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NO JOKES ABOUT DOPE: *MORSE V. FREDERICK'S* EDUCATIONAL RATIONALE

Emily Gold Waldman*

There is an undeniable irony to *Morse v. Frederick*.¹ The majority opinion—which held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”²—is steeped in language about the dangers of drug use, particularly for youth. But as far as pro-drug student speech goes, the speech at the center of *Morse*—Joseph Frederick’s “BONG HiTS 4 JESUS” banner³—seems particularly *unlikely* to prompt anyone to actually take drugs and thus suffer those harms. As a frustrated Justice Stevens wrote in dissent, “[t]he notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.”⁴ Yet in the majority’s eyes, the silliness of Frederick’s banner—along with his disclaimer of any intent to communicate a coherent message—actually seemed to harm rather than help his case.⁵ Why?

The answer to this apparent inconsistency, I suggest, lies in a rationale lurking beneath *Morse*’s surface. I have previously observed that two major rationales underlie the Supreme Court’s student speech framework for restricting student speech rights: protection and education.⁶ The protective rationale stems from the idea that student speech can sometimes pose a threat to other students or to the school environment itself, at which point school officials must step in to protect the school community from this potentially damaging speech.⁷ The educational rationale, meanwhile, holds that speech restrictions themselves can play a legitimate—indeed, important—role in teaching students about appropriate oral or written discourse.⁸

*Tinker v. Des Moines*⁹ introduced the protective rationale, holding that schools could restrict student speech that threatened to materially disrupt the school or invade the rights of other students.¹⁰ *Bethel School District v. Fraser*¹¹ and *Hazelwood v. Kuhlmeier*,¹² in turn, relied on both the protective and educational rationales. In concluding, respectively, that schools could restrict

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¹ 551 U.S. 393 (2007).

² *Id.* at 397.

³ *Id.*

⁴ *Id.* at 444 (Stevens, J., dissenting).

⁵ See discussion *infra* Part II.

⁶ See, e.g., Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1121-22 (2010).

⁷ *Id.* at 1121.

⁸ *Id.* at 1122.

⁹ 393 U.S. 503 (1969).

¹⁰ *Id.* at 512-13.

¹¹ 478 U.S. 675 (1986).

¹² 484 U.S. 260 (1988).

“plainly offensive” student speech¹³ and that schools could restrict school-sponsored student speech out of any “legitimate pedagogical concerns,”¹⁴ the *Fraser* and *Hazelwood* Courts not only described the need to protect younger students from inappropriate or overly mature speech. They also endorsed the schools’ central role in influencing the content of student speech by requiring it to be civil, appropriate, well-researched, well-written, and/or grammatical, as applicable.¹⁵

Where, then, does *Morse* fit in? An initial reading of *Morse* suggests that it is all about protection. The majority holding was framed in terms of schools’ need to “safeguard those entrusted to their care” from pro-drug speech,¹⁶ and the majority never invoked the same sort of expressly educational justifications that the *Fraser* and *Hazelwood* Courts called forth. But the protective rationale appearing on *Morse*’s surface only goes so far. *Morse* makes real sense only when the educational rationale is pulled out of the decision’s subtext and added to the mix. This rationale helps illuminate the *Morse* Court’s holding, the divisions between the various *Morse* opinions, and the case’s ultimate implications.

This piece begins with a “protective” reading of *Morse*, showing how this rationale provides a good starting point in understanding *Morse* but is ultimately incomplete. Indeed, Justice Stevens’ dissent is largely an argument that the protective rationale falls short here. I then re-examine *Morse* from the perspective of the educational rationale and conclude that the underlying, largely unstated premise of the *Morse* majority is that schools—as part of teaching students about the gravity of drug use—should be able to convey disapproval of messages suggesting that drug use is a joking or trivial matter. This helps to explain why Justice Stevens’ argument—that Frederick’s message was “stupid”¹⁷ and that he was just seeking attention—was wholly unconvincing to the majority, which was disturbed by those very aspects of Frederick’s speech. It also helps to explain Justice Alito’s concurrence, in which he distinguished between Frederick’s speech and any speech that could “plausibly be interpreted as commenting on any political or social issue.”¹⁸ What harmed Frederick was that his speech minimized the seriousness of drug use while lacking the redeeming value of conveying a genuine message. In Justice Alito’s eyes, a thoughtful argument for legalizing marijuana would deserve more protection than Frederick’s banner, regardless of whether the former might actually have greater potential to persuade at least some students to experiment with it. I conclude with some reflections about why the Court left *Morse*’s educational rationale in

¹³ *Fraser*, 478 U.S. at 683.

¹⁴ *Hazelwood*, 484 U.S. at 273.

¹⁵ See, e.g., *Hazelwood*, 484 U.S. at 271-72; *Fraser*, 478 U.S. at 681-83, 685-86..

¹⁶ *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (emphasis added).

¹⁷ *Id.* at 445 (Stevens, J., dissenting).

¹⁸ *Id.* at 422 (Alito, J., concurring).

the subtext, rather than explicitly articulating it, and what this suggests for how the Supreme Court is approaching student speech cases.

I. A “PROTECTIVE” READING OF *MORSE*

The Supreme Court has repeatedly held that students sometimes need protection from their fellow students’ speech. In *Tinker*, the Court held that schools could restrict speech that was likely to materially disrupt the school environment or invade the rights of other students.¹⁹ Lower courts have relied on those prongs to uphold, for instance, restrictions on student speech of a threatening nature,²⁰ racially inflammatory speech (particularly in school districts with a history of unrest),²¹ and severely harassing or bullying speech.²² *Fraser* and *Hazelwood* added to the list of protective justifications for restricting certain student speech. They each suggested that it is appropriate for schools to try to shield their younger students from language or ideas that are too explicit or mature for them.²³

Morse is steeped in protective language. The majority devoted numerous paragraphs to the problem of illegal drug use.²⁴ It explained that drug abuse “can cause severe and permanent damage to the health and well-being of young people,”²⁵ that statistics indicate that “[t]he problem remains serious today,”²⁶ and that schools—at Congress’s direction—have adopted policies specifically to convey that drug use is “wrong and harmful.”²⁷

If all the majority had to do was convince readers of the dangers of drug use for youth, it clearly accomplished that goal—not a very difficult one, after all. But the leap from the dangers of drug use to the dangers of Frederick’s *speech* was more difficult. Usually when the protective rationale is invoked, the idea is that the student speech itself may cause some imminent harm—for example, a riot, a fistfight, or perhaps younger students’ exposure to language or concepts for which they are not emotionally ready.²⁸ Here, however, the link

¹⁹ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

²⁰ See, e.g., *Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012).

²¹ See, e.g., *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010).

²² See, e.g., *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011).

²³ See *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (stating that educators should be able to restrict school-sponsored student speech to ensure that “readers or listeners are not exposed to material that may be inappropriate for their level of maturity”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (stating that *Fraser*’s speech “could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality”).

²⁴ *Morse v. Frederick*, 551 U.S. 393, 407-08 (2007).

²⁵ *Id.* at 407.

²⁶ *Id.*

²⁷ *Id.* at 408 (quoting 20 U.S.C. § 7114(d)(6) (2000)).

²⁸ See, e.g., *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 334-35 (6th Cir. 2010) (upholding school’s ban on Confederate flag displays was justified given evidence of “racial violence, threats, and tension at Clinton High School,” which had led lower court to conclude that the flag was likely to

between the speech and the danger was far more attenuated. In trying to make this connection, the majority quoted a statement in Justice Breyer's concurrence in *Board of Education v. Earls*²⁹—a case involving drug testing, not speech about drugs—that “the single most important factor leading schoolchildren to take drugs” is peer pressure.³⁰ But this argument was a stretch. There, Justice Breyer had been discussing evidence that students with friends who *use* drugs are more likely to use drugs themselves.³¹ He was not addressing pure pro-drug *speech* unaccompanied by action. Moreover, even accepting the notion that true peer pressure can prompt some students to use drugs, Frederick's banner was a far cry from conventional forms of peer pressure (e.g., “I don't want to hang out with you if you won't do drugs too,” “Everyone's going to be doing drugs at the party, so you probably shouldn't come if you don't want to do that,” “Why don't you just try them *once?*,” etc.). The majority was left to argue that while “BONG HiTS 4 JESUS” probably meant “nothing at all”³² to some students, others might interpret it as stating “[Take] bong hits,” or “bong hits [are a good thing],”³³ and that the banner thus qualified as “celebrating illegal drug use.”³⁴ From here, the majority generalized that speech that could be “reasonably regarded as promoting illegal drug use” posed a “serious and palpable” danger.³⁵

The majority thus forced the school's suppression of Frederick's banner into a protective frame. To some extent, the framing works. After all, the principal asked Frederick to take his banner down pursuant to a school board policy that prohibited any “public expression that . . . advocates the use of substances that are illegal to minors.”³⁶ That broader rule, as the *Morse* majority explained, clearly had a protective justification, insofar as it swept in pure peer pressure.³⁷ Frederick's banner, in turn, could reasonably be regarded as violating that rule. The more generalizing the majority did—the farther it moved away from the substance of Frederick's actual banner—the easier it was to make the protective case for ruling in the school's favor.

Similarly, Justice Alito's concurrence argued in protective terms:

[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. . . .

Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details,

lead to unrest).

²⁹ 536 U.S. 822 (2002).

³⁰ *Id.* at 840 (Breyer, J., concurring), *cited in Morse*, 551 U.S. at 408.

³¹ *Earls*, 536 U.S. at 840 (Breyer, J., concurring).

³² *Morse*, 551 U.S. at 401.

³³ *Id.* at 402.

³⁴ *Id.* at 402.

³⁵ *Id.* at 408.

³⁶ *Id.* at 398.

³⁷ *Id.* at 410.

illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use.³⁸

Justice Alito did not even attempt to argue that Frederick's particular banner posed a threat to other students' safety. Instead, like the majority, he generalized about speech that advocates illegal drug use and proceeded from there.

Justice Stevens' dissent, in turn, turned the focus back to Frederick's banner itself, which he variously described as "nonsense,"³⁹ "ridiculous,"⁴⁰ "silly,"⁴¹ and "stupid."⁴² To Justice Stevens, the fact that Frederick was just seeking to get the camera crews' attention—rather than convince his fellow students to do anything—shed a "revelatory light"⁴³ on this case. He made two main points. First, he argued that Frederick's speech lacked "a meaningful chance of making otherwise-abstemious students try marijuana."⁴⁴ He thus suggested—albeit not in those exact words—that the protective rationale fell short here. Second, somewhat inconsistently with his first argument that Frederick had not been conveying any substantive message, Justice Stevens argued that the majority had been deaf to the fact that the war on drugs and the legalization of marijuana were issues of public concern and debate, particularly in Alaska.⁴⁵ He thus concluded that the majority's approach conflicted with "the constitutional imperative to permit unfettered debate."⁴⁶

These two arguments were wholly unconvincing to the majority. The majority did not even respond to the dissent's first point, which addressed the shortcomings of the majority's protective rationale. (After all, if Frederick's speech was unlikely to prompt any students to use drugs, why did they need to be protected from it?) This, I believe, is because the majority knew that it had overstated the protective case, at least as it applied to Frederick's banner. The majority also knew, however, that its reasoning did not rest on protective grounds alone. It thus responded solely to the dissent's second point, which pressed on the educational rationale underlying the majority's thinking by suggesting that schools should encourage, or at least not squelch, political debate among their students. I now turn back to *Morse* to view it through this educational lens.

³⁸ *Id.* at 425 (Alito, J., concurring).

³⁹ *Id.* at 435 (Stevens, J., dissenting).

⁴⁰ *Id.* at 438.

⁴¹ *Id.* at 444.

⁴² *Id.* at 445.

⁴³ *Id.* at 433.

⁴⁴ *Id.* at 441.

⁴⁵ *Id.* at 446 & n.8.

⁴⁶ *Id.* at 445.

II. AN “EDUCATIONAL” READING OF *MORSE*

The educational rationale for restricting student speech can be traced back to *Fraser*. There, the Court held that the school’s suspension of Matthew Fraser, who delivered a student counsel speech laced with sexual innuendo, could be punished not only because his speech could have seriously damaged younger students in the audience, but also because “schools must teach by example the shared values of a civilized social order.”⁴⁷ The Court explained that the school was entitled to punish this student to “make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education,”⁴⁸ and later concluded that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”⁴⁹ In other words, the punishment would serve as a lesson to this student-speaker—and other student-listeners—about “the habits and manners of civility as values in themselves.”⁵⁰ The *Hazelwood* Court explicitly invoked educational justifications as well, holding that schools had great leeway to restrict school-sponsored student speech in order to convey disapproval of speech that was “ungrammatical, poorly written, inadequately researched, biased or prejudiced, [or] vulgar or profane.”⁵¹

The *Morse* majority did not explicitly use these sorts of educational justifications in upholding the school district’s punishment of Frederick’s speech. But they are lurking just beneath the surface. Most telling are the divergent reactions of the majority and dissent to Frederick’s testimony that he had not intended to address fellow students with his banner, and was instead just trying to get the camera crews’ attention so that he could appear on TV.⁵² For Justice Stevens, who devoted most of his dissent to debunking the protective justifications for punishing Frederick’s banner, this information was “revelatory” because it proved that there was no need to protect any students from Frederick’s speech.⁵³ Frederick was not trying to pressure students to take drugs—he hadn’t even been speaking to them! “[A] speaker who does not intend to persuade his audience can hardly be said to be advocating anything,” Justice Stevens reasoned.⁵⁴ Indeed, while Frederick’s intentions here are not dispositive—it is possible for a student’s speech to collaterally harm another student even when

⁴⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

⁴⁸ *Id.* at 685-86.

⁴⁹ *Id.* at 685.

⁵⁰ *Id.* at 681.

⁵¹ *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

⁵² *See Frederick v. Morse*, 439 F.3d 1114, 1117-18 (9th Cir. 2006), *rev’d*, 551 U.S. 393 (2007).

⁵³ *Morse v. Frederick*, 551 U.S. 393, 433 (2007) (Stevens, J., dissenting).

⁵⁴ *Id.* at 444.

that was not the intention—they do at least weaken the protective justification for restricting Frederick’s speech as a type of peer pressure.

The majority, however, clearly viewed the evidence about Frederick’s motivations as supporting, rather than undermining, its conclusion that school officials were entitled to restrict Frederick’s speech. Indeed, it emphasized that, contrary to the dissent’s observation that drug policy is a matter of significant public debate, “[n]ot even Frederick argues that the banner conveys any sort of political or religious message.”⁵⁵ If the majority were proceeding from a protective rationale alone, that acknowledgment by Frederick would be, at best, irrelevant. The key question would be the likely *effect* of Frederick’s banner itself on other students, and Frederick’s testimony that he was not trying to communicate anything to them would only help his case. The educational perspective, however, focuses on the lesson that the student-speaker (and other students) will learn from how the school *responds* to the speech. From this standpoint, Frederick’s motives for uttering the speech were more significant and damaging. Had he been trying to convey a political message—say, an argument that drug use did little harm and should be legalized—he would at least have been contributing to debate on a serious issue, something that schools are preparing their students to do in their role as citizens. If the school were to suppress such speech, the take-away lesson for students would be more problematic. Here, however, Frederick was trivializing drug use merely to get attention and fulfill his own personal ambition of appearing on television. This rendered him less sympathetic from an educational perspective and made it more justifiable for the school to respond negatively to his speech.

Further harming Frederick, from the perspective of the educational rationale, was that he displayed his banner right in front of school officials, essentially flouting their own repeated teachings about the dangers of drugs.⁵⁶ Notice that the *Morse* majority repeatedly returned to this point, stating that Frederick unfurled his banner “*in the presence of teachers and fellow students*”⁵⁷ and that student speech “celebrating illegal drug use at a school event, *in the presence of school administrators and teachers . . . poses a particular challenge for school officials.*”⁵⁸ Again, the fact that school officials were present when Frederick delivered his message would seem, at best, irrelevant under the protective rationale. If anything, it might be more dangerous for a student to deliver a pro-drug message in an *unsupervised* setting at school (e.g., while students are on their lunch break) where other students can start using drugs right away. But from the educational rationale, this fact was significant because of its “in your face” nature: Frederick was essentially mocking school officials and their anti-drug teachings. Thus, Frederick not only trivialized drug use—in direct

⁵⁵ *Id.* at 403 (majority opinion).

⁵⁶ *Id.* at 400-01.

⁵⁷ *Id.* at 402 (emphasis added).

⁵⁸ *Id.* at 408 (emphasis added).

opposition to a school districts' charge, traceable all the way to Congress, to teach students about the gravity of drug use—but he arguably did so in a way that lacked civility and respect.

The majority thus held that Principal Morse was entitled to respond in order to teach Frederick—and his fellow classmates—that drugs were no joking matter. This comes through most clearly in the end of the opinion, where the majority stated that Principal Morse reasonably concluded that “failing to act *would send a powerful message* to the students in her charge, including Frederick, *about how serious the school was* about the dangers of illegal drug use.”⁵⁹

This educational reading of the majority's opinion helps to explain why Justice Stevens' dissent and the majority opinion were like two ships passing in the night. Justice Stevens' dissent responded to the majority's surface language about protecting students from pro-drug advocacy by trying to prove that Frederick's speech would not actually prompt students to do anything. But the majority was also concerned about something different here: preserving schools' ability to negatively respond to student speech that trivialized drug use. And Justice Stevens' dissent had nothing to say about that. Indeed, his argument that *some* pro-drug speech has political content further called attention to the lack of such content in Frederick's banner itself.

The educational reading also sheds light on Justice Alito's concurrence, which even more starkly emphasized the distinction between speech that simply advocates illegal drug use and 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.’”⁶⁰ If protection were the main rationale here, that distinction would make little sense; both categories of speech might well be equally likely to prompt students to experiment with drugs. But from an educational perspective, the second category has a redeeming value—giving students room to develop their capacity as citizens commenting on issues of public concern—while the first category does not. Relatedly, Professor John Taylor has observed:

To advocate the legalization of marijuana or any other drug is to imply that drug use is not so bad or dangerous as conventional wisdom would suggest; and if tolerance of “Bong Hits 4 Jesus” signals a lack of commitment in the school's anti-drug message, it is unclear why tolerance of “Legalize Marijuana” does not do the same thing. The difference in treatment must be a function of the content of the speech. “Legalize marijuana” is political advocacy, traditionally high-value

⁵⁹ *Id.* at 410 (emphasis added).

⁶⁰ *Id.* at 422 (Alito, J., concurring) (quoting *id.* at 445 (Stevens, J., dissenting)).

speech; “Bong Hits 4 Jesus” is (at least in the Court’s eyes) an incitement to illegal action, traditionally low-value speech.⁶¹

While I agree with Taylor that Justice Alito was making a value judgment about the two categories of speech, I think the educational justification—unique, within the First Amendment setting, to the public school context—provides an important added dimension here. The Court did not (and really could not) make the claim that the “BONG HiTS 4 JESUS” banner qualified as an incitement to illegal action. Even describing Frederick’s banner as “*advocacy of illegal drug use*”⁶² was a stretch. Although some student pro-drug speech, including peer pressure, can fall into this category, Frederick’s speech did not. Yet the Court was willing to lump Frederick’s banner in with purer forms of advocacy in order to give schools more latitude to “make the point to the pupils”⁶³ that trivializing drug use—particularly right in the face of school officials was inappropriate and inconsistent with the school’s anti-drug teachings.

But this educational rationale—though a necessary piece of the *Morse* puzzle—remained in the decision’s subtext. Why? Why *not* articulate it more explicitly? This question becomes particularly intriguing upon an examination of the papers submitted to the Supreme Court by the *Morse* defendants and their amici. Such a review, as I discuss in the next section, reveals that the defendants repeatedly brought this educational rationale to the Court’s attention and framed the case in those terms. I thus turn to these papers and then explore why the Supreme Court refused to follow—explicitly, at least—the defendants down this path.

III. EXPLAINING THE SUBTEXTUAL STATUS OF *MORSE*’S “EDUCATIONAL” RATIONALE

The *Morse* defendants’ (and their amici’s) submissions to the Supreme Court repeatedly indicated their recognition that this particular case was about something other than pure pro-drug advocacy. When the *Morse* school district defendants filed their petition for a writ of certiorari, for instance, they asked the Supreme Court to rule on whether school districts were entitled to restrict student speech “advocating or *making light of* illegal substances.”⁶⁴ A subsequent amicus curiae brief from the National School Boards Association (“NSBA”) argued that *Fraser* meant that schools could regulate “student messages promoting or *trivializing* drug use.”⁶⁵

⁶¹ John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 230 (2007).

⁶² *Morse*, 551 U.S. at 409 (emphasis added).

⁶³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

⁶⁴ Petition for Writ of Certiorari at 12, *Morse*, 551 U.S. 393 (No. 06-278), 2006 WL 2506659 at *12 (emphasis added).

⁶⁵ Brief of Amici Curiae National School Boards Association, American Association of School Administrators, and National Association of Secondary School Principals in Support of Petitioners

Moreover, the defendants and their amici emphasized the educational, rather than the purely protective, justifications for restricting Frederick's speech. The defendants' subsequent brief on the merits argued that Frederick's banner "expressed a positive sentiment about marijuana use" and that this message was "directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle."⁶⁶ Similarly, the NSBA argued that "messages touting illegal drug use" were "inimical to fundamental school and civic mores."⁶⁷

As described above, however, the Court refused to follow the defendants down this path, instead insistently framing the case in protective terms. Indeed, the Court explicitly declined to use any part of *Fraser* as the basis for upholding the school's restriction of Frederick's speech, instead carving out its new, narrow pro-drug speech exception that it justified on protective grounds.⁶⁸ There are, I believe, two key reasons for why the Court did so.

First, the defendants—and in particular, some of their amici—went too far in their briefs. They did not just assert that student speech trivializing *drug use* implicated unique educational concerns, given the general societal consensus—and Congressional directive—that schools should educate students about the gravity and danger of drug use. Instead, they suggested that schools should have broad rein to restrict all sorts of speech that conflicts with their self-defined educational mission. The defendants, for example, stated that "*Fraser* permits schools to prohibit student speech that undermines the basic educational mission."⁶⁹ The United States, also an amicus curiae for the school district, similarly did not limit itself to a discussion of pro-drug speech, but cited *Hazelwood* for the proposition that "a school need not tolerate speech that is inconsistent with its 'basic educational mission.'"⁷⁰ The NSBA took this argument even further. It emphasized that:

The determination of whether student speech is at odds with schools' educational mission should be vested in school boards, which establish policies based on local community standards, and who are intimately familiar with the "facts on the ground" that may make an expression perceived as innocuous or unremarkable in one school community, so inflammatory and divisive in another one that it interferes with the educational process.⁷¹

12, *Morse*, 551 U.S. 393 (No. 06-278), 2007 WL 140999 at *12 (emphasis added) [hereinafter Brief of NASB et al. in Support of Petitioners].

⁶⁶ Brief for Petitioner at 25, *Morse*, 551 U.S. 393 (No. 06-278), 2007 WL 118979 at *25.

⁶⁷ Brief of NASB et al. in Support of Petitioners, *supra* note 65, at 29.

⁶⁸ *Morse*, 551 U.S. at 404.

⁶⁹ Brief for Petitioner, *supra* note 66, at 21. The defendants placed particular emphasis on this assertion by casting it as an argument point heading. *See id.*

⁷⁰ *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)), *cited in* Brief for the United States as Amicus Curiae Supporting Petitioners at 6, *Morse*, 551 U.S. 393 (2007) (No. 06-278), 2007 WL 118978 at *6.

⁷¹ Brief of NASB et al. in Support of Petitioners, *supra* note 65, at 15.

In support, the NSBA approvingly cited a Texas district court that had allowed a school to broadly censor sex-related speech on grounds that it conflicted with the school's "abstinence-only" curriculum."⁷²

The NSBA thus asked the Supreme Court to use *Morse* as a vehicle for providing school officials with extremely broad discretion to restrict student speech. Indeed, the NSBA even asked the Court to rule that Principal Morse would have been entitled to restrict Frederick's banner under *Tinker*'s "invasion of rights" prong on grounds that the "BONG HiTS 4 JESUS" phrase might have been offensive to "devout Christian students."⁷³ Not only would this have been an unprecedented expansion of *Tinker*, but the school itself had not even tried to justify its actions on that basis.

Advocacy groups supporting Frederick were deeply disturbed by these broad-reaching arguments,⁷⁴ and the Supreme Court was apparently concerned as well. During oral arguments, the Justices repeatedly pressed the advocate for the school district on this issue, quickly prompting a retreat back to a drug-specific focus. Consider, for example, the following exchange:

MR. STARR: The argument is that this Court in *Tinker* articulated a rule that allows the school boards considerable discretion both in identifying the educational mission and to prevent disruption of that mission, and this is disruptive of the mission—

JUSTICE KENNEDY: Well, suppose you have—suppose you have a mission to have a global school. Can they ban American flags on lapel pins?

⁷² *Id.* at 16 (citing *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 563 (N.D. Tex. 2004)).

⁷³ *Id.* at 20-21.

⁷⁴ An interesting mix of groups filed amicus briefs on Frederick's behalf, ranging from the Student Press Law Center and the National Coalition Against Censorship to six conservatively-oriented religious advocacy groups, including the Christian Legal Society, the Liberty Legal Institute, and the American Center for Law and Justice. For further discussion of this point, see, e.g., Emily Gold Waldman, *A Post-Morse Framework for Students' Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 463-65, 484-86 (2008). The Liberty Legal Institute, for instance, wrote:

What amicus fears most is that a loosely worded opinion, holding that students have no First Amendment right to promote drug use, will fatally undermine protection for core religious and political speech in public schools. The vague and deferential standard proposed by Petitioner and her *amici* invites this consequence.

Brief for Liberty Legal Institute as Amicus Curiae Supporting Respondents at 5, *Morse*, 551 U.S. 393 (2007) (No. 06-278), 2007 WL 550930, at *5.

MR. STARR: Absolutely not, because under *Tinker* that is political expression. Let me be very specific. This case is ultimately about drugs and other illegal substances.⁷⁵

Similar exchanges permeated the oral argument.⁷⁶

To emphasize that it was not endorsing the larger argument that schools could restrict any speech that undermined their self-defined educational mission, the Court bent over backwards to avoid any explicitly educational justifications in its opinion. The Court's framing of this case in protective terms, even though they did not quite fit Frederick's banner, was thus intended to communicate a larger message. To ensure this message was lost on no one, the majority opinion included the following statement:

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.⁷⁷

Justice Alito's concurrence similarly highlighted and criticized this argument. He wrote:

The opinion of the Court 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 speech that interferes with a school's "educational mission." This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public school is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as

⁷⁵ Transcript of Oral Argument at 5, *Morse*, 551 U.S. 393 (2007) (No. 06-278), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-278.pdf.

⁷⁶ See, e.g., *id.* at 8-9.

JUSTICE ALITO: Are you arguing that there should be a sui generis rule for speech that advocates illegal drug use, or this broader argument that the school can suppress any speech that is inconsistent with its educational mission as the school . . . defines it?

MR. STARR: . . . The Court can certainly decide this on very narrow grounds, that there are certain substances, illegal drugs, we would include alcohol and tobacco, that's part of the school's policy, because those are illegal substances which are very injurious to health.

⁷⁷ *Morse*, 551 U.S. at 409 (citation omitted).

including the inculcation of whatever political and social views are held by the members of these groups.⁷⁸

Thus, by insisting that this case was *only* about drugs and the need to protect students from pro-drug speech, the five justices in the *Morse* majority tried to distance themselves from the broader arguments made by the school and its amici.

But something else was also at work here. The *Morse* Court did not overstate the protective case for restricting Frederick's banner solely to rebuke the overly broad educational rationales advanced by the school and its allies here. I believe the Court also did so because it was genuinely conflicted about the strength and breadth of the educational rationale. Most of the justices rejected the NSBA's contention that school boards and officials should be able to define a school's "educational mission" based on local community standards to the point where speech that would seem innocuous in one school might be proscribable in another.⁷⁹ But over the past few decades, a majority of the Court has also accepted that, at least in certain cases, student speech can be prohibited on educational rather than purely protective grounds, as exemplified by *Fraser*, *Hazelwood*, and now *Morse* (if you are convinced by my argument). What the Court has not settled on or articulated is the dividing line for when the educational rationale is acceptable and when it is not. And this is a very difficult question. As Professor Douglas Laycock, who also wrote an amicus brief for respondent Frederick, later reflected:

No one objects when schools forcefully indoctrinate the viewpoint that it is wrong to hit other children, or that it is wrong to steal their property. At the other extreme, few schools are so politically foolish as to seek to inculcate the idea that the Republican Party, or the Democratic Party, is the only hope for the country

. . . .

We are unlikely to find a bright line between "Don't hit" and "Support the Republican Party." There is a continuum from uncontroversial ideas to controversial ones, from ideas that are accepted as part of the school's mission to ideas that almost certainly would not be if the issue were squarely raised.⁸⁰

⁷⁸ *Id.* at 423 (Alito, J., concurring) (citation omitted).

⁷⁹ See Brief of NASB et al. in Support of Petitioners, *supra* note 65, at 15. The one justice who accepts this view is Justice Clarence Thomas, who indeed believes that "the Constitution does not afford students a right to free speech in public schools." *Morse*, 551 U.S. at 418-419 (Thomas, J., concurring). This, of course, would give schools free rein to ban any student speech of their choosing.

⁸⁰ Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 117-19 (2008).

Professor Richard Garnett made a similar argument in his article, “Can There Really Be ‘Free Speech’ in Public Schools?”⁸¹ Reflecting on the complexities of applying the First Amendment here, he observed

[H]ow can a constitutional provision whose aim, many think, is to constrain the government from interfering in or directing a diverse and pluralistic society’s conversations about the common good be incorporated into a context in which the state—again, that which this constitutional provision binds—is exercising “managerial” authority for the purpose of producing not just certain facilities, but certain core values, loyalties, and commitments? . . . Public K-12 schools . . . seem more like anti-First Amendment—or, perhaps, pre-First Amendment—institutions.⁸²

Garnett is thus not surprised that the *Morse* opinions “never squarely addressed” what he views as the “most intriguing question” posed by the case: “What is the mission—i.e., the ‘basic educational mission’—of public schools?”⁸³

Laycock and Garnett thus helpfully identify and articulate the thorny inquiry at the root of *Morse*: if we accept the idea that schools have some sort of educational mission, how broadly should this mission be defined, and when does protecting that mission justify limiting student speech that undermines it? Framing the case in protective terms enabled the Supreme Court to avoid explicitly addressing this question. But I have tried to show here that the Court *did* answer this question, at least implicitly and incrementally. *Morse* only makes complete sense if you read it as endorsing the view that schools, as part of their educational mission, can disapprove of—and restrict—student speech suggesting that drugs are a trivial or joking matter. It is unfortunate that the Court, in its efforts to avoid the overly broad rationale advanced by the school and its allies, refused to say that explicitly. Doing so not only would have made the *Morse* decision itself much clearer, but it also would have contributed to the difficult project of fleshing out, through careful case-by-case analysis, exactly how broadly the educational rationale for restricting student speech should extend.

IV. CONCLUSION

Upon first reading of *Morse*, Joseph Frederick seems to have been in a no-win position. The Supreme Court faulted him for advocating illegal drug use, yet his argument that “the words were just nonsense meant to attract television

⁸¹ See Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45 (2008).

⁸² *Id.* at 58-59.

⁸³ *Id.* at 47 (citation omitted) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). Garnett later reflected: “No wonder the Court continues to struggle to formulate free-speech doctrine that takes into account [K-12 public schools’] special characteristics.” *Id.* at 59 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

cameras”⁸⁴ hurt his case, too. Viewing the case through both the protective and educational lenses makes clear that there are really two different types of student pro-drug speech that *Morse* allows schools to restrict: (1) genuine advocacy, which is unprotected for protective reasons; and (2) speech that trivializes drug use, like Frederick’s banner, which is unprotected for largely educational reasons. This examination also sheds light on the narrow category of student pro-drug speech that *retains* robust First Amendment coverage: speech that qualifies as legitimate political or social commentary.⁸⁵ Here, the educational reasons for schools to allow such speech outweigh the protective and educational concerns cutting the other way. Frederick himself was in a no-win position, but students whose speech falls into this remaining category should fare better. What remains to be seen is how the educational rationale itself will evolve as the Supreme Court continues to develop its student speech jurisprudence. *Morse* reveals a Court that accepts the educational rationale to some extent, but is uncomfortable and conflicted about it.

⁸⁴ *Morse*, 551 U.S. at 401 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1118 (9th Cir. 2006), *vacated*, 551 U.S. 393 (2007)).

⁸⁵ This is the category that Justice Alito singled out for protection in his concurrence. *See id.* at 422 (Alito, J., concurring). Although Justice Alito joined the majority as well, he provided the crucial fifth vote for the Court’s holding, and thus his reasoning warrants careful attention. Moreover, the majority itself, in emphasizing that Frederick had disclaimed any intent to convey a political or religious message, appeared sympathetic to this view. *Id.* at 403 (majority opinion).