

HIGH-VALUE SPEECH AND THE BASIC EDUCATIONAL MISSION OF A PUBLIC SCHOOL: SOME PRELIMINARY THOUGHTS

by
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This Article assesses the alarming proposition at the core of the school's argument in Morse v. Frederick: that a school has constitutional power to suppress any speech inconsistent with its self-defined "basic educational mission." The phrase was taken from an earlier opinion upholding punishment of the "vulgar and lewd" manner in which an idea was expressed. It would be a very different thing to extend this concept to suppression of the idea itself.

This Article explores the extent to which inculcating particular ideas can be part of a school's mission, and the still narrower set of cases in which suppression of dissent can be an acceptable means of inculcating those ideas. While the Court cannot identify a clear principle that describes all the cases in which student speech can be suppressed, it can identify a clear counter-principle: the right to freely state political and religious ideas is protected. Tinker v. Des Moines Independent Community School District is an essential protection for such high-value speech, and all subsequent cases in the Supreme Court appear to reaffirm this core holding of Tinker.

The Court's public-forum doctrine is no substitute for Tinker; public-forum doctrine would permit even-handed suppression of broad categories of speech. The school's "basic educational mission" standard, unless carefully defined and limited in ways the school did not even attempt, would eliminate even the requirement of viewpoint neutrality and substantially repeal the Free Speech Clause in public schools.

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I. FOUR RESULTS IN SEARCH OF A RULE

On the doctrinal surface, the law of free speech for students in public schools consists of a broad speech-protective principle and an unfolding list of exceptions. *Tinker v. Des Moines Independent Community School District* says that students retain their right to speak so long as they do not cause material disruption of the educational process.¹ *Hazelwood School District v. Kuhlmeier* says that this rule does not apply if the speech is school-sponsored.² *Bethel School District No. 403 v. Fraser* says that schools can censor “vulgar and lewd speech.”³ And now *Morse v. Frederick* says that schools can censor advocacy of illegal drug use, even where that advocacy is fleeting and ambiguous.⁴ A legal realist might look at these same cases and say that the rule is broad judicial deference to school officials, with a *Tinker* exception that protects political speech. And a free-speech pessimist might say the real question is whether the Court remains committed to *Tinker* at all.

The three cases upholding restrictions on speech are not at all equal in scope or in their relationship to *Tinker*. *Kuhlmeier*’s distinction of school-sponsored speech states an intelligible principle, even if its application is sometimes difficult. Its relationship to *Tinker* is not one of rule and exception—in either direction—but rather an inevitable recognition of a separate rule for a distinct class of cases. If *Tinker* is the rule, then *Fraser* and *Morse* do state exceptions, but they are isolated, fact-bound exceptions. Neither case states any broader principle for identifying exceptions to *Tinker*, and no such principle can be inferred from the Court’s cases whether taken singly or collectively. But it is quite reasonable to infer that there will be more cases upholding restrictions on student speech in the future. Especially in the absence of any coherent principle, another *Tinker* “exception” is likely to emerge whenever school censorship seems reasonable to the Court. This prospect of ever expanding “exceptions” is why it may make sense to say that *Tinker* is the exception to a general rule of reasonable censorship.

I can hardly complain that *Morse* announced no broader principle. In an effort at damage control, I urged the Court to do exactly what it did. In an amicus brief for the Liberty Legal Institute, my co-counsel and I said that if the Court decided to reverse, it need say no more than that the school could punish advocacy of illegal drug use.⁵ It was a rather

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988).

³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

⁴ *Morse v. Frederick*, 127 S. Ct. 2618, 2625–29 (2007).

⁵ Brief of the Liberty Legal Institute as Amicus Curiae in Support of Respondent at 14–16, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550930. I co-authored this brief with Kelly Shackelford and Hiram Sasser of the Liberty Legal

obvious solution, and the Court could easily have thought of it without a suggestion from us. I feared that if the Court tried to state a general principle for when student speech could be suppressed, it might adopt the principle proffered in the school's brief or some other equally censorious principle. The Court may have feared simply that it had not seen enough of these cases to generalize with confidence and that it did not have a good principle to announce. Whatever the Court's motives, the fact is that *Morse* announces a narrow result with no statement of broader principle.

It is therefore important to emphasize that there is a principle—not a principle for defining the scope of school officials' power to censor, but a principle for identifying the core scope of *Tinker* where student speech is protected and any exceptions must be severely limited. High-value speech at the core of the First Amendment⁶—political speech and religious speech most obviously, but also speech about other kinds of serious ideas—is protected by *Tinker* and cannot be subjected to proliferating exceptions. Certainly this is what the Court should say, and there is reason to hope that this is what it has said and will say. Each of the cases upholding restrictions on student speech can easily be read as reaffirming *Tinker*, and as reaffirming the protected status of political speech. This reaffirmance is most explicit in *Morse*, the most recent of the cases. Thus, *Morse* says that “[t]he essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment,”⁷ and that “[p]olitical speech, of course, is ‘at the core of what the First Amendment is designed to protect.’”⁸ And *Morse* appears to recognize that religious speech has the same highly protected status as political speech.⁹ Justices Alito and Kennedy joined the opinion “on the understanding” that it was confined to advocacy of illegal drug use and that “it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”¹⁰

This short Article contrasts this protected core with the proposed principle for overriding *Tinker* urged in the school's briefs in *Morse*.¹¹

Institute and Robert Destro of Catholic University.

⁶ See David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 33, 37, 53–57 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (tracing the origin and application in the Court's cases of the concepts of high-value speech and low-value speech); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 232–42 (1993) (elaborating a two-tier theory of free speech with political speech as the core case of high-value speech).

⁷ *Morse*, 127 S. Ct. at 2626.

⁸ *Id.*

⁹ *Id.* at 2625 (“not even Frederick argues that the banner conveys any sort of political or religious message”); *id.* at 2629 (refusing to authorize punishment of speech that is “offensive,” because “much political and religious speech might be perceived as offensive to some”).

¹⁰ *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

¹¹ Brief for Petitioner, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 118979; Reply Brief for Petitioners, *Morse v. Frederick*, 127 S. Ct. 2618

Drawing on language in *Fraser* and *Kuhlmeier*, those briefs argued that a school can suppress student speech inconsistent with its “basic educational mission.”¹² This was an alarmingly broad proposal, because it was offered without discussion of what the public school’s basic educational mission is, and with no suggested limits on school officials’ ability to define their own mission in ways that justify broad censorship. The defendants did not explicitly call for overruling *Tinker*, but their brief in chief repeatedly quoted from the *Tinker* dissents, including Justice Black’s vigorous denunciation of *Tinker*’s basic principles.¹³ Those quotations revealed the school’s aspiration to a general power of censorship and the hope that *Morse* might be the decisive step in restoring that power. The brief spread great alarm among all free speech advocates who read it, including six conservative Christian groups who found themselves forced to file briefs in support of a student proclaiming “BONG HiTS 4 JESUS.”¹⁴ Based on hard experience litigating repeated efforts to censor religious speech by students, these groups feared that if the school’s argument prevailed, other schools would soon be saying that religious speech was inconsistent with their basic educational mission. By the reply brief, the school was backing off in part, disavowing any power to define religious or political speech as inconsistent with its mission,¹⁵ but still claiming that it could find such speech materially disruptive and be subject to judicial review only for reasonableness.¹⁶

The Justices pointedly ignored the “basic educational mission” theory. But precisely because they ignored it, they did not visibly reject it. The phrase remains in *Fraser* and *Kuhlmeier*, and it remains unclarified, waiting to be invoked by other school boards in other cases.¹⁷

The basic educational mission of public schools is a concept ill-suited to do any significant doctrinal work, because the legal literature reflects remarkably little thought about just what the basic educational mission of

(2007) (No. 06-278), 2007 WL 747754.

¹² Brief for Petitioner, *supra* note 11, at 20–25; Reply Brief for Petitioners, *supra* note 11, at 10.

¹³ Brief for Petitioner, *supra* note 11, at 20 n.5, 21, 31 n.11.

¹⁴ See Amicus Brief of the American Center for Law and Justice in Support of Respondent, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550934; Brief of Amicus Curiae Alliance Defense Fund Supporting Respondent, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 542418; Brief Amicus Curiae of the Christian Legal Society in Support of Respondent, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 550932; Brief for Amicus Curiae Liberty Counsel in Support of Respondent, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 542416; Brief of the Liberty Legal Institute, *supra* note 5; Brief of the Rutherford Institute, Amicus Curiae, in Support of Respondent, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 527496. Apparently no one was coordinating amicus briefs.

¹⁵ Reply Brief for Petitioners, *supra* note 11, at 12–13.

¹⁶ *Id.* at 10–11.

¹⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

public schools is. I am certainly not prepared to give a systematic answer to that question here. But I can say this much with confidence: The basic educational mission of the public school is not inconsistent with, and cannot be defined to be inconsistent with, the First Amendment's core commitment to freedom of political and religious speech.

II. THE CASES UPHOLDING RESTRICTIONS ON SPEECH

In *Fraser*, the Court said that the "First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission,"¹⁸ and that the school could "make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."¹⁹ In *Kuhlmeier*, the Court cited *Fraser* for the general proposition that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"²⁰ But this observation appeared in the Court's introductory overview of relevant doctrine and played no role in its analysis of the case before it, so *Kuhlmeier* cast no light on the meaning of a school's basic educational mission.

In *Fraser*, the Court's comment about the basic educational mission took meaning from the gratuitous sexual content of the student's speech and from the school's interest in maintaining civility and in protecting younger children from offensive and age-inappropriate content. The Court said that "the habits and manners of civility" were among the values essential to self-government that public schools must inculcate,²¹ and it noted that Congress conducts vigorous political debates under rules that preclude "impertinent" and "indecent" language.²² But it also noted that another value essential to self-government is "tolerance of divergent political and religious views, even when the views expressed may be unpopular."²³ It acknowledged the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms."²⁴ And it emphasized that "the penalties imposed in this case were unrelated to any political viewpoint."²⁵

The student speaker in *Fraser* was using sexual innuendo to attract attention to a candidate for student office, not to express views on any issue concerning sex.²⁶ He could easily have promoted the candidacy and

¹⁸ *Fraser*, 478 U.S. at 685.

¹⁹ *Id.* at 685–86.

²⁰ *Kuhlmeier*, 484 U.S. at 266.

²¹ *Fraser*, 478 U.S. at 681.

²² *Id.* at 681–82.

²³ *Id.* at 681.

²⁴ *Id.*

²⁵ *Id.* at 685.

²⁶ *See id.* at 677–78 (describing the speech and its purpose); *id.* at 687 (Brennan,

expressed any viewpoint relevant to that candidacy without the sexual innuendo. Nothing in the holding or opinion in *Fraser* suggested any broad power to punish speech simply because the school disagreed with the views expressed.

But in *Morse*, the school's disciplinary action was squarely and explicitly based on viewpoint. The school claimed power to punish speech it disagreed with; it punished Frederick because his banner "expressed a positive sentiment about marijuana use."²⁷ The proffered reason for censorship was precisely the communicative impact of the message expressed. The school's principal interpreted the student's banner to promote drug use; she interpreted the school's basic educational mission to include prevention of drug use; and therefore, she and her school board said, the student could be punished for displaying the banner.²⁸ At least on these facts, the Court agreed.²⁹

The result was probably inevitable. But this is a dangerous doctrine, requiring careful definition. Schools no doubt have broader power than the government at large to suppress viewpoints, but it is important to specify limits to that claim of power. The Court did not specify the limits, but neither did it adopt the school's expansive theory. To simply say, without elaboration, that the school can suppress any viewpoint that undermines anything it defines as part of its basic educational mission would be to confer an utterly standardless discretion on school officials. Standardless discretion to censor is anathema to First Amendment values,³⁰ and that principle is so basic—so essential to enforcing any other protection for free speech, including the rule against censoring unpopular viewpoints³¹—that it must extend to public schools. As the Court of Appeals said in *Morse*, the school "is not entitled to suppress speech that undermines whatever missions it defines for itself."³²

J., concurring) (quoting the speech in its entirety).

²⁷ Brief for Petitioner, *supra* note 11, at 25.

²⁸ *Id.*

²⁹ *Morse v. Frederick*, 127 S. Ct. 2618, 2625–29 (2007).

³⁰ See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–59 (1988). The doctrine is most fully developed in the context of deciding that speakers may challenge standardless licensing schemes without applying for a license first. The rule also applies to standardless discretion to grant or withhold access to a public or nonpublic forum. *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 386–87 (4th Cir. 2006) (collecting cases). The school's argument in *Morse*, for essentially standardless power to make whatever rules it chose prohibiting student speech, would be even more threatening to freedom of speech than standardless discretion to control access to a forum.

³¹ See *Southworth v. Bd. of Regents*, 307 F.3d 566, 579–80 (7th Cir. 2002) (concluding that a ban on "unbridled discretion" is inherent in the requirement of viewpoint neutrality).

³² *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006), *rev'd on other grounds*, 127 S. Ct. 2618 (2007).

III. DEFINING THE SCHOOL'S MISSION

A. *Ends and Means*

The basic educational mission of a public school cannot be to instill religious or political conformity or to suppress speech with which it disagrees. Suppression of speech inconsistent with a school's mission, if tolerated at all, must be confined to uncontroversial parts of the school's mission. There is actually a series of questions here: To what extent can a public school adopt inculcation of a viewpoint as part of its educational mission? To what extent can it indoctrinate students in that viewpoint by one-sided teaching or repeated emphasis? To what extent can it universalize instruction in that viewpoint by insisting that all students read or listen to the viewpoint, or be examined on it, without exempting those who conscientiously object? And finally, to what extent can it enforce its indoctrination in that viewpoint by suppressing all dissent? Suppression of dissent is at the most restricted end of the range of possible means for pursuing the school's mission. The school cannot suppress a student viewpoint as inconsistent with its educational mission unless the school is free, under our Constitution and under the political norms of a free society, to use the most aggressive means to indoctrinate students into a viewpoint contrary to the student speech that is suppressed.

These are difficult questions, and except for attempts to suppress private speech, we have mostly left them to the political process rather than to litigation.³³ No one objects when schools forcefully indoctrinate the viewpoint that it is wrong to hit other children, or that it is wrong to steal their property. At the other extreme, few schools are so politically foolish as to seek to inculcate the idea that the Republican Party, or the Democratic Party, is the only hope for the country, and except in the most lopsidedly one-party districts, any school that tried such a thing would get an angry reaction from parents who are politically independent or loyal to the other party.

In between these obvious cases, schools attempt to instill values concerning sexuality, with varying degrees of conflict. Probably few parents object to Illinois's requirement that schools "shall teach pupils to not make unwanted physical and verbal sexual advances and how to say no" to such advances, and "that it is wrong to take advantage of or to exploit another person."³⁴ A much larger minority may object to the requirement that schools "shall stress that pupils should abstain from sexual intercourse until they are ready for marriage" and "shall teach honor and respect for monogamous heterosexual marriage."³⁵ But that

³³ For the seminal treatment, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

³⁴ 105 ILL. COMP. STAT. ANN. 5/27-9.1(c)(8) (West 2006).

³⁵ *Id.* 5/27-9.1(c)(2), (3).

minority has neither a plausible constitutional argument nor enough political power to change the practice. So long as they avoid open political partisanship and current issues with sharp partisan divides, schools are free in practice to promote a range of policy views. It has been a while since I spent much time in public schools, but students and parents and occasional critics say that schools promote broad policy views with some frequency and little objection, usually in support of broadly popular positions such as marriage, capitalism, environmentalism, civil rights, and the like. Some of these examples are more popular on the right, some on the left, but each has gained broad support. None are beyond debate, but dissenters are not in position to make serious trouble for the school board.

When families seek to exempt their students from objectionable material, schools often take the absurd position that everything they teach is an integrated whole and that no student can be exempted from any part of it.³⁶ This is a flat refusal to think about the real issue: what ideas are so important that the state has a compelling interest in insisting that every child learn them? The answer to that question is some subset of all that schools teach, and probably a rather small subset. But judges, fearful of becoming curriculum supervisors, have generally deferred to school officials.³⁷ Judge Boggs, criticizing the majority for evading the real issues in the leading case, approvingly summarized the court's holding as follows: "The school board recognizes no limitation on its power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause. Our opinion today confirms that right"³⁸

Groups unhappy with the sweep of this *de facto* rule have been large enough to get some relief from legislatures. Many states have enacted a right to exemption from sex education;³⁹ some have enacted a right to exemption from any material that violates a parent's religious beliefs.⁴⁰ This broad exemption has not been unworkable; the Texas version has generated *no* reported litigation and *no* opinions of the Attorney General in the thirteen years since its enactment. There is also one settled

³⁶ See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1071–72 (6th Cir. 1987) (Kennedy, J., concurring) (sympathetically summarizing the school's position).

³⁷ See, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (finding no federal right to be exempted from a sexually explicit student assembly); *Mozert*, 827 F.2d at 1063–70 (refusing to exempt children from a reader to which their parents had religious objections); Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993) (discussing the issues presented by *Mozert* and similar cases).

³⁸ *Mozert*, 827 F.2d at 1073 (Boggs, J., concurring)

³⁹ See, e.g., CAL. EDUC. CODE §§ 51937–51939 (West 2006); COLO. REV. STAT. ANN. § 22-1-110.5 (Lexis/Nexis 2007); 105 ILL. COMP. STAT. ANN. 5/27-9.1 (West 2006); MASS. GEN. LAWS ANN. ch. 71, § 32A (Lexis/Nexis 2002); MICH. COMP. LAWS § 380.1507(4) (West 2005).

⁴⁰ TEX. EDUC. CODE ANN. § 26.010 (Vernon 2006).

constitutional limit: public schools are not permitted to inculcate beliefs about religion, even if they try to do it non-coercively, and this rule is judicially enforceable.⁴¹

Parents entrust the public schools with their children for important but particular purposes. Parents may expect the school to teach skills and values conducive to success in later life, and they may expect the schools to teach fundamental democratic values. But they do not expect the schools to indoctrinate their children on current political or religious questions that may be the subject of substantial disagreement among the parents themselves, either locally or nationally. Indoctrination on that sort of question is not part of the school's basic educational mission, and the schools have no power to censor non-disruptive student speech on such questions.

American political norms certainly, and the Constitution at least with respect to means, prevent the public schools from propagandizing students on controversial political or religious issues. The school cannot prohibit Republican speech, or Democratic speech, or anti-war speech, or pro-war speech, or define such speech as inconsistent with the school's mission. No set of American parents accepts it as part of the public school's role to indoctrinate their children on controversial political issues, and no set of American taxpayers accepts such partisan indoctrination as a legitimate expenditure of education funds. Of course many parents will never become aware of their commitment to this principle unless and until they find themselves disagreeing with what a public school is trying to teach their child, but when the issue is focused in that way, we may expect the reaction to be strong and widespread.

As the Court recognized long ago, in *West Virginia State Board of Education v. Barnette*, "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing."⁴² If the Court were ever to permit viewpoint-based censorship on the basis of any such amorphous test as inconsistency with the school's basic educational mission, it would have to emphatically reaffirm *Barnette's* insight that inducing political conformity cannot be any part of the school's mission.

We are unlikely to find a bright line between "Don't hit" and "Support the Republican Party." There is a continuum from uncontroversial ideas to controversial ones, from ideas that are accepted as part of the school's mission to ideas that almost certainly would not be if the issue were squarely raised. The question of what viewpoints the schools can teach is left to the political process and the discretion of

⁴¹ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) ("[s]chool sponsorship of a religious message is impermissible"); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223–27 (1963) (prohibiting school-sponsored prayer and Bible reading in public schools).

⁴² 319 U.S. 624, 641 (1943).

school officials, perhaps partly because there are no judicially manageable standards, but more fundamentally because there is no political Establishment Clause. If a school, or a teacher, takes partisan political positions in the classroom, that may violate our shared understanding of the role of public schools, but it is hard to make an argument that it violates any individual's constitutional rights.

When a student seeks exemption from such inappropriate instruction, then we have a justiciable claim of individual right, although courts have been enormously reluctant to take that claim seriously, and schools have been bitterly resistant to their doing so. When the school takes the final step of trying to suppress all student dissent, then we have a classic free-speech claim that courts can readily adjudicate. *Morse* shows that there are some ideas on which the school can suppress dissent. But there cannot be many.

B. Preparing Students for Citizenship

In *Ambach v. Norwick*, in the course of upholding a requirement that public school teachers be citizens, the Court praised “[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.”⁴³ The Court relied on *Ambach* in *Fraser*, citing civility in debate as important to participation as citizens.⁴⁴ But of course civility is only a collateral feature of political debate; the fundamental feature of political debate in a free society is disagreement—disagreement among citizens and disagreement between citizens and the government. To respond to such disagreement with suppression is a far more fundamental violation of democratic self-governance than to respond with an uncivil reply. It is an essential part of a public school's mission to prepare students for a citizen's responsibility to participate in political debates, or at least to listen to and evaluate them, and to do so vigorously as well as civilly. It can never be part of a school's basic educational mission to suppress student interest or participation in political discussion.

Ambach also described public schools “as an ‘assimilative force’ by which diverse and conflicting elements in our society are brought together on a broad but common ground,” and “as inculcating fundamental values necessary to the maintenance of a democratic political system.”⁴⁵ Of course, freedom of speech is precisely one of these fundamental values “necessary to the maintenance of a democratic political system.”

More generally, this “assimilative” function of public schools is necessarily confined, as the Court said in *Ambach*, to values that are “fundamental” and “necessary” to a democratic system, and to a

⁴³ *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

⁴⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

⁴⁵ *Ambach*, 441 U.S. at 77.

“broad . . . common ground.”⁴⁶ Let this “assimilative” function expand to values that are less fundamental, less essential to a democratic system, narrow rather than broad, and the public schools would become an engine for instilling conformity and for suppressing discussion of public issues. Representative government, majority rule (subject to protection for individual and minority rights), nondiscrimination and equal protection of the laws, freedom of speech, religion, and assembly, tolerance of dissenting views and of personal and group differences, due process of law, innocent until proven guilty—these are the kinds of values that may be fairly described as “fundamental” and (the most important of the *Ambach* criteria, because it provides the most real guidance) as “necessary to the maintenance of a democratic political system.” And these are not values that provoke much disagreement in principle among American adults, however great the disagreements over particular applications. It is indeed part of the basic educational mission of public schools to instill these broad values in each succeeding generation. But even with respect to these fundamental values, how far a school may go in suppressing student dissent is a much harder question.

It cannot be part of the school’s mission to go beyond such broad and fundamental principles to instill agreement on, or suppress dissent on, more particular social, political, or religious issues. The school cannot define suppression of dissent as part of its educational mission. It cannot justify suppression of dissent by defining its basic educational mission to include instilling support of particular or current government policies or administrations.

C. *Instilling Personal Virtues*

A school may also seek to instill uncontroversial personal virtues that have the overwhelming support of the American people and that are often as important as academic skills to success in adult life: honesty, diligence, personal responsibility, obedience to law, tolerance for dissenting views. That sort of socialization into responsible adulthood is consistent with American political norms. *Morse* in effect holds, and reasonably so, that avoidance of drugs is such a virtue.⁴⁷ Whatever disagreement there may be about the efficacy of the drug laws, or about the need for laws against adult use of the less dangerous illegal drugs, there is overwhelming consensus in the polity that adults should discourage children from using drugs.

In adult society, government power to prohibit conduct does not include power to prohibit advocacy of that conduct. Advocacy of illegal conduct is protected speech, subject to the stringent rule of *Brandenburg v. Ohio*, which protects everything short of intentional incitement of

⁴⁶ *Id.*

⁴⁷ *Morse v. Frederick*, 127 S. Ct. 2618, 2625–29 (2007).

illegal conduct that is likely to imminently result in such conduct.⁴⁸ But as I had the good sense to say more than twenty years ago, *Brandenburg* is not the standard in public schools.⁴⁹ All nine Justices in *Morse* appeared to agree that schools can prohibit advocacy of prohibited conduct on a standard less speech protective than *Brandenburg*.⁵⁰

The school is engaged in educating children, and it may seek to educate them about the reasons for its conduct rules. Indeed, giving reasons is far better than issuing unexplained rules that appear to be arbitrary. Assuming the conduct rules themselves are not politically or religiously controversial, the school may seek to persuade students to believe in these rules, to accept them as norms of behavior, and to live by them as adults without enforcement by teachers and parents. Moreover, because children are younger and on average have less impulse control than adults, the school may believe that urging violations is more likely to lead to violations, and that the speaker who persuades a child to violate a rule bears more responsibility for the resulting violation than a speaker who persuades an adult to violate a rule. These are some of the reasons for the Court's intuition that schools may prohibit students from advocating violation of school rules.

But the school's undoubted power to prohibit drug use does not include power to prohibit all criticism of that policy. A student presentation to the school board, arguing for a change in the school's drug policy, would undoubtedly be protected political speech, even if its very purpose was to undermine what the school defined as part of its basic mission. Even in speech addressed to other students, there must be some room for advocating a change in policy without advocating violations of existing policy. The cryptic incoherence of the student's message in *Morse* was a problem for the school; it was not obvious that he was advocating drug use. But it was a bigger problem for the student; it was even harder to interpret his sign as presenting any kind of genuine political message.

Of course the line between advocating policy change and advocating violations of existing policy will not always be crystal clear at the margins.

⁴⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

⁴⁹ Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 55 (1986).

⁵⁰ See *Morse*, 127 S. Ct. at 2626–28 (collecting authority for the proposition that students in public schools have narrower constitutional rights than adults); *id.* at 2630 (Thomas, J., concurring) (“the First Amendment, as originally understood, does not protect student speech in public schools”); *id.* at 2638 (Alito, J., concurring) (“due to the special features of the school environment, school officials must have greater authority [than permitted by *Brandenburg*] to intervene before speech leads to violence”); *id.* at 2640 (Breyer, J., concurring) (arguing that Court should not reach the merits, because “school officials need a degree of flexible authority” and detailed judicial supervision would “engender further disputes among teachers and students”); *id.* at 2646 (Stevens, J., dissenting) (“it is possible that our rigid imminence requirement ought to be relaxed at schools”).

Clever speakers can imply more than they explicitly say, a technique highlighted for many high school students when they study Marc Antony's funeral oration.⁵¹ Or a student could say, in a serious discussion in civics class, that the drug laws are a failure and the source of much injustice, and that it is time to invoke the long American tradition of civil disobedience to unjust laws, a tradition that includes such heroes as Martin Luther King and the patriots at the Boston Tea Party. Such cases raise important fact-finding and line-drawing problems, and the schools will probably win the close cases, as they did in both *Fraser* and *Morse*. Some justices thought that Fraser's speech was not all that lewd,⁵² and some thought that Frederick did not really advocate drug use,⁵³ but the majority in each case deferred to the judgment of the school officials. In any event, close cases on the facts do not undermine the basic distinction between debating policy and advocating violations, which will remain clear enough in most of the cases.

The Court of Appeals said that no government mission is more important than war, so if anti-war speech is protected, pro-drug speech must also be protected. But that is not the right basis for comparison. It ignores the difference between advocating policy change and advocating violation of existing policy; the Tinker children did the former but Frederick was interpreted as doing the latter. It also ignores another relevant difference: unlike drug education, war is not part of the *school's* mission. The decision to go to war, like most other disputed political decisions, is entrusted to government institutions other than schools. Educating children, and protecting children from self-destructive behavior, is at the core of the mission entrusted to schools. A decision permitting the schools to censor student speech promoting the use of drugs implies nothing about the schools' power to censor student speech on political issues entrusted to other organs of government.

IV. PROTECTING RELIGIOUS SPEECH

A. *The First Amendment Status of Religious Speech*

What is true of political issues entrusted to other organs of government is equally true of religious issues entrusted to churches and synagogues, families, and individual conscience. Religious speech, like

⁵¹ WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act III, sc. 2.

⁵² *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 687 (1986) (Brennan, J., concurring) ("Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes."); *id.* at 695 (Stevens, J., dissenting) ("even if the language of the rule could be stretched to encompass the nondisruptive use of obscene or profane language, there is no such language in respondent's speech.").

⁵³ *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting) ("it takes real imagination to read a 'cryptic' message . . . with a slanting drug reference as an incitement to drug use.").

political speech, is at the core of the First Amendment. We can infer this relationship textually, from the explicit constitutional protections for religion in the same sentence with the Free Speech Clause.⁵⁴ And we can infer it historically. In the early modern era, when the idea of free speech was struggling for acceptance, Europe was embroiled in religious conflict growing out of the Reformation,⁵⁵ and the speech that governments most wanted to suppress was very often religious speech.⁵⁶ Schools cannot constitutionally interpret their basic educational mission as requiring the suppression of religious speech.

Another way to approach that conclusion is through the Establishment Clause. The Court has repeatedly held for nearly half a century that it is no part of the mission of public schools to inculcate religion among students. Because religious instruction is not part of a school's basic educational mission, speech on religious questions does nothing to undermine a school's educational mission. Therefore, even if schools could suppress all speech inconsistent with their basic educational mission, that would not be a basis for suppressing private religious or anti-religious speech.

But many schools do not see it that way. Persistent attempts to inculcate religion in some public schools have required many Supreme Court decisions holding that public schools cannot sponsor religious exercises or encourage religious belief or practice.⁵⁷ And persistent attempts by other public schools to suppress religious speech have required many Supreme Court decisions holding that private religious speech is protected in public schools.⁵⁸ Schools have repeatedly claimed that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from their own confused definition

⁵⁴ U.S. CONST. amend. I.

⁵⁵ See Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1049–66 (1996) (summarizing this conflict and collecting sources).

⁵⁶ See generally LEONARD W. LEVY, *BLASPHEMY* 46–237 (1993) (reviewing persecution of dissenting religious speech from Augustine to the end of the seventeenth century); ROBERT HARGREAVES, *THE FIRST FREEDOM: A HISTORY OF FREE SPEECH* 39–64 (2002) (reviewing controversies over religious speech of Erasmus, Martin Luther, and William Tyndale); *id.* at 41 (“In the west, the road to free speech therefore necessarily began as a struggle against the authority of the Church itself.”); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.”).

⁵⁷ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

⁵⁸ See *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same issue at university level).

of their mission. Because the Establishment Clause prohibits *schools* from promoting religion, some schools conclude that any *student* speech promoting religion is inherently inconsistent with the educational mission of the school. Other schools reach the same conclusion out of hostility to religious speech, with or without misunderstanding the Establishment Clause. By whatever route, many schools plainly believe that it is part of their basic educational mission to maintain a religion-free zone in and around the public school. A deferential standard in *Morse*, permitting censorship on the basis of whatever schools declare to be their mission, would have gone far to validate such policies.

B. Even-Handed Suppression

Another theory that has been prominent in the religious speech cases, and sometimes appears in political speech cases, is that speech may be suppressed so long as the suppression is even-handed. Schools might suppress all religious speech and all anti-religious speech, or all political speech of any kind,⁵⁹ or all speech on certain controversial political topics, and claim that it was part of its basic educational mission to avoid such controversies and to focus on education. This sort of argument has been most prominent in limited-public-forum cases, where schools argue that they have simply excluded debate about religion from the scope of their forum. The issue is often posed by the claim that the challenged rule is a permissible subject-matter exclusion instead of impermissible viewpoint discrimination.⁶⁰ The *reductio ad absurdum* of this argument was the infamous resolution banning all “First Amendment activities” in the airport, adopted precisely because of its viewpoint neutrality.⁶¹ A rule banning student discussion of politics, or of religion, or of particular political or religious issues, could be viewpoint neutral and not so flagrantly overbroad.

It is true that excluding one side of an issue is worse than excluding both sides of an issue. And it is true that appropriate subject-matter exclusions, narrowly limited to a particular time and place, can enhance debate by setting a focused agenda and keeping participants on topic while leaving ample opportunity to debate other topics at many other times at that place and in many other places at that time. But broadly applicable subject-matter exclusions, such as those that attempt to exclude a whole subject matter from discussion anywhere and any time within a school, raise very serious First Amendment problems.

In at least two frequently recurring ways, subject-matter exclusions

⁵⁹ Compare *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding ban on all political advertising on rapid transit cars or facilities).

⁶⁰ See *Good News Club*, 533 U.S. at 106–12; *Lamb’s Chapel*, 508 U.S. at 392–94; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–37 (1995) (same issue at university level).

⁶¹ See *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (striking down the resolution as overbroad).

have powerful viewpoint consequences. First, the exclusion of a controversial subject matter insulates the status quo from criticism. Speakers who would defend the status quo have no need to do so if all speakers who would criticize the status quo have been silenced by a subject-matter exclusion. Second, speakers who believe that a particular subject matter is unimportant and unworthy of public comment are unaffected by an exclusion of that subject matter; the effect of the ban falls only on speakers who hold the opposite viewpoint, and think that the subject matter is important.

To prohibit discussion of race relations, even in the Deep South in 1954, would be a mere subject-matter exclusion, apparently requiring no justification in designated limited forums under the Supreme Court's current doctrine.⁶² Similarly today, to prohibit discussion of race relations is to insulate those who are satisfied with the current degree of racial progress and to silence all those who think either that we have gone too far or that much more remains to be done. To prohibit discussion of animal rights, or estate taxes, or the Electoral College, is to prevent any criticism of an entrenched status quo, and to silence a minority that vigorously disagrees with that status quo. To prohibit any discussion of the candidates for school board is to insulate incumbents from criticism and to silence those who want a change. To prohibit all discussion of political issues is a subject-matter exclusion that insulates the status quo across the board, on all these more specific topics and many others.

A subject-matter exclusion of religious speech has all these vices. It tends to insulate the religious status quo in the community, whatever that status quo may be. It enacts the viewpoint of those who think religion is a purely private matter, inappropriate for public discussion, and suppresses the viewpoint of those who think religion is a vitally important topic. It suppresses religious viewpoints on every issue before the community. And the history of misunderstanding or evasion of the Court's rule protecting religious speech illustrates that those who would exclude a viewpoint can adjust or gerrymander definitions of subject matter in pursuit of their goals.⁶³

⁶² See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) ("a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, *or for the discussion of certain subjects*") (emphasis added); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups *or for the discussion of certain subjects.*") (emphasis added).

⁶³ Consider the remarkable saga of *Bronx Household of Faith v. Board of Education*, first filed in 1994 and still pending in the Second Circuit. See *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 1996 WL 700915 (S.D.N.Y., Dec. 5, 1996), *aff'd*, 127 F.3d 207 (2d Cir. 1997); *Bronx Household of Faith v. Bd. of Educ.*, 226 F. Supp. 2d 401 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003), *on remand*, 400 F. Supp. 2d 581 (S.D.N.Y. 2005), *vacated*, 492 F.3d 89 (2d Cir. 2007), *appeal from remand pending*, *Bronx Household of Faith v. Bd. of Educ.*, No. 07-5291 (2d Cir.). Despite repeated Supreme Court decisions prohibiting discrimination against religious speech, the New York

This power to exclude unpopular or controversial subject matters is part of a larger body of rules defining various types of public and nonpublic forums. As Justice Kennedy has explained on behalf of four Justices, “[t]his analysis . . . leaves the government with almost unlimited authority to restrict speech on its property[;]”⁶⁴ it “grants the government authority to restrict speech by fiat.”⁶⁵ Or as I once put it, “censorship can become self-justifying” under the Court’s forum rules.⁶⁶

The Court has avoided these problems with respect to religious speech by holding that religion is a source of viewpoints and not merely a subject matter. That doctrinal move works, but it requires continued litigation about the difference between viewpoint and subject matter. The Court would do much better to recognize that broad subject-matter exclusions are inconsistent with the First Amendment. It should not accept viewpoint-neutral suppression of all political or religious speech.

The Court recognized this point in *Tinker*. The Court did not elaborate the point, but its opinion expressly reached beyond viewpoint discrimination:

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school.⁶⁷

At the time of *Tinker*, a viewpoint-neutral rule prohibiting any discussion of the war would have fully achieved the goal of prohibiting criticism of the war, and the Court clearly understood that. And it seems to have understood in the more recent cases that prohibiting discussion of religion would achieve the goal of suppressing religious viewpoints. The point is of quite general applicability, and the Court should not lose sight of it as schools respond to *Morse*.

V. WHY *TINKER* IS ESSENTIAL

Tinker is an independent protection for student speech, essential to

City school board continues to invent new arguments why these decisions do not preclude it from refusing to rent assembly spaces to churches on the same terms as it rents to secular community groups. In this case, the school board’s determined resistance to the Supreme Court’s decisions appears to be reinforced by the Second Circuit’s equally determined resistance.

⁶⁴ Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

⁶⁵ *Id.* at 694.

⁶⁶ Laycock, *supra* note 49, at 46.

⁶⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (emphasis added).

avoid both the potential for even-handed suppression in the Court's public-forum doctrine and the power to suppress all dissenting views inherent in the idea of prohibiting speech inconsistent with a school's self-defined basic mission. No other doctrine can safely substitute for *Tinker's* requirement that if school officials want to suppress high-value student speech, they must demonstrate that suppression is necessary to prevent a material and substantial disruption.⁶⁸ This standard protects students' right to dissent and to debate ideas as part of their education in a democratic society, but it permits government intervention for the unusual speech that actually disrupts the school. If school officials had unfettered discretion to ban speech that the school subjectively determines is inconsistent with its educational mission, *Tinker* would be eviscerated. And in that event, no other existing free-speech doctrine would do *Tinker's* work.

As already discussed, the rule against viewpoint discrimination is no protection against attempts to eliminate controversy by suppressing all speech on any side of an issue. More fundamentally, a rule permitting suppression of speech inconsistent with a school's educational mission can only be understood as overriding the rule against viewpoint discrimination. A ban on speech promoting drug use is a ban on a particular viewpoint. The school's claim in *Morse* was precisely that it could engage in viewpoint discrimination whenever it rejects a viewpoint in pursuit of its basic educational mission. The Court held that advocacy of illegal drug use is one viewpoint that can be suppressed—and the existence of one implies the likelihood of others—but the holding was sharply limited by explicit reaffirmation of the protected status of political and religious speech.

Nor would public-forum doctrine do the work of *Tinker*. Public-forum rules are no help in those parts of the school that are not part of a public forum, and schools fiercely deny that even their student activity periods are a public forum, let alone the rest of the campus and the rest of the school day. Public-forum doctrine is no help when schools close their forum to avoid permitting religious speech, as sometimes happens.⁶⁹ And the current version of public-forum doctrine has few explicit limits on subject-matter exclusions.

⁶⁸ See *id.* at 513.

⁶⁹ In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006), the school attempted to close its forum to outside community groups after an injunction forbidding it to discriminate against religious viewpoints. See *id.* at 379–80. The court held the new policy unconstitutional as well, because the forum was not really closed; any speaker that the school sponsored or endorsed could still get access. *Id.* at 386–89. A clearer but unreported example is *Good News/Good Sports Club v. School District*, 28 F.3d 1501 (8th Cir. 1994), ordering a school not to exclude religious group from its forum. Events on remand are not reported, but I know from discussions with Carl Esbeck, Professor of Law at the University of Missouri and counsel for the student club, that the school board succeeded in its strategy of closing the forum.

One of the reasons *Tinker* is so important is that it is not entangled in public-forum doctrine. *Tinker* did not involve a question of access to public property. When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech. The various versions of the public-forum doctrine address these questions. But public-forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech.⁷⁰ “A student’s rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam,” subject only to the material and substantial disruption standard.⁷¹

VI. CONCLUSION

The boundary between protected and unprotected student speech in public schools is unavoidably fuzzy, to be picked out and defined case-by-case. *Fraser*, *Kuhlmeier*, and *Morse* will not be the only limits on freedom of student speech. But this does not mean the courts are without guidance or principle. The protected core of the student right to free speech is clearly identified. If a student speaks in his or her private capacity, without school sponsorship, then political speech, religious speech, and other speech about serious ideas is protected by *Tinker*, unless the speaker causes material and substantial disruption of the school. Nothing in the Court’s subsequent cases undermines that core principle. The Court’s opinion in *Morse* appears to reaffirm that principle, and five Justices reaffirm it more emphatically—Alito and Kennedy concurring, and Stevens, Souter, and Ginsburg dissenting.

Tinker’s core principle is essential to reasonable freedom of speech in schools. Public-forum doctrine cannot protect student speech, and a requirement of viewpoint neutrality is not enough in schools that are willing to even-handedly suppress large categories of student speech.

Certainly school officials cannot be permitted to ban ideas that are inconsistent with the officials’ idea of the school’s “basic educational mission.” When that phrase was introduced in *Fraser*, it referred to the “lewd” manner in which ideas were expressed, not to the ideas

⁷⁰ Laycock, *supra* note 49, at 48; see *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987) (recognizing that *Tinker* might apply without regard to property’s status as a public forum, and reserving the issue).

⁷¹ *Tinker*, 393 U.S. at 512–13

themselves. Extending that vague phrase to the substance of student ideas would be a path to general repeal of the First Amendment in public schools. Fortunately, only Justice Thomas appeared to be interested in that.⁷² *Morse* studiously ignored the school's request to let it ban any idea that undermines its mission, and that is a very good thing.

⁷² *Morse v. Frederick*, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring) (“[I]t cannot seriously be suggested that the First Amendment ‘freedom of speech’ encompasses a student’s right to speak in public schools.”).