

1-1-2008

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Recommended Citation

Erwin Chemerinsky, *How will Morse v. Frederick be Applied?*, 12 *Lewis & Clark L. Rev.* 17 (2008).

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HOW WILL MORSE V. FREDERICK BE APPLIED?

by
Erwin Chemerinsky*

In 2007, the Supreme Court decided Morse v. Frederick, a 5-4 decision in which Chief Justice Roberts, writing for the majority, decided that a student could be punished for displaying a banner with the words “BONG HiTS 4 JESUS” on a public sidewalk. In this Essay, the author explores the implications of this decision, focusing on the important question of how it will be understood and applied by school officials, school boards, and lower court judges. The author suggests that the opinion was misguided and—from a First Amendment perspective—highly undesirable.

The author argues that the decision cannot be justified under existing First Amendment principles, and cautions that it could be seen as authorizing punishment of students for speech that is deemed distasteful or offensive, even just juvenile. However, the concurring opinion by Justice Alito suggests that the decision is exceedingly narrow and based on a very unusual factual context. The author notes that if Justice Alito’s opinion is seen as defining the scope of the holding, the case establishes only the power of schools to punish speech encouraging illegal drug use rather than giving school officials great discretion to punish student speech.

Despite the fact that Morse v. Frederick is consistent with decisions from the Supreme Court and lower federal courts over the last two decades, the author’s hope is that Chief Justice Roberts’s majority opinion will be read through the prism of Justice Alito’s concurring opinion, thereby having little effect on the already very limited First Amendment rights of students.

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I. INTRODUCTION

The most important question about *Morse v. Frederick* is how it will be understood and applied by school officials, school boards, and lower

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court judges.¹ Will this decision be seen as authorizing punishment of students for speech that is deemed distasteful or offensive or even just juvenile?² Or will it be regarded as a narrow decision about a very unusual factual context? Justice Alito's concurring opinion offers hope that it will have little effect. He wrote separately, joined by Justice Kennedy, to suggest that it is an exceedingly narrow decision. Justice Alito wrote:

I join the opinion of the Court 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 speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'³

My hope is that lower courts will read Chief Justice Roberts's majority opinion through the prism of Justice Alito's concurring opinion. After all, it was a 5-4 decision and Justices Alito and Kennedy were obviously integral to that result. Yet, I worry that there will be the tremendous temptation to read the opinion broadly as giving school officials great discretion to punish student speech. I want to suggest in this Essay that the opinion was misguided because the only way that it makes doctrinal sense is if it is read as being about deference to school officials, but from a First Amendment perspective this is highly undesirable.

Thus, Part II of this Essay argues that the decision cannot be justified under existing First Amendment principles, other than the need for deference to school officials. In Part III, I argue why this is undesirable and thus why school officials and lower courts should adopt Justice Alito's interpretation of the opinion.

II. WHAT WAS WRONG WITH CHIEF JUSTICE ROBERTS'S APPROACH?

In many ways, the Court's majority opinion was at odds with long-standing First Amendment precepts. First, the Court upheld a viewpoint-based restriction in a public forum. I cannot think of any other case that ever has done this. Public sidewalks long have been regarded as the quintessential public forum. In *Hague v. Committee for Industrial Organization*, the Court struck down an ordinance that prohibited all public meetings in the streets and other public places without a

¹ *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

² A number of years ago, a school administrator complained to me that my child's columns for the school newspaper were "juvenile." I could not resist remarking that as a sixteen-year-old that was to be expected since he was a juvenile.

³ *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

permit from the city.⁴ In a famous plurality opinion, Justice Owen Roberts found that there was a right to use government property for speech purposes. Roberts wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.⁵

If any principle of the First Amendment is clearly established it is that viewpoint restrictions are not allowed in public forums unless the government meets strict scrutiny. Viewpoint restrictions of speech are virtually never allowed. The government obviously should not be able to advance a particular position by silencing those holding an opposite view.

There can be no dispute that Frederick would not have been punished if his speech had condemned use of drugs. Thus, the sanctions for his speech were based entirely on the viewpoint he choose to express in a public forum. Chief Justice Roberts argued that it was an official school activity, but this fails to acknowledge that the speech occurred not in a classroom or even an auditorium, but on a public sidewalk. If Frederick had not been a student, but a person who used the occasion to hold up such a banner, surely the government could not have punished the individual, even though the government would have had an interest in keeping students from receiving messages that they perceived as encouraging illegal drug use. By contrast, the government could have stopped the person from coming into school with such a banner. The point is that even though it was during the school day, it was still a public sidewalk, and it was still the Court upholding viewpoint discrimination.

Second, there was no evidence of any disruption of school activities. In *Tinker v. Des Moines Independent Community School District*, the Court said that the First Amendment protected the ability of students in a high school to wear black armbands to protest the Vietnam War.⁶ The Court emphasized that the armbands were a silent protest that did not disrupt education within the schools.⁷ The Court said that “[t]here is no indication that the work of the schools or any class was disrupted.”⁸ Justice Fortas wrote that the speech was protected absent a showing that it would “materially

⁴ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

⁵ *Id.* at 515 (Roberts, J., concurring).

⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁷ The Court also stressed that other symbols worn by students were allowed in the school and that it was impermissible for the government to discriminate among them based on their message. *Id.* at 508, 510.

⁸ *Id.* at 508.

and substantially interfere[] with the requirements of appropriate discipline in the operation of the school.”⁹

Admittedly, subsequent Supreme Court cases failed to follow *Tinker*'s holding that student speech could be punished only if it was actually disruptive of school activities. In *Bethel School District No. 403 v. Fraser*, the Court upheld the punishment of a student for a speech given at a school assembly, nominating another student for a position in student government, that was filled with sexual innuendo.¹⁰ The student was suspended for a few days and kept from speaking at his graduation as scheduled.

The Court upheld the punishment and emphasized the need for judicial deference to educational institutions. Chief Justice Burger, writing for the Court, said that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”¹¹ The Court also distinguished *Tinker* on the ground that it had involved political speech, whereas the expression in *Bethel* was sexual in nature. Chief Justice Burger said that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”¹² He concluded that “[a] high school assembly or classroom is no place for a sexually explicit monologue” and “it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech . . . is wholly inconsistent with the ‘fundamental values’ of public school education.”¹³

In *Bethel*, the Court at least argued that Fraser’s speech disrupted school activities, but in *Morse v. Frederick*, the Court made no effort to do so. Although the Court did not overrule *Tinker*, it clearly abandoned the idea that speech can be punished only if it is actually disruptive of school activities.

Third, the Court allowed punishment of speech that advocated illegal activity without any showing that it would have the slightest effect. The key case, defining when the government may punish advocacy of illegality is *Brandenburg v. Ohio*.¹⁴ A leader of a Ku Klux Klan group was convicted under the Ohio criminal syndicalism law. Evidence of his incitement was a film of the events at a Klan rally, which included racist and anti-Semitic speech, and several items that appeared in the film, including a number of firearms. In a per curium opinion, the Court said that:

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not

⁹ *Id.* at 505 (citation omitted).

¹⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

¹¹ *Id.* at 683.

¹² *Id.*

¹³ *Id.* at 685–86.

¹⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁵

Chief Justice Roberts did not assert that Frederick's banner would have the slightest effect in encouraging drug use. He could not do so. It is questionable whether students understood the banner as encouraging drug use, and even if they did it is doubtful any would be more likely to use drugs because of it. Justice Stevens expressed this well:

This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that. . . . 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.¹⁶

My concern is thus that *Morse v. Frederick* is a significant departure from well established First Amendment principles, even those that concern when student speech can be punished. The only way of understanding the case is being about the need for deference to school authorities. Indeed, the majority concludes its opinion by expressing the need for deference to the principal. Chief Justice Roberts states:

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse 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.¹⁷

Justice Alito, in his concurring opinion, wants to see the case as being just about the interest of schools in stopping illegal drug use.¹⁸ But that begs the question of why expression about illegal drug use would be regarded as different from all other speech. Surely other activities—such as violence in schools—are worse. If a school can stop a student from holding up an ambiguous banner, like “Bong Hits 4 Jesus,” it would be able to punish a banner encouraging violence. There are countless examples of behavior that is illegal and harmful that might be expressed by students. Imagine a t-shirt or a banner encouraging promiscuous sexual activity illegal under statutory rape laws and potentially devastating

¹⁵ *Id.* at 447.

¹⁶ *Morse v. Frederick*, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting).

¹⁷ *Id.* at 2629.

¹⁸ *Id.* at 2636 (Alito, J., concurring).

to health. Or even what about a t-shirt or banner that encouraged students to skip school? The point is that if schools can punish “Bong Hits 4 Jesus,” it is hard to see why they could not sanction that speech as well. My fear is therefore that principals, school boards, and lower courts will read *Morse v. Frederick* as giving them more authority to punish student speech.

Already there is indication that exactly this is occurring. For example, soon after *Morse*, in *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit upheld “an eighth-grade student’s suspension for sharing with friends via the Internet a small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed.”¹⁹ The speech occurred entirely outside school. It was shared among friends via Instant Messaging. It was hyperbole, not a threat. As the Second Circuit noted:

At the same time, a police investigator who interviewed Aaron concluded that the icon was meant as a joke, that Aaron fully understood the severity of what he had done, and that Aaron posed no real threat to VanderMolen or to any other school official. A pending criminal case was then closed. Aaron was also evaluated by a psychologist, who also found that Aaron had no violent intent, posed no actual threat, and made the icon as a joke.²⁰

Still, the Court of Appeals, citing to *Morse*, upheld the student’s punishment. This, of course, goes even further than *Morse* because it says that even speech that occurs entirely outside school can be punished.

III. WHY *MORSE V. FREDERICK* WAS WRONG

Why care whether school administrators can punish students for a silly banner like “Bong Hits 4 Jesus”? Justice Thomas, in his concurring opinion, argues that students should have no free speech rights at all and that *Tinker* should be expressly overruled.²¹

In *Tinker*, the Court said that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²² The Court said that “[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students [Students] are possessed of fundamental rights which the State must respect”²³

¹⁹ *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).

²⁰ *Id.* at 36.

²¹ *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring).

²² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²³ *Id.* at 511.

The problem with Justice Thomas's argument that students should have no speech rights is that it undervalues the importance of student speech and overvalues the interests of the government in suppressing student speech. On the one hand, students, like all others in society, have an autonomy interest in expressing themselves. In general, freedom of speech is safeguarded as a fundamental right that is an essential aspect of personhood and autonomy. Professor Baker said:

To engage voluntarily in a speech act is to engage in self-definition or expression. A Vietnam war protestor may explain that when she chants "Stop This War Now" at a demonstration, she does so without any expectation that her speech will affect the continuance of war . . . ; rather, she participates and chants in order to *define* herself publicly in opposition to the war. This war protestor provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization.²⁴

Protecting speech because it aids the political process or furthers the search for truth emphasizes the instrumental values of expression. Protecting speech because it is a crucial aspect of autonomy sees expression as intrinsically important.²⁵ Justice Thurgood Marshall observed that "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression."²⁶

Students, too, have an autonomy interest in expressing themselves. The message may be political or entertainment or even just silly, but that is true of all speech that is protected in society. The Court in *Morse v. Frederick* stresses that Frederick's banner was not political speech. Chief Justice Roberts states: "But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, . . . this is plainly not a case about political debate over the criminalization of drug use or possession."²⁷ But the First Amendment has never been limited to protecting just political expression.

Tinker powerfully expressed the importance of protecting student speech. After his famous declaration that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Justice Fortas states: "This has been the unmistakable holding of this Court for almost 50 years."²⁸ After a long string of

²⁴ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 994 (1978).

²⁵ See, e.g., Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that self-realization should be regarded as the exclusive value of the First Amendment).

²⁶ *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

²⁷ *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007).

²⁸ *Tinker*, 393 U.S. at 506.

citations to many prior Supreme Court rulings, Justice Fortas quotes Justice Robert Jackson's eloquent opinion from *West Virginia State Board of Education v. Barnette*.²⁹

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.³⁰

Later in his majority opinion, Justice Fortas returns to this theme and powerfully proclaims the free speech rights of students. Fortas declares:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, 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. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.³¹

Indeed, like Justice Jackson in *Barnette*, Justice Fortas stressed freedom of speech is especially important in schools. He quoted an earlier opinion from Justice Brennan declaring: “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the ‘marketplace of ideas.’”³²

At the same time, the Court underestimates the danger of government power in the schools context. The First Amendment is based on the reality that there is a strong impulse to silence and punish speech that is distasteful. As has often been expressed, the First Amendment is not needed for the messages we like; they would be allowed to occur anyway. Freedom of speech is about safeguarding the controversial or unpopular message. Chief Justice Roberts's majority

²⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a state law requiring students to salute the flag is unconstitutional).

³⁰ *Id.* at 637.

³¹ *Tinker*, 393 U.S. at 511.

³² *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

opinion in *Morse v. Frederick* never acknowledges the reality that principals may often choose to punish speech they don't like, especially from students they don't like.

For students, there is no protection from arbitrary punishment for speech except through the First Amendment and the courts. Yet, the Supreme Court's decision in *Morse v. Frederick* risks that there will be much less judicial protection for student speech.

The solution, then, is for lower courts—and hopefully principals and school boards—to read *Morse v. Frederick* narrowly. It was a 5-4 decision and two of the Justices in the majority—Alito and Kennedy—emphasized that the holding is just about the ability of schools to punish student speech encouraging drug use. The opinion should be read no more broadly than that.

IV. CONCLUSION

The reality is that *Morse v. Frederick* is consistent with the decisions from the Supreme Court and the lower federal courts over the last two decades. Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools. Indeed, there have been remarkably few rulings concerning students' speech, despite hundreds of lower court decisions on the topic. There have been only two Supreme Court cases concerning student speech in elementary, middle, and high schools, excluding cases concerning religious expression: *Bethel School District No. 403 v. Fraser*³³ and *Hazelwood School District v. Kuhlmeier*.³⁴ In both, the Court rejected the students' First Amendment claims and sided with the schools.

In fact, in the almost forty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights. For instance, in *Ingraham v. Wright*,³⁵ the Court rejected that students have a right to procedural due process before the imposition of corporal punishment. In *New Jersey v. T.L.O.*³⁶ and *Vernonia School District 47J v. Acton*,³⁷ the Court rejected Fourth Amendment claims by students and upheld the ability of schools to search students without probable cause and to subject them to random drug testing. In *Board of Education v. Earls*,³⁸ the Court allowed a school system to require random drug testing of all students participating in extracurricular activities.

In light of the later cases, it is hardly surprising that at least one federal court of appeals has concluded that subsequent Supreme

³³ 478 U.S. 675 (1986).

³⁴ 484 U.S. 260 (1988).

³⁵ 430 U.S. 651 (1977).

³⁶ 469 U.S. 325 (1985).

³⁷ 515 U.S. 646 (1995).

³⁸ 536 U.S. 822 (2002).

Court cases cast doubt on whether *Tinker* remains viable and whether students retain free speech rights.³⁹ There simply are hardly any Supreme Court cases in the past thirty years protecting students' constitutional rights.

Morse v. Frederick continues that pattern. But if lower courts focus on the concurring opinion of Justice Alito there is more hope. Reading his opinion as defining the scope of the holding leads to the conclusion that the case establishes only the power of schools to punish speech encouraging illegal drug use. It is not a victory for the First Amendment, but it is far better than Chief Justice Roberts's majority opinion.

³⁹ *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994).