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# "Bong Hits 4 Jesus": Have Students' First Amendment Rights to Free Speech Been Changed After Morse v. Frederick?

Nathan M. Roberts
*University of Louisiana at Lafayette*

ARTICLE

**"Bong Hits 4 Jesus": Have students' First Amendment rights to free speech been changed after *Morse v. Frederick*?**

Nathan M. Roberts, J.D., Ph.D.
Mr. & Mrs. E. P. Nalley/BORSF Professorship in Education
Director of Graduate Studies in Education
University of Louisiana at Lafayette

In 2007, the United States Supreme Court issued its opinion in the closely watched case of *Morse v. Frederick*,[1] better known as the "Bong Hits 4 Jesus" case. This First Amendment case was closely watched by public school administrators because the Ninth Circuit Court of Appeals had earlier overruled a lower court's finding that no First Amendment violation had occurred and instead ruled that the school principal, in fact any reasonable administrator, should have known that she was violating the student's rights, and accordingly, that she could not assert qualified immunity as a defense to damages, including punitive damages and attorney fees.[2] This case has major implications for public school systems and students nationwide. In a 5-4 decision, the Supreme Court in an opinion authored by Chief Justice Roberts, created another narrow exception to the standard set forth in *Tinker v. Des Moines Independent Community School District*[3], issued in 1969.

## Just the Facts, Please

The Supreme Court and the Ninth Circuit Court of Appeals both described the same basic facts, but reached different conclusions based on the question each court chose to address. The facts indicate that students from Juneau-Douglas High School were released to watch the Olympic Torch pass by the school as part of a Coca Cola sponsored "Winter Olympic Torch Relay." The students were on both sides of the street outside the school and the teachers were interspersed in the group. Joseph Frederick, an 18-year old senior who had never made it to school due to a snow covered driveway, arrived across the street from where the school was located. He waited with some other students until the television cameras were around and then opened a banner that read "Bong Hits 4 Jesus." The school principal crossed the street and grabbed the banner from Frederick and suspended him for ten days.[4] The Ninth Circuit concluded from the facts that this was a student speech issue even though Frederick never arrived at school that morning because of snow in his driveway.

The Ninth Circuit framed the question as "Whether a school may, in the absence of concern about disruption of educational 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."[5] The Ninth Circuit analyzed the facts under *Tinker* and found that the answer was "No." The Supreme Court opined that Frederick's banner did not convey any sort of political or religious message; therefore, the case was not about the political debate over criminalization of drug use or possession.[6] Accordingly, the question framed by the Supreme Court was "Whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when the speech is reasonably viewed as promoting illegal drug use?"[7] The Supreme Court reversed the Ninth Circuit and held "Yes," the principal could. However, upon close review of the opinion, the direction provided by the court is extremely narrow. *Morse v. Frederick* has major implications for public school systems and students as it provides guidance for school administrators on the difficult topic of student First Amendment rights, while recognizing the difficult task principals have in responding to free speech issues on the spot.

## General Background

Student First Amendment rights are generally analyzed under three cases: (1) *Tinker v. Des Moines*

*Independent Community School Dist,.*[8] (2) *Bethel School Dist. No. 403 v. Fraser,*[9] and/or (3) *Hazelwood School Dist. v. Kuhlmeier.*[10] *Tinker* is most famous for its declaration that students do not "shed their constitutional rights to freedom of expression at the schoolhouse gate."[11] *Tinker* involved students who planned and wore black arm bands to silently protest the Vietnam War. After school leaders uncovered the plan, they adopted a policy prohibiting students from wearing the armbands. When the students wore the armbands they were suspended. The Supreme Court ruled students have some First Amendment rights in school and the school system's action violated those rights. The rule of law established by *Tinker* holds that student expression may not be suppressed unless school leaders reasonably determine that the expression will "materially and substantially disrupt the learning environment at the school."[12] The students' speech in *Tinker* was clearly recognized as political protest, and the only reason the school system stopped the expression was to avoid the uneasiness and unpleasantness associated with an unpopular viewpoint. The Supreme Court's decision in *Tinker* held that simply avoiding controversy by suppressing unpopular views, without the threat of disorder or disruption, violates student free speech.

The second Supreme Court decision utilized to evaluate student speech rights is *Bethel School Dist. No. 403 v. Fraser*.[13] *Bethel* involved the suspension of a student who gave a sexually suggestive speech at a high school assembly. The lower court followed *Tinker* and ruled in favor of Fraser. The Supreme Court reversed, explaining that *Tinker* applied to political speech, but that school officials could sanction students for offensively lewd and indecent speech, as school officials need to have the authority to determine appropriate speech for school assemblies and the classroom, and that lewd and indecent speech is not protected by the First Amendment. The Court further stated that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[14] *Bethel* does not rely on substantial disruption, but instead focuses on the special characteristics of a school and establishes the first exception to the substantial disruption standard of *Tinker*.

*Hazelwood School Dist. v. Kuhlmeier*[15] adds another exception to *Tinker*. The Court in *Hazelwood* involved activities by students that might reasonably be attributed to the school or bear the imprimatur of the school.[16] *Hazelwood* involved a student newspaper that had two articles withheld by the principal because the principal felt the students had not followed appropriate journalistic standards. The Court did not find any substantial disruption and instead ruled that schools may exercise editorial control over style and content of student speech in "school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[17] *Hazelwood* is important because it recognizes the school's ability to regulate some speech that it could not control outside of school. It also provides another exception to the "substantial disruption" standard of *Tinker*.

In *Frederick v. Morse,* the Ninth Circuit relied on *Tinker* and found there was no evidence that the banner caused any disruption; therefore, the student had the right to display the banner and the principal violated the student's First Amendment rights. They further found, contrary to the district court that ruled in favor of the principal, that any reasonable principal would have known that she was violating the student's rights; therefore, the principal was not entitled to qualified immunity.[18] The Supreme Court on the other hand, found that *Tinker* was not the only basis for restricting student speech and then drew upon the Fourth Amendment random drug testing cases of *Vernonia v. School Dist. 47J v. Acton*[19] and *Board of Ed. of Independent School Dist. No.92 of Pottawatomie Cty. v. Earls*,[20] to hold deterring drug use by schoolchildren as an important, indeed, perhaps compelling interest of school districts.[21] In fact, in the Juneau-Douglas school, the concern for drug prevention was included in a school policy. Once the Supreme Court established drug prevention was a compelling interest, it was fairly easy to move to the finding that Frederick was disciplined for displaying a banner that appeared to advocate illegal drug use in violation of school policy. The Chief

Justice concluded that "School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse [the principal] had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use–in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[22]

The decision in *Morse* is fairly simple and addresses a very narrow exception to the standard established by *Tinker*. The burning issue left unresolved is whether the Court's recent decision will curtail student-speech rights dramatically, or will it represent only a narrow drug exception to *Tinker*. To answer this question, it is important to analyze each of the concurring and dissenting opinions to attempt to formulate guidelines that can serve to guide the future decisions of educational leaders.

**Analysis**

*Morse* involves the expressive activities of an 18-year old, who defiantly raised a banner with the words "Bong Hits 4 Jesus." The student admitted he was not advocating for drugs or for religion, but was simply testing the limits of his free speech rights. He merely claimed he wanted to get on camera and was not making a political point. The majority opinion led by Chief Justice Roberts, opined the principal acted appropriately under the circumstances and did not violate the student's First Amendment rights. As nonsensical as the message may have been, the Court found it was fair for the principal to interpret it as a pro-drug message.[23] The Court also found the action took place at a school event, even though it was not on school property. The Court took the position that the First Amendment does not require schools to tolerate student expression that contributes to the danger of illegal drug use. The opinion written by Chief Justice Roberts was joined by Scalia, Kennedy, Thomas and Alito.

Whatever Frederick's intent was, the Court opined that a reasonable observer would support the principal's interpretation that the message advocated drug use and contravened the school's anti-drug mission and policies. However, the Court made clear it was not fiddling with *Tinker,* nor was it relying on *Bethel's* exception that allows for the censure of lewd and offensive speech. The Court articulated that the concern was not that the student's speech was offensive, but that it was promoting illegal drug use.

The concurring opinion of Alito and Kennedy further proposes to limit the impact of the decision, as they stressed in their opinion that this decision only applies in the context of student speech that promotes illegal drug use. Alito wrote "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."[24] He further indicated that even the regulation of drug speech stands at the far reaches of what the First Amendment permits.[25] Additionally, Alito and Kennedy made sure that the opinion "provides no support for any restriction of student 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 purposes."[26] However, since the *Morse* decision, at least one court, the Fifth Circuit in *Ponce v. Socorro Independent Sch. Dist.*[27], has interpreted *Morse* to allow school administrators to bypass the *Tinker* analysis of whether the speech causes a substantial disruption and instead allow a decision based on whether the administrator believes the "content" of the speech could potentially lead to physical harm to students, such as Columbine-type violence advocated in a student notebook.

Conservatives had one supporter on the Court who wanted to go much further. Justice Thomas in a

separate concurrence wrote he would have overturned *Tinker* as without basis in the Constitution.[28] In his opinion, Justice Thomas suggested the history of public education indicated that the First Amendment, as originally understood, did not protect student speech in public school.[29] Justice Thomas cites the legal doctrine of *in loco parentis*, for the proposition that schools should be allowed to regulate student speech and preserve the right of teachers to punish speech that the school or teacher thinks is contrary to the interests of the school and its educational goals. Justice Thomas reviewed the history of American public education and opined that the First Amendment "freedom of speech" did not encompass a student's right to speak in public schools. Thomas' concurrence suggests early public schools gave total control to teachers, who expected obedience and respect from students, and courts consistently deferred to them. Accordingly, Justice Thomas joined the Court's opinion because it chips away at *Tinker* by establishing another small exception to the *Tinker* standard, although he would prefer to eliminate it completely.[30]

Justice John Paul Stevens, writing for the dissent, perceived a greater danger in the result reached by the Court. The dissent argued that the student's message was nonsense and did not advocate any dangerous or illegal activity.[31] Justices Souter and Ginsburg joined Stevens' opinion that suggested the decision diminishes the protection of the First Amendment by upholding an action to discipline a student for expressing a view they, the school administration, interpreted as violating school policy. The dissent suggests that even if the banner advocated drug use, the activity of unfurling a banner is not the equivalent of advocating immediate violence, nor was it lewd or indecent and should not have been suppressed. The dissenters were concerned that the majority's opinion could provide authority for schools to crack down on any student speech that could be interpreted as pro-drug and ultimately, for any viewpoint that contradicts established board policy.

Justice Breyer also dissented, indicating he would not have ruled on the First Amendment issue at all. He would have ruled the principal was not individually liable for her decision, and qualified immunity should have been applied.[32] To the relief of many administrators, each Supreme Court Justice concurred that the principal should not have been penalized, which is good news for educational leaders across the country.

The *Morse* case led to the formation of some interesting partners. According to Charles Lane of the *Washington Post*, Frederick, the student involved, was supported by the civil libertarians, gay rights advocates, and proponents of medical marijuana, as well as some conservative Christian legal organizations.[33] Lambda Chi, which pushes for equal rights for gay and lesbian students, supported Frederick, as they were concerned a decision in favor of the principal would encourage educational leaders to stop students from openly declaring their sexual orientation at school. The Christian groups were worried that a favorable ruling for the school would be used to stop students from expressing their opposition to gays and lesbians in schools that have policies calling for tolerance of sexual orientation. Although it is unclear how much this decision will curtail student speech, the concurrence by Alito and Kennedy should prevent it from being utilized to restrict student speech about sexuality.

## Conclusion

The *Morse* decision could be more about protecting a principal from personal liability than one about limiting student speech, since the decision is expressly limited to speech promoting illegal drug use. It is noteworthy that Justice Roberts rejected the school's position that *Hazelwood* controlled this case because it was school sponsored. The Court announced that no one would reasonably believe Frederick's banner carried the school's imprimatur. If the court had expanded *Hazelwood*, the impact to student speech would have been extensive. Another important limitation to the decision was the Court's refusal to categorize Frederick's speech as "offensive" and allow Frederick to be disciplined under the guidelines set forth in *Bethel School District v. Fraser*. *Bethel* implies school leaders can

discipline students for speech that is vulgar, lewd or indecent. Justice Roberts limited the opinion when he wrote, "We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some."[34] Finally, the concurrences of Alito and Kennedy severely limit the use of *Morse* for anything other than speech a reasonable observer would interpret as advocating illegal drug use.

School administrators everywhere were grateful that the Supreme Court decided to hear the case of *Morse v. Frederick*. Whereas most administrators see themselves as responsible for providing students with an environment conducive for learning as well as for safety, they were fearful this case would put them at risk any time they disciplined a student for speech purposes. Most administrators believe they have an obligation to uphold school board policies and to strive to protect the health and welfare of students. *Morse*, as decided, turned out to be simple for administrators, as all the justices were in favor of finding the principal not personally liable. The First Amendment issue also turned out to be simple due to its limited holding. The fear of most involved the Court's potential for adding significantly to or expanding the exceptions to *Tinker* or classifying "Bong Hits 4 Jesus" as lewd or indecent. In the end, the Court simply ruled that the principal acted reasonably in her interpretation that the message advocated for illegal drug use—in violation of established school policy—and that her action was justified to avoid the message that the school was not serious about the dangers of illegal drug use.

After *Morse,* administrators when confronted with a student speech issue should now categorize the speech into one of the following four categories: (1) constitutes a substantial disruption; (2) is offensive; (3) is school sponsored or carries the imprimatur of the school; or (4) could be reasonably interpreted as advocating for illegal drug use. Once the speech is categorized, administrators must analyze it under the appropriate standard to determine if it is permissible student expression.

## References

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[2] *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006)

[3] *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969)

[4] *Morse v. Frederick*, 127 S. Ct. at 2623

[5] *Frederick v. Morse*, 439 F.3d at 1118

[6] *Morse,* 127 S. Ct. at 2625

[7] *Morse*, 127 S. Ct. at 2625

[8] *Tinker*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)

[9] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986)

[10] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988)

[11] *Tinker*, 393 U.S. at 506

[12] *Tinker, 393 U.S.* at 513

[13] *Bethel v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986)

[14] *Bethel v. Fraser* 478 U.S. at 682

[15] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)

[16] *Hazelwood v. Kuhlmeier* 484 U.S. at 271

[17] *Hazelwood v. Kuhlmeier* 484 U.S. at 273

[18] *Frederick v. Morse*, 439 F.3d. 1114

[19] *Veronia v. School Dist. 475 v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. 2d 564 (1996)

[20] *Board of Education of Independent School District No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 122 S. Ct. 2559, 153 L. 2d 735 (2002)

[21] *Vernonia*, 515 U.S. at 661.

[22] *Morse,* 127 S. Ct. at 2629

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

[24] *Morse,* 127 S. Ct. at 2637

[25] *Morse*, 127 S. Ct. at 2638

[26] *Morse*, 127 S. Ct. at 2636

[27] *Ponce v. Soccorro Independent School District*, 2007 U.S. App. LEXIS 26862

[28] *Morse*, 127 S. Ct. at 2630

[29] *Morse*, 127 S. Ct. at 2630

[30] *Morse*, 127 S. Ct. at 2636

[31] *Morse*, 127 S. Ct. at 2649

[32] *Morse*, 127 S. Ct. at 2638

[33] Lane, Charles, "Court Backs School on Speech Curbs." *Washington Post*, Tuesday, June 26, 2007, A06.

[34] *Morse,* 127 S. Ct. at 2629