

tions. This veritable “constitutional sea change”<sup>73</sup> — hiding inside of a new test for as-applied challenges — arrives on the eve of the 2008 presidential election, as Americans brace for an onslaught of campaign advertisements. The fallout of the *WRTL* decision will be more money spent on corporate election-related speech,<sup>74</sup> and that speech will likely consist of “ads that contain a fig-leaf of reference to issues that is just enough to give them constitutional protection.”<sup>75</sup> Although the principal opinion and the concurrence espoused high-principled First Amendment rhetoric, they did so, ironically, to the benefit of wealthy corporations and unions without regard for the fact that ordinary citizens may cease to be heard in the resultant flood of corporate-sponsored speech. Invalidating Congress’s attempt to clean up its own campaigns and handing elections to wealthy special interests is quite a radical result from a supposedly modest Chief Justice.

2. *Student Speech*. — In 1969, the Supreme Court held in *Tinker v. Des Moines Independent Community School District*<sup>1</sup> that a public school district could not constitutionally ban students from wearing black armbands to class in protest of the Vietnam War.<sup>2</sup> The Court ruled that such student speech could be prohibited only if it threatened “substantial disruption of or material interference with school activities,”<sup>3</sup> and Justice Fortas famously pronounced that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>4</sup> In the 1980s, the Court decided two cases that have been read as creating significant exceptions to *Tinker*’s First Amendment protections,<sup>5</sup> holding that schools may prohibit “offensively lewd and indecent speech”<sup>6</sup> and that schools may regulate the student-produced content of a school-sponsored newspaper in “any

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<sup>73</sup> Posting of Richard Pildes to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2007/06/wrtl\\_blockbuste.html](http://www.scotusblog.com/movabletype/archives/2007/06/wrtl_blockbuste.html) (June 25, 2007, 12:27).

<sup>74</sup> See Editorial, *supra* note 66 (“Chief Justice Roberts and the four others in his ascendant bloc used the next-to-last decision day of this term to reopen the political system to a new flood of special-interest money. . . . [The Roberts Court] opened a big new loophole in time to do mischief in the 2008 elections.”).

<sup>75</sup> Posting of Richard Pildes to SCOTUSblog, *supra* note 73.

<sup>1</sup> 393 U.S. 503 (1969).

<sup>2</sup> *Id.* at 508–10.

<sup>3</sup> *Id.* at 514.

<sup>4</sup> *Id.* at 505.

<sup>5</sup> See, e.g., Erwin Chemerinsky, *Students Do Leave First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 535–38, 541–42 (2000) (arguing that the subsequent decisions stripped *Tinker* of most of its force); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 *BAYLOR L. REV.* 623, 662 (2002) (arguing that the subsequent decisions “created narrow exceptions” to the rule expressed in *Tinker*, although lower courts have broadened these exceptions “in trying to circumvent the rule”).

<sup>6</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

reasonable manner.”<sup>7</sup> Last Term, in *Morse v. Frederick*,<sup>8</sup> the Court took another significant step away from *Tinker*. The *Frederick* Court upheld the suspension of a student for displaying a banner reading “BONG HiTS 4 JESUS” because a school official reasonably interpreted the banner as advocating illegal drug use.<sup>9</sup> In its eagerness to allow schools to prohibit pro-drug speech, the Court failed to provide any contained or compelling justification for its newly created exception to the First Amendment. As a result, schools and courts will have wide latitude not only in deciding how and when to apply *Frederick* to student drug-related speech, but also in deciding what other viewpoints are simply outside a student’s right to freedom of expression.

In January of 2002, classes at Juneau-Douglas High School in Juneau, Alaska, were dismissed early to allow students and staff to watch the Olympic Torch Relay as it passed by the school on its way to the winter games in Salt Lake City.<sup>10</sup> Many of the students lined up on both sides of the street to watch the relay.<sup>11</sup> Joseph Frederick, a senior at Juneau-Douglas, had not come to school that morning — he later explained that he had been stuck in the snow at home — but showed up across the street from the school in time for the relay.<sup>12</sup> As the torch relay passed and the television cameras were pointing in his direction, Frederick and several other students unfurled a fourteen-foot banner that read “BONG HiTS 4 JESUS.”<sup>13</sup> The school principal crossed the street and demanded the students take the banner down; Frederick alone refused,<sup>14</sup> citing his First Amendment rights.<sup>15</sup> The principal then grabbed the banner from Frederick and crumpled it up.<sup>16</sup> She afterwards called Frederick to her office and suspended him for ten days.<sup>17</sup> The principal later stated that she suspended Frederick for violating a school board policy prohibiting students from “advocat[ing] the use of substances that are illegal to minors”;<sup>18</sup> Frederick later explained that he designed the sign “to be meaningless and funny, in order to get on television.”<sup>19</sup>

Frederick unsuccessfully appealed his suspension to the school board and then brought suit in federal district court under 42 U.S.C.

<sup>7</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

<sup>8</sup> 127 S. Ct. 2618 (2007).

<sup>9</sup> *See id.* at 2625.

<sup>10</sup> *Id.* at 2622.

<sup>11</sup> *Id.*

<sup>12</sup> *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006).

<sup>13</sup> *Frederick*, 127 S. Ct. at 2622.

<sup>14</sup> *Id.*

<sup>15</sup> *Frederick*, 439 F.3d at 1116.

<sup>16</sup> *Id.*

<sup>17</sup> *Frederick*, 127 S. Ct. at 2622.

<sup>18</sup> *Id.* at 2623.

<sup>19</sup> *Frederick*, 439 F.3d at 1116.

§ 1983, accusing the principal and the school board of violating his First Amendment rights.<sup>20</sup> The district court held that under the Supreme Court's ruling in *Bethel School District v. Fraser*,<sup>21</sup> Frederick's speech was not protected and the principal's actions were proper.<sup>22</sup>

A Ninth Circuit panel unanimously vacated and remanded.<sup>23</sup> The court first held that "even though supervision of most students was minimal or nonexistent" during the relay, it was a school event, and Frederick was speaking as a student.<sup>24</sup> Stating that it would "proceed on the basis" that Frederick's banner conveyed a pro-marijuana message,<sup>25</sup> the court held that the banner did not fall under *Fraser*'s "plainly offensive" standard,<sup>26</sup> nor had it given rise to substantial "concern about disruption of educational activities"<sup>27</sup> as required for the suppression of student speech under *Tinker*. Rejecting the school's justification that the banner undermined the anti-drug element of its educational mission, the court stated that "government is not entitled to suppress speech that undermines whatever missions it defines for itself."<sup>28</sup> The court found Frederick's rights to be so clearly established that the principal was not entitled to qualified immunity.<sup>29</sup>

The Supreme Court reversed. Writing for the Court, Chief Justice Roberts<sup>30</sup> held that schools may suppress student speech "that can reasonably be regarded as encouraging illegal drug use."<sup>31</sup> The Court quickly dismissed Frederick's argument that he was not at a school event,<sup>32</sup> and found that at least two reasonable interpretations of the words "bong hits 4 Jesus" demonstrated that the banner advocated illegal drug use: an imperative interpretation ("[Take] bong hits") and a declarative interpretation ("bong hits [are a good thing]" or "[we take] bong hits").<sup>33</sup> The Court also found that the banner was "plainly not" political speech.<sup>34</sup>

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<sup>20</sup> *Frederick v. Morse*, No. J 02-008 CV(JWS), 2003 WL 25274689, at \*1 (D. Alaska May 27, 2003).

<sup>21</sup> 478 U.S. 675 (1986) (holding that the First Amendment does not protect vulgar or lewd student speech).

<sup>22</sup> See *Frederick*, 2003 WL 25274689, at \*4-5.

<sup>23</sup> *Frederick*, 439 F.3d at 1125.

<sup>24</sup> *Id.* at 1117.

<sup>25</sup> *Id.* at 1118. Given the court's wording, it is unclear to what degree it assumed only for the sake of argument that the banner contained a pro-drug message.

<sup>26</sup> *Id.* at 1119.

<sup>27</sup> *Id.* at 1118.

<sup>28</sup> *Id.* at 1120.

<sup>29</sup> See *id.* at 1123-24.

<sup>30</sup> Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts's opinion.

<sup>31</sup> *Frederick*, 127 S. Ct. at 2622.

<sup>32</sup> See *id.* at 2624.

<sup>33</sup> *Id.* at 2625 (alterations in original) (internal quotation marks omitted).

<sup>34</sup> *Id.*

The Court reaffirmed that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate’”<sup>35</sup> and agreed that the banner did not fall within the offensiveness standard of *Fraser*.<sup>36</sup> However, the Court also reaffirmed *Fraser*’s holding that students’ rights “are not automatically coextensive with the rights of adults in other settings,”<sup>37</sup> and held that *Fraser* and other post-*Tinker* school speech cases demonstrated that the *Tinker* “substantial disruption” test “is not absolute.”<sup>38</sup> Given the importance of the school’s mission to deter drug use, the Court held, the threat posed by Frederick’s banner was “far more serious and palpable” than that posed by the war-protest armbands worn by the students in *Tinker*, and Frederick’s speech was not protected by the First Amendment.<sup>39</sup>

In addition to joining the majority opinion, Justice Alito filed a separate concurrence.<sup>40</sup> Justice Alito wrote that he joined the Court’s opinion only on the understanding that “(a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue,” including the marijuana legalization debate.<sup>41</sup> Justice Alito noted that because schools define their own educational missions, allowing them to suppress speech that runs counter to those missions would allow suppression of “speech on political and social issues based on disagreement with the viewpoint expressed.”<sup>42</sup> Instead, Justice Alito argued that schools can restrict non-political speech about drugs because such speech can pose a “threat to the physical safety of students,” which schools are specially obligated to protect.<sup>43</sup>

Justice Thomas also filed a separate concurrence in addition to joining the majority opinion. Justice Thomas argued that instead of continuing to create exceptions to *Tinker*, the Court should simply overrule it and hold that students have no free speech rights under the original understanding of the First Amendment.<sup>44</sup> In Justice Thomas’s

<sup>35</sup> *Id.* at 2622 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>36</sup> *See id.* at 2629.

<sup>37</sup> *See id.* at 2626 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)) (internal quotation mark omitted).

<sup>38</sup> *Id.* at 2627.

<sup>39</sup> *Id.* at 2629.

<sup>40</sup> Justice Kennedy joined Justice Alito’s concurrence.

<sup>41</sup> *Frederick*, 127 S. Ct. at 2636 (Alito, J., concurring).

<sup>42</sup> *Id.* at 2637.

<sup>43</sup> *Id.* at 2638.

<sup>44</sup> *See id.* at 2634–36 (Thomas, J., concurring); *see also id.* at 2630–33 (discussing the history of speech in American public schools).

view, *Tinker* improperly replaced a “democratic regime” — in which dissenting parents could attempt to influence school boards, enroll children in private school, or move — with “judicial oversight of the day-to-day affairs of public schools.”<sup>45</sup>

Justice Breyer concurred in the judgment in part and dissented in part. Justice Breyer criticized the majority for carving out a specific exception allowing school censorship of drug-related speech “without a satisfying explanation of why drug use is *sui generis*,” and criticized the dissent for proposing a rule that would permit student conduct that is “simply beyond the pale.”<sup>46</sup> Although he indicated that a school would not run afoul of the First Amendment by simply banning students from unfurling large banners during field trips,<sup>47</sup> Justice Breyer argued that the Court should not have reached the First Amendment issue at all, and instead should have disposed of the case on qualified immunity grounds.<sup>48</sup>

In a vigorous dissent, Justice Stevens<sup>49</sup> characterized the school’s action as “punish[ing] Frederick for expressing a view with which it disagreed.”<sup>50</sup> In Justice Stevens’s view, the majority violated “two cardinal principles” of First Amendment law: that viewpoint-based censorship must be rigorously scrutinized, and that advocacy may be punished only when it is likely to incite imminent unlawful action.<sup>51</sup> However, even under the majority’s test, Justice Stevens argued, Frederick’s speech should have been protected because it was not drug advocacy, but an “obscure message” with a drug-related theme.<sup>52</sup> According to the dissent, the majority’s reliance on the principal’s interpretation of the banner was an “abdicat[ion of] its constitutional responsibility,”<sup>53</sup> and the Court’s own interpretations could not establish that the sign “*objectively* amount[ed] to the advocacy of illegal drug use.”<sup>54</sup> The dissent predicted that the majority’s decision would quash student debate on drug-related political issues,<sup>55</sup> and implied that the

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<sup>45</sup> See *id.* at 2635.

<sup>46</sup> *Id.* at 2639 (Breyer, J., concurring in the judgment in part and dissenting in part).

<sup>47</sup> See *id.* at 2638.

<sup>48</sup> See *id.* at 2640–43. Although granting the principal qualified immunity would not have disposed of Frederick’s claims for injunctive and declaratory relief, Justice Breyer indicated that Frederick’s non-speech-related behavior, such as showing up late to the principal’s office and acting defiantly, would likely justify his suspension. See *id.* at 2642–43.

<sup>49</sup> Justices Souter and Ginsburg joined Justice Stevens’s dissent.

<sup>50</sup> *Frederick*, 127 S. Ct. at 2644 (Stevens, J., dissenting).

<sup>51</sup> See *id.* at 2644–45.

<sup>52</sup> See *id.* at 2646–47.

<sup>53</sup> *Id.* at 2647.

<sup>54</sup> *Id.* at 2649.

<sup>55</sup> See *id.* at 2649–50.

Court, like the school in *Tinker*, was improperly bending to popular opinion on an increasingly controversial subject.<sup>56</sup>

The Court's decision in *Frederick*, even as limited by Justice Alito's concurrence, is overreaching and too unprincipled to allow for consistent application in practice. The ad hoc reasoning of the decision will make it easy for other schools and other courts to discover new subject areas in which student speech can be prohibited.

The majority's "can reasonably be regarded as encouraging illegal drug use" test puts almost no practical limitations on a school's ability to censor drug-related student speech. The government speaks with one voice on the subject of drugs, at least when speaking to schoolchildren. As the Court noted, the federal government provides funds for public schools to create programs that teach "a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful."<sup>57</sup> Because schools see an unimpeached anti-drug message as a major tool in their fight against drugs, they naturally tend to see any questioning or contradictory messages as "encouraging" drug use. In other words, if schools reasonably believe that their messages prevent drug use, then they can also reasonably believe that any speech that counters or dilutes those messages will lead to increased drug use. A student wishing to convince others that smoking pot is not always "wrong and harmful" could do so by creating a banner that says "bong hits are a good thing," or she could, to use the Ninth Circuit's example, hand out copies of a judicial decision striking down the state's anti-marijuana laws.<sup>58</sup> Conversely, a student with no interest in undermining a school's general anti-drug message could be reasonably regarded as doing so — and might indeed be doing so — if she pointed out a gross factual inaccuracy in a school presentation on the dangers of drugs. Taken on its face, the majority's rule removes from First Amendment protections any student speech that contradicts the school's official message on drug use.

However, *Frederick*'s banner did not explicitly contradict his school's anti-drug message. Under the Court's analysis, student speech need not even convey a contradictory message to be proscribable: at least in some cases, it need only mention drugs without saying how bad they are. The majority showed no hesitation in asserting that the "cryptic"<sup>59</sup> words on *Frederick*'s banner could reasonably be interpreted as advocating drug use. In offering its own interpretations of the banner, the Court simply ignored the "4 Jesus" language, and in-

<sup>56</sup> See *id.* at 2650–51.

<sup>57</sup> *Id.* at 2628 (majority opinion) (alteration and omission in original) (quoting 20 U.S.C. § 7114(d)(6) (Supp. IV 2004)) (internal quotation mark omitted).

<sup>58</sup> See *Frederick v. Morse*, 439 F.3d 1114, 1122 n.44 (9th Cir. 2006).

<sup>59</sup> *Frederick*, 127 S. Ct. at 2624.

stead interpreted the banner as though it read “bong hits” in its entirety.<sup>60</sup> Erasing half of the banner freed the Court to write its own phantom language onto it, resulting in new banners bearing messages such as “[we take] bong hits” and “bong hits [are a good thing].”<sup>61</sup> The Court, in other words, found the use of a single, contextless drug-related phrase (“bong hits”) sufficient to warrant suspension.

This result is in line with the majority’s deference to school officials working in the context of a governmental anti-drug agenda. The natural (and intentional) result of schools’ anti-drug campaigns is that student discussion of the officially “wrong and harmful” act of using drugs is, to a greater or lesser degree, officially taboo. In other words, when schools tell students they should never, ever even think about doing drugs, it is unsurprising (and intended) that students feel less free to talk about drug use around school officials — no doubt one of the reasons that led Frederick to use the phrase “bong hits” as an attention-getting device. Breaking the taboo on drug-related speech in front of a school official can seem as much a threat to a school’s anti-drug campaign as directly assailing its message.<sup>62</sup> After *Frederick*, if a student makes a reference to illegal drugs out of context, she must quickly add that using those drugs is a bad thing — otherwise, the majority’s First Amendment jurisprudence will in many cases require a judge to assume her speech was reasonably interpretable as “drugs [are a good thing].”

Justice Alito’s concurrence attempted to put a substantial limitation on this wholesale exception of student drug-related speech from the First Amendment.<sup>63</sup> The concurrence protects student speech that “can plausibly be interpreted as commenting on any political or social issue.”<sup>64</sup> If it were as broad as it appears, the concurrence’s standard would be an exception that swallows the rule (or, more precisely, an exception-to-the-exception that swallows the exception). The concurrence seems to counter the majority’s “can reasonably be regarded as encouraging” standard with one that is equally, if not more, expansive: “can plausibly be interpreted as commenting upon.” The term “political or social issue” is also potentially extremely broad: Justice Alito mentioned the eminently political examples of the war on drugs and

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<sup>60</sup> See *id.* at 2625. One of the Court’s interpretations of the banner, “bong hits [are a good thing],” could arguably incorporate a loose interpretation of the phrase “4 Jesus.” However, the Court’s other two interpretations, “[Take] bong hits” and “[We take] bong hits,” have no plausible semantic or syntactic connection to the “4 Jesus” language.

<sup>61</sup> *Id.*

<sup>62</sup> Cf. *id.* at 2628–29 (discussing the negative effects of drug-related speech at school).

<sup>63</sup> Because the votes of Justices Kennedy and Alito were necessary to create the five-Justice majority in *Frederick*, Justice Alito’s concurrence would seem to be controlling, as it provides the narrowest reading of the majority opinion. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

<sup>64</sup> *Frederick*, 127 S. Ct. at 2636 (Alito, J., concurring).

legalizing medical marijuana,<sup>65</sup> but drug culture and even drug use itself are certainly “social issues” within many definitions of the term.

However, it is precisely the expansiveness of “commenting upon any political or social issue” that will render it difficult to apply — and hence ineffectual — in practice. It is a short step, and perhaps not an additional step at all, to move from “reasonably regarding” Frederick’s banner as reading “bong hits [are a good thing]” to “plausibly interpreting” it as reading “bong hits [should not be illegal]” or even “bong hits [represent a sociopolitical issue worthy of debate].” After all, the laconic textual mediums of banners, pickets, buttons, and the like offer little verbal space to “frame” a statement — the medium itself clues the reader to look for greater context and meaning than the words on their face provide. In fact, the phrase “4 Jesus,” which the Court simply read out of Frederick’s banner, almost certainly popped into Frederick’s head because of its relative cultural prominence, largely due to a social phenomenon in which people yoke various identities and activities to the phrase “for Jesus” in order to demonstrate that those identities and activities are compatible with Christianity<sup>66</sup> — or to market themselves to Christian consumers.<sup>67</sup> At least part of Frederick’s sign is thus best understood as a parody of this particular cultural usage of Jesus’s name — that is, as a “comment on a social issue.”

The concurrence, however, made no attempt to evaluate Frederick’s banner under its own just-announced standard. In fact, it did not even state that Frederick’s speech was *not* a comment on a political or social issue, apparently resting instead on the majority’s conclusory (and much narrower) statement that “this is plainly not a case about political debate over the criminalization of drug use or possession.”<sup>68</sup> With the boundaries of the “comment on political or social issues” standard so unclear, lower court decisions will likely diverge significantly in their interpretations of *Frederick*;<sup>69</sup> but Justice Alito’s

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<sup>65</sup> See *id.* (quoting *id.* at 2649 (Stevens, J., dissenting)).

<sup>66</sup> See, e.g., Goths for Jesus, <http://www.gothsforjesus.com> (last visited Oct. 6, 2007); The Metal for Jesus Page!, <http://www.metalforjesus.org> (last visited Oct. 6, 2007); Road Riders for Jesus, <http://www.roadridersforjesus.org> (last visited Oct. 6, 2007). Perhaps the most well-known example of this usage of the phrase comes from the religious organization Jews for Jesus, founded in 1973 and likely a source for the more current trend. See Jews for Jesus Timeline, <http://jewsforjesus.org/about/timeline> (last visited Oct. 6, 2007).

<sup>67</sup> See, e.g., Juggler for Jesus, <http://www.christianjuggler.com> (last visited Oct. 6, 2007); Magic for Jesus, <http://www.magicforjesus.com> (last visited Oct. 6, 2007); Show Me Clowns for Jesus, <http://www.showmeclownsforjesus.com> (last visited Oct. 6, 2007).

<sup>68</sup> *Frederick*, 127 S. Ct. at 2625.

<sup>69</sup> Cf. David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts’ Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 191–200 (2002) (detailing lower courts’ widely divergent interpretations of the Court’s “offensively lewd and indecent” standard in *Fraser*).



casual and unexplained determination that Frederick's speech was unprotected does not bode well for the robustness of the standard.

Just as the concurrence could not draw a practicable line between political and apolitical drug-related speech, it similarly failed to provide any realistic limits on the judicial creation of further whole-hog exceptions in response to "compelling" school interests. Unlike the majority, Justice Alito recognized and discussed the real dangers of first allowing the government to define "educational missions" and then using those same educational missions to carve out exceptions to the First Amendment.<sup>70</sup> Justice Alito also rejected, for First Amendment purposes, "the dangerous fiction . . . that parents simply delegate their authority" to the government when they send their children to school.<sup>71</sup> For the concurrence, it was not enough for the school to have an anti-drug educational mission or to claim *in loco parentis* power<sup>72</sup>; there had to be "some special characteristic of the school setting" that compelled the constitutional exception.<sup>73</sup> Unfortunately, the concurrence's justification for excluding student drug-related speech from First Amendment protection is very broad: "The special characteristic that is relevant in this case is the threat to the physical safety of students."<sup>74</sup> As Justice Alito went on to explain, what makes threats to physical safety a "special characteristic" of schools is that the children's guardians are not there to "provide protection and guidance" and that the students have a diminished "ability to choose the persons with whom they spend time."<sup>75</sup> In other words, when students go to school, they are surrounded by other students and their parents are not around. It is difficult to understand how Justice Alito, having just rejected the *in loco parentis* argument that schools possess delegated parental authority to restrict speech, found a narrower, more viable alternative in the notion that schools must protect children from each other's speech because their parents are absent.

The physical threat posed even by student speech explicitly encouraging drug use is emphatically *not* the type of direct and imminent danger, whether posed by a hostile mob<sup>76</sup> or a receptive audience,<sup>77</sup> that can justify governmental suppression of speech elsewhere in the Court's First Amendment jurisprudence. The threat to physical health invoked by the concurrence is simply too distant, too generalized, and

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<sup>70</sup> See *Frederick*, 127 S. Ct. at 2637–38 (Alito, J., concurring).

<sup>71</sup> *Id.* at 2637.

<sup>72</sup> See *id.* at 2637–38.

<sup>73</sup> *Id.* at 2638.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *Feiner v. New York*, 340 U.S. 315 (1951).

<sup>77</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); see also *Frederick*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

too vaguely connected to student speech to justify “physical safety” as a standalone category of First Amendment exceptions. Student health is, of course, an important and wholly valid area of school concern. So too are, for example, student values of good citizenship and democratic participation, but these valid concerns cannot be a rational basis for removing those subject areas from First Amendment protections.<sup>78</sup> After all, a student may be just as likely to lose her political values as she is to smoke marijuana when she is forced to mingle with peers without the benefit of her parents’ watchful eyes.

Even accepting Justice Alito’s statement that the threat to physical safety is a “special characteristic” of schools, he gave no reason why the relevant threat should be limited to illegal drugs. Instead, he issued a conclusory statement: “[I]llegal drug use presents a grave and in many ways unique threat to the physical safety of students.”<sup>79</sup> Perhaps; but so do gun violence, unprotected sexual intercourse, traffic accidents involving inexperienced drivers, anorexia, and obesity — to take some of the more popularly known examples. And these examples are all within the one “special characteristic” of (general, nonimminent) threats to safety; schools and judges will undoubtedly be able to think up other “special characteristics,” each of which will encompass several categories of student speech that can be removed from First Amendment protections with broad strokes. The most disturbing aspect of the Court’s decision in *Frederick* is its capacity to be replicated in the lower courts with all its doctrinal infirmities intact.

This is not to say that schools should be (nor were they ever) powerless to prevent students from holding up “BONG HiTS 4 JESUS” banners on their next field trip to the local art museum. As Justice Breyer put it, “[t]o say that school officials might reasonably prohibit students during school-related events from unfurling 14-foot banners (with any kind of irrelevant or inappropriate message) . . . seems unlikely to undermine basic First Amendment principles.”<sup>80</sup> Indeed, it seems likely that *Frederick*’s school principal was motivated primarily by the general inappropriateness of any large, non-Olympic-themed

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<sup>78</sup> See Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 85–86 (2002) (describing the “values-enclave model” of public education, in which schools inculcate values such as “patriotism, racial and gender equality, and opposition to drugs and tobacco use” and “preempt debate on the accuracy of those postulates”); *id.* at 86–88 (rejecting the values-enclave model as incompatible with First Amendment principles).

<sup>79</sup> *Frederick*, 127 S. Ct. at 2638 (Alito, J., concurring).

<sup>80</sup> *Id.* (Breyer, J., concurring in the judgment in part and dissenting in part); see *id.* at 2643 (Stevens, J., dissenting) (“[C]oncern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal’s decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed ‘Glaciers Melt!’”); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”).

sign at the event; although “BONG HiTS” may have quickened her step, it was the physical banner itself that got her feet moving. It is difficult, in any case, to imagine the same principal who ripped down Frederick’s sign allowing a student to hold up a similarly juvenile banner reading “this school sucks.” The school, however, explicitly decided to punish Frederick because of the perceived content of his speech, not because of the inappropriateness of his choice of time, place, or verbal medium. In its opinion the Court, like the school principal, made this case emphatically about drugs; but no matter how weighty the Court, the school, or the government as a whole may find the issue of drug use to be, it cuts into the core of the First Amendment to say that it is a topic too important for student dissent to be heard.

## II. FEDERAL JURISDICTION AND PROCEDURE

### A. Civil Procedure

*Pleading Standards.* — In 1938, Dean Charles Clark and the other drafters of the Federal Rules of Civil Procedure created the liberal notice pleading standards of Rule 8,<sup>1</sup> which requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>2</sup> Fifty years ago, the Supreme Court declared in *Conley v. Gibson*<sup>3</sup> that Rule 8 means that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>4</sup> Last Term, in *Bell Atlantic Corp. v. Twombly*,<sup>5</sup> the Supreme Court abandoned *Conley*’s broad interpretation of Rule 8 by holding that a complaint brought under section 1 of the Sherman Act<sup>6</sup> alleging “parallel conduct unfavorable to competition” must, in order to survive a Rule 12(b)(6) motion to dismiss, allege “some factual context suggesting agreement, as distinct from identical, independent action.”<sup>7</sup> The majority, motivated by legitimate concern over the large costs that discovery places on defendants, had good intentions. But a judicial opinion is the wrong forum for enacting a major change to settled interpretations of the Federal Rules. Instead of resolving the case by looking to the Rules’ text, their original understanding, and the

<sup>1</sup> Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433 (1986).

<sup>2</sup> FED. R. CIV. P. 8(a)(2).

<sup>3</sup> 355 U.S. 41 (1957).

<sup>4</sup> *Id.* at 45–46.

<sup>5</sup> 127 S. Ct. 1955 (2007).

<sup>6</sup> 15 U.S.C. § 1 (2000 & Supp. IV 2004).

<sup>7</sup> *Twombly*, 127 S. Ct. at 1961.