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Can There Really Be "Free Speech" in Public Schools?

Richard W. Garnett
Notre Dame Law School, rgarnett@nd.edu

CAN THERE REALLY BE "FREE SPEECH" IN PUBLIC SCHOOLS?

by
Richard W. Garnett[*]

The Supreme Court's decision in Morse v. Frederick *leaves unresolved many interesting and difficult problems about the authority of public-school officials to regulate public-school students' speech. Perhaps the most intriguing question posed by the litigation, decision, and opinions in* Morse *is one that the various Justices who wrote in the case never squarely addressed: What* is *the "basic educational mission" of public schools, and what are the implications of this "mission" for officials' authority and students' free-speech rights? Given what we have come to think the Free Speech Clause means, and considering the values it is thought to enshrine and the dangers against which it is thought to protect, is it really possible for the freedom of speech to co-exist with the "mission" of the public schools? We all recall Justice Jackson's stirring rhetoric in the West Virginia flag-salute case: "If there is any fixed star in our constitutional constellation," he proclaimed, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]" But, is this really true*—could *it be true?—in public schools?*

I.

It is not entirely clear—not to this writer, anyway—why the Court agreed to review the lower-court decision in *Morse*[1] or that the case is, at the end of the day, particularly important.[2]

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[*] John Cardinal O'Hara, C.S.C. Associate Professor of Law, University of Notre Dame. I am grateful to Gerard Bradley, John Robinson, Amy Barrett, Paolo Carozza, Nicole Garnett, and Paul Horwitz for their helpful comments and suggestions.

[1] It is possible that those Justices who voted to take up the case were troubled by the fact that the Ninth Circuit's decision left the school principal, Ms. Morse, open to liability for money damages. *See* Frederick v. Morse, 439 F.3d 1114, 1123–25 (9th Cir. 2006), *rev'd,* Morse v. Frederick, 127 S. Ct. 2618 (2007). However, it is widely believed by Court-watchers and litigators that the Justices rarely grant certiorari merely to correct errors in the application of law. It is also possible, of course, that a decision by the Ninth Circuit, extending free-speech protection to a "BONG HiTS 4 JESUS" banner was—particularly given the Court's ever-shrinking docket—simply too tempting an opportunity to let pass by.

[2] *Cf. Morse,* 127 S. Ct. at 2637 (Alito, J., concurring) ("I do not read [the majority] opinion to mean that there are necessarily any grounds for [school-speech] regulation that are not already recognized in the holdings of this Court. . . . I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.").

Certainly, there are a number of interesting student-speech cases that have recently been decided or that are moving through the courts.[3] Technological changes and other developments continue to raise difficult questions—how to treat students' speech on blogs and other websites, for example—about the reach of the Court's school-speech doctrines.[4] There are splits and divisions in the lower courts about controversial and offensive student expression. And, as the National Association of School Boards emphasized in its amicus brief supporting certiorari, school administrators working to balance free speech, discipline, safety, and effective learning are in desperate need of "guidance."[5] But, the Court's decision in *Morse* did little to clear up the confusion about where, for free-speech purposes, the school stops and the public square begins, because the Justices took it as given that it *was* a school-speech case,[6] involving expression at a "school-sanctioned and school-supervised event."[7] The case leaves unanswered hard questions about the circumstances in which what Justice Stevens called, somewhat cryptically, "targeted viewpoint discrimination" might be permissible in public schools.[8] And, it seems unlikely that many school administrators found much clear "guidance" (even if they were relieved by the outcome) in the ruling.

So, why all the fuss? Why the inclusion of *Morse* in the various "Supreme Court round-ups" published in our top newspapers (and law reviews)? Why the sounding, by so many, of the "First Amendment bugle"?[9] Part of the answer, one suspects, is that, for many who cover and

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[3] *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (upholding suspension of student who wore T-shirt expressing religious condemnation of homosexuality), *vacated*, 127 S. Ct. 1484 (2007).

[4] *See, e.g.*, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007) (concluding that it violated a student's free-speech rights to suspend him for an online parody of school principal). *See generally, e.g.*, Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65 (2005); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000).

[5] Brief of Amicus Curiae National School Boards Association et al. in Support of Petitioners at 3, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).

[6] *See Morse*, 127 S. Ct. at 2624 ("[W]e reject Frederick's argument that this is not a school speech case—as has every other authority to address the question."). The other Justices, in their various separate writings, did not contend, or even suggest, that *Morse* was not a school-speech case.

[7] *Id.* at 2622.

[8] *Morse*, 127 S. Ct. at 2646 (Stevens, J., dissenting). *Cf. id.* at 2638 (Alito, J., concurring) ("[T]he public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits.").

[9] *Id.* at 2629 ("The dissent's contrary view [on the question whether Frederick's banner promoted illegal drug use] hardly justifies sounding the First Amendment bugle."). *See, e.g.*, Melissa Daniels, *'Bong Hits' Case Still Haunts Roberts as Protesters Hit Quad*, DAILY ORANGE, Sept. 20, 2007, http://.www.dailyorange.com/media/storage/paper522/news/2007/09/20/News/bong-Hits.Case.Still.Haunts.

comment on the Court's work, it is difficult to imagine an inconsequential free-speech case. It could also be relevant that *Morse* involved an exotic location like Juneau, Alaska[10] and the snicker-worthy term, "BONG HiTS"! What's more, the case fits—though not perfectly[11]—the standard, "sharp turn to the right" account of October Term 2006 and its closely-divided decisions.[12] And, even if short on doctrinal guidance, the case is full of curiosities. For example, the case attracted a number of amicus briefs by religious-liberty-focused and right-leaning groups, who argued in opposition to the brief filed on behalf of the Bush Administration and in company with the A.C.L.U. (Division in the ranks! Strange bedfellows!) Justice Stevens wrapped himself more closely in the role of the amiable, if slightly hectoring, avuncular storyteller, sharing lessons from his youthful experiences with Prohibition.[13] Justice Thomas filed, to the horror of some and the fascination of others, another "yes, I really mean it about this 'originalism' business!" concurrence.[14]

Perhaps the most intriguing question posed by the litigation, decision, and opinions in *Morse* is one that the various Justices who wrote in the case never squarely addressed: What *is* the "mission"—i.e., the "basic educational mission"[15]—of public schools? Both Ms. Morse and the United States had—to the dismay of Mr. Frederick's many amici[16]—urged the Court explicitly to make the public schools' "basic educational mission" the key to its school-speech doctrines.[17] The Solicitor General, for example, proposed that "public schools may prohibit speech that is inconsistent with their basic educational mission in order to disassociate themselves from such speech, and thereby reinforce the values . . . they

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Roberts.As.Protesters.Hit.Quad-2980102.shtml (quoting Josh Snodgrass, "a senior English and religion major," as saying that the duct tape over his mouth symbolized "free speech liberties being taken away").

[10] This writer lived for a time in Juneau. It is a beautiful, if not-very-sunny, place.

[11] *See Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in part, dissenting in part) ("This Court need not and should not decide this difficult . . . issue on the merits.").

[12] *See, e.g.*, Robin Toner, *The 2008 Election and the Supreme Court*, N.Y. TIMES, July 4, 2007, http://www.nytimes.com/2007/07/04/us/politics/04web-toner.html ("It was a session marked by a sharp turn to the right in a series of 5-to-4 decisions."); Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, (2007) ("Conservatives finally got their Court.").

[13] *Morse*, 127 S. Ct. at 2643, 2651 (Stevens, J., dissenting).

[14] *Id.* at 2629–36 (Thomas, J., concurring). *See also, e.g.*, Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 601 (1995) (Thomas, J., concurring).

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

[16] *See, e.g.*, Brief Amicus Curiae of the Christian Legal Society in Support of Respondent, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).

[17] Brief for Petitioner at 21, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278) (urging Court to affirm that public schools may censor and punish speech that "undermines [their] basic educational mission").

seek to teach."[18] Similarly, the National School Boards Association urged the Court to appreciate the richness of that mission—a mission that, they insisted, extends beyond technical training and classroom exercises—and to defer to school officials' judgments about how best to carry it out.[19]

True, the Court did not endorse or enforce such a broad rule. For Chief Justice Roberts, it was enough to note simply that schools have "special characteristics" which "circumscribe[]" students' free-speech rights and that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use."[20] Accordingly, he reasoned, school officials may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[21] But, in a concurring opinion, which Justice Kennedy joined, Justice Alito took care to reject the broad "educational mission" argument, insisting that it "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed" and that it therefore "strikes at the very heart of the First Amendment."[22]

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At one point in the 1991 blockbuster film, *The Silence of the Lambs*[23], Dr. Hannibal "The Cannibal" Lecter is toying with Clarice Starling, an earnest, ambitious F.B.I. agent-in-training who is eager—desperate, even—for clues and insights that might help her catch a serial killer known as "Buffalo Bill."[24] "Everything you need to know," Lecter assures her, is in the pages of the case file.[25] "Then tell me how," she entreats him. Lecter replies, "First principles, Clarice. Simplicity. Read Marcus Aurelius. Of each particular thing ask: What is it, in itself, what is its nature . . . ? What does he do, this man you seek?"[26]

So, what might Marcus Aurelius—or, Dr. Hannibal Lecter—have to say about the "mission" of public schools? What *are* these institutions? What is their aim, the point of their enterprise, from which, some argue, free-speech doctrine should take its shape? "What is [their] nature"?

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[18] Brief for the United States as Amicus Curiae Supporting Petitioners at 19, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).

[19] *See, e.g.*, Brief of Amicus Curiae National School Boards Association et al., *supra* note 5, at 29 ("[S]chool districts should be permitted to regulate speech that, in the reasonable professional judgment of school officials, undermines their core educational mission . . . .").

[20] *Morse*, 127 S. Ct. at 2626, 2628.

[21] *Id.* at 2625; *see also id.* at 2629.

[22] *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). This same point was powerfully argued in, for example, the amicus curiae brief filed by the Liberty Legal Institute. *See, e.g.*, Brief of the Liberty Legal Institute as Amicus Curiae in Support of Respondent at 5–9, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).

[23] THE SILENCE OF THE LAMBS (Orion Pictures 1991).

[24] *Id.*

[25] *Id.*

[26] *Id.*

"What do[] [they] do"? And, given what we have come to think the Free Speech Clause means, and considering the values it enshrines and the dangers against which it protects, is it really even possible for the freedom of speech to co-exist with the "mission" of the public schools?

Think of Justice Jackson's famously stirring—if a bit florid[27]—rhetoric in the West Virginia flag-salute case: "If there is any fixed star in our constitutional constellation," he proclaimed, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]"[28] Is this really true—*could* it be true—in public schools?

II.

Two principles, or maxims, framed the Justices' analysis in *Morse*. First, "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[29] Fair enough. Only Justice Thomas refused to toe this line, insisting that our "Constitution does not afford students a right to free speech in public schools."[30] Second, and "[a]t the same time, we have held that 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'"[31]

This two-part starting point is entirely consistent with a leading free-speech *leitmotif*. The rules and standards that constrain government regulation of speech are, in part, a function of the capacity in which the government is acting.[32] Governments have more leeway to discipline their employees' speech than they do to punish private citizens for theirs; officials may control speakers' access to the floor of the Senate but not—for the most part—to their soapbox; the public authority may "speak"—through public-service announcements, commissioned art works, etc.—even when it lacks the power to require people to speak, and so on.

The First Amendment, after all, is first and foremost a check on the acts and aims of government. True, it expresses deep philosophical

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[27] Steven D. Smith, Barnette's *Big Blunder*, 78 CHI.-KENT. L. REV. 625 (2003).

[28] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[29] Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)).

[30] *Id.* at 2634 (Thomas, J., concurring).

[31] *Id.* at 2622 (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)). *See also, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995) ("[W]hile children assuredly do not shed their constitutional rights . . . at the schoolhouse gate, the nature of those rights is what is appropriate for children in school." (citation and internal quotation marks omitted)).

[32] *See, e.g.*, EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES, AND POLICY ARGUMENTS 2 (2d ed. 2005) (urging students confronted with free-speech problems to consider "whether the government is acting *in a special capacity*, such as employer, landlord, public school educator, and the like, rather than acting as sovereign (exercising its powers to control everyone's conduct)").

commitments, promotes and reflects fundamental values, and facilitates human flourishing—it does and means many things—but it does all this by regulating official action: "Congress shall make no law . . . ." So, the Amendment directs attention and analysis to the doings of state actors, public officials, legislators, etc. It also demands appreciation for the fact that, again, governments act in all kinds of ways and in a variety of capacities.[33] Public officials enact and enforce criminal statutes; run jails and courts; operate schools and hospitals; hire, employ, and fire millions of people; conduct research and assemble football teams; sponsor advertisements and monuments; manage parks and forests; build roads and office buildings; sort and deliver mail; collect taxes and disburse benefits; raise armies and fight wars.

The point here—one that then-Justice Rehnquist pressed more than thirty years ago—is that the particular constraints the First Amendment imposes on government activities will often vary, depending on the activity at issue, or on the capacity—regulator, subsidizer, property manager, employer, and so forth—in which the government acts.[34] The Supreme Court's free-speech doctrine makes it easier for government to control demonstrations in government buildings, or to regulate what teachers say in the classrooms of public elementary schools, than to prosecute newspaper publishers for hostile editorials. The rules that apply to an official's decision to fire a public employee for her outrageous or offensive comments are not the same as those that apply to an effort to criminalize such comments.

We could also approach the matter at a slightly different angle. Instead of breaking out the many different capacities in which the government acts, or listing the vast and growing array of things governments do and aims they pursue, we could—following Professor Robert Post—narrow our focus to the "nature of the government authority in question."[35] There are, Post has proposed:

> two kinds of government authority, corresponding to two distinct regimes of first amendment regulation. The first is what I call "managerial" authority, with which the state is characteristically invested when it acts to administer organizational domains dedicated to instrumental conduct. In such contexts the

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[33] Some of the discussion that follows is adopted from Richard W. Garnett, *Less Is More: Justice Rehnquist, The Freedom of Speech, and Democracy, in* THE REHNQUIST LEGACY 26–42 (Craig M. Bradley ed., 2006).

[34] Buckley v. Valeo, 424 U.S. 1, 290 (1976) ("The limits imposed by the First and Fourteenth Amendments on governmental action may vary in their stringency depending on the capacity in which the government is acting."). *See also* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.").

[35] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1717 (1987).

> government may constitutionally regulate speech as necessary to achieve instrumental objectives. The second kind of authority can be termed that of "governance." It is characteristic of the authority which the state exercises over what Hannah Arendt has called the "public realm": the arena in which members of the general public meet to accommodate competing values and expectations, and hence in which all goals or objectives are open to discussion and modification. The government's ability to restrict speech in the public realm is limited by ordinary and generally applicable principles of first amendment adjudication.[36]

Or, we could look not at the capacity in which the government acts, or at the nature of the authority it exercises, but at the institutional context of the speech at issue. Inspired by Frederick Schauer and others,[37] we might examine the extent to which the speech-regulation constraints under which the government operates should take their shape from the character, history, and aims of the institutions in which it confronts speech. Too often, Schauer has complained, our free-speech law has been "institutionally oblivious,"[38] and failed to take into account important features of, or differences among, various institutions. At the same time, as Professor Scott Moss has pointed out, there are some doctrinal areas—and student-speech is one—which are quite sensitive to institutional context.[39]

The point is, each of these approaches and insights is consistent with the foundation on which the *Morse* decision is built: public-school students' free-speech rights, such as they are, take their shape and receive their bounds from the nature of the school enterprise and the "special characteristics of the school environment."[40] They are not a function merely of the fact that public-school students tend not to be adults.[41] After all, there is not a general free-speech rule permitting governments to censor children on the basis of the content or viewpoint of their speech. It is not as if the *Brandenberg* "imminence" requirement is bracketed when a speaker is a minor, or as if children have a lesser right to engage in *Buckley*-type expression by contributing to campaigns and candidates.[42] In the school-speech cases, the doctrine does not reflect the speaker's age, but rather her situation and status as a student-in-school. It

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[36] *Id.* (footnote omitted).

[37] *See generally, e.g.*, Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

[38] *Id.* at 1264.

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

[40] Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (internal quotation marks omitted) (citing Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988), and Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)).

[41] As it happens, Mr. Frederick *was* eighteen years old when he was suspended. Brief for Respondent at 1, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).

[42] *See* McConnell v. F.E.C., 540 U.S. 93, 231–32 (2003) (plurality opinion).

is the school enterprise—the public school's "mission"—that drives the decisions.[43] (Otherwise, it would hardly matter whether or not Mr. Frederick's banner was displayed "during normal school hours," at an "approved social event or class trip," under the supervision of "[t]eachers and administrators," surrounded by the "band and cheerleaders."[44])

So what, for free-speech purposes, are the salient features of the public schools and the animating aims of public education? The public schools are a government enterprise,[45] and the Free Speech Clause will apply in a way, and to an extent, that is consistent with the purpose and nature of that enterprise.[46] The challenge posed by the *Tinker* line of school-speech cases, then, is to decide *how* the Free Speech Clause applies, and this challenge can be met only by thinking about what the public-education enterprise *is*.

III.

Writing for the Court in the 1986 *Fraser* decision,[47] Chief Justice Burger explained that the First Amendment's Free Speech Clause does not "prevent[] a school district from disciplining a high school student for giving a lewd speech at a school assembly,"[48] or from "determining that to permit a vulgar and lewd speech ... would undermine the school's basic educational mission."[49] After all, he observed, "vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[50] In support of this observation, he cited the Court's 1979 *Ambach* decision, in which the Court identified the "inculcat[ion of] fundamental values necessary to the maintenance of a

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[43] *Cf.* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1397 (2000) ("Although the nature of students as children has some explanatory power, it is ultimately a problematic and incomplete explanation ...."). On the other hand, the Court's Establishment Clause decisions involving schools have often emphasized the immaturity—and, accordingly, the vulnerability-to-religious-indoctrination—of children. *See, e.g.*, School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (noting that "symbolism of a union between church and state is most likely to influence children of tender years"). And, the First Amendment's constraints do, in some other circumstances, take account of the special interest in protecting children from certain words or messages. *See, e.g.*, F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968).

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

[45] *See id.* at 2637 (Alito, J. concurrence) ("The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State.").

[46] *See* Ryan, *supra* note 43, at 1403 ("[T]he unifying theme is that the Court alters constitutional standards and upholds school policies or practices when doing so appears necessary to preserve the academic function of public schools.").

[47] Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[48] *Id.* at 677.

[49] *Id.* at 685.

[50] *Id.* at 686–87.

democratic political system" as the "objective[] of public education."[51] In addition:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic .... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[52]

Right away, then, it seems we are not examining, and students are not operating within, a context where "one man's vulgarity [may be] another's lyric"[53] or where it is either possible or desirable to encourage "uninhibited, robust, and wide-open" conversation.[54] One need not embrace Justice Thomas's methodology or conclusion in *Morse* to suspect that what he said of "the earliest public schools"—*i.e.*, that "teachers taught, and students listened[, t]eachers commanded, and students obeyed"[55]—fits pretty well the former Chief Justice's understanding of the school's aims.

In *Tinker,* Justice Fortas's opinion for the Court did not explore in great detail the mission of public education, or the implications of that mission for students' free-speech rights. "First Amendment rights," he stated, "applied in light of the special characteristics of the school environment, are available to teachers and students."[56] That said, there runs through the opinion a clear and—for the time—typical confidence that "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"; after all, "our Constitution says we must take [the] risk" of disturbance.[57] In other words, it is not so much the special characteristics of the school as the unavoidable features of an open society that dominate the discussion. We know that state-operated schools are *not* "enclaves of totalitarianism," bent on "foster[ing] a homogenous people,"[58] but, as for what they are, we are given little besides the (improbable) suggestion that, even in primary and secondary schools, "[t]he classroom is peculiarly the 'marketplace of ideas.'"[59]

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[51] *Id.* at 681 (citing and quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).

[52] *Id.* at 681.

[53] Cohen v. California, 403 U.S. 15, 25 (1971).

[54] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[55] Morse v. Frederick, 127 S. Ct. 2618, 2631 (2007) (Thomas, J., concurring).

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

[57] *Id.* at 508.

[58] *Id.* at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

[59] *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)). To characterize this suggestion as "improbable" is not to deny that, in many ways, the search for truth goes on in elementary and secondary school classrooms. However, it seems to me that, in these contexts, this search goes on in a very different—that is, a controlled and constrained—way than that which is evoked by the image of the "marketplace of ideas."

Perhaps Chief Justice Burger's purpose, then, in devoting a section of his *Fraser* opinion to the "role and purpose" of the American public-school system was to wring out of the school-speech cases some of the *Brandenburg* and *Sullivan* attitude toward expression and disruption. Yes, there is a place, even in public schools, for "unpopular and controversial" views, but the need for these views, and the right to express them, "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[60] Indeed, the work of public schools is not so much to serve as triple-A marketplaces of ideas—they are not, Justice White would emphasize later in *Kuhlmeier,* "forum[s] for public expression"[61]—but to "teach by example the shared values of a civilized social order."[62]

As the *Morse* litigation was proceeding, the notion that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission'"[63] was heavily emphasized by the principal and her supporters, and resisted—or at least qualified—by Frederick and a wide range of civil-liberties and religious-freedom organizations. The latter, in particular, worried that the "educational mission" standard could serve as an invitation to regulate student speech with religious content. Such speech, after all, might be divisive and distracting to some. The concern, clearly, was that some of the gains religious-liberty advocates have secured in recent years—decisions requiring equal-treatment of religious speech in limited public forums, for example[64]—could be rolled back.

What follow are just a few examples of how the "educational mission" argument was deployed and countered: The Brief for Petitioner (authored by former federal judge, special prosecutor, and now law-school dean Kenneth W. Starr) emphasized the "challenge" posed by "declining academic performance in the age of globalization" and said that "[p]reventing teenage drug use is a critical educational mission of our public schools."[65] The Solicitor General agreed, insisting that "[a] school district can reasonably conceive of its mission as including not only educating students, but doing so in an environment that keeps them free from the scourge of drugs during their K–12 years."[66] More generally, the United States put at the heart of the public schools' mission the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."[67]

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[60] Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[61] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

[62] *Fraser,* 478 U.S. at 683.

[63] *Kuhlmeier,* 484 U.S. at 266 (quoting *Fraser,* 478 U.S. at 685).

[64] *See, e.g.,* Good News Club v. Miford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[65] Brief for Petitioner, *supra* note 17, at 26.

[66] Brief for the United States, *supra* note 18, at 7.

[67] *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

The amicus briefs filed by educators and school administrators were even more ambitious in proposing content for the schools' mission. Quoting *Brown v. Board of Education,* the National School Boards Association cast public education as "the very foundation of good citizenship" and "a princip[al] instrument in awakening the child to cultural values."[68] What's more, the Association contended both that local school boards were entitled to wide latitude in defining their schools' education mission and that courts should defer to teachers' and administrators' decisions about how best to advance and protect the mission through speech regulation.

As was noted earlier, this emphasis on public schools' claimed right to regulate speech in the service of their educational mission, broadly understood, triggered a diverse array of powerfully argued amicus briefs emphasizing the dangers inherent in the deference and discretion claimed by the schools. It also prompted a separate writing by Justice Alito, in which he said that "[t]his argument can easily be manipulated in dangerous ways, and I would reject it before [it] ... occurs."[69] He worried, in particular, that some schools would "define[] their educational missions as including the inculcation of whatever political and social views are held by" the relevant officials.[70] For Justice Alito, the distinctive feature of the "school setting" to be emphasized is not the schools' formative role in inculcating public values but rather their more prosaic obligation to protect students from the "threats to their physical safety" posed by illegal drugs.[71]

There is, of course, much more that could be said about the history, purpose, and evolution of public schools. And yet, enough has been said already to justify the suggestion that *Tinker*'s vision was insufficiently attentive to the fact that schools are government-run institutions, charged with forming and shaping students' values, loyalties, commitments, and manners. One can share—as this writer does—the worries of Justice Alito and Mr. Frederick's amici about the imposition of majoritarian orthodoxies in the guise of mission-required discipline and still wonder if these worries reflect a failure to confront, in a clear-eyed way, the implications of state-run schools. One can agree with Justice Alito that the "educational mission" argument "give[s] public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed," and yet suspect that such a license is unavoidable.[72]

Consider H.L. Mencken's view of the aim of public education. It is not, he suggested, "to fill the young of the species with knowledge and

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[68] Brief of Amicus Curiae National School Boards Association et al., *supra* note 5, at 5.

[69] Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring).

[70] *Id.*

[71] *Id.* at 2638.

[72] *Id.* at 2637.

awaken their intelligence. . . . Nothing could be further from the truth. The aim . . . is simply to reduce as many individuals as possible to the same safe level, to breed and train a standardized citizenry, to put down dissent and originality."[73] Henry Adams expressed a similar view, though perhaps in a less gloomy way: "All State education," he believed, "is a sort of dynamo machine for polarizing the popular mind; for turning and holding its lines of force in the direction supposed to be [the] most effective for State purposes."[74] Perhaps, to be fair, this puts a too-gloomy (if Menckenish) cast on the enterprise. Still, there is no denying that public education in the United States is an aggressively ideological enterprise, one that long aimed at Americanizing—sometimes Protestantizing—the children of immigrants and Catholics.[75] The fear—or maybe the conviction—is unmistakable in the briefs of Mr. Frederick's religiously-affiliated amici that the schools are up to something similar still.

And, why should we be surprised? We are talking, after all, about *education*, and education by the government. It would be strange to expect the government not to care about education's content and effects. Drawing on the discussion above, the government acting in its capacity as "educator," exercising its "management" authority, could hardly be expected to regard the project in which it invests so much as narrowly confined to protecting students' safety and equipping them with various technical skills.

As I have suggested elsewhere,[76] "education" is best understood as the indivisible process of acquiring beliefs, premises, and dispositions that are our windows on the world, that mediate and filter our experience of it, and that govern our evaluation and judgment of it. Education is what attaches us to those goods and ends that attract, almost gravitationally, our decisions and actions. It is precisely because education is really, in the end, the process and craft of soul-making, and is as much about transmitting values and loyalties to our children as it is

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[73] John Taylor Gatto, *Against School: How Public Education Cripples Our Kids, and Why*, HARPER'S MAG., Sept. 2003, at 33, 35 (quoting Mencken).

[74] HENRY ADAMS, THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY 78 (Norman S. Berg ed., Houghton Mifflin Co. 1975) (1918).

[75] *See generally, e.g.*, Richard W. Garnett, *American Conversations With(in) Catholicism*, 102 MICH. L. REV. 1191 (2004) (reviewing JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY (2003)); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMENDMENT. L. REV. 45 (2003). *See also, e.g.*, CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 76 (Eric Foner ed., 1983) (describing the "ideology" of the common schools as "republicanism, Protestantism, and capitalism"). For more on the ideology of the common-school movement, see generally CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925 (1987); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 145–79 (1999).

[76] Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001).

about outfitting them with useful data and "skill sets," that we care, argue, and even fight so much about it. We care about education not just because we think it matters what facts and figures our children and our fellow citizens know. We care—more particularly, the government cares—because, we think, it matters what they value, it matters what—and in what—they believe, and it matters to and for what they aspire. After all, a political community can no more perpetuate itself without attending carefully to the dispositions of its citizens than a religious community that does not evangelize each new generation can hope to thrive and survive.[77] In Horace Mann's words, "It may be an easy thing to make a republic; but it is a very laborious thing to make Republicans."[78] This is true, and it presents the question, whether "the freedom of speech" can meaningfully, non-disingenuously be imported into government enterprises charged with this "laborious thing."

IV.

As has already been mentioned, a number of scholars have endorsed, and taken to heart, Professor Schauer's complaint that First Amendment doctrine "has been persistently reluctant to develop its principles in an institution-specific manner, and thus to take account of the cultural, political, and economic differences among the differentiated institutions that together comprise a society."[79] Institutions vary, however, and their differences matter. And so, Schauer has urged the Supreme Court to embrace and employ an "institutionally sensitive approach" in at least certain free-speech cases.[80]

Among those leading the way in developing such an approach is Professor Paul Horwitz.[81] In particular, Horwitz has contended that some

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[77] William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 870 (1999) ("Liberal democratic citizens are made, not born . . . ."); GEORGE WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 90–91 (1983) ("[M]en and women are biological facts, but that ladies and gentlemen fit for self-government are social artifacts, creations of the law.").

[78] STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 42 (1998) (quoting Horace Mann, *The Importance of Universal, Free, Public Education*).

[79] Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998).

[80] *See generally* Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

[81] *See generally*, Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. (forthcoming 2008) (on file with author), *available at* http://ssrn.com/abstract=1018969; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007); Paul Horwitz, *"Or of the [Blog],"* 11 NEXUS 45 (2006), *available at* http://ssrn.com/abstract=871325; Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461 (2005).

institutions—"First Amendment institutions"—"play a significant role in contributing to public discourse" and "are both institutionally distinct and largely self-regulating according to a set of institutional norms, practices, and traditions."[82] Universities are (at their best) such "First Amendment institutions," and so "[l]egal doctrine should recognize the special role [they play] under the First Amendment by largely deferring to these institutions and permitting them to govern themselves according to their own sense of academic mission, without government interference."[83]

What about public schools? Are public schools "First Amendment institutions"? In what way? And, if so, how does this cut? Does the "special role" public schools play in "contribut[ing] to public discourse" weigh in favor of more judicial supervision of officials' speech regulations or less? On the one hand, Justice Brennan was clearly of the view that the reasoning and result in *Tinker* were consonant with—indeed, required by—an appropriate appreciation for the fact that "[p]ublic education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic."[84] On the other hand, the educators' and administrators' amicus briefs, quoted earlier, reflect an equally firm conviction that public schools' First Amendment role is best served by deference to, and discretion for, school officials.

So, as Horwitz has already asked, "[i]f universities are entitled to be treated as First Amendment institutions and granted substantial autonomy accordingly, are K–12 public schools similarly entitled"?[85] In his view, they are not:

> [U]niversities are sites for the exchange of ideas, and for the *production* of free speech, in the form of research, publication, speeches, conferences, and so on. Public schools, on the other hand, primarily serve the First Amendment as sites for the production of the *facility* for free speech: that is, they teach children so that they will have the capacity to be engaged and active citizens elsewhere and later in life.[86]

This is a sensible point. At the same time, perhaps it does not go far enough. To reiterate a question that has surfaced several times in this Essay: how can a constitutional provision whose aim, many think, is to constrain the government from interfering in or directing a diverse and

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[82] Horwitz, *Universities as First Amendment Institutions*, *supra* note 81, at 1497. *See also, e.g.*, Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. ___ (2008) (forthcoming).

[83] Horwitz, *Universities as First Amendment Institutions*, *supra* note 81, at 1498.

[84] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting).

[85] Posting of Paul Horwitz to PrawfsBlog, Public Schools as First Amendment Institutions?, http://prawfsblawg.blogs.com/prawfsblawg/2007/03/public_schools_.html (Mar. 21, 2007).

[86] *Id.*

pluralistic society's conversations about the common good be incorporated into a context in which the state—again, that which this constitutional provision binds—is exercising "managerial" authority for the purpose of producing not just certain *facilities,* but certain core values, loyalties, and commitments? It is not hard to agree that universities—institutions which are soaked in traditions of independence, self-government, and state-checking—play an important structural role in the landscape of civil society, clearing out the space necessary for discovery and dissent. Public K–12 schools, on the other hand, seem more like anti-First Amendment—or, perhaps, pre-First Amendment—institutions. No wonder the Court continues to struggle to formulate free-speech doctrine that takes into account these schools' "special characteristics."

CONCLUSION

"There's no such thing as free speech," Professor Fish has said, "and it's a good thing, too."[87] Certainly, Fish's work is a valuable gut-check, and a useful corrective to the tendency to get too comfortable with high-flying rhetoric about speech, liberalism, neutrality, and politics. Even so, it seems strange to close an essay on the Supreme Court's most recent case involving the application of the First Amendment in public schools with the suggestion that it cannot, in the end, apply very well. To be clear: given all the givens, Mr. Frederick's amici and Justice Alito did well to resist the suggestion that government officials charged with running public schools should enjoy immunity from the suspicion that rightly attaches to all content-based regulations of speech, particularly those regulations that purport to aim at protecting and developing shared civic values. That said, we all do well to remain skeptical about the compatibility of government-run education with the freedom of speech.

Does this mean that education is not, in fact, all that Chief Justice Burger said it is, that it is not—in the words of *Brown*—"the very foundation of good citizenship" and "a princip[al] instrument in awakening the child to cultural values"?[88] Not at all. It means, instead, that the freedom of speech would be better served, nurtured, and protected if education, richly understood, took place in non-state "First Amendment institutions," at public expense. But, that is a matter for another essay.[89]

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[87] *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994).

[88] Brief of Amicus Curiae National School Boards Association et al., *supra* note 5, at 5.

[89] *See, e.g.,* Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good,* 23 CARDOZO L. REV. 1281 (2002).