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Morse v. Frederick: Evaluating a Supreme Hit to Students' First Amendment Rights

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In *Tinker v. Des Moines Independent School District*,[1] the Supreme Court proclaimed that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."[2] Ever since this celebrated declaration of student speech rights, the Court has steadily continued to carve out exceptions to this once expansive ruling. Imprints on the broad grant of rights set forth in *Tinker* include exceptions for "plainly offensive" speech,[3] school-sponsored speech,[4] and now speech that advocates illegal drug use.[5]

While further enabling the War on Drugs may indeed be a commendable objective, the case of *Morse v. Frederick*[6] did not provide the appropriate vehicle to further curtail student speech rights. On the contrary, Frederick's speech should be interpreted as political rather than as promoting illegal drug use. Frederick displayed his banner at a time when Alaska, the state with the "most liberal drug laws in the country,"[7] was considering the constitutionality of a voter referendum to overturn a statute that decriminalized the personal possession of marijuana,[8] a fact manifestly overlooked by the majority opinion.

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

2. *Id.* at 506.

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

4. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

5. Morse v. Frederick, 127 S. Ct. 2618 (2007).

6. *Id.*

7. Anne Sutton, *Alaska Gets Tougher on Marijuana?*, PHILADELPHIA INQUIRER, April 14, 2006, at A7.

8. *Morse,* 127 S. Ct. at 2650 n.8 (stating that at the time Frederick unfurled his banner, the constitutionality of a voter referendum to recriminalize the possession of marijuana had yet to be decided). *See infra*, pp. 20-22.

This article contends that the Supreme Court's view of Frederick's banner, as speech which promotes illegal drug use, was an incorrect and thus an improper basis for their decision to establish an exception to *Tinker's* expansive holding. Part I provides a historical overview of the trilogy of Supreme Court cases that form the basis of student speech rights. Part II discusses the facts, procedural history, holding and rationale of *Morse*. Part III argues that Frederick's speech was in fact political speech and should have been granted protection under the First Amendment. Part IV considers an alternative basis upon which Frederick's speech should have been protected. Finally, this article concludes by arguing that the Court unwisely carved out an exception to *Tinker* for speech that advocates illegal drug use on facts that plainly warranted First Amendment protection.

I. A Historical Overview of Supreme Court Precedent

Three main standards developed by the Supreme Court form the basis of student speech jurisprudence. Beginning with the "magna carta"[9] of students' free speech rights, *Tinker v. Des Moines Independent School District*,[10] the following trio of cases shape the broad outline under which student expression is evaluated.

A. Tinker v. Des Moines Independent School District

In 1965, students Mary Beth Tinker, John Tinker, and Christopher Eckhardt wore black armbands to their public school to demonstrate their view of the Vietnam War and support for a military truce.[11] In response to their expression, the school suspended each student and refused to reinstate them unless they agreed to return without the armbands.[12] The students filed suit to enjoin the school district from disciplining them for wearing the armbands.[13] Both the district and appellate courts upheld the school's action as constitutional, stating

9. Martha McCarthy, *Student Expression Rights: Is a New Standard on the Horizon?*, 216 EDUC. L. REP. 15 (West 2007).

10. 393 U.S. 503 (1969).

11. *Id.* at 504.

12. *Id.*

13. *Id.*

that disciplining the students was reasonable under the circumstances in order to prevent disturbance.[14]

The Supreme Court, however, granted certiorari and reversed the lower courts,[15] holding that the school district's prohibition of black armbands to protest the Vietnam War was unconstitutional.[16] To support this view, the Court stated that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[17] Most significantly, the Court declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] Thus, in *Tinker*, the Court firmly planted the roots to support students' rights to free speech.

In enunciating *Tinker*'s parameters, the Court sought to balance a student's right to free speech against school officials' authority to control conduct on school grounds.[19] While school officials may not regulate a student's speech to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,"[20] a school official does have a duty to protect against disruptive conduct.[21] The Court thus held that school officials cannot regulate a student's free speech rights unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ."[22] Accordingly, the Court found that the school district's ban of the black armbands was unconstitutional as there was no overt disturbance that occurred as a result of the expression.[23]

14. *Id.* at 504-05.
15. *Id.* at 505.
16. *Id.* at 513-14.
17. *Id.* at 511.
18. *Id.* at 506.
19. *Id.* at 513.
20. *Id.* at 509.
21. *Id.* at 513.
22. *Id.*
23. *Id.* at 508. ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioner's interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.").

The Court also addressed the issue of a school official's response to the apprehension of a potential disruption as a result of a student exercising free speech rights, stating that "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[24] Rather, schools must accept this risk of disruption.[25] Although a student may express a viewpoint that sparks debate or disturbance, the court reasoned that the shaping of the Nation's future leaders rests on students' exposure to dissimilar ideas and the exchange of diverse opinions.[26] In setting forth such an expansive holding, the Court advocated the utmost protection of a student's free speech rights, even within the school setting.[27]

B. Bethel School District No. 403 v. Fraser

In *Bethel School District v. Fraser*,[28] decided seventeen years after *Tinker*, the Court addressed the issue of offensive speech. Fraser, a high school student, delivered a campaign speech to a voluntary assembly of approximately six hundred of his peers as part of a school-sponsored educational program.[29] Fraser's speech, however, was filled with "elaborate, graphic and explicit sexual metaphor[s]" that caused reactions by students that ranged from hooting, yelling, and making gestures graphically depicting the sexual activities referred to in the

24. *Id.*

25. *Id. See id.* at 511 (cautioning against the potential for public schools to become "enclaves of totalitarianism," the Court urged that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."); *id.* at 512 (stating that students should be entitled to express their views on controversial subjects as part of the educational process).

26. *Id.* at 512.

27. *Id.* at 508-09. ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.") (citations omitted).

28. 478 U.S. 675 (1986).

29. *Id.* at 677.

speech to utter bewilderment and embarrassment.[30] After giving his speech, Fraser was suspended for three days and informed that he would not be considered as a potential commencement ceremony speaker.[31]

In response, Fraser brought an action against the school district for the violation of his First Amendment rights pursuant to 42 U.S.C. § 1983.[32] The district and appellate courts held that Fraser's First Amendment rights were indeed violated.[33] The Supreme Court, however, granted certiorari and reversed.[34]

The Court began its opinion by enunciating the now universally accepted principle that students' rights in public schools "are not automatically coextensive with the rights of adults in other settings."[35] Under this theory, the Court distinguished Fraser's lewd and vulgar speech from the political message evoked by *Tinker*'s black armbands.[36] The sexual innuendos which pervaded Fraser's speech "were unrelated to any political viewpoint"[37] and "plainly offensive,"[38] thereby outside the bounds of *Tinker*'s expansive approach to students' free speech rights.[39] The Court contended that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission."[40] Since Fraser's speech was "wholly inconsistent" with the school's

30. *Id.* at 678.

31. *Id.* Fraser's suspension was premised on his violation of the Bethel High School disciplinary rules regarding obscene language. Specifically, the rule provides that "'[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'" *Id.*

32. *Id.* at 679. 42 U.S.C. § 1983 (1979) provides:

> Every person who, under color of any . . . custom . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

Id.

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

34. *Id.* at 680.

35. *Id.* at 682.

36. *Id.* at 681.

37. *Id.* at 685.

38. *Id.* at 683.

39. *Id.* at 685.

40. *Id.*

"fundamental values," the Court held that his speech was unprotected and therefore subject to disciplinary action by the school.[41]

In *Fraser*, the Court carved out an exception to *Tinker*'s precedent for "plainly offensive" speech that is both vulgar and lewd.[42] However, in doing so, the Court failed to develop a clear analytical framework to evaluate subsequent student speech cases.[43] Federal courts have since struggled in applying *Fraser*, because the precise contours of what constitutes "plainly offensive" speech are not clearly defined.[44] As will be discussed *infra*, the Court's decision to permit school officials to discipline student speech that undermines a school's basic educational mission has been broadly construed, thereby narrowing the Court's initial approach as set forth in *Tinker*.[45]

C. Hazelwood School District v. Kuhlmeier

Two years after *Fraser* was decided, the Supreme Court made its third effort at determining the appropriate balance between students' free speech rights and school officials' authority to regulate conduct in *Hazelwood School District v. Kuhlmeier*.[46]

41. *Id.* at 685-86. This also adheres to the Court's holding in *Tinker* because Fraser's speech disrupted the school assembly at which he spoke. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

42. *See* Douglas D. Frederick, *Restricting Student Speech That Invades Others' Rights: A Novel Interpretation of Student Speech Jurisprudence in Harper v. Poway Unified Sch. Dist.*, 29 U. HAW. L. REV. 479, 483 (2007) (explaining that "the Court merely created another category of speech with its own framework," rather than weakened the standard in *Tinker*).

43. *See* Jerry C. Chiang, *Plainly Offensive Babel: An Analytical Framework for Regulating Plainly Offensive Speech in Public Schools*, 82 WASH. L. REV. 403, 409 (2007).

44. *See* Ralph D. Mawdsley, *Sailing the Uncharted Waters of Free Speech Rights in Public Schools: The Rocky Shoals and Uncertain Currents of Student T-Shirt Expression*, 219 EDUC. L. REP. 1, 10 (West 2007). *See also* Frederick v. Morse, 439 F.3d 1114, 1119 (9th Cir. 2007), *rev'd*, Morse v. Frederick, 127 S. Ct. 2618 (2008). The Ninth Circuit in *Morse* reversed the district court's decision, which was based upon *Fraser*, and stated that "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo is." *Id.*

45. *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000) (upholding the school's right to prohibit Marilyn Manson T-shirts because the rock group promotes disruptive and demoralizing values that are inconsistent with and counter-productive to the educational mission of the school).

46. 484 U.S. 260 (1988).

In *Kuhlmeier*, a high school principal exercised editorial control over a school-sponsored newspaper that was published as part of a journalism class.[47] Specifically, the principal deleted two pages of the publication that included an article about student pregnancy and another concerning the effect of divorce on students.[48]

The Court held that the school was permitted to "[exercise] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[49] Here, the Court rationalized that the newspaper, published as part of a high school journalism class, could be fairly characterized as part of the school's curriculum.[50] Since the relevant expression concerned school-sponsored speech, rather than pure student speech, *Tinker* did not directly govern this issue.[51] Instead, where a school is required to "lend its name and resources to the dissemination of student expression," a great deal of flexibility is granted—so long as any such editorial control is limited to "legitimate pedagogical concerns."[52]

II. *Morse v. Frederick*: Background

A. *Factual Background*

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska as part of the opening events for the Salt Lake City, Utah Winter Games.[53] As part of their route, torchbearers passed in front of the Juneau-Douglas High School ("JDHS") during school hours.[54] Students were permitted to

47. *Id.* at 264.
48. *Id.*
49. *Id.* at 273.
50. *Id.* at 271.
51. *Id.* at 272 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . or conduct otherwise inconsistent with 'the shared values of a civilized social order' or to associate the school with any position other than neutrality on matters of political controversy.") (citations omitted). The *Kuhlmeier* holding was thus limited to speech that may reasonably be viewed as being "school-sponsored," rather than inclusive of any and all student speech that takes place on school grounds. *See id.*
52. *Id.* at 272-73.
53. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
54. *Id.*

leave their classes and watch the relay from the sidewalk outside the school, while teachers and administrative officials monitored the students, as part of an "approved social event or class trip."[55]

Frederick, a JDHS student, arrived late to school but joined his classmates to watch the event at a spot conspicuously selected as easily visible to the television crews filming that particular leg of the relay.[56] Frederick and his classmates' plan to appear on television, however, did not end there. As the relay runners and television cameras passed by their location, Frederick and his friends unfurled a fourteen-foot banner that stated, "BONG HiTS 4 JESUS."[57] Upon viewing the banner, Deborah Morse, the JDHS principal, demanded that the banner be taken down.[58] Frederick was the only student who refused.[59]

Morse subsequently seized the banner and suspended Frederick for ten days for violating Juneau School Board Policy No. 5520,[60] which pertains to advocacy of illegal drug use.[61] Frederick then administratively appealed his suspension to the Juneau School District Superintendent, who denied his claim.[62] In his report, the superintendent relied on the Supreme Court's decision in *Fraser* as the basis for upholding Frederick's suspension, viewing the banner as "speech or action that intrudes upon the work of the schools."[63] The superintendent further stated that the speech was not political in nature, but rather potentially disruptive to the event and "clearly disruptive" of the school's educational mission.[64] In response, Frederick filed a

55. *Id.*

56. *Id*. *See also* Murad Hussain, *The "Bong" Show: Viewing Frederick's Publicity Stunt through Kuhlmeier's Lens*, 116 YALE L.J. POCKET PART 292 (2007) (characterizing Frederick's conduct as intentionally "hatch[ing] a plan to get on television").

57. *Morse,* 127 S. Ct. at 2622; Hussain, *supra* note 56, at 292.

58. *Morse*, 127 S. Ct. at 2622.

59. *Id.*

60. *Id.* at 2622-23. Juneau School Board Policy No. 5520 provides that "'[t]he Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .'" *Id.* at 2623.

61. *Id.* at 2623.

62. *Id.*

63. *Id.*

64. *Id.* ("'The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only

§ 1983 claim, alleging that his First Amendment right to free speech was violated by both Morse and the school board.[65]

B. *District Court Decision*

The district court granted summary judgment for the school board and Morse, holding that Frederick's First Amendment rights were not violated and that the "BONG HiTS 4 JESUS" phrase constituted unprotected speech.[66] In support of its view, the district court relied on *Fraser* to extend the reach of a school's authority to speech that "might undermine the school's basic educational mission . . . ."[67] Since the Juneau School Board determined that the banner's message undermined its educational mission by promoting illegal drug use, the district court reasoned that Morse had the authority, "if not the obligation," to demand that the sign be taken down.[68] Accordingly, the district court ruled in favor of Morse and the school board.[69] Frederick then appealed to the Ninth Circuit.

C. *Ninth Circuit Decision*

The Ninth Circuit began its opinion by focusing on evidence of several disruptive events that occurred during the Olympic Torch Relay, where Frederick's banner was unfurled—such as students throwing plastic soda bottles and snowballs at each other and others becoming involved in fights.[70] Any evidence of a substantial disruptive event stemming from Frederick's display of the "BONG HiTS 4 JESUS" banner was, however, no-

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agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug use in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.'").

65. *Id*. at 2620, 2623 ("[Frederick] sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees.").

66. Frederick v. Morse, No. 02-008, 2003 WL 25274689, at *4-6 (D. Alaska May 27, 2003).

67. *Id.* at *5.

68. *Id.*

69. *Id.* at *6

70. Fredrick v. Morse, 439 F.3d 1114, 1115-16 (9th Cir. 2006).

ticeably absent from this list.[71] While the Ninth Circuit admitted that some "pro-drug graffiti" was found on the school grounds in the days following the relay, the Ninth Circuit reasoned that the principal's motive in taking the sign down was not to prevent such effects, but instead to prevent the display of offensive material that violated school policy.[72]

In reversing the district court's decision, the Ninth Circuit "proceed[ed] on the basis that the banner expressed a positive sentiment about marijuana use" that was nonetheless "vague" and "nonsensical."[73] The Ninth Circuit also acknowledged that Morse and the school board conceded that their main concern in taking the banner down and upholding Frederick's punishment was not the risk of disruption, but rather the potential that the banner would be construed as advocating illegal drug use.[74] In considering the issue of "whether a school may, in the absence of concern about disruption of education activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school," the Ninth Circuit determined that the simple answer to such an inquiry is "'[n]o.'"[75]

The Ninth Circuit first considered the *Tinker* precedent and its application to Frederick's banner. Recognizing that *Tinker* grants public school students the constitutional right to engage in speech that may at times oppose government policy, the Ninth Circuit held that students, like Frederick, should not be disciplined for taking such contrary positions.[76] Just as the students in *Tinker* were constitutionally permitted to display armbands that demonstrated their opposition to the Vietnam War, a position plainly divergent from the Government's stance, Frederick's banner also justified similar protection.[77]

71. *See id.*
72. *Id.* at 1116.
73. *Id.* at 1118.
74. *Id.* at 1117.
75. *Id.* at 1118.
76. *Id.*
77. *Id.* ("*Tinker* disposes of the School Board's argument that 'school administrators were entitled to discipline Frederick's attempt to belittle and undercut this critical mission' of preventing use of illegal drugs by a sign that was 'a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs.'"). *Id.*

The Ninth Circuit also considered the *Fraser* decision. While *Fraser* concerned a sexually suggestive campaign speech brimming with innuendo that was deemed "vulgar," "lewd," and "plainly offensive,"[78] the Ninth Circuit distinguished the "BONG HiTS 4 JESUS" banner as potentially "funny, stupid, or insulting . . . but . . . not 'plainly offensive' in the way sexual innuendo is."[79] The Ninth Circuit also considered the political aspects of Frederick's speech, stating that "it is not so easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued."[80] Unlike the district court, which neglected to refer to the political context of Frederick's banner, the Ninth Circuit acknowledged that "messages about marijuana have a degree of political salience to them and might be understood as political advocacy [in Alaska]"[81] and thus categorized the banner as analogous to the political expression of the students in *Tinker* rather than the "plainly offensive" election speech in *Fraser*.[82] Accordingly, the Ninth Circuit found that *Fraser* did not constitute the controlling authority under the circumstances.[83]

The Ninth Circuit also viewed the Supreme Court's decision in *Kuhlmeier* as inapplicable to Frederick's banner.[84] Instead, the Ninth Circuit considered Frederick's banner as neither sponsored nor endorsed by the school and in no way affiliated or representative of its curriculum.[85] Since Frederick's banner did not implicate any type of school-sponsored speech, *Kuhlmeier* could not apply.[86]

The Ninth Circuit then considered *Fraser*'s reach with respect to protecting a school's authority to punish student speech that is viewed as "'undermin[ing] the school's basic educational

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

79. *Morse*, 439 F.3d. at 1119.

80. *Id.*

81. *Id.* at 1118 n.4 (citing Noy v. State, 83 P.2d 545, 545-46 (Alaska Ct. App. 2003)).

82. *Id.* at 1119.

83. *Id.*

84. *Id.*

85. *Id.* at 1119-20.

86. *Id.* at 1119.

mission.'"[87] The Ninth Circuit urged "some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker*."[88] Therefore, the Ninth Circuit interpreted *Fraser* as permitting school officials to suppress only that speech which "disrupts the good order necessary to conduct their educational function."[89]

Furthermore, the Ninth Circuit declined to follow the Sixth Circuit, which interprets *Fraser* as providing school officials with "wide-ranging discretion to determine the appropriateness or inappropriateness of certain messages at school."[90] Instead, the Ninth Circuit adhered to the approach followed by the Fourth Circuit, which maintains "that student speech that is neither plainly offensive nor school-sponsored can be prohibited only where the school district demonstrated a risk of substantial disruption."[91] Thus, the Ninth Circuit analyzed Frederick's banner through *Tinker*'s lens and held that "to censor or punish student speech, the school must show a reasonable concern about the likelihood of substantial disruption to its educational mission."[92] Since Morse and the school board insisted Frederick take his banner down solely because they believed it to conflict with the school's anti-drug mission, rather than out of reasonable concern for potential disruption among the student body, "BONG HiTS 4 JESUS," while indeed controversial, constituted protected speech.[93]

87. *Id.* at 1120 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

88. *Id.*

89. *Id.*

90. *Id.* at 1122 ("[C]lothing may be banned when it contains 'symbols and words that promote values that are [ ] patently contrary to the school's educational mission.'" (quoting Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000))).

91. *Id.* (citing Newsom v. Albermarle County Sch. Bd., 354 F.3d 249, 260 (4th Cir. 2003) (holding that a student's decision to wear a T-shirt depicting men shooting weapons did not conflict with the school's message against guns, but rather was protected under the First Amendment as no substantial disruption occurred as a result of the student wearing the clothing)).

92. *Id. at* 1123.

93. *Id.* The Court further found that Morse was not entitled to qualified immunity as Frederick's right to exercise his free speech right was "clearly established." *Id.* at 1125.

D. *Supreme Court Decision*

Morse and the school board filed an appeal with the Supreme Court, which granted certiorari.[94] In a 5-4 decision, with Chief Justice Roberts writing for the majority, the Court reversed the Ninth Circuit, finding that Frederick's banner did not constitute protected speech.[95] The Court reasoned that Morse and the school board did not violate Frederick's rights by seizing the banner and suspending him for displaying it at the relay.[96]

The Court made clear that *Morse* involved a school speech case. Although the Court admitted that Frederick's banner was not displayed on school grounds, the Court found that the context of the speech was similar to that of an approved school trip and thereby subject to Morse's authority.[97] In doing so, the Court narrowed the relevant inquiry to solely that of a school speech case, thereby avoiding any question of whether Frederick's speech was, in fact, off-campus speech.[98]

The Court also supported Morse's view that the "BONG HiTS 4 JESUS" banner would be interpreted by those viewing it as promoting illegal drug use.[99] Characterizing the phrase "BONG HiTS 4 JESUS" as either an imperative or celebratory expression, the Court found that it undeniably referred to illegal drugs.[100] Accordingly, the Court stated that the case did not involve any "political debate over the criminalization of drug use or possession."[101]

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94. Morse v. Frederick, 127 S. Ct. 722 (2006).

95. Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).

96. *Id.*

97. *Id.* at 2624.

98. *Id.* Many questions regarding the parameters of a school's authority to exercise control regarding student speech that takes place off-campus, which results in effects that occur on-campus, persist. Here, Frederick technically unfurled his banner off-campus, beyond the schoolhouse gates. Nonetheless, any discussion of this murky area of law was avoided by analogizing the event to that of a "school trip." *See* Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727 (2007) (discussing the implications of off-campus speech in the context of the internet).

99. *Morse*, 127 S. Ct. at 2624.

100. *Id.* at 2625.

101. *Id.* Here, the Court refuted Justice Stevens's dissent, which suggested that the speech is political in nature. *See id.* at 2651 (Stevens, J., dissenting). Moreover, the Court held that the phrase could be viewed as an imperative to

In narrowing the relevant issue to whether, pursuant to the First Amendment, a school official may restrict school speech that is reasonably viewed as promoting illegal drug use, the Court fashioned a new exception to *Tinker*'s expansive holding.[102] While conceding that Frederick's banner did not constitute lewd or vulgar speech, like that found in *Fraser*,[103] the Court invoked *Fraser* to emphasize that "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'"[104] The Court, however, was careful to state that Frederick's speech was not "plainly offensive," as opposed to the speech at issue in *Fraser*.[105] Instead, the Court focused solely on the fact that "BONG HiTS 4 JESUS" could be reasonably viewed as advocating illegal drug use.[106]

Although the Court admitted the banner was "cryptic" and "probably means nothing at all" to some people, it nevertheless found that it advocated illegal drug use, therefore falling beyond First Amendment protection.[107] In a lengthy analysis of the dangers of drug use by schoolchildren and the important role schools play in educating students about such harm,[108] the Court found that the school's concern in preventing drug abuse fell outside of *Tinker*'s admonition against the prohibition of student speech due to "'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular view-

"take bong hits" or "smoke marijuana" or "use an illegal drug." *Id*. at 2625 (majority opinion). Additionally, the Court noted that the banner could be interpreted as celebrating drug use (e.g. "we take bong hits"). *Id.* The Court found no distinction between these two alternative positions. *Id.*

102. *Id.* at 2634 (Thomas, J., concurring).

103. *Id.* at 2629 (majority opinion).

104. *Id.* at 2626 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

105. *Id.* The Court stated that adopting such an expansive rule would stretch *Fraser* too far and might be later construed as implicating political and religious speech that may indeed be offensive in certain circumstances.

106. *Id.* at 2625.

107. *Id.* at 2624.

108. *Id.* at 2628-29. The Court acknowledged the seriousness of the staggering number of young people who admit to using illegal drugs, and referred to the influence of peer pressure as "the single most important factor leading schoolchildren to take drugs." *Id*. at 2628. Accordingly, the Court found that Frederick's banner, which "celebrat[ed] illegal drug use" directly challenged the school's mission to educate children on the dangers of such conduct. *Id.*

point.'"[109] In fashioning a new exception to *Tinker*, the Court established that student speech reasonably understood as promoting illegal drug use, yet not political in nature, does not constitute protected speech.[110] Accordingly, the Court reversed the Ninth Circuit's decision and found in favor of Morse and the school board.[111]

E. *Justice Alito's Concurrence*

Justice Thomas's concurrence urged that *Tinker* be overruled on the grounds that the "Constitution does not afford students a right to free speech in public schools"[112] and advocated that regulation of student speech should be governed by school boards and legislatures. In contrast, Justice Alito's concurrence shapes the contours of *Morse*'s ruling and outlines its precise limits. Accordingly, Justice Alito stated that his agreement with the majority opinion goes no further than limiting:

> (a) . . . speech that a reasonable observer would interpret as advocating illegal drug use and (b) [as providing] no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the "wisdom of the war on drugs or of legalizing marijuana for medicinal use."[113]

Justice Alito joined the majority "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions."[114] He also disagreed with the school board's argument that the First Amendment allows school officials to exercise control over speech that interferes with the school's educational mission.[115] Instead, he stated that such a ruling would provide

109. *Id.* at 2626 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

110. *Id.* at 2629.

111. *Id.*

112. *Id.* at 2634 (Thomas, J., concurring). Justice Breyer concurred in the judgment that Fredrick's claim must be dismissed, but upon qualified immunity grounds and not for the constitutionality of the speech. *See id.* at 2638-43 (Breyer, J., concurring in part and dissenting in part).

113. *Id.* at 2636 (Alito, J., concurring).

114. *Id.* at 2637.

115. *Id.*

public school officials with "a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed."[116] Justice Alito's opinion, therefore, rested on the grounds that speech that promotes illegal drug use poses a serious threat to student safety, thus warranting its exclusion—so long as it is not political.[117]

F. *Justice Stevens's Dissent*

Justice Stevens, joined in dissent by Justices Souter and Ginsberg, disagreed with the majority's decision to uphold "a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint."[118] Accordingly, Justice Stevens argued that the decision "invites stark viewpoint discrimination."[119] The government, he asserted, cannot prohibit the expression of an idea that society finds to be offensive or disagreeable.[120] In support of this view, he cited the Court's earlier decision in *Brandenberg v. Ohio*[121] for the proposition that a person cannot be punished for advocating illegal conduct unless the advocacy is "likely to provoke the harm that the government seeks to avoid."[122]

Justice Stevens further stated that creating a new exception for speech that promotes drug use is without support in case law and contrary to First Amendment values.[123] Rather, he viewed the message as failing to advocate anything at all. Referring to the sign as a "nonsense message, not advocacy,"[124] Justice Stevens acknowledged that Frederick's stated purpose in displaying the banner was to attract the attention of television cameras rather than make a political statement and, therefore, argued that such a sign could "hardly be said to advocate

116. *Id.*
117. *Id.* at 2638.
118. *Id.* at 2645 (Stevens, J., dissenting).
119. *Id.*
120. *Id.*
121. Brandenberg v. Ohio, 395 U.S. 444 (1969).
122. *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (quoting *Brandenberg*, 395 U.S. at 449).
123. *Id.* at 2646.
124. *Id.* at 2649.

anything."[125] He also did not view the banner as reasonably inciting others to use drugs, stating:

> Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.[126]

In deriding the majority's view that Frederick's sign amounted to advocacy of illegal drugs, Justice Stevens referred to the importance of deliberation and debate among high school students.[127] He also pointed out the majority's failure to consider the political climate in Alaska regarding the issue of the legalization of marijuana and *Tinker*'s emphasis on the importance of such free debate among students regarding both majority and minority views, emphasizing that it is the minority who is most deserving of First Amendment protection.[128]

III. Discussion

While the *Morse* Court fashioned an exception from its holding's restriction on "pro-drug" speech, based on the freedom to engage in political discourse, it failed to properly apply it to the very facts of *Morse*.[129] Instead, the Court rested on the erroneous notion that Frederick's sign did not constitute political speech, stating that "not even Frederick argues that the banner conveys any sort of political or religious message" and, therefore, that "this is plainly not a case about political debate over

125. *Id.*

126. *Id.*

127. *Id.* at 2649-50.

128. *Id.* at 2651 ("[A] rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views.").

129. *See* Hans Bader, *Campaign Finance and Free Speech: Bong Hits 4 Jesus: The First Amendment Takes a Hit*, 2007 CATO SUP. CT. REV. 133, 161 (2006) ("While the justices wrongly created a new 'drug exception' to the First Amendment, they rightly declined to include political speech advocating drug legalization within that exception.").

the criminalization of drug use or possession."[130] This conclusion was reached, however, without regard to the context in which Frederick's speech was put forth.

While the Ninth Circuit and Justice Stevens acknowledged and discussed Alaska's political climate at the time Frederick displayed his banner, the Court handily disregarded this critical issue. Rather, the Court relied on Frederick's admission that he did not intend to make a political statement, but sought only to attract the attention of the television cameras[131] to conclude that Frederick's speech was not political in nature. This conclusion, however, is inconsistent with the Court's ruling in *Spence v. State of Washington*.[132]

A. *Frederick's Intent (or Lack Thereof) to Make a Political Statement*

In *Spence*, the Supreme Court reversed the defendant's conviction for improperly using the American flag for exhibition or display, because it found that his conduct constituted protected speech.[133] Specifically, the defendant flew an American flag, with a large peace symbol comprised of removable tape affixed to both sides, outside of his apartment window.[134] In finding that the defendant's expression was protected, the Court referenced the armbands in *Tinker* to note that "the context in which a symbol is used for the purposes of expression is important, for the context may give meaning to the symbol."[135]

Just as the context of the defendant's flag in *Spence*—"the Cambodian incursion and the Kent State tragedy"[136]—was viewed as giving meaning to his expression, the context of Frederick's speech—a state-wide, public debate regarding Alaska's

130. *Morse,* 127 S. Ct. at 2625.

131. *ACLU Slams Supreme Court Decision in Student Free Speech Case*, ACLU, June 25, 2007, http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html (reporting that Frederick said the "Bong Hits 4 Jesus" message "'was never meant to have any substantive meaning. It was certainly not intended as a drug or religious message. I conveyed this to the principal by explaining it was intended to be funny, subjectively interpreted by the reader and most importantly an exercise of my inalienable right to free speech.'").

132. 418 U.S. 405 (1974).

133. *Id.* at 413-15.

134. *Id.* at 405-06.

135. *Id.* at 410.

136. *Id.*

legal position on the legalization of marijuana, referred to by Justice Stevens as "an issue of considerable public concern in Alaska"[137]—should also provide such significance. While the *Spence* decision placed particular emphasis on the defendant's intent to make such a political statement, the Tenth Circuit subsequently diverged from this interpretation. In *Eagon Through Eagon v. City of Elk City, Oklahoma*,[138] the Tenth Circuit stated that the Court relied on the defendant's intent in *Spence* solely "because Spence's message was not conveyed 'through printed or spoken words' . . . ."[139] The Tenth Circuit therefore found that "implicit in this statement is the principle that perception and intent analysis is not necessary where printed or spoken words are used . . . ."[140] Under this analysis, Frederick's intent in displaying the banner should not be determinative in whether his speech was indeed political. Emphasis should instead be placed solely on the banner's content and context.

B. *The Political Context of Frederick's Speech*

At the time Frederick's "BONG HiTS 4 JESUS" banner was displayed at the Olympic Torch Relay, Alaska was in the midst of a state-wide political debate about the legalization of marijuana.[141] The ruling established in *Ravin v. State of Alaska*,[142] the seminal case involving the decriminalization of marijuana in Alaska, was then being contested through a voter referendum.[143] In *Ravin*, the Supreme Court of Alaska found, based upon the Alaska Constitution's explicit right to privacy,[144] that adults may constitutionally possess marijuana in their home for

137. Morse v. Frederick, 127 S. Ct. 2618, 2649 n.8 (2007) (Stevens, J., dissenting).

138. 72 F.3d 1480 (10th Cir. 1996).

139. *Id.*

140. *Id.* at 1485.

141. *Id.*

142. 537 P.2d 494 (Alaska 1975).

143. *Id.* at 497.

144. *See* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").

personal use.[145] The decision, however, did not provide specific guidelines for the appropriate exercise of this right.[146]

In response to *Ravin*, the Alaska state legislature amended its law and "exempted marijuana from the normal penalties for possession of 'depressant, hallucinogenic, or stimulant drugs' . . . ."[147] In 1982, the Alaska state legislature moved the drug laws from Title 17 to Title 11.[148] In that same year, the state legislature enacted additional provisions, which made the possession of four ounces or more of marijuana a class B misdemeanor.[149] These provisions exempted personal non-public use of less than four ounces of marijuana from criminal (and civil) penalties pursuant to Title 11 and thus effectively legalized such use.[150] In 1990, however, the voters amended this statute by passing a ballot initiative,[151] which directly contravened *Ravin*'s holding[152] by providing that "possession of any amount of marijuana *less than* eight ounces was a class B misdemeanor."[153] The constitutionality of this newly amended statute had yet to be challenged in the Supreme Court of Alaska at the time Frederick displayed his banner.[154] Subsequently, in

145. *See Ravin,* 537 P.2d at 511 (overruling ALASKA STAT. § 17.12.010 (1975), which provided that "it is unlawful for a person to manufacture, compound, counterfeit, possess, have under his control, sell, prescribe, administer, dispense, give, barter, supply, or distribute in any manner, a depressant, hallucinogenic or stimulant drug.").

146. *Id.* at 511-12.

147. Noy v. State, 83 P.3d 538, 541 (Alaska Ct. App. 2003). Specifically, former ALASKA STAT. § 17.12.110(e) (repealed 1982) "prohibited possession by an adult of one ounce or less of marijuana in a public place. It also prohibited possession by an adult of any amount of marijuana for personal use in a non-public place." *Id.*

148. *Id.*

149. *Id.* at 541-42. ALASKA STAT. § 11.71.060(a) (1982) further "prohibited use of marijuana in a public place, or possession of one ounce or more of marijuana in a public place, or possession of any amount of marijuana while operating a motor vehicle, or possession of any amount of marijuana by a person under 19 years of age." *Id.* at 542 n.11.

150. *Id.* at 542.

151. *Id.* (citing Initiative Proposal No. 2, §§ 1-2 (effective Mar. 3, 1991), 11 ALASKA STAT., p. 872 (Lexis 2006)).

152. *See id.* ("We have concluded that [ALASKA STAT.] § 11.71.060(a)(1) is unconstitutional to the extent that it proscribes marijuana possession that, under the *Ravin* decision, is protected by article I, section 22 of the Alaska Constitution.").

153. *Id.* (emphasis added) (citing ALASKA STAT. §§ 11.71.060(a)(1), (b)).

154. Morse v. Frederick, 127 S. Ct. 2618, 2649 n.8 (2007) (Stevens, J., dissenting).

2003, the statute was struck down by the Alaska Court of Appeals in *Noy v. State*.[155]

This, however, was not the only issue of concern regarding the legalization of marijuana. In 1998, a voter initiative approved the decriminalization of the use of marijuana for medical purposes.[156] An effort to further broaden the rights granted by the legislature subsequent to *Ravin*, however, failed in 2000.[157]

Given Alaska's political climate, a great deal of public attention, before, during, and after Frederick's display of the "BONG HiTS 4 JESUS" banner, focused on the issue of the legalization of marijuana. The striking absence of any such reference to this ongoing political debate in Alaska is curious, and the context in which Frederick's banner was displayed was deserving of a more thorough analysis. Had any attention been devoted to this long-running political issue, it would have been evident that Frederick's banner, despite its failure to be held by an individual specifically *intending* to make a political statement, did, indeed, make such an assertion. The appearance of Frederick's sign in the crowd likely called to mind the political debate regarding the true extent of an individual's right to use marijuana, which, at that time, had persisted in Alaska for over twenty-five years. The Supreme Court failed to engage in such an analysis, glibly stating that "this is plainly not a case about political debate over the criminalization of drug use or possession."[158]

As a result of this analytical omission, the Court ultimately misapplied its own *Morse* precedent—that public school officials may restrict speech that a reasonable observer would interpret as advocating illegal drugs use, except that "speech that can *plausibly* be interpreted as commenting on any political or social issue . . . ."[159] Under the facts of *Morse*, it is indeed plausible that Frederick's banner may have been reasonably

155. 83 P.3d at 542.

156. *See Morse*, 127 S. Ct. at 2649 n.8 (Stevens, J., dissenting) (citing Alaska 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), 11 ALASKA STAT., p. 882 (codified at ALASKA STAT. §§ 11.71.090, 17.37.010-17.37.080 (1999))).

157. *See id.* (citing Alaska 2000 Ballot Measure No. 5 (failed Nov. 7, 2000), 11 ALASKA STAT., p. 886 (granting amnesty to anyone convicted of any marijuana-related crimes)).

158. *Id.* at 2625 (majority opinion).

159. *Id.* at 2637 (Alito, J., concurring) (emphasis added).

interpreted as commenting on Alaska's continuing debate on the decriminalization of marijuana. While the justices "rightly declined to include political speech advocating drug legalization" within the *Morse* precedent, they failed to properly apply that standard to the specific circumstances surrounding Frederick's banner.[160]

C. *"BONG HiTS 4 JESUS" Fails to Constitute Speech that Advocates Illegal Drugs Use*

Frederick's banner fails to fit within the parameters of the Court's holding in *Morse* on grounds that are separate from its political nature. An additional component of the *Morse* holding specifically permits speech that "a reasonable observer would interpret as *advocating* illegal drugs use" to be regulated by public school officials.[161] While "BONG HiTS 4 JESUS" may be viewed as "'curious,' 'ambiguous,' 'nonsense,' 'ridiculous,' 'obscure,' 'silly,' 'quixotic,' and 'stupid,'"[162] it does not amount to the type of advocacy that would, in fact, encourage and persuade other children to use and experiment with illegal drugs.

The majority opinion, however, views "BONG HiTS 4 JESUS" as speech that is either imperative or celebratory.[163] In considering the celebratory nature of the speech, the Court stated that "we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion."[164] The Court favored a "pro-drug interpretation" of the "BONG HiTS 4 JESUS" banner, thereby finding that Morse was permitted to restrict its display.

Justice Stevens's dissent, however, provides a better approach to determining whether the banner indeed advocates illegal conduct. Referring to the landmark decision of *Brandenburg v. Ohio*,[165] Justice Stevens recited the fundamental principal that "punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to

160. Bader, *supra* note 129, at 162.
161. *Morse*, 127 S. Ct. at 2637 (Alito J., concurring) (emphasis added).
162. *Id.* at 2625 (majority opinion) (citations omitted).
163. *Id.*
164. *Id.*
165. 395 U.S. 444 (1969).

provoke the harm that the government seeks to avoid."[166] Under this premise, Frederick's banner fails to satisfy this standard because the vast majority of students would not be persuaded to "take bong hits" or "celebrate bong hits" as a result of viewing the sign. Or, as Justice Stevens articulated, "[t]he notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible."[167] Thus, from an objective viewpoint, the banner wholly failed to constitute advocacy under *Brandenburg*.

Although the majority supported a pro-drug interpretation of the banner, they also considered "BONG HiTS 4 JESUS" to be a "cryptic" phrase that "probably means nothing at all" to some people.[168] This flies in the face of their pronouncement that the banner could reasonably be found to constitute a pro-drug message.[169] If the speech is in fact "cryptic" as the majority stated, it is further inconsistent with *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*,[170] which was announced on the same day as *Morse*. In *Wisconsin Right to Life*, Justice Roberts found that where the "First Amendment is implicated, the tie goes to the speaker."[171] Justice Roberts continued by stating that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy . . . we give the benefit of the doubt to speech, not censorship."[172] Here, experts have disagreed over the meaning of Frederick's banner in regard to whether it in fact constitutes advocacy,[173] thereby constituting a "close case" in which "the tie [should have gone] to Frederick's speech."[174]

166. *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (citing *Brandenburg*, 395 U.S. at 449).

167. *Id.* at 2649.

168. *Id.* at 2624 (majority opinion).

169. *Id.* at 2625.

170. 127 S. Ct. 2652 (2007).

171. *Id.* at 2669.

172. *Id.* at 2674.

173. *See* Bader, *supra* note 129, at 144, n.58 (referring to the differing opinions of a language expert, who concluded that "the banner did not endorse drugs" and a law professor who found that it could "plausibly be interpreted as pro-drug").

174. *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting). The majority attempts to avoid criticism regarding the disparity between its views in *Wisconsin Right to Life* and *Morse* by referencing *Tinker*, *Fraser*, and *Kuhlmeier*'s maxim that "First Amendment rights are 'applied in light of the special characteristics of the

IV. Conclusion

When a majority of the Supreme Court found that Frederick's "BONG HiTS 4 JESUS" banner was speech that could be reasonably interpreted as promoting illegal drug use under a new exception to *Tinker*'s broad precedent, it justified its holding by finding that, while the banner did not constitute political speech, it did advocate illegal drug use. In his dissent, Justice Stevens challenged the underpinnings of the Court's analysis, urging instead that Frederick's banner was political speech that fell outside the parameters of advocacy. While the Court's support of the War on Drugs is noteworthy, the *Morse* holding plainly ignores the political climate and context of Frederick's banner, thereby cutting off any potential for the display to fit within the exception for political speech. When viewed objectively, Frederick's speech fails to reach the level of advocacy required to constitute a reasonable belief that students would be persuaded to alter their opinions and habits in light of viewing the banner.

In *Morse*, the Court ultimately sought to create an exception to *Tinker* that would deter the use and abuse of illegal drugs by students. Unfortunately, the specific facts of the case did not provide the appropriate vehicle to reach such a conclusion, resulting in the improper punishment of Frederick and the continued damage to the Court's once expansive protection of students' rights as enunciated in *Tinker*.

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school environment'" and further emphasizing that "there is no serious argument that Frederick's banner is political speech of the sort at issue in *Wisconsin Right to Life*." *Id.* at 2627 n.2 (majority opinion) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).