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The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions – for the Law and for the Litigants

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THE OVERHYPED PATH FROM *TINKER* TO *MORSE*: HOW THE STUDENT SPEECH CASES SHOW THE LIMITS OF SUPREME COURT DECISIONS—FOR THE LAW AND FOR THE LITIGANTS

Scott A. Moss[*]

Abstract

Each of the Supreme Court's high school student speech cases reflected the social angst of its era. In 1965's *Tinker v. Des Moines Independent Community School District*, three Iowa teens broke school rules to wear armbands protesting the Vietnam War. In 1983, amidst parental and political upset about youth exposure to sexuality in the media, *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier* allowed the censorship of an innuendo-filled student government speech and a school newspaper article on teen pregnancy and parental divorce. In 2007, *Morse v. Frederick* paralleled the rise of reality television and online self-exposure in the 2000s: an iconoclastic student, long feuding with his principal, unfurled a cryptically drug-themed banner ("BONG HiTS 4 JESUS") as national television news crews visited his sleepy Alaska town.

Many depict the school speech cases as fundamental alterations of student–school relationships, or even of the basic role of minors in society. *Tinker* draws praise as the landmark decision on student rights and on minors' constitutional rights generally; detractors complain that it "departed from the traditional . . . vision of education, which emphasizes order, civility, and the inculcation of virtue." And the broader body of school speech case law is a familiar three-act Supreme Court saga: the 1960s Warren Court declared a new right; the Burger and Rehnquist Courts chipped away at it; and the Roberts Court undercut it further, leading *Tinker* detractors to claim that the Court is restoring their preferred traditionalist vision, while *Tinker* supporters lament that the Court "eviscerated" *Tinker* with "exceptions . . . swallow[ing] the *Tinker* rule" and "unquestioned deference" to school officials.

This Article argues that a closer look shows a more nuanced state of affairs than the prevailing narrative—that of landmark decisions

* Associate Professor, University of Colorado Law School. The author thanks the parties and attorneys in the various cases who graciously agreed to be interviewed, and also thanks Professors Kristi Bowman, Alan Canner, Kristen Carpenter, Joseph Feller, Victor Fleischer, Richard Garnett, Clare Huntington, Derek Kiernan-Johnson, Sarah Krakoff, Mark Loewenstein, Robert Nagel, Helen Norton, Paul Ohm, and Andrew Schwartz for feedback on drafts. This Article is dedicated to the author's father, George Moss, a solo practitioner who loved telling and hearing stories about the people in his and others' cases. Portions of this Article (mainly the parties' stories) will appear in GARRETT & KOPPELMAN, FIRST AMENDMENT STORIES (forthcoming 2011).

sweepingly altering the legal landscape and handing parties dramatic victories and defeats. Instead, even such watershed decisions as the school speech cases show the limits of Supreme Court opinions, both for the law and for the litigants themselves. Close factual examination of these cases and the social settings in which they occurred shows not only that each case was a major life event for the student, school, and community—but also that each had a surprisingly modest real-world impact on the law and on the student-litigants' lives.

On the law, none of the student speech cases reshaped the legal landscape to the extent commonly depicted. *Tinker* never had the impact on actual schools that it had on paper: the infeasibility of most speech litigation left censorship widespread and lawsuits rare. And schools' post-*Tinker* wins never really gutted *Tinker*, as the unexpected continued vitality of *Tinker* in the lower courts shows.

On the facts, each Court decision had an unexpectedly limited impact on the student litigants themselves, as this Article documents with both contemporary media accounts and new interviews with the various students and their attorneys. Somewhat surprisingly, whether the students won or lost at the Court bore little relationship to whether they felt victorious or defeated. Some who lost at the Court, or never reached a final verdict, express a striking sense of vindication from their cases. Another losing plaintiff found vindication in further legal battles and further speech shenanigans. Only one losing plaintiff actually expressed a complete sense of defeat and largely left behind any ambitions of issue advocacy. With their cases affecting them unpredictably, the six plaintiffs in the four school speech cases are the most vivid illustrations of the limits of Supreme Court decisions.

INTRODUCTION

The high school speech cases were reality shows before reality shows existed, each a much-hyped reflection of its era's best and worst. In 1965, in *Tinker v. Des Moines Independent Community School District*,[1] three Iowa teens, the leading edge of a nascent hippie movement, drew ire and praise for defying their principals by protesting the Vietnam War's escalation with black armbands. In 1983, early on in an era of angst about sexuality in pop culture,[2] *Bethel School District No. 403 v. Fraser*[3] and *Hazelwood School District v. Kuhlmeier*[4] allowed the censorship of quite varied student speech—an innuendo-filled student government address, and a newspaper article on teen pregnancy and parental divorce. In 2007, *Morse v. Frederick*[5] paralleled the rise of reality television and online self-exposure in the 2000s: an iconoclastic student topped off his longtime feud with the principal by unfurling an absurdist banner ("BONG HiTS 4 JESUS") as national television news crews visiting his sleepy Alaska town rolled cameras. Each case featured very different speech but told a similar story: students pressed the envelope, expressing themselves in ways that schools thought were inappropriate.

Given their entertainment value, school speech cases tend to draw media attention. "All the sudden *Newsweek* and *Time* magazine were coming to my school, which was really strange as a 16-year-old," recalled Mary Beth Tinker, the most reluctant of the three co-protesters in her case.[6] Joe Frederick's case also drew national coverage,[7] some of it even before any prospect of appellate litigation,[8] and became a cause célèbre for college students as far away as the Deep South.[9]

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1. 393 U.S. 503 (1969).

2. *E.g.*, *First Session on Contents of Music & Lyrics of Records*: *Hearing Before the S. Comm. on Commerce, Science & Transportation*, 99th Cong. 99-529 (1985) (discussing age ratings for music advocated by Tipper Gore, who cofounded the Parents Music Resource Center that year).

3. 478 U.S. 675 (1986).

4. 484 U.S. 260 (1988).

5. 551 U.S. 393 (2007).

6. Karen McCowan, *Student Rights Icon Will Speak*, THE REGISTER-GUARD, Nov. 28, 2009, at B13 (quoting Mary Beth Tinker) (internal quotation marks omitted).

7. *E.g.*, Robert Barnes, *Justices to Hear Landmark Free-Speech Case*, WASH. POST, Mar. 13, 2007, at A3.

8. *E.g.*, Sean Cavanagh, *Alaska Student Challenges Suspension for Display of Banner*, EDUC. WK., May 8, 2002, at 4.

9. *E.g.*, Brandon Niemeyer, *What Would Jesus Smoke?*, DAILY MISSISSIPPIAN, Apr. 6, 2005 ("[A]n obviously absurd protest sign at a school should not warrant . . . suspension. Much like any other religiously-based sarcasm, i.e. 'nuke a gay whale for Christ' . . . 'Bong Hits for Jesus' is not endorsing that Christians should smoke pot in honor of their savior.").

The school speech cases draw similarly great attention from legal analysts, with many depicting the cases as fundamental alterations of student–school relationships, or even of the entire role of minors in society. As "the landmark Supreme Court decision on student rights,"[10] *Tinker* arguably declared the American public school an "*educational public forum*"[11] and may have even more "elemental" importance as a key case establishing constitutional rights for minors.[12] *Tinker* detractors similarly recognize the precedent's importance when they complain that it "departed from the traditional, communitarian vision of education, which emphasizes order, civility, and the inculcation of virtue[,] . . . embrac[ing] a more libertarian vision of education that saw public schools as platforms for student free speech."[13] Scholars have never stopped studying and debating the meaning of *Tinker*,[14] which remains one of the Court's most storied free speech decisions.

The three post-*Tinker* decisions, all rulings allowing speech restrictions, draw a similar mix of praise and criticism. Some argue that the post-*Tinker* cases "eviscerate[d]"[15] or at least "severely eroded"[16] *Tinker* by establishing a "legal trend . . . toward unquestioned deference to . . . school administrators."[17] One scholar colorfully opined that while *Tinker* famously declared that students do not "'shed their constitutional

10. Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 516 (1987).

11. Sheldon H. Nahmod, *Beyond* Tinker*: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278, 294 (1970).

12. William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 508 (1989) (describing *Tinker*'s holding but adding, "At a more elemental level, in recognizing the free speech rights of public school students in *Tinker*, the Supreme Court had to conclude that being a student in school, or being young, does not disqualify a person from holding rights *generally* held by individuals under the first amendment").

13. Kenneth W. Starr, *From* Fraser *to* Frederick*:* Bong Hits *and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 662–63 (2009). Justice Thomas believes the same: "[T]he history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. . . . [T]eachers instilled a core of common values in students and taught them self-control." Morse v. Frederick, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (internal quotation marks omitted).

14. *E.g.*, Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U. L. REV. 1129, 1132 (2009) (demonstrating that "the student free speech rights articulated in *Tinker* are built upon the struggles of the Civil Rights movement" for the symposium "*Tinker* Turns 40: Freedom of Expression at School and Its Meaning for American Democracy").

15. J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 707.

16. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 81 (1990).

17. *Id.*; *see also* Gil Grantmore, *Lex and the City*, 91 GEO. L.J. 913, 920–21 (2003) (criticizing the Court for having "greatly narrowed" *Tinker*, to the point of flatly contravening the famous *Tinker* declaration that students do not "shed their constitutional rights . . . at the schoolhouse gate" (internal quotation marks omitted)).

rights . . . at the schoolhouse gate[,]' . . . [t]he truth is . . . that they don't even acquire those rights until after they graduate from high school."[18] Others praise the post-*Tinker* three, deeming *Fraser* an admirably "traditionalist opinion" that "turned away from *Tinker*'s libertarian norms and ringingly embraced the . . . notion that public school officials . . . have power to decide what speech is appropriate[,] . . . [on] the vision of schools as the inculcators of the habits and manners of civility."[19] A more nuanced view is that, though still standing, *Tinker* is staggering from heavy blows, possibly on the verge of being knocked out on the next hit: once the definitive precedent, *Tinker* has been reduced to "the back-up rule[,] . . . applied only if the facts before a court fall outside the framework of sexually lewd and offensive expression ([*Fraser*]), school-sponsored expression (*Kuhlmeier*), or expression that advocates illegal drug use (*Morse*)"[20]—and if the Court "continue[s] to carve out exceptions to *Tinker*, . . . the exceptions will eventually swallow up the *Tinker* rule."[21]

The school speech case law thus presents a familiar three-act Supreme Court saga, detailed in Part I. First, *Tinker* declared a new right, just as the 1960s Warren Court did with other rights, such as reproductive,[22] voting,[23] and criminal defense rights.[24] Second, the Burger and Rehnquist Courts chipped away at *Tinker* in the 1980s in *Fraser* and *Kuhlmeier*,[25] as they did to reproductive rights[26] and voting rights.[27] Third, the Roberts Court in *Morse* undercut *Tinker* further, as it did to reproductive rights[28] and criminal defense rights.[29]

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18. Grantmore, *supra* note 17, at 921 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); *see also* Abrams & Goodman, *supra* note 15, at 723 (concluding that students "have no enforceable constitutional rights until they receive their high-school diploma").

19. Starr, *supra* note 13, at 671–72 (internal quotation marks omitted).

20. Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1175 (2009).

21. *Id.* at 1191.

22. Griswold v. Connecticut, 381 U.S. 479 (1965).

23. Reynolds v. Sims, 377 U.S. 533 (1964).

24. Mapp v. Ohio, 367 U.S. 643 (1961).

25. *E.g.*, Ingber, *supra* note 16, at 81, 84 (noting, before *Morse*, that "[a]lthough *Tinker* has never been overruled, its significance has been severely eroded" and that *Kuhlmeier* in particular "applies such a lenient test to educational conflicts, the Court arguably has betrayed the premise of *Tinker* that schoolchildren too have fundamental first-amendment rights").

26. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

27. *See, e.g.*, Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1002 (2005) (collecting cases and noting that although *Reynolds v. Sims* and other "landmark decisions by the Warren Court established . . . the one person, one vote principle, over the past thirty years the Supreme Court has chipped away at this ideal").

28. Gonzales v. Carhart, 550 U.S. 124 (2007).

29. Herring v. United States, 555 U.S. 135 (2009) (holding that evidence is usable even

The premise of all this fanfare—the energetic media coverage, the extensive legal analysis, and the view of the cases as illustrating a decades-long Court shift—is that these are major cases. They are, but a closer look shows a more nuanced state of affairs than the prevailing narrative of landmark decisions sweepingly altering the legal landscape and handing parties dramatic victories and defeats.

This Article argues that the school speech cases show the limits of Supreme Court decisions, both for the law and for the litigants themselves. Part I illustrates that each case was a major life event for each student, each school, and each community—but then Part II illustrates how the actual impact of the cases was more modest, for the students and for the state of the law, in multiple ways.

Section II.A details how each case had a more modest impact on the state of the law than in the common narrative of Warren Court declarations of new rights undercut by later Courts. First, Subsection II.A.1 notes that *Tinker* never had the impact on actual schools that it had on paper: censorship remained widespread, while speech lawsuits remained rare. With speech rights claims unprofitable for lawyers to litigate, lawsuits are filed mainly by nonprofit advocates too thinly staffed to sue every time any school, anywhere, oversteps its bounds.

Second, Subsection II.A.2 details how, just as *Tinker* had less legal impact than many assumed, so did schools' three post-*Tinker* victories, which never really gutted *Tinker* to the extent often depicted. The *Tinker* era of emboldened students defying authority continues: Joe Frederick actually cited *Tinker* as inspiration. This Article reviews the post-*Morse* case law to document the mix of wins and losses for students pressing speech claims in the lower courts—with a notable degree of student success undercutting portrayals of *Fraser*, *Kuhlmeier*, and *Morse* as the end of student rights. *Tinker*'s surprising continued vitality traces back to the idiosyncratic facts of the major student speech cases, which leave lower courts free to interpret them as fact-specific *Tinker* exceptions. Hard cases make bad law, in the popular cliché—and the post-*Tinker* cases show that idiosyncratic cases make little law, good or bad. Thus, post-*Tinker* students still faced a fair degree of censorship, while post-*Fraser*/*Kuhlmeier*/*Morse* students still enjoy a fair degree of success asserting speech rights. Others have noted that some Court decisions have less impact than depicted. This Article shows that the school speech cases typify this point, with not only the post-*Morse* lower court case law, but also a mix of contemporary media accounts and new interviews with the school speech plaintiffs and their lawyers.

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when obtained in violation of Fourth Amendment, if police error was merely negligent); Hudson v. Michigan, 547 U.S. 586 (2006) (holding that evidence police obtained without undertaking the required knock-and-announce is usable and that not all evidence violating the Fourth Amendment must be excluded).

Third, legal doctrine aside, there is an even more intriguing way the school speech cases show the limits of Supreme Court decisions: the limited impact that those decisions had on the student litigants themselves. Section II.B examines the impact of the cases on the students, not only through contemporary media accounts, but also through new interviews with the various students and their attorneys, some of which document facts not previously reported in any academic or news publications. Specifically, whether the students won or lost at the Supreme Court bears little relationship to whether they felt victorious or defeated, validated or repudiated. Some who lost at the Court, or never reached a final case verdict, express a striking sense of vindication from their cases. Another losing plaintiff found vindication in further legal battles, and further speech shenanigans, with the same defendant. Only one of the losing plaintiffs actually lived out the expected role of the losing party, expressing a sense of defeat and largely leaving behind her ambition for a life of issue involvement. With their cases affecting them in unpredictable ways, unrelated to whether they formally won at the Court, the six plaintiffs in the four school speech cases are the most vivid illustration of the limits of Supreme Court decisions, each plaintiff entering adulthood bearing a very different impact from his or her high school ordeal.

I. THE SUPREME COURT'S SCHOOL SPEECH DECISIONS: A FAMILIAR THREE-ACT SAGA

A. *Act I,* Tinker v. Des Moines Independent Community School District*: An Early Vietnam Protest Yields the First Student Speech Rights*

1. The Context: Escalation of the Vietnam War and Antiwar Protests

The myth of the accidental revolutionary is powerful. *Casablanca* depicted a cynical American expatriate, apolitically running a nightclub in Nazi-occupied Morocco, who reluctantly harbors a Czech resistance fighter and shoots a Nazi officer. Rosa Parks, in challenging Southern bus segregation, is cast as "a cleaning woman with bad feet who was too tired to drag herself to the rear of the bus."[30] Yet Parks was an eyes-wide-open activist who was active in her local NAACP chapter and whose arrest came at the hands of a bus driver with whom she had disputed segregation more than a decade before.[31]

Tinker features a similar myth, befitting its stature as the first major student speech rights precedent. "Mary Beth Tinker didn't set out at age

30. E.R. Shipp, *Rosa Parks, 92, Founding Symbol of Civil Rights Movement, Dies*, N.Y. TIMES, Oct. 25, 2005.

31. *Id.*

13 to enshrine her family name in a landmark U.S. Supreme Court free speech decision," media coverage recounted; "[b]y safety-pinning a black armband to her blouse in December of 1965, the Iowa schoolgirl was just trying to support then-Sen. Robert Kennedy's . . . call for a Christmas cease-fire" in Vietnam.[32] But Tinker and her co-protestors were no naïve children swept unaware into controversy.

In December 1965, Mary Beth Tinker, her older brother John, and their friend Christopher Eckhardt decided to wear black armbands to school "to mourn those who had died in the Viet Nam war and to support Senator Robert F. Kennedy's proposal that the truce proposed for Christmas Day, 1965, be extended indefinitely."[33] They also planned to "fast[] on December 16 and New Year's Eve."[34] "I hoped," Eckhardt explained, "in a small way to influence public opinion."[35] Each attended a different school in the Des Moines district: John Tinker, 15, went to North High School; Christopher Eckhardt, also 15, went to Roosevelt High; and Mary Beth Tinker, 13, went to Warren Harding Junior High.[36]

Rebellious as this seemed to the school, the children were following, not rebelling against, their parents. Eckhardt's mother, the president of the "Des Moines Chapter of the Women's International League for Peace and Freedom,"[37] had recently brought her son to Washington with Students for a Democratic Society, "protesting the war in Viet Nam in [a] march . . . ."[38] The Tinkers' father, Reverend Leonard Tinker, was a "minister without a church, under appointment by the Methodist appointive powers to serve as 'Secretary for Peace and Education,'" and also "paid a salary by the American Friends Service Committee,"[39] a pacifist, interfaith group created by the Quakers.[40] In the Tinker home, "Viet Nam and the political and moral implications [were] discussed quite often," John Tinker testified.[41]

Despite this pacifist community, antiwar sentiment was not yet widespread. Through the middle of 1965, American casualties in

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32. McCowan, *supra* note 6.

33. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966).

34. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

35. Brief for Petitioners, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (No. 21), 1968 WL 112602, at *4 (internal quotation marks omitted).

36. *Tinker*, 258 F. Supp. at 972 n.1.

37. Brief for Respondents, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (No. 21), 1968 WL 112603, at *17.

38. *Id.* at *4.

39. *Id.*

40. American Friends Service Committee, *Mission & Values*, http://afsc.org/mission-and-values (last visited Aug. 30, 2011).

41. Brief for Respondents, *supra* note 37, at *17.

Vietnam had barely totaled 500;[42] in 1966, they exceeded 6,000.[43] In mid-1965, only 72,000 American troops were in Vietnam;[44] by 1966, 385,000.[45] With American involvement still limited in 1965, the public overwhelmingly supported the war,[46] and "[i]n Iowa, . . . the Peace Movement [was] a small minority," John Tinker recalled: "I was used to the idea that my beliefs were not very widely appreciated . . . ."[47] Eckhardt's gym coaches orchestrated "calisthenics to 'Beat the Viet Cong,' as opposed to our usual, 'Beat East High,'"[48] and because of his protest, "[m]y girlfriend dropped me and told me I could no longer come over to her house."[49] More seriously, Mary Beth Tinker remembers "threats on our lives and on our house. Someone called on Christmas eve and said that the house would be blown up by morning. Some other people threw red paint on our house and threatened to kill me."[50]

This mix of protohippie family and 1950s-holdover Iowa town made the children a contradictory mix. A Boy Scout, paperboy, church volunteer, and track team member who was voted holder of the "cleanest locker," Eckhardt was in part a stereotypically quaint Midwestern boy—but he was also part of a disillusioned clique that "sat in [its] own section of the auditorium [at school events] and refused to cheer . . . or to rise for the National Anthem."[51] He did not come out as gay until many years later.[52] Mary Beth Tinker was the most precociously rebellious of the three, having joined the protest in junior

42. *Nation: Viet Nam & Korea: A Comparison*, TIME, July 23, 1965.

43. Phillip Carter & Owen West, *Iraq 2004 Looks Like Vietnam 1966*, SLATE, Dec. 27, 2004, http://www.slate.com/id/2111432.

44. *Nation: Viet Nam & Korea*, *supra* note 42.

45. Carter & West, *supra* note 43.

46. *USA Today/CNN Gallup Poll*, USA TODAY, Nov. 15, 2005 (recounting that in late August and early September of 1965, roughly 60% of the people sampled did not think that the U.S. entering the Vietnam War was a mistake).

47. John Tinker, Tinker v. Des Moines *Frequently Asked Questions*, http://schema-root.org/region/americas/north_america/usa/government/branches/judicial_branch/supreme_court/decisions/schools/tinker_v._des_moines/~jft/jft.faq.html (last visited Aug. 30, 2011).

48. Christopher Eckhardt, Tinker vs. Des Moines*: The True Story*, KNOL: A UNIT OF KNOWLEDGE (July 25, 2008, 5:00 AM), http://knol.google.com/k/tinker-vs-des-moines#.

49. *Questions & Answers: Effects on Relationships with Family & Friends*, AM. BAR ASS'N DIVISION FOR PUB. EDUC., http://abapubliceducation.org/publiced/lawday/tinker/effect.html (last visited Aug. 7, 2011).

50. *Questions & Answers: Perspectives Then*, AM. BAR ASS'N DIVISION FOR PUB. EDUC., http://www.abapubliceducation.org/publiced/lawday/tinker/then.html (last visited Aug. 7, 2011).

51. John W. Johnson, *Behind the Scenes in Iowa's Greatest Case: What Is Not in the Official Record of* Tinker v. Des Moines Independent Community School District, 48 DRAKE L. REV. 473, 476–77 (2000).

52. E-mail from Christopher Eckhardt to Scott A. Moss (Aug. 5, 2010) (on file with author).

high—but she also was "the most photographed of the three"[53] because the clean-cut thirteen-year-old Iowan so badly mismatched the stereotype of the rabble-rousing protester: "the media focused on me," she admits, "because I was this cute, little Midwestern girl."[54]

Unlike the public, school principals were unconflicted. Hearing the armband plans, the local principals swiftly met and "adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused[,] . . . suspended until he returned without [it]."[55]

The students' defiance varied when they arrived with armbands on December 16. Mary Beth Tinker took her armband off when called to the principal's office but still was suspended and sent home.[56] Christopher Eckhardt was more combative: on his own, he "went directly to . . . the principal when he arrived at school[,] . . . refused to remove his arm band," and was sent home.[57] John Tinker chose not to wear an armband that day: "I didn't feel that I should just wear it against the will of the principals," he explained, "without even trying to talk to them first."[58] Officials would not meet with him, so he wore an armband the next day, December 17; after lunch, the principal summoned him and he was suspended for not removing the armband.[59] The three "did not return to school until after the planned period for wearing armbands had expired . . . after New Year's,"[60] and returned uncowed: "[W]e dressed in all black clothing for the remainder of the school year in protest," Mary Beth Tinker recalled.[61]

The three filed a federal lawsuit claiming violation of their First Amendment rights, seeking an injunction against the school's actions plus nominal damages.[62] The early proceedings were brief. After an evidentiary hearing, the district court dismissed the case, depicting school order as primary and rejecting the very notion of student rights: "the disciplined atmosphere of the classroom, not the plaintiffs' right to wear arm bands[,] . . . is entitled to the protection of the law."[63] The court deferentially presumed speech restrictions valid: "Unless the actions of school officials . . . are unreasonable, the Courts should not

53. Johnson, *supra* note 51, at 475.
54. McCowan, *supra* note 6 (internal quotation marks omitted).
55. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
56. Brief for Petitioners, *supra* note 35, at *5.
57. *Id*. at *5–6.
58. *Id.* at *7 (internal quotation marks omitted).
59. *Id.* at *7–8.
60. *Tinker*, 393 U.S. at 504.
61. McCowan, *supra* note 6 (internal quotation marks omitted).
62. *Tinker*, 393 U.S. at 504.
63. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966).

interfere."[64] It was reasonable "to anticipate that . . . arm bands would create some type of classroom disturbance,"[65] the court explained, because "debate over the Viet Nam war had become vehement in many localities," as unrelated draft-card burnings showed.[66] Thus, "[w]hile the arm bands themselves may not be disruptive, the reactions and comments from other students . . . would be likely to disturb the disciplined atmosphere required for any classroom," making the anti-armband policy valid.[67]

The students' appeal in the U.S. Court of Appeals for the Eighth Circuit was hotly litigated but anticlimactic. After argument to the three-judge panel, the entire eight-judge circuit ordered en banc reargument—but split 4-4, yielding a one-paragraph order with no analysis, concluding, "[t]he judgment below is affirmed by an equally divided court."[68] Around the same time, the U.S. Court of Appeals for the Fifth Circuit held the opposite. Far from letting schools restrict speech whenever "reasonable," it held that Mississippi high school students wearing pro-civil rights "freedom buttons" constituted protected speech unless it "materially and substantially interfere[s] with the requirements of appropriate discipline."[69]

2. The Decision: Newly Protecting Speech Rights in Three 1969 Cases

No Supreme Court case had upheld student speech rights before *Tinker*—but then again, the pre-1960s Court rarely protected anyone's speech. Only in 1925 did the Court hold that state and local governments are bound by the First Amendment.[70] Through the 1950s, it allowed criminal punishment of a wide range of unpopular nonviolent advocacy: urging resistance to a war draft the speaker thought unconstitutional;[71] helping organize[72] or being an officer in[73] the American Communist Party; and advocating industrial strikes, whether to inhibit war efforts[74] or just in solidarity with communists abroad.[75]

But the Court's 1960s expansion of various rights included speech

64. *Id.* at 972.
65. *Id.* at 973.
66. *Id.*
67. *Id.*
68. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988, 988 (8th Cir. 1967).
69. Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). The same panel upheld a ban on buttons in another school where wearers harassed others. Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966).
70. Gitlow v. New York, 268 U.S. 652, 666 (1925)
71. Schenck v. United States, 249 U.S. 47, 52–53 (1919).
72. Whitney v. California, 274 U.S. 357, 371–72 (1927).
73. Dennis v. United States, 341 U.S. 494, 497, 516–17 (1951).
74. Abrams v. United States, 250 U.S. 616, 624 (1919).
75. *Gitlow*, 268 U.S. at 671–72.

rights, especially in two cases from 1969, the same year *Tinker* was decided. *Watts v. United States* held that even an expressed desire to harm the president is protected, absent real risk of executing the threat.[76] Watts had ranted that if drafted and given a gun, President Lyndon Baines Johnson was "the first man I want to get in my sights . . . . They are not going to make me kill my black brothers."[77] The Court called this "political hyperbole"[78] not a real threat: "[H]is only offense here was 'a kind of very crude offensive method of stating . . . opposition to the President.'"[79] Months later, *Brandenburg v. Ohio* established the modern rule that even advocacy of illegality is protected unless intended and likely to produce imminent harm.[80] Brandenburg, a local Ku Klux Klan leader, gave an on-camera speech threatening: "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[81] Overturning his conviction, the Court declared the modern "imminent . . . incite[ment]" test that government cannot "forbid or proscribe advocacy . . . of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[82]

Amidst these then-recent First Amendment precedents, the *Tinker* Court reversed the dismissal, starting with deeming the "wearing of an armband for . . . expressing certain views . . . [a] symbolic act that is within the Free Speech Clause"[83]—a holding paralleled by later cases protecting expressive acts from flag burning[84] to nude dancing.[85] The Court then ruled for the students based on three points—all major declarations of First Amendment law, but all of which came under heavy fire in later cases.

First, *Tinker* rejected the idea of schools as specially speech-restricted institutions. The district court had concluded that "the disciplined atmosphere of the classroom, not the plaintiffs' right to wear arm bands," merits protection, so "[u]nless the actions of school

76. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

77. *Id.* at 706 (internal quotation marks omitted).

78. *Id.* at 708.

79. *Id.* (quoting counsel for Petitioner Watts).

80. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (per curiam).

81. *Id.* at 446 (internal quotation marks omitted).

82. *Id.* at 447.

83. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).

84. Texas v. Johnson, 491 U.S. 397, 404–05 (1989) (noting that while the First Amendment "literally" protects only speech and press, it "does not end at the spoken or written word," extending to "an expressive element in conduct relating to flags").

85. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (holding that "nude dancing of the kind . . . here is [protected] expressive conduct").

officials in this connection are unreasonable, the Courts should not interfere."[86] Defending this holding, the school district titled its Supreme Court brief's second section, "Disturbances in Schools Are Not Properly Measured by Identical Standards Used to Measure Disturbances on the Streets, in Eating Houses or Bus Depots."[87] The Court rejected that argument: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[88] This historical declaration was spurious; the cited "50 years" of cases addressed mainly different rights, such as students' religious rights and teachers' speech rights.[89] Despite its weak support, "the schoolhouse gate" is *Tinker*'s most cited passage, reiterated by all subsequent school speech cases.[90] Having declared a student's right to in-school free speech, *Tinker* strongly denounced school restrictions of student speech:

> [S]tate-operated schools may not be enclaves of totalitarianism . . . . Students . . . are "persons" under our Constitution. . . . [They] possess[] . . . fundamental rights. . . . [They] may not be regarded as closed-circuit recipients of only that which the State chooses . . . [nor] confined to . . . sentiments that are officially approved. . . . [A]bsen[t] . . . valid reasons to regulate . . . , students are entitled to freedom of expression. . . .[91]

Second, *Tinker* required speech restrictions to be based on actual evidence of threatened harm: "where there is no finding and no showing that . . . [the] conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,

86. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972–73 (S.D. Iowa 1966).

87. Brief for Respondents, *supra* note 37, at *23.

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

89. *Id.* at 506–07. The cases cited held as follows: (1) due process liberty disallows bans on the teaching of foreign languages, Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and bans on private (mainly religious) schools, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); (2) teachers can espouse or choose not to disavow communism or other ideologies, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); (3) freedom from compelled speech bars schools from forcing Jehovah's Witnesses to recite the Pledge of Allegiance, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); and (4) freedom of religion bars devoting school time to religious instruction, McCollum v. Bd. of Educ., 333 U.S. 203, 209–10 (1948), holding school prayers, Engel v. Vitale, 370 U.S. 421, 435–36 (1962), and banning the teaching of evolution, Epperson v. Arkansas, 393 U.S. 97, 107–09 (1968).

90. Morse v. Frederick, 551 U.S. 393, 396 (2007); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655–56 (1995); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986).

91. *Tinker*, 393 U.S. at 511.

the prohibition cannot be sustained."[92] The district court deemed the ban "reasonable . . . upon [officials'] fear of a disturbance," but the Supreme Court held "undifferentiated fear . . . of disturbance" insufficient because "[a]ny word spoken . . . in the lunchroom, or on the campus, that deviates from the views of another . . . [may] cause a disturbance."[93] The evidence actually showed that armbands had *not* "materially and substantially interfere[d]"[94] with schooling or "colli[ded] with the rights"[95] of others: "[O]fficials banned . . . silent, passive expression of opinion, unaccompanied by . . . interference . . . with the schools' work or . . . the rights of other students. . . . [A] few students made hostile remarks . . . , but there were no threats or acts of violence."[96] In fact, "testimony . . . indicates that it was not fear of disruption" that prompted the school to ban the armbands, but rather that "authorities simply felt that the schools are no place for demonstrations. . . ."[97] John Tinker later detailed the mild classroom consequences: "[O]nly the students sitting near me in class could see that I had the armband on. The teachers apparently did not notice it. Or, if they did, they did not make an issue of it."[98]

Third, the Court closely scrutinized the facts to find improper viewpoint discrimination: "prohibition . . . of one particular opinion, . . . without evidence that it is necessary to avoid material and substantial interference . . . is not constitutionally permissible."[99] Viewpoint-bias evidence included the following:

- "[A principals'] meeting . . . to issue the contested regulation was called in response to a student's . . . want[ing] to write an article on Vietnam . . . in the school paper."[100]
- "[A]uthorities, in prohibiting black armbands, were influenced by the fact that . . . debate over the Viet Nam war had become vehement. . . ."[101]
- "[A]uthorities did not purport to prohibit . . . all symbols of political or controversial significance. . . . [Students]

92. *Id.* at 509 (internal quotation marks omitted).
93. *Id.* at 508.
94. *Id.* at 509.
95. *Id.*
96. *Id.* at 508.
97. *Id.* at 509 n.3 (internal quotation marks omitted).
98. RICHARD PANCHYK, OUR SUPREME COURT 57 (orig. ed. 2007) (quoting an interview with John Tinker) (internal quotation marks omitted).
99. *Tinker*, 393 U.S. at 511.
100. *Id.* at 510.
101. *Id.* at 510 n.4 (internal quotation marks omitted).

> wore buttons . . . [of] political campaigns, and . . . the Iron Cross, traditionally a symbol of Nazism. . . . [I]nvolvement in Vietnam[] was singled out. . . ."[102]

Thus, to the Court, the ban was based on "an urgent wish to avoid the controversy . . . from the expression, even by the silent symbol of armbands, of [war] opposition. . . ."[103]

So *Tinker* declared three cornerstones of student speech rights: (1) schools' institutional uniqueness yields no special authority to restrict speech; (2) schools can restrict only speech proven to cause material and substantial disruption or interference with others' rights; and (3) the facts must show the restrictions to be viewpoint-neutral (unless the disruption results only from one viewpoint, and not just because of its unpopularity). *Tinker* remains the most cited student speech precedent, but later decisions undercut all three of these holdings.

B. *Act II*, Bethel School District No. 403 v. Fraser *and* Hazelwood School District v. Kuhlmeier*: Reining in* Tinker*, but to an Unclear Extent*

1. The Supreme Court's Evolution After the Warren Court

The evolution of post-*Tinker* speech law was part of a decades-long Court shift. *Tinker* was one of the last decisions under the tenure of Chief Justice Earl Warren.[104] Though appointed by President Dwight D. Eisenhower, a moderate Republican who would go on to criticize expansive Warren Court precedents,[105] Warren led the Court to broaden numerous individual rights, from freedom of speech and reproductive privacy to equal representation and school integration. Warren and Justice William Brennan, another Eisenhower appointee, are much-cited examples of how a president's views cannot predict a Justice's career; "Eisenhower is frequently quoted as saying . . . Warren and Brennan were [his] two biggest mistakes. . . ."[106] But these "mistakes" reflect that Eisenhower was uninterested in "entrenching a specific political agenda . . . [and] more concerned with rewarding political favors and pleasing particular constituencies," as he appointed Warren "as a reward

102. *Id.* at 510–11.

103. *Id.* at 510.

104. Chief Justice Warren left the Court on June 22, 1969. *Earl Warren*, THE OYEZ PROJECT, http://www.oyez.org/justices/earl_warren (last visited Aug. 5, 2011).

105. Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 18–22 (2009) (noting Eisenhower's private criticism, public ambiguity, and official support of *Brown v. Board of Education*).

106. Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 158 n.120 (2009) (citations omitted).

for political favors" and Brennan to "curry[] favor with northeastern Catholics."[107] Far from showing the unpredictability of Justices, the Warren Court rulings "precluded subsequent presidents from following Eisenhower's examples. Today it is unimaginable that a President would pay so little attention to a nominee's political ideology[.]"[108] Indeed, "[d]espite . . . celebrated examples . . . such as Warren, Brennan, Blackmun, and Souter, . . . most Justices [are] broadly consistent with" their appointing President.[109]

After *Tinker*, the Court saw ten consecutive Republican appointees, seven from presidents (Richard M. Nixon and Ronald Reagan) determined to shift the Court to the right,[110] and almost all ten "more conservative than his or her predecessor," according to one of the ten, Justice John Paul Stevens.[111] By the mid-1980s, only two *Tinker* Justices remained, and two 1980s student speech decisions increased school authority: 1986's *Bethel School District No. 403 v. Fraser*[112] and 1988's *Hazelwood School District v. Kuhlmeier*.[113] Below are brief discussions of *Fraser* and *Kuhlmeier*, which set the stage for narrowing *Tinker* further in 2007's *Morse v. Frederick.*[114]

2. *Fraser*: Restricting Sexually Explicit Speech on Unclear Reasoning

On April 26, 1983, at a Bethel High School assembly in Tacoma, Washington, top student and inveterate smart-aleck Matthew Fraser used "an elaborate, graphic, and explicit sexual metaphor"[115] in his speech nominating a friend for student government:

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107. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 492 (2006).

108. David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1887 (2008) (citation and internal quotation marks omitted).

109. William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 475 (2002).

110. *Id.* at 435, 439, 442 ("Nixon . . . criticized the Warren Court's activism and promised . . . conservative judges." In 1980, "constitutionally-charged issues such as abortion, school prayer, and criminal prosecutions," as well as the platform on which Reagan ran for president, made "abortion a litmus test for judicial selection . . . .").

111. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 50 (internal quotation marks omitted).

112. 478 U.S. 675, 680–86 (1986) (holding that the school district acted within its authority when it imposed sanctions for offensively lewd and indecent speech).

113. 484 U.S. 260, 267–70 (1988) (holding that school officials were entitled to regulate the school newspaper's content in any reasonable manner).

114. 551 U.S. 393, 400–10 (2007) (holding that school officials did not violate the First Amendment when they confiscated a pro-drug banner from a student at a school event and suspended the student).

115. *Fraser*, 478 U.S. at 677–78.

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm . . . . Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff. . . . [H]e'll never come between you and the best our high school can be.[116]

"I wrote the speech about an hour before the assembly," Fraser said, knowing "it would cause some reaction"—but not a suspension and graduation speech ban.[117]

Fraser sued, winning nominal damages, attorney's fees, and a declaratory judgment against the suspension and graduation speech ban.[118] Fraser then got to deliver the graduation speech he earned by his classmates' votes.[119] After the U.S. Court of Appeals for the Ninth Circuit affirmed, the Supreme Court reversed, reaffirming *Tinker* but declaring a "marked distinction" between the speech in *Tinker* and in *Fraser*.[120]

"The mode of analysis employed in *Fraser* is not entirely clear,"[121] Chief Justice John Roberts tactfully noted decades later. In *Fraser*, Chief Justice Warren Burger offered three ill-explained distinctions from, and one point arguably disagreeing with, *Tinker*.

First, Fraser's speech was harmful to youths, while *Tinker* "did 'not concern speech or action that intrudes upon the work of the schools or [students'] rights.'"[122] Deeming sexual speech especially harmful would modestly distinguish *Tinker*, but Burger then dropped the point, only pages later cursorily saying the speech was "insulting to teenage girl[s]" and "could well be seriously damaging" to students "on the threshold of awareness of human sexuality."[123] And the speech's string of non-profane double entendres ("he's firm," etc.) was not all that explicit; as Justice Brennan noted, it "does not even approach the sexually explicit speech" of obscenity cases, and "was no more 'obscene,' 'lewd,' or

116. *Id.* at 687 (Brennan, J., concurring).

117. David Hudson, *Matthew Fraser Speaks Out*, FREEDOM FORUM (Apr. 17, 2001), www.freedomforum.org/templates/document.asp?documentID=13701 (internal quotation marks omitted).

118. *Fraser*, 478 U.S. at 679.

119. *Id.*

120. *Id.* at 679–80.

121. Morse v. Frederick, 551 U.S. 393, 404 (2007).

122. *Fraser*, 478 U.S. at 680 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

123. *Id.* at 683.

'sexually explicit' than . . . prime time television."[124]

Second, "[u]nlike . . . in *Tinker*," Fraser's speech was "unrelated to any political viewpoint."[125] But this potentially major political/apolitical distinction came only in a short snippet in the penultimate paragraph of the opinion, without elaboration.

Third, Fraser's speech occurred in "an official high school assembly," implicating the school's educational role to "prepare pupils for citizenship . . . [and] inculcate the habits and manners of civility."[126] Only minimally explained here, the speech's occurrence in an official school setting later proved key in *Kuhlmeier*.

A fourth point was arguably contrary to *Tinker*: "[C]onstitutional rights of students . . . are not automatically coextensive with the rights of adults in other settings . . . . '[S]tudent[s] . . . [can] wear Tinker's armband, but not Cohen's jacket,'"[127] the Vietnam-era "Fuck the Draft" jacket the Court deemed protected.[128] Potentially contradicting *Tinker*'s bringing established speech rights within "the schoolhouse gate," this point drew no further elaboration in *Fraser*.

Fraser's various ill-explained rationales made it a Rorschach precedent, viewable as either distinguishing or undercutting *Tinker*. *Kuhlmeier* then clarified one speech type that schools can limit.

3. *Kuhlmeier*: Further Narrowing *Tinker* for School-Sponsored Speech

St. Louis' Hazelwood East High School published its school newspaper through the Journalism II class, whose teacher Robert Stergos left midyear in 1983.[129] Stergos' replacement reviewed the about-to-print upcoming issue, and then had the principal review it.[130] The principal cut one article on pregnant students and another on parental divorce impacting students.[131] He thought the former inappropriate for young readers, the latter intrusive into students' family privacy, and both excessively detailed about students' personal lives.[132]

Student editor Cathy Kuhlmeier was outraged; a few years earlier,

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124. *Id.* at 689 n.2 (Brennan, J., concurring).

125. *Id.* at 685 (majority opinion).

126. *Id.* at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)) (internal quotation marks omitted).

127. *Id.* at 682 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

128. *See* Cohen v. California, 403 U.S. 15, 22–26 (1971) (holding that the First and Fourteenth Amendments protected the defendant's ability to wear a jacket with an expletive on it in a courthouse corridor).

129. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262–63 (1988).

130. *Id.* at 263.

131. *Id.*

132. *Id.*

"under a different principal, the same story ideas were printed."[133] She thought the articles could help troubled students, later recalling: "[A]n individual from our class ran away and ended up committing suicide. Could the articles have made a difference for his life choice? . . . I will always wonder."[134] Seeing the articles cut, "[a] few of us contacted Mr. Stergos," the recently departed teacher, "and he suggested we contact the American Civil Liberties Union."[135]

Like Fraser, Kuhlmeier sought injunctive relief; however, such relief was unavailable for several reasons. First, the principal's action was a *fait accompli*: he "did not inform the student authors of his decision; they learned of the deletions when the paper was released."[136] Second, other students engaged in self-help, "xerox[ing] the articles and distribut[ing] them to other students on the school premises."[137] Third, by the time the Court heard the case, the students had graduated, arguably mooting injunctive relief as to their articles.[138] Continuing to seek other relief—damages and a declaratory judgment that the school violated their rights—the students lost in district court, won on appeal, then lost at the Supreme Court.[139]

The Court ruled against the student authors, but unlike in *Fraser*, it declared one specific distinction from *Tinker*. *Kuhlmeier* began by reaffirming the basic *Tinker* rule: because students retain rights within "schoolhouse gate[s]," they "cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."[140]

But in viewing *Fraser* as allowing control over school-sponsored speech, *Kuhlmeier* used broad language declaring schools, arguably contrary to *Tinker*, speech-restricted institutions: "The First Amendment rights of students . . . 'are not automatically coextensive with the rights of adults in other settings.'"[141] In the "official school assembly" of *Fraser* or the in-class writing of *Kuhlmeier*, a school can restrict speech

133. PANCHYK, *supra* note 98, at 62.

134. *Id.*

135. David Hudson, *Cathy Cowan Reflects on Her High School Journalism Fight in* Hazelwood *Case*, FREEDOM FORUM (Dec. 27, 2001), www.freedomforum.org/templates/document.asp?documentID=15516.

136. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1371 (8th Cir. 1986).

137. *Id.*

138. Kuhlmeier v. Hazelwood Sch. Dist., 596 F. Supp. 1422, 1424 (E.D. Mo. 1984).

139. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 264–66 (1988).

140. *Id.* at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 509 (1969)).

141. *Id.* (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)).

to its "educational mission."[142] *Kuhlmeier* also found that "public forum" case law justified school newspaper control. Speech is most protected in "streets, parks, and other traditional public forums . . . 'used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[143] Schools are "public forums" only if authorities "by policy or by practice opened those facilities 'for indiscriminate use.'"[144] The *Kuhlmeier* newspaper was no open forum: the teacher selected editors, assigned stories, and edited articles; "[m]any of these decisions were made without [student] consultation."[145] Even after teacher review, "the issue still had to be reviewed by [the] Principal."[146]

The *Kuhlmeier* Court interpreted *Fraser* as allowing control of speech in "school-sponsored publications, theatrical productions, and other expressive activities that . . . might reasonably [be] perceive[d] to bear the [school] imprimatur."[147] This narrowed *Tinker* to only "personal expression that happens to occur on the school premises."[148] Thus, "*Tinker* . . . need not also be the standard" for school-sanctioned speech;[149] "what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school."[150]

Yet *Fraser* and *Kuhlmeier* may reach more than just school-sanctioned speech. The two 1980s decisions stressed schools' institutional distinctness and control needs—arguments that failed in *Tinker*. On these rationales, the Court limited non-school-sanctioned speech further in *Morse v. Frederick*.[151]

C. *Act III,* Morse v. Frederick*: The Roberts Court Further Limits* Tinker, *Leaving Student Speech Rights Uncertain*

1. The Context: Joe Frederick Versus His School, the Ongoing Saga

"On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in . . . Utah. The torchbearers . . . [passed] along a street in front of Juneau-Douglas High School (JDHS)," with network camera crews.[152] This would be a big

142. *Id.* (internal quotation marks omitted).
143. *Id.* at 267 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
144. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).
145. *Id.* at 268.
146. *Id.* at 269.
147. *Id.* at 271.
148. *Id*.
149. *Id.* at 272.
150. *Id.* at 267 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)).
151. Morse v. Frederick, 551 U.S. 393 (2007).
152. *Id.* at 397.

event anywhere, but it was especially so in sleepy Juneau. Though Alaska's capital, Juneau is sparse and sprawling: barely 30,000 people live among 2,700 square miles, and even with over half the population concentrated in the urban areas, Juneau is one of the nation's least dense cities.[153] It has just two main public high schools, Thunder Mountain High School and JDHS, the one Frederick attended.[154] The torch relay was during school, so JDHS principal Deborah Morse announced that students could leave class to watch on the street.[155] Because the outing was "an approved social event or class trip[,] . . . [t]eachers and administrative officials monitored the students."[156]

Unsurprisingly, the mass outing of small-town students to a nationally televised event "became rambunctious."[157] Some were "throwing plastic cola bottles and snowballs and scuffling"[158]—but the scene-stealer, and the target of the school's crackdown, was Frederick's homemade banner.

> As . . . torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS" . . . readable by the students on the other side of the street. Principal Morse immediately . . . demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner.[159]

Frederick's goal was "partly to get on TV as the Olympic torch passed," but mainly "to get under the skin of his disciplinarian principal, . . . with whom he had a running feud."[160] In an earlier incident, when Frederick sat in the school commons reading Albert Camus' existential novel *The Stranger*, a vice principal told him to leave because his classes were over.[161] Frederick refused—he was waiting for his girlfriend—so the school summoned Juneau police officers to threaten a "trespass" arrest.[162] The next day, he sat while

153. *State and County Quickfacts*, U.S. CENSUS BUREAU (Nov. 4, 2010), http://quickfacts.census.gov/qfd/states/02/0236400.html.

154. JUNEAU SCHOOL DISTRICT, http://www.juneauschools.org/schools/high_schools (last visited Aug. 5, 2011).

155. *Morse*, 551 U.S. at 397.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 397–98.

160. Barnes, *supra* note 7.

161. Tom Kizzia, *'Bong Hits 4 Jesus' Goes to the Supreme Court*, ANCHORAGE DAILY NEWS, Mar. 4, 2007, at A1, *available at* http://www.november.org/stayinfo/breaking07/BongHits.html.

162. *Id.*

others stood for the Pledge of Allegiance and "was sent to the principal's office,"[163] threatened with suspension,[164] despite the established right to abstain from the Pledge.[165]

But what did "BONG HiTS 4 JESUS" mean? Frederick, who was reading a novel about life's absurd meaninglessness in his "trespass" altercation, just thought it "funny, provocative and nonsensically ambiguous."[166] "I wasn't trying to say anything about religion . . . [or] drugs. I was just trying to say *something*," Frederick explained on an ACLU conference call.[167] Whether or not he meant to encourage drug use, Frederick knew he pushed the envelope: "I had taken an American Justice class," he elaborated, and "decided to devise a plan that would clearly be constitutionally protected speech and speech that would be funny and at the same time embarrass . . . school administration."[168] With friends, he "brainstormed but could not arrive at a verse," until his girlfriend "pointed out a sticker on a snowboard that read: 'Bong Hits For Jesus,'" which he thought "perfect for the planned free speech experiment."[169]

The school saw the banner differently. Morse "thought it encouraged illegal drug use," violating school policy against "advocat[ing] the use of substances that are illegal to minors . . . [at] approved social events and class trips."[170] Contrary to Frederick's image of Morse as an unfair disciplinarian, the fourth-generation teacher and second-generation principal insisted that she simply "carried out her responsibility" to enforce "long-established school board policy."[171]

After the outing, Morse called Frederick to her office. It went badly. Morse suspended Frederick—and then doubled the suspension. "Frederick said a five-day suspension was doubled after he talked back by quoting Thomas Jefferson on free speech. Morse testified the extra days came because he wouldn't cooperate and name the other students who held the banner."[172] "I went home immediately and wrote the

163. Barnes, *supra* note 7.

164. Kizzia, *supra* note 161.

165. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

166. Kizzia, *supra* note 161.

167. Barnes, *supra* note 7 (quoting interview with Frederick) (internal quotation marks omitted).

168. Joe Frederick, *Joe's Story*, STRIKE THE ROOT (Nov. 16, 2003), http://www.strike-the-root.com/3/frederick/frederick1.html.

169. *Id*.

170. Morse v. Frederick, 551 U.S. 393, 398 (2007) (internal quotation marks omitted).

171. Eric Hagen, Morse v. Frederick*: Why the School Should Prevail*, http://www.publicsquare.net/content.php?pid=153 (last visited Aug. 5, 2011) (opinion piece by counsel for JDHS).

172. Kizzia, *supra* note 161.

ACLU," Frederick recalled.[173] Superintendent Peggy Cowan, like other district officials, stood by Morse, arguing that "teaching students in an environment that is conducive to learning is of the utmost importance."[174]

In court, Frederick lost on a pretrial summary judgment motion, but the Ninth Circuit reversed, reinstating his claim.[175] Former Solicitor General and Clinton impeachment prosecutor Kenneth Starr then joined the school's legal team,[176] and the Supreme Court ruled against Frederick, reinstating the dismissal.[177]

2. The Decision: Further Reining in *Tinker*

Was *Frederick* really a school speech case at all? True, Frederick was a student whose speech upset the principal. But Frederick displayed his banner at a public event on a public street where students stood among the public, in front of national television cameras. Though acknowledging "some uncertainty at the outer boundaries,"[178] the Court deemed the banner "school" speech because the school sanctioned the outing and other students saw the banner: "[It was] during normal school hours. It was sanctioned . . . as an approved social event or class trip . . . . Teachers and administrators were interspersed among the students . . . supervising them. The high school band and cheerleaders performed. . . . [A]cross the street from the school, [Frederick] directed his banner . . . visible to most students."[179]

Yet the Court then declared inapplicable the tests of all three main school speech precedents, *Tinker*, *Fraser*, and *Kuhlmeier*. *Fraser*/*Kuhlmeier* deference applies to speech "reasonably perceive[d] to bear the imprimatur of the school,"[180] but "no one would reasonably believe that Frederick's banner bore the school's imprimatur."[181] Despite distinguishing a key *Fraser*/*Kuhlmeier* fact, *Morse* still cited those cases as undercutting *Tinker*'s "substantial disruption" requirement: *Fraser* "did not conduct the 'substantial disruption' analysis . . . [of] *Tinker*"[182] and *Kuhlmeier* confirmed "that the rule of

173. Frederick, *supra* note 168.

174. Pepperdine University, *Law School News: Supreme Court Issues Decision in 'Bong Hits' Case*, http://law.pepperdine.edu/news-events/news/2007/06/courtdecision.htm (last visited Aug. 5, 2011).

175. *Morse*, 551 U.S. at 399.

176. Kizzia, *supra* note 161.

177. *Morse*, 551 U.S. at 400.

178. *Id.* at 401.

179. *Id.* at 400–01 (internal quotation marks omitted).

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

181. *Morse*, 551 U.S. at 405.

182. *Id*.

Tinker is not the only basis for restricting student speech."[183] Therefore, while the *Morse* Court depicted the banner as "school" speech, it effectively established that schools can restrict even *non*-school-sponsored speech without "substantial disruption."[184]

Morse left unclear what scrutiny level it applied, but it did announce three principles—two of deference to schools, and a third based on drug illegality. First, *Morse* extended the *Fraser*/*Kuhlmeier* rule that schools are specially speech-restricted institutions *beyond* school-sanctioned speech. "[I]t is enough to distill from *Fraser*" both that the *Tinker* disruption test need not apply and "that 'the constitutional rights of students . . . are not automatically coextensive with the rights of adults in other settings.' Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[185] Similarly, *Kuhlmeier*, though focused on school sponsorship of speech, "nevertheless . . . confirms . . . that schools may regulate some speech 'even though the government could not censor similar speech outside the school.'"[186]

Second, *Morse* allowed punishment of "cryptic" speech as long as it was "reasonable" for the school to think it unlawful advocacy: "Frederick's banner is cryptic," Chief Justice Roberts admitted, "offensive to some, perhaps amusing to others. To still others, it probably means nothing."[187] It sufficed that "Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one."[188] Where *Tinker* required the school to prove actually disruption, *Morse* required it to prove only the "reasonable[ness]" of viewing the speech as "promoting" some evil—regardless of whether the evil (drug use) occurred or was likely and regardless of whether students actually viewed the speech as promoting the evil.[189]

Third, the speech was about illegal drugs. The school argued "that Frederick's speech is proscribable because it is plainly 'offensive' as . . . in *Fraser*," but the Court said that it "stretches *Fraser* too far . . . to encompass any speech that could fit under some definition of 'offensive.'"[190] Rather, the speech was punishable because "deterring

183. *Id.* at 405–06.

184. *Id. Tinker* also allowed restriction of speech "colli[ding] with the rights of other students," but *Frederick* saw no "collision" arguments. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

185. *Morse*, 551 U.S. at 404–05 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)).

186. *Id.* at 405–06 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

187. *Id.* at 401.

188. *Id.*

189. *Id.*

190. *Id.* at 409.

drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest. Drug abuse can cause severe and permanent damage."[191] It cited legislative findings and various laws declaring "that part of a school's job is educating students about . . . drug use," and that "[t]housands of school boards . . . adopt[] policies . . . effectuating this message."[192] And "peer pressure is perhaps 'the single most important factor leading schoolchildren to take drugs,'" supporting proscription of Frederick's banner, as "speech celebrating illegal drug use at a school event."[193]

II. THE LIMITS OF SUPREME COURT DECISIONS: THE MURKY STATE OF SPEECH RIGHTS IN THE *TINKER*/*MORSE* MUDDLE AND THE CURIOUS FATES OF THE SPEECH PLAINTIFFS THEMSELVES

The school speech cases were major events. As Part I details, *Tinker* created a new right, while the three later decisions exemplified a historically significant shift of the Supreme Court from declaring new rights in the Warren Court era to progressively undercutting those rights in subsequent decades. As Part I also detailed, each case was a major social event, reflecting the social controversies of its era and drawing substantial attention from its community and the media.

But precisely because they were such legally and socially significant cases, the limits of the school speech cases powerfully illustrate the limits of even landmark Supreme Court decisions; each had less impact, on the law and on the parties, than is commonly understood.

Section II.A details how each case had a more modest impact on the state of the law than the prevailing narrative conveys. Subsection II.A.1 notes that because civil rights cases are unprofitable to litigate, *Tinker* never had the real-world impact that it had on the cold legal doctrine: censorship remained widespread and speech lawsuits remained rare. Subsection II.A.2 details that the opposite is true as well: schools' three post-*Tinker* victories were idiosyncratically fact-dependent wins that never gutted *Tinker* to the extent often depicted. *Tinker* never stopped emboldening students and never stopped yielding a notable record of lower court speech rights victories—contrary to the view of *Fraser*, *Kuhlmeier*, and *Morse* as the three-pronged end of student rights.

Section II.B then goes beyond the legal impact of each case to examine its human impact, finding an even more intriguing way the school speech cases show the limits of Supreme Court decisions: each Court decision had a quite limited impact on the student litigants themselves. Interviews with various student plaintiffs and their

191. *Id.* at 407 (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661 (1995)).

192. *Id.* at 408.

193. *Id*. (internal quotation marks omitted).

attorneys, as well as contemporary media coverage, show that whether each student felt vindicated bears remarkably little relationship to whether each actually won or lost at the Supreme Court. Some of those who lost, or never reached a verdict, feel the most like winners, to this day.

A. *The Limited Impact of the Court Decisions:* Tinker*'s Lack of Enforceability and the Later Cases Leaving* Tinker *Alive, Yielding Mixed Rulings and Legal Ambiguity*

Tinker was a bombshell; it vastly changed school speech law,[194] and scholars still study it and debate its meaning.[195] Post-*Morse*, debate has raged among the lower courts because the impact of *Morse* is clearly substantial, but unclear in scope. Without fully examining each question *Morse* raises, this Section surveys several major debates on *Morse*'s meaning, *Tinker*'s remaining vitality, and new speech controversies yet to be addressed.

1. *Tinker*'s Limited Enforceability, Leaving Schools Largely Free to Censor

Violations of student speech rights tend to go unlitigated. To litigators, "some types of civil rights litigation [are] less attractive than other types"[196]—and student speech cases fall squarely into the "less attractive" category. Damages for speech rights violations typically are modest because compensatory damages for any civil rights violation require proof of specific injury with admissible evidence;[197] courts will not presume damages from the mere fact of the violation.[198] Even where evidence establishes emotional or otherwise subjective injury, courts tend to limit damages for civil rights violations to four or five figures,[199]

194. *See, e.g.*, Richard L. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 568–69, 580 (1970) (calling *Tinker* a "notable departure from th[e] tradition of judicial timidity" that adopted a view of "education different from that traditionally expressed by American courts[,]" and that offered "none of the familiar rhetoric about the disciplinary purposes of education").

195. *See, e.g.*, Bowman, *supra* note 14.

196. Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 199 (1997).

197. Carey v. Piphus, 435 U.S. 247, 266 (1978).

198. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310–11 (1986).

199. *See, e.g.*, Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130 F.3d 349, 357–58 (8th Cir. 1997) (reducing plaintiff's award from $150,000 to $50,000 on evidence of emotional harm plus headaches, ulcers, and withdrawal from his wife as a result of discrimination); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 804–05, 809 (5th Cir. 1996) (upholding $7,500 award on for sexual harassment in the form of numerous comments on plaintiff's sexual activities and personal life, where plaintiff (with corroboration from co-worker) testified that she felt stressed, embarrassed, belittled, disgusted, hopeless, and stupid); McKinnon v. Kwong Wah

unless the plaintiff can present particularized evidence of significant emotional consequences, such as clinical depression shown by solid evidence, whether through a medical diagnosis or extensive lay witness corroboration.[200]

The only other monetary relief is the attorney's fee award to the plaintiff's attorney, pursuant to 42 U.S.C. § 1988(b), but various judicial decisions have diminished the size and certainty of such an award: decisions "permitting waivers of attorneys' fees as a condition of settlement";[201] decisions "eliminat[ing] contingent risk enhancement of fees";[202] and decisions denying a fee award when a plaintiff wins a pre-judgment settlement (rather than an actual verdict) providing much or even all of the relief sought.[203] In a review of case law combined with interviews of plaintiffs' civil rights attorneys, Julie Davies documented how limiting damages and fee awards "leads to undercompensation of plaintiffs' attorneys, and produces disincentives to represent plaintiffs in cases that lack 'personal injury'-type damages"[204]—such as student speech claims.

The fizzle of the *Tinker* case itself, the very case that raised the promise of student speech lawsuits, shows how even a successful claim

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Rest., 83 F.3d 498, 501, 506 (1st Cir. 1996) (affirming $2,500 in damages for similar claim); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215–16 (6th Cir. 1996) (upholding award of $50,000 for plaintiff terminated for contemplating an abortion, when witnesses testified plaintiff was upset and frightened after termination, and where plaintiff testified she suffered nightmares, weight loss during pregnancy, and nervousness: "plaintiffs can prove emotional injury by testimony without medical support. However, damages for mental and emotional distress will not be presumed, and must be proven by 'competent evidence'" (citations omitted)); Cowan v. Prudential Ins. Co. of Am., 852 F.2d 688, 690–91 (2d Cir. 1988) (awarding only $15,000 for race discrimination where plaintiff claiming emotional distress and humiliation but neither faced public humiliation nor sought counseling); Ramsey v. Am. Air Filter Co., 772 F.2d 1303, 1313 (7th Cir. 1985) (reducing race discrimination damages award from $75,000 to $35,000, despite evidence of mental anguish and humiliation, because no medical evidence showed treatment for depression or emotional distress).

200. Salinas v. O'Neill, 286 F.3d 827, 830, 832–33 (5th Cir. 2002) (allowing $150,000 award but reducing it from $300,000 when evidence showed plaintiff suffered high levels of paranoia about further retaliation by superiors, deteriorating relations with his family, and numerous physician visits); Kim v. Nash Finch Co., 123 F.3d 1046, 1065 (8th Cir. 1997) (upholding $100,000 award on claim of discriminatory denial of promotion and retaliation: where "[plaintiff], his wife and his son testified about the anxiety, sleeplessness, stress, depression, high blood pressure, headaches, and humiliation he suffered[,] . . . medical or other expert evidence was not required to prove emotional distress").

201. Davies, *supra* note 196, at 198 (citing Evans v. Jeff D., 475 U.S. 717 (1986) (allowing waivers of statutorily provided attorney's fees in settlements)).

202. *Id.* (citing City of Burlington v. Dague, 502 U.S. 107 (1992) (curtailing judicial discretion to award fee enhancements)).

203. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605–06 (2001).

204. Davies, *supra* note 196, at 200.

may reap little monetary reward—and even get dropped before a verdict. The *Tinker* Supreme Court decision just revived the dismissed claim, remanding it for further proceedings. Decades later, the ACLU attorney on the case did not remember whether any further proceedings occurred,[205] perhaps illustrating the limits of the ACLU's ability to represent students with speech cases. But the students' local Iowa counsel, Dan Johnston, did remember: "[t]here were no proceedings after the S[upreme] C[our]t decision," because by then the school ceased banning armbands, and the students had graduated.[206] With little left for which to sue, Johnston explained, they were "not particularly interested"[207] in continuing the case for relief they did not actually need.

With student speech rights claims unprofitable for lawyers to litigate, there is essentially no private bar of school speech lawyers. Claims do get litigated by pro bono lawyers, by functionally pro bono attorneys who accept a fee award but fully expect to litigate at a loss, and by attorneys at nonprofit entities like the ACLU and the Student Press Law Center (SPLC), the sole legal organization focused on student speech rights. Tellingly, the SPLC "gets several thousand complaints a year about censorship at high school [news]papers[,]" and its Executive Director, Frank D. LoMonte, believes that "[t]he vast majority of complaints are well-founded . . . . It's a pretty big step for a 16-year-old to call a lawyer and when they call it normally checks out."[208] But even those thousands of complaints likely are just the tip of the iceberg because "our experience is that the vast majority of high school students are too scared to complain and don't understand that they have rights," LoMonte elaborates; "if we take 1,000 complaints a year of censorship, the real number must be 10 times that."[209]

2. The Post-*Tinker* Court Decisions Leaving *Tinker* Alive and the Law Muddled: How Major Decisions Yield Less Change than Expected

To illustrate how *Fraser*, *Kuhlmeier*, and *Morse* did not truly eviscerate *Tinker*, this Subsection notes key ways that, even following *Morse*, interpretations vary widely on various fundamental issues of student speech rights: the extent to which schools are specially speech-restricted institutions, a point on which *Morse* substantially disagreed with *Tinker*; the continued vitality of the *Tinker* requirement of

205. E-mail from Melvin Wolf, Former ACLU Legal Director, to Scott A. Moss (June 29, 2010) (on file with author).

206. Interview with Dan Johnston (Aug. 6, 2010) (on file with author).

207. *Id.*

208. Tony Rogers, *Faculty Advisers Increasingly Face the Ax for Not Censoring High School Papers*, ABOUT.COM, http://journalism.about.com/od/schoolsinternships/a/studentcensorship.htm (last visited Sept. 16, 2011) (internal quotation marks omitted).

209. *Id*. (internal quotation marks omitted).

viewpoint-neutrality in speech restrictions, a requirement *Morse* arguably undercut; whether students' online speech is "school" speech such that schools can restrict it—a matter of growing lower court controversy that the Supreme Court has not yet addressed; and the extent to which student speech rights, once uniformly asserted by left-leaning teenagers against schools enforcing traditional values and discipline, will prove powerful for the new generation of younger conservative activists.

These unsettled issues the *Tinker*-to-*Morse* evolution raises are merely examples of an important broader point about how to view major Supreme Court decisions: when the Court issues what appears to be a major decision, commentators should be wary of declaring it a high-impact precedent sweepingly reshaping the legal landscape. Decisions that at first blush appear transformative may prove to leave open a range of key issues, illustrating the limits of even those Supreme Court decisions that appear to substantially alter existing legal principles.

a. Is School a Specially Speech-Restricted Institution?

Should speech be more limited in schools? Many think so. Professor Frederick Schauer criticizes the "presumption" that rights "do not vary substantially with institutional setting":[210] "[H]aving created the test for obscenity in the context of sales of printed materials by mail, the Court . . . appl[ies] the same line . . . to outdoor theaters, to dial-a-porn telephone services, to cable and satellite television, and to the Internet . . . ."[211] The Court is "institutionally oblivious"[212] in treating all speech the same, Schauer contends, "distort[ing] doctrine and underprotect[ing]" speech: "A Court that . . . must apply the same . . . grounds of offensive content to both broadcast television and Bob's XXX Adult Bookstore and Peepshow is, in reality, much more likely to allow less for Bob than it is to permit virtually everything for CBS during prime time[.]"[213]

Along these lines, Professor Paul Horwitz defends the speech choices of "First Amendment institutions," such as schools, libraries, and the press,[214] and Professor Joseph Blocher thinks a robust "marketplace of ideas" justifies schools' judgments that "academic

210. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1263 (2005).

211. *Id.* at 1261–62 (footnotes omitted).

212. *Id*. at 1264.

213. *Id*. at 1272–73.

214. Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 589 (2005); *see also* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

principles bar the presence of certain speakers."[215]

Others criticize such deference, including Justice Robert Jackson in an early school case: "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment . . . of this Court when liberty is infringed."[216] More recently, scholars such as Dean Erwin Chemerinsky argue that constitutional rights "apply least where they are needed the most" because of the Court's "great deference to institutions . . . such as prisons, the military, [and] schools," where individuals "have little, if any, protection."[217] Agreeing with Chemerinsky, I have argued that "[b]y dividing speech rights so starkly by institutional context, courts have not just recognized, but . . . overstated, the uniqueness of schools, workplaces, and prisons."[218] Of course, many on both sides might accept nuanced views like Blocher's: schools can restrict speech, "[b]ut in keeping with academia's marketplace-of-ideas-enhancing mission, these restrictions must . . . ultimately improve the market," not enforce orthodoxy.[219] And deference to schools pales in comparison to deference to prisons, where speech rights are far more diminished.[220]

This debate is not just academic. While speech in public by fringe radicals dominated the early case law,[221] cases since address schools, prisons,[222] prosecutor's offices,[223] and websites.[224]

Tinker rejected deference; requiring "substantial disruption" to restrict speech,[225] it paralleled *Brandenburg*'s requiring imminent, likely harm.[226] True, *Tinker* omitted *Brandenburg*'s rule that restricted speech must be intended ("directed") to produce harm.[227] But *Tinker* did not aim to lower speech rights in schools: it famously declared

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215. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 863 (2008).

216. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639–40 (1943).

217. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441 (1999).

218. Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1640 (2007).

219. Blocher, *supra* note 215, at 869.

220. Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 80–90 (2010) (documenting different judicial scrutiny); Moss, *supra* note 218, at 1641–42 (same).

221. *E.g.*, Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (discussing "a silly leaflet by an unknown man"); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 93 (1972) ("[B]y himself, Mosley would walk the public sidewalk . . . carrying a sign[.]").

222. Turner v. Safley, 482 U.S. 78, 81 (1987).

223. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

224. *See infra* Subsection II.A.2.c.

225. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 514 (1969).

226. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

227. *Id.*

traditional speech rights within "the schoolhouse gate"; it railed against schools becoming "enclaves of totalitarianism";[228] and it closely scrutinized evidence of harm. Thus "*Tinker* [was] the 'inside' speech correlate to the 'outside' speech principle of *Brandenburg*[.]"[229]

Despite *Tinker*, "later school speech cases—all of which have upheld restrictions . . . —have demonstrated an increasing institutional awareness."[230] Citing *Fraser* and *Kuhlmeier*, *Morse* held that "rights of students in public school are not automatically coextensive with the rights of adults in other settings"[231] and that "schools may regulate some speech 'even though the government could not censor similar speech outside[.]'"[232] Yet *Fraser* and *Kuhlmeier* turned heavily on the schools' role in publishing the speech; *Morse* held that "*Kuhlmeier* does not control . . . because no one would reasonably believe that Frederick's banner bore the school's imprimatur."[233] *Morse* thus was the first non-school-sponsorship case declaring school a speech-restricted institution; it paralleled the *Tinker* district court's deferential declaration that "[u]nless the actions of school officials . . . are unreasonable, the Courts should not interfere."[234]

Morse sided with the institutionalists, but to what extent? The scope of school power remains unclear in various respects, including two surveyed below: schools declaring certain viewpoints off-limits and students' online speech.

b. Whither Viewpoint Neutrality: To What Extent Can Schools "Take Sides," at Least on Cases Implicating Safety Concerns?

The *Tinker* armband ban was viewpoint-discriminatory; principals focused their crackdown on antiwar speech in particular, and they left other controversial symbolic speech untouched. *Fraser* and *Kuhlmeier* excluded particular content—sexual imagery (*Fraser*) and intimate family details (*Kuhlmeier*)—but did not address discrimination by viewpoint; the *Kuhlmeier* principal excluded by content (private family and sexual matters) but not by viewpoint within that content (such as by

228. *Tinker*, 393 U.S. at 506, 511.

229. Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the* Tinker *Decision*, 58 AM. U. L. REV. 1193, 1195 (2009); Schauer, *supra* note 210, at 1263 (reading *Tinker* as reaffirming that speech rights do not vary substantially by institution). *But see* Steven Penaro, *Reconciling* Morse *with* Brandenburg, 77 FORDHAM L. REV. 251, 252 (2008) ("*Brandenburg* has never been used . . . [for] school speech.").

230. Blocher, *supra* note 215, at 873.

231. Morse v. Frederick, 551 U.S. 393, 404–05 (2007) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)) (internal quotation marks omitted).

232. *Id.* at 405–06 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

233. *Id*. at 405.

234. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966).

excluding an article sympathetic to teen mothers while still publishing another taking a critical view).

Morse newly allowed punishment "squarely and explicitly based on viewpoint," Professor Douglas Laycock observes: "The school claimed power to punish speech it disagreed with . . . because [the] banner 'expressed a positive sentiment about marijuana[.]'"[235] It allowed viewpoint discrimination even for speech "*not* bear[ing] the school's imprimatur," Professor Emily Gold Waldman further notes.[236] More colorfully, Professor Clay Calvert blasts the broader readings of the authority *Morse* granted schools as "a judicial joyride down a slippery slope of censorship[.]"[237]

Several academics, though, read *Morse* narrowly and would still disallow schools from restricting particular ideas. Blocher calls the decision "quite narrow" because it "[i]nvok[ed] the importance of student safety" to justify restricting "speech that reasonably appears to encourage illegal drug use," without touching more issue-oriented speech such as "advocating decriminalization, or opposing the war on drugs, or any other social or political commentary."[238] Laycock similarly warns against reading *Morse* as permitting all viewpoint discrimination: "this is a dangerous doctrine, requiring careful definition. Schools no doubt have broader power . . . to suppress viewpoints. . . . [T]here are some ideas on which the school can suppress dissent. But there cannot be many."[239] Arguably *Morse* itself rejects broad discrimination, rebuffing arguments for restricting any "offensive" speech as "stretch[ing] *Fraser* too far" because "much political and religious speech . . . [is] offensive to some."[240] Concurring, Justice Samuel Alito warned that *Morse* "provides no support" for restricting speech "on any political or social issue"[241] and that restrictions must "be based on some special characteristic of the school setting";[242] Alito's concurrence drew the fourth and fifth votes on the

235. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 116 (2008).

236. Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 111 (2008).

237. Clay Calvert, *Misuse and Abuse of* Morse v. Frederick *by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 5 (2008).

238. Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 47 (2007) ("The actual holding of the case was quite narrow. Invoking the importance of student safety, it upheld schools' power to limit speech that reasonably appears to encourage illegal drug use, as opposed to advocating decriminalization, or opposing the war on drugs, or any other social or political commentary.").

239. Laycock, *supra* note 235, at 116, 120.

240. Morse v. Frederick, 551 U.S. 393, 409 (2007).

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

242. *Id.* at 424.

Court, so some circuits view it as controlling,[243] but others do not.[244] Paralleling Alito's cautionary note, Professor John E. Taylor argues for allowing viewpoint discrimination only where schools act not to suppress views, but in "narrowly tailored" efforts to prevent harms specific to speech with that viewpoint.[245] Waldman suggests another limit on viewpoint discrimination: "the stronger the perception of school imprimatur" over speech, "the more latitude . . . [for] viewpoint-based restrictions";[246] the banner lacked official backing but arguably reflected on the school that authorized the across-the-street outing.

Several lower courts have rejected the notion that *Morse* authorizes broad viewpoint discrimination, instead viewing schools' post-*Morse* powers as extending only to speech advocating illegal drugs, threatening serious violence, or otherwise posing the "substantial disruption" risk that *Tinker* required. *Ponce v. Socorro Independent School District* viewed *Morse* as narrowly "focused on the particular harm to students of speech advocating drug use" or other similarly weighty illegality; "speech advocating a harm that is demonstrably grave . . . to the physical safety of students . . . is unprotected."[247] *Ponce* ultimately allowed punishment of the student, but the extremity of the speech—a high school student's threatening diary—made the case no real defeat for student rights:

> [The] notebook diary . . . detailed the "author's" creation of a pseudo-Nazi [student] group[,] . . . [incidents] in which the author ordered his group "to brutally injure two homosexuals and seven colored" people and another in which the author describes punishing another student by setting his house on fire and "brutally murder[ing]" his dog. . . . [It] details the group's plan to commit a "[C]olumbine shooting" attack on Montwood High . . . . At several points . . . , the author expresses the feeling that his "anger has the best of [him]" and that "it will get to the point where [he] will no longer have control" . . . [and] that this outburst will occur on the day that his close friends at

243. *See, e.g.*, Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 508 n.8 (5th Cir. 2009) ("Alito's concurrence is 'controlling[.]'"); Barr v. Lafon, 538 F.3d 554, 564 (6th Cir. 2008) (referencing Alito's concurrence in its discussion of the *Morse* holding).

244. *See* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 673 (7th Cir. 2008) (finding that Alito's concurrence is not controlling).

245. John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 578–79 (2009).

246. Waldman, *supra* note 236, at 112.

247. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769–70 (5th Cir. 2007).

the school graduate.[248]

However, *Cuff ex rel. B.C. v. Valley Central School District*[249] held that even for speech advocating serious illegality, and thus falling within even a *narrow* definition of *Morse*, schools must still satisfy the *Tinker* "material and substantial disruption" test. The student in *Cuff* "was suspended for six days after submitting an alleged threat of violence to his teacher during an in-class assignment"[250]—specifically, he wrote "'blow up the school with all the teachers in it.'"[251] The district court dismissed the student's lawsuit challenging his suspension, deeming such a threat unprotected as a matter of law.[252] But the U.S. Court of Appeals for the Second Circuit reversed, finding plausible a claim that punishment of the speech was improper because no real threat existed: the student was ten years old, with no "history that would suggest a violent tendency,"[253] and his supposed threat came when his teacher "asked her students to fill in a picture of an astronaut with statements about their personalities,"[254] and in response, the student—"in crayon"[255]—"listed his birthday, his teacher's name, and his favorite sports," in addition to his troubling "blow up" non sequitur.[256]

In short, the cases reading *Morse* narrowly still require the *Tinker* showing that the advocacy of illegality poses a real threat; to be punishable, the threat must be more like the *Ponce* high schooler's private diary detailing a credible plan for a shooting massacre, and less like the *Cuff* ten-year-old's crayon-scribbled free association of favorite sports, his birthday, and "blow up the school." But *Morse* itself shows the line is blurry: it is not clear that Joe Frederick's absurdist banner threatened to produce the illegality it arguably advocated ("BONG HiTS") much more meaningfully than the *Cuff* child's "blow up the school" writing. True, a ten-year-old probably lacked bomb-making or bomb-procurement abilities, so no harm was imminent; at most, the school could have thought that the statement showed the child was disturbed enough to pose a risk of future harm. But with no evidence Frederick himself was taking or dealing drugs, neither was his banner

248. *Id.* at 766. Ponce's loss seemed preordained once the first sentence of the court's opinion declared, "This appeal presents the question of whether student speech that threatens a Columbine-style attack on a school is protected by the First Amendment." *Id.*

249. 341 F. App'x 692 (2d Cir. 2009).

250. *Id*. at 693.

251. Cuff *ex rel*. B.C. v. Valley Cent. Sch. Dist., 559 F. Supp. 2d 415, 417 (S.D.N.Y. 2008).

252. *Id*. at 419–22.

253. *Cuff*, 341 F. App'x at 693.

254. *Cuff*, 559 F. Supp. 2d at 417.

255. *Cuff*, 341 F. App'x at 693.

256. *Cuff*, 559 F. Supp. 2d at 417.

likely to induce imminent illegality.

Contrary to the cases deeming *Morse* to authorize only drugs-and-violence crackdowns, other cases allow schools to target views threatening a broader array of harms than actual illegality. For example, *Harper v. Poway Unified School District* interpreted *Morse* as sweepingly allowing speech restrictions "to protect students . . . from degrading acts or expressions that promote injury to the student's physical, emotional or psychological well-being and development."[257] *Harper* ruled against a student punished for violating a school "hate behavior" policy with a religiously antihomosexuality t-shirt stating, "Homosexuality is shameful. . . . Our school has embraced what God has condemned."[258] *Barr v. Lafon*[259] similarly allowed a ban on confederate flags, but only upon a *Tinker* "substantial disruption" analysis,[260] and upon declaring *Morse* "a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school 'reasonably view[s] as promoting illegal drug use.'"[261] With the cases all over the map on when schools can target only certain viewpoints, the impact of *Morse* "on questions not involving illegal[lity] . . . remains to be seen."[262]

c. Is Online Speech "School Speech" at All?

Morse broadly defined what is sufficiently "school speech" to face restriction. But *Morse*'s setting—a banner at a public event—resembled twentieth century protest controversies more than the increasingly typical twenty-first century controversy: online speech. Are students' school-related online postings from home punishable?

In two post-*Morse* cases, the Second Circuit let schools punish student online speech; in two surprising twists, it applied the *Tinker* "substantial disruption" test, but tweaked the test to be more school-deferential under *Morse*. In *Wisniewski v. Board of Education*,[263] a student's instant messenger icon read, "Kill Mr. VanderMolen"—an English teacher—and depicted "a pistol firing a bullet at a person's head . . . [with] dots representing splattered blood."[264] In *Doninger v.*

257. 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) (vacating injunctive claims as moot; otherwise affirming judgment for defendants).

258. *Harper*, 545 F. Supp. 2d at 1075, 1081 (internal quotation marks omitted).

259. 538 F.3d 554 (6th Cir. 2008).

260. *Id.* at 565–66 (undertaking *Tinker* "substantial disruption" analysis).

261. *Id*. at 564 (quoting Morse v. Frederick, 551 U.S. 393, 409 (2007)).

262. Taylor, *supra* note 245, at 586 n.80.

263. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).

264. *Id.* at 36.

Niehoff,[265] a student blog complained that a school activity was cancelled by "douchebags in central office," and urged student complaints to "piss [the superintendent] off more."[266] Surprisingly, given that *Morse* freed courts from always having to apply *Tinker*'s "substantial disruption" test, *Wisniewski* declared *Tinker* "the appropriate First Amendment standard."[267] Yet both Second Circuit cases thought the speech threatened "foreseeable risk . . . [of] 'materially and substantially disrupt[ing] the [school's] work and discipline.'"[268]

Yet where *Tinker* closely scrutinized disruption evidence, these post-*Morse* decisions defer to schools on likelihood of disruption. *Wisniewski* declared, "the icon, once made known to the teacher and . . . officials, would foreseeably create a risk of substantial disruption"—but the Court offered no explanation and no evidence of that risk.[269] It said only that the image "distressed" the teacher, but a psychological exam found the student "had no violent intent, posed no actual threat, and made the icon as a joke."[270] *Doninger* asserted that calling officials "douchebags" and urging complaints about an event threatened substantial disruption because "students were 'all riled up' and . . . a sit-in was threatened."[271] But the First Amendment typically does not allow punishing speakers for calling officials names and criticizing their decisions just because listeners may commit illegality that the speaker never urged; officials' duty "is to restrain the mob" and "preserve the opportunity of an individual to speak."[272]

The Second Circuit muddied the waters further by considering a factor courts typically do not apply: the magnitude of punishment. The *Doninger* court said it had "no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns."[273] Deeming speech protected against some punishments but not others is a novel idea that, if applied broadly, would substantially alter much speech law.

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265. 527 F.3d 41 (2d Cir. 2008).

266. *Id.* at 45.

267. *Wisniewski*, 494 F.3d at 38; *see also Doninger*, 527 F.3d at 50 (declining to decide whether *Fraser* or other precedent applies because the school, "as in *Wisniewski*," satisfied *Tinker*).

268. *Wisniewski*, 494 F.3d at 38–39 (quoting Morse v. Frederick, 551 U.S. 393, 403 (2007)).

269. *Id*. at 40.

270. *Id.* at 36.

271. *Doninger*, 527 F.3d at 51.

272. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416–17 (1986) (citing Feiner v. New York, 340 U.S. 315, 327 (1951) (Black, J., dissenting) (dissenting from the ruling that the crowd's angry response justified the speaker's arrest)).

273. *Doninger*, 527 F.3d at 53.

The Third Circuit applied a similar standard but held online speech protected in *Layshock v. Hermitage School District*.[274] Layshock posted a fake MySpace profile of his principal, calling him a marijuana user, a keg thief, a member of "Steroids International," a "big whore," and a "big fag"; this inspired other offensive copycats.[275] Though students accessed the page not only from home but also from school computers, the court would "not allow the School District to stretch its authority so far that it reaches . . . [students'] home[s]."[276] Finding insufficient evidence of disruption under *Tinker*, or school sponsorship under *Morse*, *Layshock* viewed *Morse* as a slight expansion of controllable "school sponsored" speech, encompassing any "school sponsored event."[277] Absent sponsorship, *Tinker* requires real evidence of disruption, leaving the speech protected even though it was more offensive than *Doninger*'s "douchebag."

Evans v. Bayer similarly deemed protected a student's Facebook group, "Ms. Sarah Phelps is the worst teacher I've ever met": "To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred."[278] Calling a teacher "insane" and declaring "hatred" outstrips "douchebag," but *Evans* protected the speech "made off-campus, never accessed on-campus, and . . . no longer accessible" when the school found it.[279] Citing *Tinker*, *Evans* held "key" whether officials had "a well-founded belief that a 'substantial' disruption will occur."[280] While *Morse* restricted "speech at off-campus, school sponsored activities,"[281] *Evans* reasoned that applying *Morse* "to the entire internet . . . [is] too far reaching."[282] This fear parallels Professor Sonja West's concern that *Morse* "could encourage school[s] . . . to sanction all sorts of off-campus community events, thereby aggrandizing government power" over students' speech.[283]

d. The Ideological Flip: How Powerful Will Speech Rights Prove for Conservative Causes?

Cases from *Tinker* to *Morse* pitted liberal or norm-challenging

274. 593 F.3d 249 (3d Cir. 2010).

275. *Id.* at 252–53.

276. *Id.* at 260.

277. *Id.* at 251.

278. Evans v. Bayer, 684 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010) (internal quotation marks omitted).

279. *Id*. at 1372.

280. *Id*. at 1373.

281. *Id*. at 1370.

282. *Id*. at 1374.

283. Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 LEWIS & CLARK L. REV. 27, 29 (2008).

students against officials protecting traditional morality and education. Today, the ideological waters of speech rights and speech restrictions are muddier, thanks to the rise of both conservative activism and online speech that the left, rather than the right, aims to restrict.

Student activists in the 1960s typically were antiwar liberals, but student activists citing *Tinker* now include pro-war conservatives, as in *Bowler v. Town of Hudson*.[284] *Bowler* concerned a conservative poster at Hudson High School (HHS), in the small town of Hudson, Massachusetts, which "became the subject of some notoriety, both locally and nationally."[285] Christopher Bowler and other conservative students "believed that faculty, administration, and fellow students . . . were prejudiced against conservative political views, and that the school lacked a forum for . . . their beliefs";[286] he thought "teachers often only presented a left-leaning viewpoint when tackling issues such as the Iraq war."[287] They formed the "Conservative Club" as "a venue for 'pro-American, pro-conservative dialogue and speech.'"[288] HHS Principal Stapelfeld told Bowler "he was glad they were 'getting involved politically,' and helped the Club find an advisor."[289] But Bowler perceived hostility: "teachers telling the club advisor . . . he would 'spread hate around the school, promote violence, be anti-gay;'"[290] then HHS taking down Club posters. The posters listed the website address of the "High School Conservative Clubs of America," which linked to another site "hosting graphic video footage of hostage beheadings in Iraq and Afghanistan."[291] The site displayed "a prominent banner entitled 'Islam: A Religion of Peace?' . . . [with] a picture of a blindfolded hostage kneeling in front of three masked and armed terrorists . . . [and] realtime videos of beheadings linked underneath . . . with a warning that the 'following videos are extreme [sic] graphic.'"[292] "[A]ll recognized student clubs" put up posters,[293] but the school disallowed Bowler's because of the links to video of "hooded executioners; the sounds of the victim as he was killed; . . . blood [and] close-up images of the fatal wound, the severed head and the lifeless

284. 514 F. Supp. 2d 168 (D. Mass. 2007).

285. *Id.* at 174. *E.g.*, John Dyer, *Lawsuit Trial Date*, BOS. GLOBE, Dec. 27, 2007; Jennifer Rosinski, *Hudson Asks Judge to Dismiss Student's Lawsuit*, BOS. GLOBE, June 21, 2007; Peter Schworm, *Conservative Teens Say School is Biased*, BOS. GLOBE, Feb. 10, 2005.

286. *Bowler*, 514 F. Supp. 2d at 172.

287. Dan McDonald, *Debate Continues after Judge Rules against Hudson High*, METROWEST DAILY NEWS, Oct. 7, 2007.

288. *Bowler*, 514 F. Supp. 2d at 172.

289. *Id.*

290. *Id.* at 173.

291. *Id.* at 171, 172.

292. *Id.* at 173. The website, www.hscca.org, is now defunct.

293. *Id.*

body."[294] Bowler countered that HHS discriminated in restricting violent footage, having "shown the films *Fahrenheit 9/11* and *Schindler's List*, both of which show graphic violence."[295] Bowler thought the real reason for the poster removal was "to censor . . . [its] political views"[296] and retaliate against Bowler for posting on the Club website "articles critical of . . . a liberal bias that had permeated the school's curriculum."[297]

Bowler denied the school summary judgment but not just by deeming trial factfinding necessary; it paralleled *Tinker* in repeatedly using the charged word "censorship" to describe the poster removal—and in rejecting the school's arguments. "Fear of disruption" was insufficient because "under *Tinker*, school officials must produce some *evidence* that a restriction 'is necessary to avoid material or substantial interference with schoolwork or discipline.'"[298] Disruption is a "narrow" ground for restriction, and the school presented little evidence, so "[t]he risk that student counseling may be required, or the likelihood of unplanned classroom discussions, does not rise to the level of a substantial and material disruption comprehended by *Tinker*."[299] Neither did *Fraser* support deeming the posters "plainly offensive": someone viewing the videos had to "access the website[,] . . . navigate past an express warning, and . . . affirmatively click on a link to the videos."[300] Students thus "were not a 'captive audience,'" distinguishing *Fraser*;[301] and "[w]hen students are exposed to speech only . . . [by] voluntary choice, the speaker has not invaded the rights of others," distinguishing *Tinker*'s rights-of-others basis for restriction.[302] And *Morse* supported restricting only pro-drug speech, *Bowler* held. Though just a district court case, *Bowler* illustrates how schools' three post-*Tinker* Supreme Court victories leave intact the *Tinker* holding that schools cannot discriminate against antiwar speech—or, here, pro-war speech by Christopher Bowler, who is both war protester John Tinker's heir and his ideological opposite.[303]

More broadly, since the *Tinker*-to-*Hazelwood* era, there has been a

294. *Id.*

295. *Id.* at 175.

296. *Id.* at 172.

297. McDonald, *supra* note 287.

298. *Bowler*, 514 F. Supp. 2d at 178 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

299. *Id.* at 178.

300. *Id.* at 177–78 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683) (internal quotation marks omitted).

301. *Id.* at 178 (quoting *Fraser*, 478 U.S. at 684).

302. *Id*.

303. *Id.* at 176–77 (reaffirming the rule against viewpoint discrimination and interpreting *Morse* as limited to pro-drug speech).

new crop of conservative activists pressing not only their rights to political advocacy (as in *Bowler*) but also their rights to religious, usually Christian, public expression. Illustrating how student speech rights can overlap with the goal of allowing more religious expression in governmental settings, student speech rights, once the province of hippies and rebels, have found a powerful advocate in Jay Sekulow, chief counsel for the American Center for Law and Justice (ACLJ), who has argued at the Supreme Court for school prayer,[304] religious displays on public lands,[305] and public scholarship availability for theology students.[306] In a law review article that begins with a ringing quote from *Tinker*, Sekulow argues "for broad First Amendment protection for 'controversial' religious and pro-life student expression," on the premise that "[t]he vast majority of religious and pro-life clothing is no more likely to create an actual disturbance that substantially disrupts school functions than a peace armband worn during Vietnam."[307]

Thus, whereas the prior generation of values-focused conservatives pressed for more school authority to restrict impertinent student speech, Sekulow goes as far as "encouraging lower courts to follow the reasoning of the more speech-protective cases whenever possible."[308] Sekulow's Christian conservative argument for broad student speech rights may ring true with the new crop of young conservative political and religious activists, but it shows how behind the times the conservative school speech advocacy at the Supreme Court has been. *Morse* school attorney Kenneth Starr blasts *Tinker* for having "departed from the traditional" view of schools as sources of "order, civility, and the inculcation of virtue";[309] Justice Clarence Thomas similarly wrote in *Morse* that the First Amendment should "not protect student speech in public schools" at all, because schools exist to "instill[] 'a core of common values' in students and [teach] them self-control."[310]

Conservative activists are not the only ones who have changed since the *Tinker*-to-*Hazelwood* era; liberal perspectives on harmful speech have also substantially shifted. In contrast to the free speech fundamentalism of the 1960s, today's left presses for restrictions on, among other speech, "cyberbullying"—that is, online ridicule and insulting of classmates. While most cyberbullying originates on home

304. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).

305. Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

306. Locke v. Davey, 540 U.S. 712, 715 (2004).

307. Jay Alan Sekulow & Erik M. Zimmerman, Tinker *at Forty: Defending the Right of High School Students to Wear "Controversial" Religious and Pro-Life Clothing*, 58 AM. U. L. REV. 1243, 1245 (2009).

308. *Id*. at 1246.

309. Starr, *supra* note 13, at 662.

310. Morse v. Frederick, 551 U.S. 393, 410, 411 (2007) (Thomas, J., concurring) (citation omitted).

computers, effects are "felt every day within the schoolhouse"[311]—the sort of outside speech with inside effects with which courts struggle. Restrictions on cyberbullying respond to calls by Professor Danielle Keats Citron and others for "cyber civil rights" efforts against online harassment: "On social networking sites [and] blogs, . . . groups publish lies and doctored photographs of vulnerable individuals. They threaten rape and . . . violence . . . overwhelmingly target[ing] . . . women[,] . . . people of color, religious minorities, gays, and lesbians. . . . [C]yber civil rights advocates must overcome the free speech argument asserted by online abusers."[312]

In short, most mid-twentieth century cases were law-and-order crackdowns on liberals and radicals, but since the late twentieth century, many equality-promoting and offense-avoiding speech restrictions draw liberal support and conservative opposition: liability for discriminatory harassment;[313] hate crime penalties;[314] and corporate political speech limits.[315] Professor Jack Balkin makes this point colorfully with a tongue-in-cheek quiz:

> What do the Klan, conservative PACs, R.J. Reynolds Tobacco, and the conglomerate that owns the holding company that owns the manufacturer of your favorite brand of toothpaste all have in common? They can all justify their activities in the name of the first amendment. What was sauce for the liberal goose increasingly has become sauce for the more conservative gander.[316]

Given the recognized ideological indeterminacy of speech rights—protecting not only left against right, but also right against left—it is odd that, at the Supreme Court, the school speech battle lines have remained so ideologically drawn: edgy liberal speech against moralistic restrictions pressed by conservative legal establishment figures from Kenneth Starr[317] to Clarence Thomas.[318] In this light, *Morse* was an anachronism, an old-style case of a student who was half *Tinker*-style 1960s rebel, half *Fraser*-style 1980s smart-aleck. Cases of pro-war and evangelical Christian activists, already beginning to filter through the

311. Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 258 (2008).

312. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64–67 (2009).

313. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (criticizing such liability).

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

315. Citizens United v. FEC, 130 S. Ct. 876 (2010).

316. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384.

317. *See supra* text accompanying note 309.

318. *See supra* note 310 and accompanying text.

lower courts but not yet the subject of any Supreme Court decision, may change the ideological lines of the entire debate.

B. *The Limited Impact of the Supreme Court Rulings on the Parties' Lives and Causes: What Did the Cases Mean to Each Student Speech Plaintiff?*

Set aside what these cases meant for the law; what did they mean for the *plaintiffs*, the real people claiming constitutional injuries? The school speech plaintiffs were so young compared to most litigants; looking back, do they stand by their actions, or do they view their speech—antiwar, sexually explicit, drug-related—as youthful idealism or petulance? Or is it that maybe some of the speech was never really about the students?

The *Tinker* school district argued that the parental involvement betrayed that counterculture pacifists like Reverend Tinker were just "infiltrat[ing]" schools with "propaganda."[319] The students responded that they acted on their own "personal concern about the war" even if that concern "reflected the religious, ethical and moral environment in which they were raised."[320] But children's political views notoriously evolve as they age; do lawsuits really offer students vindication, or do they just entangle courts in squabbles youths soon outgrow?

The plaintiffs in the four major student speech cases are a striking mix. Some remained activists, while others became largely apolitical; and for some more than others, the litigation remained a source of identity. And of the three who lost at the Court, only one truly felt defeated; others found vindication from less famous litigation events, or from non-litigation victories. But all remain proud of their speech cases.

1. The *Tinker* Plaintiffs: Moving On, but to Different Degrees

The sole school speech plaintiffs to win at the Supreme Court, the *Tinker* plaintiffs never actually won their lawsuit—a fact oddly absent from the decades of writings on *Tinker*. The Supreme Court just reversed a pretrial dismissal and remanded for trial, or perhaps further pretrial proceedings. But four decades later, they were unsure of the status of the $1 nominal damages their lawsuit sought. They still "joke about 'when it does show up,'" John said.[321] "If anyone got the $1.00," Chris Eckhardt mused, "maybe it was Dan," their lawyer Dan Johnston.[322] But Mary Beth Tinker recalled that somehow there never was any trial after the big Supreme Court victory reviving the claim,

319. Brief for Respondents, *supra* note 37, at *18–19.
320. Brief for Petitioners, *supra* note 35, at *3.
321. Telephone Interview with John Tinker (Aug. 6, 2010).
322. Interview with Christopher Eckhardt (July 5, 2010) (on file with author).

and attorney Johnston clarified that "[t]here were no proceedings after the S.Ct. [sic] decision" for very practical reasons: "I was not particularly interested in rubbing the Trial Judge's nose in it," and "the defendants complied" with the ruling disallowing their armband ban.[323] The plaintiffs agree that it would have been pointless to litigate further, against a school they had since left, after their precedent-setting Supreme Court victory. "[T]he change in the climate of the public schools after the ruling . . . was the most significant thing," Mary Beth explained.[324]

When told he technically never won the suit—in this author's interview with him—John Tinker laughed and said, over four decades after his case, "I never thought of that!"[325] But he expressed the same sentiment as his sister: they won the battle that counted.[326]

The three plaintiffs have led very different lives since their case; all remained activists, but some in a more mainstream way than others. Christopher Eckhardt has had an eclectic range of undertakings, but a common thread is his focus on issue debate and children's welfare. After selling insurance for a time, he started a small newspaper called "Pax Today," then moved to Canada for a job assessing children in maximum security correctional facilities.[327] Returning to Iowa, he became a child-care coordinator at Iowa Children and Family Services, hosted a cable talk show called "Eckhardt's Enquiry," and was a family crisis mediator.[328] Moving to Florida to care for his parents, he worked in child support collections for the state and earned a political science degree.[329] Most recently, he is writing and distributing online a novel, *The Baker Act Conspiracy*. Based on a true story, it details one man's crusade against medical abuse and financial corruption at a now-closed Florida psychiatric hospital where Eckhardt worked in the 1990s.[330] He still takes pride in his role in "setting the precedent for [s]tudent [r]ights."[331]

John Tinker, also proud, called the lawsuit "very fulfilling" in a 2005

323. Interview with Dan Johnston, *supra* note 206.

324. E-mail from Mary Beth Tinker to Scott A. Moss (July 5, 2010) (on file with author).

325. Interview with John Tinker, *supra* note 321.

326. *Id.*

327. *Biography of Christopher Eckhardt*, AM. BAR ASS'N DIVISION FOR PUB. EDUC., http://abapubliceducation.org/publiced/lawday/tinker/chrisbio.html (last visited Sept. 16, 2011).

328. *Id*.

329. *Id*.

330. E-mail from Christopher Eckhardt to Scott A. Moss (Aug. 7, 2010) (on file with author); *see also* THE BAKER ACT CONSPIRACY, http://www.thebakeractconspiracy.com (last visited Sept. 16, 2011).

331. Christopher Eckhardt, Tinker vs. Des Moines*: The True Story*, KNOL (Jul. 24, 2008, 7:00 AM), http://knol.google.com/k/tinker-vs-des-moines#.

college speech with Mary Beth.[332] But more than his co-plaintiffs, Tinker has continued to walk a nontraditional path. He dropped out of the University of Iowa, claiming disillusionment with society during the Vietnam War, and "moved into a small truck to minimize his living expenses."[333] He worked on a shrimp boat, then as a bus driver, then in various electronics- and computer-related jobs, such as radio station engineer, proprietor of an electronics store called "Inventors' Supply," and then self-taught computer programmer.[334] Eventually, he "bought a large school building" in small-town Fayette, Missouri, and "turn[ed] it into his home,"[335] because he wanted space to store his collected inventor supplies, historical papers, and family records, including records of his mother's activism in El Salvador and elsewhere.[336] He reports his avocation as "social observer" supporting progressive causes, including Central American relief efforts in Nicaragua in the 1980s and the Zapatista uprising in Chiapas in the 1990s.[337] Since 2007, he has blogged political polemics against, for example, a court decision upholding school uniform rules;[338] "collusion" between House Speaker Nancy Pelosi and President George W. Bush to conceal torture;[339] and "abuses the capitalists have visited upon the socialists" generally.[340] With antimilitarism his lifelong focus, Tinker saw speech rights as "a secondary matter. I was mostly interested in . . . the war. Freedom of speech was a tool, not the message."[341] But he does see a link between his speech battle and his antiwar cause: "I see the imperial project as behind the repression of expression," he still argues, believing "authoritarian" forces are "clamping down on expressive behavior" to educate only worker "drones" who do not think for themselves.[342]

Mary Beth Tinker has remained politically active, but in a more mainstream way than John, more youth-focused than broadly

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332. Amy Klein, *First Amendment Advocates Speak About Famous Law Case*, IOWA STATE DAILY (Apr. 14, 2005, 12:00 AM), http://www.iowastatedaily.com/news/article_dfdf36ca-7ec5-5d8c-b0e9-ba595e749722.html.

333. *Biography of John Tinker*, AM. BAR ASS'N DIVISION FOR PUB. EDUC., http://abapubliceducation.org/publiced/lawday/tinker/johnbio.html (last visited Sept. 16, 2011).

334. *Id*.

335. *Id*.

336. Interview with John Tinker, *supra* note 321.

337. *Biography of John Tinker*, *supra* note 333.

338. John Tinker, *Ninth Circuit Panel Decision in Favor of School Uniforms*, JOHNTINKER.COM BLOG (May 20, 2008, 10:16 PM), http://johntinker.com/2008/05/20/ninth-circuit-panel-decision-in-favor-of-school-uniforms/.

339. John Tinker, *Nancy Pelosi and Torture*, JOHNTINKER.COM BLOG (May 8, 2009, 8:27 PM) http://johntinker.com/2009/05/08/nancy-pelosi-and-torture/.

340. John Tinker, *Another Other Boondoggle*, JOHNTINKER.COM BLOG (Sept. 19, 2008, 11:01 AM), http://johntinker.com/2008/09/19/another-other-boondoggle/.

341. John Tinker, *supra* note 47.

342. Interview with John Tinker, *supra* note 321.

antigovernment. The litigation was more sedate for her because she moved to St. Louis before the Supreme Court decision; her new school "did not really give it much attention."[343] She became a nurse-practitioner, mostly in pediatrics, and remained politically active,[344] taking on speaking engagements addressing "students and others throughout the country about the rights of young people."[345] "I still work as a nurse," she reported in 2010, "but now I spend most of my time on civic education and students' rights."[346]

2. Fraser: Losing at the Court, but Feeling Victorious

Matt Fraser felt like a winner. His speech worked: the candidate for whom he advocated, Jeff Kuhlman, overwhelmingly won the election.[347] And despite losing at the Supreme Court, Fraser was the only one of the school speech plaintiffs to win a District Court preliminary injunction—which cleared Fraser's record and reinstated his elected role as a graduation speaker.[348] A perfect example of how appellate reversals of fortune may do little for the parties, the Bethel School District's Supreme Court victory likely rang hollow—and came too late to undercut Fraser's victorious self-image. His election as graduation speaker came after his off-color speech and suspension,[349] and the student newspaper's last issue his senior year was a virtual "ode to Matt Fraser"; in short, the school "martyred [him]."[350]

Fraser "thought about law school," but his case left him "disenchanted with the legal system . . . and how ill-informed many of the various adults seemed, particularly many members of the Supreme Court,"[351] because "at oral argument it was obvious that they were not really well prepared . . . . The lack of depth of the questions was noticeable."[352] He looks back with no regrets; all he would do differently is procure "experienced Supreme Court litigators" to work with the "very able litigator" who represented him.[353]

Yet for all his righteousness, Fraser was the sole school speech plaintiff who pressed no issue other than the right to off-color speech:

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343. *Questions & Answers: Perspectives Then*, *supra* note 50.

344. *Biography of Mary Beth Tinker*, AM. BAR ASS'N DIVISION FOR PUB. EDUC., http://abapubliceducation.org/publiced/lawday/tinker/mbbio.html, (last visited Sept. 19, 2011).

345. E-mail from Mary Beth Tinker, *supra* note 324.

346. *Id.*

347. E-mail from Matthew Fraser to Scott A. Moss (July 16, 2010) (on file with author).

348. Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 679 (1986); E-mail from Matthew Fraser, *supra* note 347.

349. E-mail from Matthew Fraser, *supra* note 347.

350. Hudson, *supra* note 117 (quoting Fraser) (internal quotation marks omitted).

351. E-mail from Matthew Fraser, *supra* note 347.

352. Hudson, supra note 117.

353. E-mail from Matthew Fraser, *supra* note 347.

the Tinkers and Eckhardt were early protestors of a war; Kuhlmeier was publishing on difficult issues in students' lives; and even Frederick's silly banner was part of his broader challenge to the authority of a school prone to heavy-handed tactics of dubious legality, such as unconstitutionally threatening a student for abstaining from the Pledge and threatening a trespass arrest for reading in the courtyard while off from class. Now Executive Director of the debate program at Stanford University, and a longtime debate coach,[354] Fraser has made speech his career, decades after bringing the sole school speech case that was only about speech itself.

3. Kuhlmeier: Disillusioned, but Standing by Her Actions

Cathy Kuhlmeier maintained neither the Tinker plaintiffs' ongoing engagement nor Fraser's sense of moral victory. "She did not attend oral arguments because she says her attorney . . . did not maintain sufficient contact."[355] Neither did her experience lead to lifelong issue advocacy or debating, unlike the *Tinker* and *Fraser* plaintiffs. She lost at the Supreme Court the same year she graduated college with a Mass Communications degree,[356] and "the ordeal . . . left a 'bad taste' in her mouth for journalism."[357] She went on to a life raising seven children, working as a preschool teacher, and eventually becoming a risk-management official for a major sporting goods retailer.[358]

Lacking the ultimate victory of the *Tinker* plaintiffs, the early-stage practical victory of Fraser, or the post hoc vindication of Frederick, Cathy Kuhlmeier Frey has moved on more completely. But she remains proud of her case and still speaks on it: "I've been to a lot of schools to speak to journalism classes and . . . my daughter's high school," she said; "I've been the topic of some Google searches by her and her friends, and they can't believe that was me."[359] She remembers one college speech especially fondly: "a student came up to me and said I can't believe I'm meeting a freedom fighter and asked for my autograph. I was pretty shocked by that because I had never thought of myself as that person."[360] For her 1983 stand against her school, she credits the departed journalism teacher who referred her to the ACLU: "I had the courage to stand up for my rights because of our teacher

354. *Executive Home and Office Staff*, STANFORD NAT'L FORENSIC INST., http://www.snfi.org/staff (last visited Aug. 7, 2011).

355. Hudson, *supra* note 135.

356. E-mail from Cathy Kuhlmeier Frey to Scott A. Moss (July 7, 2010) (on file with author).

357. Hudson, *supra* note 135.

358. E-mail from Cathy Kuhlmeier Frey, *supra* note 356.

359. *Id.*

360. *Id.*

Robert Stergos."[361] And despite her loss, she "wouldn't change a thing" about her actions: "If people don't challenge things they don't agree with, how can we expect things to ever change? I still stand up for what I believe in and this case has really been a key factor in the person I've become."[362]

4. Morse: Ultimately Successful in Litigation, but Forced to Leave

More than for the other school speech plaintiffs, Joe Frederick's Court loss is only part of his story. One seemingly minor epilogue gave Frederick the moral victory he wanted from the start: to infuriate school officials with anti-authority speech they could not stop. Only after publication did Principal Morse see the anarchist poem Frederick wrote for the JDHS 2002 yearbook:

> just one huge freedomless controlled entity . . .
>
> . . . the time has come to take the final stand piss into the wind of illusionary sin release chaos into the land . . .
>
> . . . governments must fall civilization awaits our move no time to stall lets [sic] tear down the walls . . .
>
> . . . and let the chaos soothe . . . .[363]

"Ms. Morse was livid," Frederick said; "I was suspended for the remainder of the day. I went home very pleased . . . how upset [she] was over being too late to censor my poem."[364]

Frederick also enjoyed more tangible vindication: a $50,000 settlement. Despite losing at the Supreme Court, Frederick kept litigating his free speech claim under the Alaska Constitutional provision: "Every person may freely speak, write, and publish on all subjects."[365] Oddly, pressing a state claim similar to a losing federal constitutional claim occasionally works for abortion, criminal defense, and other rights[366]—and it worked for Frederick. In November 2008, the school district agreed to pay $45,000 to Frederick and $5,000 "to hire a neutral constitutional law expert to chair a forum on student speech."[367] Frederick flew in from China for the forum and "got a

361. PANCHYK, *supra* note 98, at 62.

362. E-mail from Cathy Kuhlmeier Frey, *supra* note 356.

363. Frederick, *supra* note 168.

364. *Id.*

365. ALASKA CONST. art. I, § 1.5.

366. *See* Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175 (2008) (summarizing parallel federal/state claims).

367. Eric Morrison, *School Board, Frederick Reach Settlement in 'Bong Hits' Case*, JUNEAU EMPIRE (Nov. 5, 2008), http://juneauempire.com/stories/110508/loc_352352563.shtml.

standing ovation, which did not make the school officials happy," his lawyer Douglas Mertz said; "[w]e take our consolations where we can find them."[368]

But a settlement and a hero's welcome back at school did not give Frederick a happy ending. Frederick claimed that during his school suspension, police repeatedly harassed him for embarrassing Juneau with his banner.

> Frederick was arrested by Juneau police and charged with trespass while parked at the municipal swimming pool next to the high school, waiting to pick up his girlfriend. . . . [C]harges were dropped. . . . [For] failing to signal a left turn[,] . . . [p]olice took him to jail, saying he'd failed to pay an old fine . . . . The charge was dropped . . . [as] clerical error . . . . Frederick accused the school and police of retaliating because of his banner . . . [and received] a $22,000 settlement.[369]

In a remarkable, unfortunate coincidence, Joe's father Frank was "a risk manager for the school district's insurance company[,] . . . facing big legal fees because of the [banner] suit."[370] Frank "shield[ed] himself from anything touching on the legal case" but claimed he was demoted, then fired, "for not pressuring his son to drop his lawsuit."[371] He sued and won $200,000, plus legal fees.[372] But with Frank "blackballed from [his] industry, basically unemployable," attorney Mertz recounted, "the Fredericks were broke,"[373] and "[w]ith no aid from his father, Joe . . . dropped out" of college.[374]

Frederick later graduated from another college, and he and his father both found jobs teaching English in China.[375] He also attended a Chinese university—and caroused a good bit, judging by his public MySpace webpage; photos show him dancing with a woman holding a beer, singing into a microphone, holding a vodka bottle, etc.[376] Though abroad, Frederick has not hid from his case: his webpage, "www.myspace.com/bonghits4jesus," includes a photo of the banner.[377] The page also lists his favorite authors: Albert Camus, whom he was

368. E-mail from Douglas Mertz to Scott A. Moss (June 28, 2010) (on file with author).

369. Kizzia, *supra* note 161.

370. *Id.*

371. *Id.*; Barnes, *supra* note 7.

372. Kizzia, *supra* note 161; E-mail from Douglas Mertz, *supra* note 368.

373. E-mail from Mertz, *supra* note 368.

374. Kizzia, *supra* note 161.

375. *Id.*

376. Joseph Frederick, *Joseph Frederick*, MYSPACE.COM, http://www.myspace.com/bonghits4jesus (last visited Feb. 20, 2010).

377. *Id.*

reading at school when accused of "trespass"; and F. Scott Fitzgerald, author of *The Great Gatsby*[378]—the tale of a disillusioned young man who, like Frederick, travels far to escape norms he finds stifling.

CONCLUSION

This Article's thesis—that numerous notionally landmark Supreme Court decisions have far less effect on the law and on the parties than assumed—should not be overstated. On the law: Many Supreme Court decisions do heavily reshape the legal landscape, of course. Some establish a major new right—*Miranda* rights for criminal suspects,[379] abortion rights under *Roe v. Wade*,[380] and proscription of the death penalty for minors[381] or for non-murderers.[382] Others importantly eliminate a major individual right, such as the more recent cases limiting the abortion rights *Roe* established[383] and limiting the scope of the exclusionary rule in criminal prosecutions.[384]

On the individual level: Certainly many decisions are among the most monumental events in the litigant's life. The importance of a death penalty decision to the individual cannot be overstated. Various other judicial decisions are life-altering, such as decisions on an individual's right to an abortion, though many abortion or other individual rights decisions, including *Roe* itself, come only after the matter is mooted for the individual litigant, making the case important as a precedent but not for the individual at the center of the storm.[385] I also would not suggest to Al Gore that *Bush v. Gore* did not have a major impact, both on his life and on American history.[386]

But the school speech cases are excellent exemplars of the wide range of limits on the legal and human impact of Supreme Court decisions. *Tinker* established an important right, but one that proved harder to enforce at the retail level, where local lawyers shy away from cases pressing constitutional principles for little monetary relief. The three post-*Tinker* cases are a striking stream of authority reining in the right *Tinker* established, but lower courts remained able to enforce

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378. *Id*.

379. Miranda v. Arizona, 384 U.S. 436 (1966).

380. 410 U.S. 113 (1973).

381. Roper v. Simmons, 543 U.S. 551 (2005).

382. Kennedy v. Louisiana, 554 U.S. 407 (2008) (barring death penalty for crimes other than murder or possibly crimes against the state, defined broadly).

383. *E.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

384. *See supra* note 29.

385. *Roe*, 410 U.S. at 125 (holding that "the termination of [Roe's] 1970 pregnancy has not rendered her case moot").

386. 531 U.S. 98 (2000) (ending Florida's recount of state votes for the 2000 U.S. presidential election between candidates Al Gore and George W. Bush).

Tinker rights for various reasons: the three later cases declined to overrule *Tinker* outright; speech rights claims are so fact-specific that particular cases seem better governed by the *Tinker* rule than the *Fraser*, *Kuhlmeier*, or *Morse* exceptions; and none of the three post-*Tinker* cases the Court has heard are typical of the types of controversies increasingly common in the lower courts, such as online postings and religious (or otherwise conservative) speech.

Finally, while the school speech plaintiffs all remain proud of their controversial youthful speech, years or even decades later, the Court outcomes have strikingly little correlation with how vindicated or defeated each feels. John and Mary Beth Tinker and Chris Eckhardt, while viewing their Court victory as vindication, did not even remember how or why they never pursued their case to a verdict. Matt Fraser felt like a winner because the later reversal of his preliminary injunction victory did not change the fact that he won a district court order reinstating him as a graduation speaker, to the chagrin of school officials. Joe Frederick's Court loss was followed by a rich, multichapter epilogue: he won a settlement on remand on his state law claim; he pulled off other controversial speech his principal could not keep from getting published; he won a settlement and his father won a court verdict, in separate lawsuits claiming retaliation by their local officials; yet Joe's litigation and his father's job loss were financially crushing, forcing both to leave the country to find work, though Joe seemed to enjoy his travels abroad. So the *Tinker* plaintiffs have lived the lives of winners despite never receiving a verdict, while the losing *Morse* and *Fraser* plaintiffs drew substantial vindication from less-famed battles than their Court appeals. Only Cathy Kuhlmeier, the least famous of the six plaintiffs in the four cases, felt such a sense of defeat from her loss that she went from firebrand student to apolitical adult. But even Kuhlmeier feels a sense of pride in having fought the fight, in having her children and their friends express surprise when they Google her, and in being called a "freedom fighter" by admiring teenagers who, for all anyone knows, could well be the next Tinker, Eckhardt, Fraser, Kuhlmeier, or Frederick.