN IN *MORSE*

The overriding concern about *Morse v. Frederick* considered by this Note is that *Morse* will be viewed and applied broadly. A broad application of *Morse* would be one in which *Morse* would not be confined to student speech that could reasonably be seen as advocating illegal drug use but would also be applied to restrict other kinds of speech, including speech that would not, and should not, be restricted under the *Tinker* standard. Perhaps the most likely way this could happen is

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[68] *Id.* at 396–97 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

[69] *Id.* at 397 (internal quotation marks omitted).

[70] *Id.* at 401–02. Frederick claimed that the banner was "just nonsense meant to attract television cameras." *Id.* at 401 (internal quotation marks omitted).

[71] *Id.* at 398.

[72] *Id.* at 407 (citation omitted).

[73] *Id.*

[74] *Id.* at 408 (alteration in original) (internal quotation marks omitted).

[75] *Id.* (citation omitted).

[76] *Id.* at 397.

through the effect that a broad view of *Morse* would have on the relationship between *Tinker* and its progeny. Regarding this relationship, the prevailing view sees *Tinker* as the general rule for student speech with its progeny as limited exceptions to that rule.[77] Thus, *Tinker* held that schools cannot restrict student speech unless school officials can reasonably forecast that the speech would cause a substantial disruption to the operation of the school.[78] *Fraser* and *Kuhlmeier* each held narrow exceptions to this rule for speech that is lewd[79] or that can be reasonably understood as school-sponsored.[80] A plain reading of *Morse* adds just another narrow exception: school officials can restrict student speech reasonably understood as advocating illegal drug use.[81]

However, an alternate view has seen *Tinker* and its progeny as equals, that is, each case pertaining to a certain category of speech with no case setting a general rule.[82] In this view, there is no general rule: *Morse* pertains to advocating illegal drug use, *Kuhlmeier* to school-sponsored speech, and *Fraser* to lewd and indecent speech. The marked difference between the alternate and the prevailing views is that the alternate does not see *Tinker* as the main rule and pertinent to most student speech, but instead as applying only to political speech such as was directly at issue in *Tinker* regarding students wearing armbands to protest the Vietnam War.

The problem with this alternate view, besides simply being inaccurate, is that it leaves uncharted much that was previously regarded as protected student speech under *Tinker*. It opens the door to restricting student speech for reasons that would not have held up under *Tinker*.

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[77] *See* Hardwick v. Heyward, 711 F.3d 426, 435 n.11 (4th Cir. 2013); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 760–61 (8th Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 927 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Niehoff, 642 F.3d 334, 353–54 (2d Cir. 2011); DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71, 78 (2d Cir. 2010); Barr v. Lafon, 538 F.3d 554, 563–64 (6th Cir. 2008); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1101 (C.D. Cal. 2010); *see also* Travis P. Hughes, *What You Need to Know to Have an Intelligent Conversation About Student Cyber-Speech: Balancing Schools' Authority with Students' Free Speech*, 17 HOLY CROSS J.L. & PUB. POL'Y 9, 25 (2013) ("When addressed with an issue of student speech, it is important to be able to categorize the speech as either under *Tinker*, or under an exception.").

[78] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[79] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[80] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).

[81] *Morse*, 551 U.S. at 397.

[82] *See, e.g.*, Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006).

The Court's decision in *Morse* may contribute, even inadvertently, to this alternate view. The analysis the Court used to reach its decision arguably could be analogized to create further restrictions on student free speech. By appealing to "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse,"[83] a broad view of *Morse* would only need to analogize other areas of speech to student drug use in order to throw the weight of the Supreme Court behind restrictions of these other areas of student speech.

The majority opinion does not clearly delineate the limits of its holding.[84] Analogizing to *Morse* could broaden the impact of its holding in such a way that *Morse* would no longer be just another exception to *Tinker* but would apply to issues far afield from student drug use. *Tinker* would be diluted to the point of being relegated to just one among many on a list of rules that pertain to student speech. Instead of *Tinker* being regarded as an important recognition of the First Amendment's protection of student speech,[85] it would be placed as an equal among other cases that restrict student speech. Rather than finding whether the student speech in question could reasonably be forecast to cause a substantial disruption to the operation of the school, courts would consider merely whether the speech falls under any of a number of categories, or whether there is yet another governmental interest (or one to be created) that may rationalize further student speech restrictions. Even Justice Stewart in his concurrence in *Tinker*—expressing reservation to what he thought was the majority's assumption that children's rights are "co-extensive with those of adults"—specified that where children's rights are not coextensive, these need to be "precisely delineated areas."[86] A broad reading of *Morse* erases the carefully-drawn line set forth in *Tinker* and opens the door to a confusing array of a growing body of exceptions to no general rule.[87] But as one court recently

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[83] *Morse*, 551 U.S. at 408 (citation omitted).

[84] *See id.* at 426 (Breyer, J., concurring in part and dissenting in part).

[85] *See* FARBER, *supra* note 20, at 193 (describing *Tinker* as "[t]he Court's first significant opinion on the rights of public school students.").

[86] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514–15 (1969) (Stewart, J., concurring).

[87] To be sure, these would be exceptions to the rule of the First Amendment; but under the prevailing view, *Tinker* served as the articulation of the First Amendment regarding student speech. There was no exception to the protection of the First Amendment to any type of speech uttered by students except that which could reasonably be forecast to cause a substantial school disruption. *Tinker*'s progeny, by contrast, puts certain *kinds* of student speech outside the protection of the First Amendment as articulated in *Tinker*. Thus, although the progeny exceptions would still have the First Amendment as the rule to which they are exceptions, there would no longer be the *Tinker*

observed, "[T]he Supreme Court in recent Terms has made it clear that the First Amendment has a broad reach, limited only by narrow, traditional carve-outs from its protection."[88]

A further observation helps to understand the difference between *Tinker* and *Morse* (and the other progeny) and why they should not be put on the same plane: *Tinker* is about protecting student speech[89] while *Morse* is about protecting students *from* certain speech.[90] The latter may be necessary sometimes. However, by allowing *Morse* to be broadened by analogizing illegal drug use to other things from which students are thought to be in need of protection, school officials can, in paternalistic fashion, restrict student speech as part of any given agenda. Although it may be well-intentioned, in many cases this would run afoul of the First Amendment as applied to students under *Tinker*. Since students transact in "the marketplace of ideas"[91] in the school environment more than anywhere else, it would be improper for school officials to regulate this market to protect students from ideas the officials believe are dangerous. *Tinker* already sufficiently protects students from dangerous effects of expressing ideas (when substantial disruption is reasonably forecast)[92] without straight-jacketing students from engaging in the marketplace of ideas in the search for meaning and truth. After all, it is through free and unfettered participation in this market that a student can best buy truth and own it—not having it imposed, or hidden, by an authority figure who thinks she knows better (and often does).[93]

Well-intentioned school officials—and judges—may analogize *Morse*'s "advocating illegal drug use" to such issues as racist speech,

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standard as the general rule articulating the application of the First Amendment to student speech.

[88] Morgan v. Swanson, 659 F.3d 359, 403 n.10 (5th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2740 (2012). The Supreme Court has been clear about this: "There are certain *well-defined and narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (emphasis added).

[89] *Tinker*, 393 U.S. at 512–13.

[90] Morse v. Frederick, 551 U.S. 393, 410 (2007). Indeed, so is *Fraser*, but *Morse*'s analysis, which perhaps more clearly than *Fraser* allows broadening by analogy, threatens to dilute *Tinker* even more.

[91] *Tinker*, 393 U.S. at 512.

[92] *See id.* at 514.

[93] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even 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.").

bullying speech, and speech indicating or threatening school violence.[94] It may be thought that some or all of these should always be restricted as pertains to students. Assuming that is so, it is equally important *why* such speech should be restricted. If the rationale is merely to protect students, then any well-intentioned school official could also think she is justified in restricting student speech promoting or opposing Communism, a political candidate,[95] abstinence before marriage, abortion, homosexuality, Christ as the only way to salvation, universal Islam as the only hope for peace, or regulation of soft drinks.

To be sure, many, if not all, of these examples could be regarded as political and/or religious speech, which *Morse* indicates as specially protected.[96] But could not people on either side of these issues consider that students legitimately need protection from the opposing side of the given issue? Without *Tinker*'s substantial disruption test, what is the standard? Actual violence? Opponents who merely take offense? Could it easily slide back to school officials restricting views out of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,"[97] hiding behind protecting students[98] without a clear standard of when they need protection? Rather than trying to protect people from certain speech, the First Amendment is meant to protect people's speech from government[99]—in this case, students' speech from school officials. And when it is necessary for student speech to be restricted, clear standards and limits are called for. *Tinker* articulates that standard. Relegating it as pertaining only to one kind of speech would be a mistake.

The impact of a broad reading of *Morse* is illustrated in two Confederate flag cases from the Sixth Circuit. In *Barr v. Lafon*, the Sixth Circuit appropriately recognized *Tinker* as the general rule and its

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[94] In fact, some courts have already done so. *See infra* notes 181–183 and accompanying text.

[95] David Duke comes to mind as a controversial, oftentimes political candidate. *See* DAVIDDUKE.COM: FOR HUMAN FREEDOM AND DIVERSITY, http://www.davidduke.com/ (last visited Oct. 10, 2013). It does not take one long on his website to realize that he is not for either freedom or diversity, but why should students who believe otherwise not be allowed to say so—short of leading to a substantial disruption, of course—and participate in the marketplace of ideas?

[96] *Morse*, 551 U.S. at 409; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (stating that the political speech in question "was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment").

[97] *Tinker*, 393 U.S. at 509.

[98] *See Morse*, 551 U.S. at 408.

[99] *Tinker*, 393 U.S. at 513.

progeny as exceptions to *Tinker*.[100] The case was brought by students who objected to a principal enforcing a school policy against wearing clothing bearing the Confederate flag.[101] The court applied *Tinker* and upheld the policy, finding it appropriate given recent racial tension and physical altercations.[102] Furthermore, the court stated that *Morse* does "not modify [the] application of the *Tinker* standard to the instant case,"[103] and that *Morse* "resulted in a narrow holding: a public school may prohibit student speech . . . that the school 'reasonably view[s] as promoting illegal drug use.'"[104]

However, only two years later, in a different Confederate flag case, the Sixth Circuit applied a broad view of *Morse* in *Defoe ex rel. Defoe v. Spiva* (*Defoe I*).[105] Although there was evidence of racial tension and recent incidents,[106] the court decided that "the law does not require . . . *Tinker*."[107] Tellingly, the court departed from the proper view that the progeny to *Tinker* are exceptions: "[I]t is not at all clear that *Tinker* must be read as providing the general rule for all student speech, limited only by subsequent categorical 'exceptions' to that general rule."[108] Instead, the court flipped it completely:

> A fair look at *Tinker*, *Fraser*, [*Kuhlmeier*], and *Morse* thus suggests that *the general rule is that school administrators can limit speech* in a reasonable fashion to further important policies at the heart of public education. *Tinker provides the exception*—schools cannot go so far as to limit nondisruptive discussion of political or social issues that the administration finds distasteful or wrong.[109]

The court went down this fateful path by making the unfortunate analogy to *Morse* as seen in two revealing statements. First, "A . . . school that can put reasonable limits on drug-related speech . . . can put reasonable and even-handed limits on racially hostile or contemptuous speech, without having to show that such speech will result in disturbances."[110] Second,

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[100] Barr v. Lafon, 538 F.3d 554, 563–64 (6th Cir. 2008).

[101] *Id.* at 556–57.

[102] *Id.* at 568.

[103] *Id.* at 564.

[104] *Id.* (alteration in original) (citation omitted).

[105] 625 F.3d 324, 342 (6th Cir. 2010).

[106] *Id.* at 326–28.

[107] *Id.* at 341. The court justifies its disregard of the *Tinker* standard by analogizing "racial tension in today's public schools" to "a concern on the order of the problem of drug abuse." *Id.* at 340. Because "no *Tinker* showing was required in *Morse*," the court states that "such a showing is not required in this case." *Id.* at 340–41.

[108] *Id.* at 341.

[109] *Id.* at 342 (emphasis added).

[110] *Id.* at 338.

> If we substitute "racial conflict" or "racial hostility" for "drug abuse," the analysis in *Morse* is practically on all fours with this case. The inescapable conclusion is that a school may restrict racially hostile or contemptuous speech in school, when school administrators reasonably view the speech as racially hostile or promoting racial conflict.[111]

Judge Boggs, dissenting from the court's denial of rehearing en banc, said the opinion in *Defoe I* "eviscerates the core holding of *Tinker*."[112] He points out that the second statement above, from *Defoe I*, "is grammatically true, but it is equally true if [for 'drug abuse'] you substitute 'religious dogma,' 'Republican propaganda,' or 'seditious libel.' *Morse* does not authorize suppression on . . . those grounds either, but the panel's *ipse dixit* reading of *Morse* would support such a holding just as strongly as the one it makes."[113]

Even under the prevailing view that *Tinker* is the general rule to which its progeny are narrow exceptions, *Morse* limits *Tinker* by its very existence as another exception. According to Professor Erwin Chemerinsky, "Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools,"[114] and "in the almost forty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights."[115] However, this Note does not argue whether *Morse* was wrongly decided, only that a broad application of it would be wrong.

III. WHY *MORSE* SHOULD BE APPLIED NARROWLY

A. Justice Alito's Controlling Concurrence

Justice Alito was concerned about the erosion of *Tinker*, and this was the reason he wrote his concurring opinion, joined by Justice Kennedy.[116] When *Morse v. Frederick* came before the Supreme Court, Alito recognized that a broad reading of the majority opinion could threaten the *Tinker*-progeny framework through analogizing to subjects

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[111] *Id.* at 339.

[112] Defoe *ex rel.* Defoe v. Spiva (*Defoe II*), 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting from denial of petition to rehear en banc). It was Judge Boggs, as will be seen, who described Alito's concurrence as "decisive." *See infra* note 164 and accompanying text.

[113] *Defoe II*, 647 F.3d at 506–07.

[114] Chemerinsky, *supra* note 9, at 25.

[115] *Id.*

[116] *See* Morse v. Frederick, 551 U.S. 393, 422–23 (2007); Dickler, *supra* note 10, at 357 (footnote omitted) (citing commentators who see *Morse* as demonstrating "a division amongst the Justices on student speech rights and continued *Fraser*'s and *Kuhlmeier*'s erosion of students' First Amendment rights").

of speech other than advocating illegal drug use.[117] Specifically, Alito recognized that "the special characteristics of the public schools [could be used to] justify . . . other speech restrictions."[118] Since he joined the majority, it is clear that Alito agreed that school administrators do not violate the First Amendment when they prohibit speech advocating illegal drugs. But, in two related senses, he wanted the erosion of *Tinker* to stop there.

First, Alito expressed that he did "not read the [majority] opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of [the] Court," referring to *Tinker* and its exceptions in *Fraser* and *Kuhlmeier*.[119] In other words, although *Tinker* is the general rule with a couple recognized exceptions, and the Court has now recognized a third exception, it does not follow that there are more exceptions to be found—in fact, adding new exceptions would be unnecessary and detrimental. Any need for restricting student speech is covered by these four cases.[120]

Second, Alito and Kennedy made it clear that they would not have joined the majority if *Morse* were understood as allowing for restrictions on student speech beyond its plain reading. As Alito expressed in the opening words of his concurrence:

> I join the opinion of the Court on the understanding that (1) 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 (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[121]

Justice Alito recognized other threats to the majority opinion. For example, he explained that the majority opinion "does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student

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[117] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (summarizing then-Judge Alito's clear understanding of the rule-exceptions framework for *Tinker* and its progeny).

[118] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[119] *Id.* at 422.

[120] Admittedly, by using the word "necessarily," *see id.*, Alito does not seem to foreclose the possibility that there may be other exceptions; but if there are, they are not to be incorporated through *Morse*. Furthermore, Alito's tenor seems to be that there is no open window to allow other exceptions; this newly-recognized exception is as far as it can go. Alito demonstrates this by his conclusion "that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension." *Id.* at 425.

[121] *Id.* at 422 (citation omitted).

speech that interferes with a school's 'educational mission.'"[122] Since school officials could define the educational mission of a school to include "the inculcation of whatever political and social views are held" by the officials, this would be an inappropriately broad and uncertain test by which to determine the contours of student speech protected by the First Amendment.[123] It would "strike[] at the very heart of the First Amendment."[124]

Justice Alito also argued against Justice Thomas's concurring opinion. Thomas joined the majority because *Morse* does not follow the *Tinker* standard, and Thomas believes that *Tinker* was wrongly decided.[125] Thomas admirably looks to the meaning of the First Amendment as it pertains to public schools in early American history as well as at the time the Fourteenth Amendment was ratified,[126] arguing that schools had authority to restrict student speech according to "the legal doctrine of *in loco parentis*."[127] However, Thomas admits that "*in loco parentis* originally governed the legal rights and obligations of tutors and private schools."[128] As the transition to public schools occurred, many aspects of the private understandably carried over to the public, as would be expected since public schools originated "as a way to educate those too poor to afford private schools."[129] However, as public schools have transitioned to become more and more "organs of the State" and public school authorities to be "agents of the State,"[130] and as public schools have come to resemble less and less an extension of the right "of parents . . . to direct the upbringing and education of children,"[131] it is

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[122] *Id.* at 423.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 410 (Thomas, J., concurring). This is why Justice Thomas's concurrence is not controlling, even though he also constituted an essential member in the five-four decision. Because Thomas disagrees with *Tinker* and joined the majority since it was a decision in favor of school officials and inconsistent with *Tinker*, Thomas would likely have joined the opinion of the Court had it been written by Alito, at least insofar as Alito agreed with the majority in favor of the school officials.

[126] *Id.* at 410–12.

[127] *Id.* at 413.

[128] *Id.*

[129] *Id.* at 411.

[130] *Id.* at 424 (Alito, J., concurring).

[131] Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)). Although Justice Thomas dismisses *Pierce* as simply upholding "the right of parents to send their children to private school," *Morse*, 551 U.S. at 420 n.8 (Thomas, J., concurring), it nevertheless stands that parents have the right to direct the education and upbringing of their children, and that school officials act as agents of the State.

difficult to maintain that public schools in their current form continue to validly exercise *in loco parentis*.[132] As Justice Alito asserts,

> 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.[133]

Therefore, Alito argues, any justification for allowing restrictions to student speech can be based neither on the "educational mission" of the school[134] nor "on a theory of [parental] delegation."[135] Rather, it "must . . . be based on some special characteristic of the school setting."[136] Alito joined the majority opinion "on the understanding that [it] does not hold that the special characteristics of the public schools necessarily justify *any other* speech restrictions."[137] It is justified in this case because "[t]he special characteristic that is relevant . . . is the threat to the physical safety of students."[138] Since school attendance creates a captive audience, "[s]tudents may be compelled on a daily basis to spend time at close quarters with other students who may do them harm."[139] This nation has become all too well aware "that schools can be places of special danger."[140]

However, given this justification for prohibiting student speech that can reasonably be understood as advocating illegal drug use, why can *Morse* not be used to prohibit student speech that advocates, for example, school violence? After all, as Alito points out, even though *Brandenburg v. Ohio*[141] recognizes that "the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence,"[142] nevertheless, "the special features of the

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[132] This, of course, is not to suggest that parents can have no say in the operation of public schools. To the contrary, like any other government organ, and especially ones that touch so close to home, parents' involvement should be considered at least on par with other duties of good citizenship to influence government that is by the people. But insofar as public schools are operated as "organs of the state," the First Amendment prohibition of government restricting free speech should apply to student protection as well.

[133] *Morse*, 551 U.S. at 424 (Alito, J., concurring).

[134] *Id.* at 423; *see also supra* notes 122–124 and accompanying text.

[135] *Morse*, 551 U.S. at 424 (Alito, J., concurring); *see also supra* notes 125–132 and accompanying text.

[136] *Morse*, 551 U.S. at 424 (Alito, J., concurring).

[137] *Id.* at 423 (emphasis added).

[138] *Id.* at 424.

[139] *Id.*

[140] *Id.*

[141] 395 U.S. 444 (1969).

[142] *Morse*, 551 U.S. at 425 (Alito, J., concurring).

school environment . . . [give] school officials . . . greater authority to intervene before speech leads to violence."[143]

The answer is that, in most situations, "*Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts."[144] The more harmful an activity is, the more likely speech about that activity will provide "facts which might reasonably [lead] school authorities to forecast substantial disruption."[145] The difference in *Morse*, as Alito recognized, was that "[s]peech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious."[146] Although it could reasonably be argued that not taking action against the Bong Hits banner could lead students to think that the school "tolerate[s] such behavior," which could make students "more likely to use drugs,"[147] which could lead to a "drug-infested school" in which "the educational process is disrupted,"[148] that view is too attenuated from "facts which might reasonably [lead] school authorities to forecast substantial disruption."[149] The difference between *Morse* and *Tinker* is not the harm; it is the attenuation from student speech to the harm. Granted, from one angle it is seen that the greater the harm, the more likely it will fall under the underlying justification in *Morse*, but even then, *only if* the link is sufficiently attenuated that it would not fall under *Tinker* first. And from a different angle, it is clear that the greater the harm, the more likely any speech advocating it will be able to provide a forecast of substantial disruption, thus clearly falling under *Tinker*. Alito is careful to point out that this "stand[s] at the far reaches of what the First Amendment permits."[150] He concludes his concurrence, "I join the opinion of the Court with the understanding that the opinion does not endorse any further extension."[151]

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143 *Id.*

144 *Id.*

145 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

146 *Morse*, 551 U.S. at 425 (Alito, J., concurring).

147 *Id.* at 408 (majority opinion).

148 *Id.* at 407 (quoting Vernonia Sch. Dist. 47J v. Acton *ex rel.* Acton, 515 U.S. 646, 662 (1995)).

149 *Tinker*, 393 U.S. at 514.

150 *Morse*, 551 U.S. at 425 (Alito, J., concurring).

151 *Id.* It is worth a final note here to provide some context of Justice Alito's record on free speech. In two particular cases in which the Court decided the speech was protected First Amendment speech (though not decided in the school context), Alito stood alone. In these two cases, *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (involving animal crush videos), and *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (involving Westboro Baptist members demonstrating at a soldier's funeral), Justice Alito was the sole dissenter. It is clear, then, that Alito is willing to stand alone against what the other eight justices perceive as protected speech.

B. Five Reasons Morse *Should Be Applied Narrowly*

Apart from being accurate, *Morse* should be applied narrowly because a broad reading would erode *Tinker* to the detriment of student free speech. This section provides reasons why *Morse* should be read narrowly and, specifically, why Justice Alito's concurrence should be followed.

The first reason to follow a narrow view of *Morse* as set forth in Alito's concurrence is that the concurrence is the controlling opinion in *Morse*, at least concerning the limits of the holding. While some disagree, several scholars and some courts have expressly recognized the logic of the controlling nature of Alito's concurrence. Judge Posner disagrees. Writing the decision in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District # 204*, he asserts that Justices Alito and Kennedy "were expressing their own view of the permissible scope of such regulation."[152] The concurrence is not controlling, Posner thinks, because "they joined the majority opinion, not just the decision."[153] However, it is by joining the majority opinion and not just the decision, that Justices Alito and Kennedy actually made the concurrence controlling in this case. Right at the outset, the concurrence makes clear that the two justices "join *the opinion* of the Court *on the understanding that*" certain restrictions apply to the majority opinion.[154] That is, they do not quarrel with the opinion. They agree with it *on condition that* it means what they understand it to mean, writing the separate opinion to express their interpretation of the majority opinion. Their opinion would not have this impact on the majority opinion if they concurred in the judgment only. Thus, in this five-four decision, two of the justices would not have joined the opinion if it applied to speech beyond "advocating illegal drug use."[155] If the holding had been broader, would they have concurred in the judgment? Would they have dissented? Would they have been able to fashion a very different majority with the three Justices in Justice Stevens's dissent? What is clear is that each of these two justices was vital to the majority, and both joined the majority expressly on the understanding that *Morse* articulated a narrow holding not to be expanded.

Unlike Judge Posner, Eugene Volokh understands Justice Alito's concurrence as seeming "to offer the controlling legal rule," since it provides "the narrowest grounds offered by any of the Justices whose

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[152] 523 F.3d 668, 673 (7th Cir. 2008).

[153] *Id.*

[154] *Morse*, 551 U.S. at 422 (Alito, J., concurring) (emphasis added).

[155] *Id.*

votes were necessary for the majority."[156] Similarly, Erwin Chemerinsky hopes that Alito's concurrence will be followed, noting that "two of the Justices in the majority . . . emphasized that the holding is just about the ability of schools to punish student speech encouraging drug use."[157] He asserts that "[t]he opinion should be read no more broadly than that."[158] Furthermore, Kenneth Starr, who represented the petitioners (the school officials' side) before the Supreme Court in *Morse*,[159] has since written, "Chief Justice Roberts, writing for the majority, sought to keep the decision quite narrow. The case, in his view, was limited to the issue of public school administrators' ability to keep the educational process free from messages about illegal drugs."[160] Starr further expressed his view of the narrowness of *Morse* by describing Justices Alito and Kennedy as "[t]wo pivotally important members of the majority . . . [who] sounded a pro-free speech warning."[161]

In addition to scholars, some courts, as well as judges writing separately, have explicitly expressed the controlling nature of the Alito concurrence. In *Ponce v. Socorro Independent School District*, the Fifth Circuit described Alito's opinion as "controlling."[162] Subsequent Fifth Circuit panels have followed suit.[163]

In *Defoe ex rel. Defoe v. Spiva* (*Defoe II*), Judge Boggs, dissenting from the decision not to rehear en banc, describes Alito's concurrence as "Justice Alito's decisive concurring opinion."[164] It is also interesting to note that, although the *Defoe* cases rejected a narrow view of *Morse* and thus failed to accept Alito's concurrence as controlling, *Defoe I* itself was governed by a controlling concurrence.[165] Judge Clay delivered the judgment of the court at the end of a full-fledged opinion,[166] and yet

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[156] Eugene Volokh, *What Did* Morse v. Frederick *Do to the Free Speech Rights of Students Enrolled in K-12 Schools?*, THE VOLOKH CONSPIRACY (June 26, 2007, 12:09 AM), http://www.volokh.com/posts/1182830987.shtml.

[157] Chemerinsky, *supra* note 9, at 25.

[158] *Id.*

[159] *Morse*, 551 U.S. at 395.

[160] Kenneth W. Starr, *Our Libertarian Court:* Bong Hits *and the Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 2–3 (2008).

[161] *Id.* at 3.

[162] 508 F.3d 765, 768 (5th Cir. 2007). However, *Ponce* ended up applying *Morse* broadly, which might be due to the procedural posture of the case. *Id.* at 771–72.

[163] *See* Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 746 n.25 (5th Cir. 2009); Palmer *ex rel.* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 508 n.8 (5th Cir. 2009).

[164] 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting from denial of petition to rehear en banc).

[165] Defoe *ex rel.* Defoe v. Spiva (*Defoe I*), 625 F.3d 324, 326 (6th Cir. 2010).

[166] *Id.* at 326, 338.

stated, "[t]o the extent that there are any differences between this opinion and the concurring opinion, the concurring opinion shall govern as stating the panel's majority position."[167] The ACLU indicated this irony in its amicus brief supporting the appellants' petition for rehearing en banc by recognizing "Justice Alito's controlling concurrence"[168] and soon after describing Judge Clay's opinion as the "lead (but not controlling) opinion."[169]

Similarly, Judge Moore, dissenting in *Morrison v. Board of Education*, recognized the narrow scope of *Morse* by noting that "[o]f the five [J]ustices in the majority, two who joined the Court's opinion construed it [narrowly]," making *Morse* "inapplicable" to *Morrison*.[170] By disagreeing with the application of *Morse* to this case in which a student wished to express his religious opposition to homosexuality contrary to a school policy, Judge Moore recognized the narrow scope of *Morse* as defined by the Alito concurrence.[171]

A second reason to follow the narrow view of *Morse* is that it maintains *Tinker* as the general rule to which its progeny are narrow exceptions. This reflects the understanding that the First Amendment is the rule with only limited and well-defined exceptions.[172] To remove *Tinker* as the general rule would leave uncharted much that was previously protected student speech with more and more coming under regulation of a growing number of exceptions to no general rule.

A third reason to follow the narrow holding of *Morse* is that it helps school officials better predict whether a proposed policy or course of action would wrongly infringe on student speech. As the majority noted in *Morse*, "[s]chool principals have a difficult job" that sometimes requires them to make important decisions on the spot.[173] A narrow reading of *Morse* allows school officials to quickly determine whether student expression advocates illegal drug use,[174] is lewd or indecent,[175] is

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[167] *Id.* at 326.

[168] Brief for American Civil Liberties Union and American Civil Liberties Union of Tennessee as Amici Curiae Supporting Appellants' Petition for Rehearing En Banc, at 7, Defoe *ex rel.* Defoe v. Spiva (*Defoe II*), 674 F.3d 505 (6th Cir. 2011) (No. 09-6080), 2010 WL 7326270.

[169] *Id.* at 8. However, the ACLU was factually wrong therein to label Justice Alito's opinion as "concurring in the judgment." *Id.*

[170] Morrison v. Bd. of Educ., 521 F.3d 602, 623–24 (6th Cir. 2008) (Moore, J., dissenting).

[171] *Id.* at 611, 623–24.

[172] *See supra* note 88 and accompanying text.

[173] Morse v. Frederick, 551 U.S. 393, 409–10 (2007).

[174] *Id.* at 397.

[175] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

or appears to be school-sponsored,[176] or can be reasonably forecast to cause a substantial disruption to the "the requirements of appropriate discipline in the operation of the school."[177]

A fourth reason to follow the narrow holding of *Morse* is that it better helps students, as citizens who will soon be voting and otherwise participating in our free democracy, to learn how to exercise their right to free speech responsibly. As the Court said in *West Virginia State Board of Education v. Barnette*, "That [Boards of Education] 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."[178] Again, the Court has said:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon 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.[179]

A related but different account for the purpose of the marketplace of ideas was given by Justice Holmes. Rather than the notion that truth is discovered from "a multitude of tongues," as if its discovery were necessarily dependent on a variety of viewpoints, Holmes wrote "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[180] Even when truth is found, it does not justify forcing it on others, but, rather, if it is the truth, then others who have yet to recognize it as such can choose to accept it—or reject it. Such is the beauty of the marketplace of ideas, not that all ideas are true but that the true ones can be trusted to stand their ground without authoritarian imposition.

Finally, a fifth reason to follow a narrow reading of *Morse* is that a broad reading is unnecessary. Some courts have thought it necessary to broadly apply *Morse* to restrict student speech that could be interpreted as racist,[181] bullying,[182] or violent.[183] However, although a narrow reading

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[176] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[177] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (internal quotation marks omitted).

[178] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[179] *Tinker*, 393 U.S. at 512 (alteration in original) (citations omitted) (internal quotation marks omitted).

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

[181] *See* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 338 (6th Cir. 2010).

[182] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011) *cert. denied*, 132 S. Ct. 1095 (2012); Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1101 (S.D. Cal. 2007), *aff'd in part*, *vacated in part*, 318 F. App'x 540 (9th Cir. 2009).

of *Morse* would not cover such speech, *Tinker* would, insofar as such speech in given circumstances could be reasonably forecast to cause a substantial disruption. This can be shown using cases from both before and after *Morse*.

For example, in *West v. Derby Unified School District No. 260*, which was decided before *Morse*, the Tenth Circuit dealt with the case of a seventh grade student who had been suspended for drawing the Confederate flag in class, in violation of the school's "Racial Harassment and Intimidation" policy.[184] The court had no problem applying the *Tinker* substantial disruption standard to find that the school had not violated the student's right to free speech by suspending him for the drawing.[185] Crucial to its determination was the fact that "[t]he evidence in this case . . . reveals that based upon recent past events, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone."[186] As the district court had reasoned,

> The history of racial tension in the district made . . . concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out . . . does not mean that the district was required to sit and wait for one. . . . In this case, the district had a reasonable basis for forecasting disruption from display of such items at school, and its prohibition was therefore permissible . . . .[187]

Although the student's drawing "could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting,"[188] in this case it was justified because of the reasonable threat of creating a substantial disruption.[189] Although a broad application of *Morse* could have yielded (anachronistically) the same result, such a broad application could also prohibit this normally-protected political speech even in the absence of a reasonable belief that

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Some could view the message on the students' shirts against homosexuality as a type of bullying. The court seemed to think so without saying as much. *Harper ex rel. Harper*, 545 F. Supp. 2d at 1101 (asserting that "the speech . . . was properly restricted based on the harm it might cause to homosexual students due to its demeaning nature").

[183] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771–72 (5th Cir. 2007).

[184] West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000).

[185] *Id.* at 1365–67.

[186] *Id.* at 1366.

[187] West v. Derby Unified Sch. Dist. # 260, 23 F. Supp. 2d 1223, 1232–33 (D. Kan. 1998).

[188] *West*, 206 F.3d at 1365.

[189] *Id.* at 1366.

the speech will cause a substantial disruption. Such an outcome would be contrary to *Tinker*, as demonstrated in the next case.

In *Bragg v. Swanson*, also decided before *Morse*, a federal district court dealt with a case of a high school student who was disciplined for wearing clothing bearing the Confederate flag.[190] The court held for the student, finding that his right to free speech had been violated.[191] Although the principal of the school had encountered disruptive events involving the Confederate flag at other schools,[192] crucial to the court's decision in this case was that "there exists at the school an environment in which people of both races mix freely together and form good relationships."[193] An African-American student who testified claimed that "[i]n her three-plus years at the school [she] ha[d] not witnessed any disputes of a racial magnitude involving the flag."[194] Additionally, the principal "conceded that prior to her arrival at the school the flag was a permissible mode of expression and no complaints or incidents ever attended its display."[195] While the outcome of this case is different from that in *West*, it is not inconsistent. As the court in *Bragg* stated,

> [T]his opinion should not be interpreted as offering a safe haven for those bent on using the flag in school as a tool for disruption, intimidation, or trampling upon the rights of others. Should that occur, or be reasonably forecast by the school, the very ban struck down today might be entirely appropriate.[196]

Although a broad reading of *Morse* would arrive at the same outcome reached in *West*, it could also extend, erroneously, to an opposite outcome from that reached in *Bragg*.

In *A.M. ex rel. McAllum v. Cash*, the Fifth Circuit dealt with the case of students who were prohibited from bringing their purses emblazoned with the Confederate flag to school.[197] The plaintiff-appellants claimed their right to free speech was violated.[198] This occurred in the context of the school witnessing several racial incidents, both before and after the purse incident—from a fight before a

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[190] Bragg v. Swanson, 371 F. Supp. 2d 814, 816, 819 (S.D. W. Va. 2005). Note that the Federal Supplement indicates that this is in the Western District of West Virginia, but no such district exists, nor does it appear to ever have existed.

[191] *Id.* at 829–30.

[192] *Id.* at 817.

[193] *Id.* at 827.

[194] *Id.*

[195] *Id.* at 819.

[196] *Id.* at 829.

[197] A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 217 (5th Cir. 2009).

[198] *Id.*

basketball game that required police to restore order,[199] to "a homemade Confederate battle flag . . . raised on the [school] flagpole and graffiti representing the flag . . . drawn on the sidewalk below" on Martin Luther King, Jr., Day,[200] to "a white . . . student [who] attempted to wrap his belt around an African-American student's neck while using racial epithets and threatening to hang him."[201]

Note that this case was decided after *Morse*. However, not only did the court not apply a broad interpretation of *Morse* in exonerating the school administrators for enforcing the school's policy in the racially-charged atmosphere, the court did not even mention *Morse* once in its opinion.[202] Instead, the court applied the *Tinker* substantial disruption standard to reach its decision in favor of the defendant school officials.[203] A broad interpretation of *Morse* is not necessary to meet such situations; it is inconsistent with Justice Alito's controlling concurrence, and it is inconsistent with the standard laid down in *Tinker* and the narrow exceptions carved out in *Fraser*, in *Kuhlmeier*, and in *Morse* itself.

CONCLUSION

Does freedom expand or contract over time? It is not necessary to answer that question in order to recognize threats, even well-meaning threats, to freedom. And once recognized, measures should be taken to protect freedom. This is what Justice Alito attempted to do in his concurring opinion in *Morse v. Frederick*. Recognizing that *Morse* had the potential to upset the relationship between *Tinker* (as the general rule) and its progeny (as narrow exceptions), Alito made it clear that he and Justice Kennedy understood *Morse* as going no further than applying to student speech that could be reasonably understood as advocating illegal drug use. What is more, these two justices made it clear that they joined the *Morse* decision on the condition that it went no further. Since they were two essential members in the five-four decision, the Alito concurrence has binding effect to control the limits of *Morse*. Unfortunately, some federal courts have either not recognized or have rejected applying *Morse* according to Alito's concurrence. The Supreme Court should recognize this threat to the freedom of student speech and take measures to protect it by clarifying that *Tinker* is the general rule pertaining to student speech, and its progeny—*Fraser*, *Kuhlmeier*, and

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[199] *Id.* at 218.
[200] *Id.* at 219.
[201] *Id.*
[202] *Id.* at 214–27.
[203] *Id.* at 222.

Morse—are narrow exceptions to it that need not and should not be expanded.

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[*] Winner of the sixth annual Chief Justice Leroy Rountree Hassell, Sr., Writing Competition, hosted by the Regent University Law Review. Special thanks to my wife, Jana Cate Smith, for her love, encouragement, and patience as I wrote this Note.