AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property/Subsidies, Employees, and Schools

---

Morse v. Frederick, 551 U.S. 393 (2007)

Joseph Frederick was suspended from school for ten days after he displayed a banner with the words "BONG HiTS 4 JESUS" at a high school outing to witness the 2002 Olympic Torch Relay. Frederick claimed he was merely trying to attract the attention of television cameras. Deborah Morse, the principle of Juneau-Douglas High School in Alaska maintained that the banner violated the school's anti-drug policy. Frederick sued Morse for violating his First Amendment rights, as incorporated by the due process clause of the Fourteenth Amendment. A federal district court rejected his claim, but that decision was reversed by the Court of Appeals for the Ninth Circuit. Morse appealed that verdict to the Supreme Court.

Morse *provided the third occasion in which the Supreme Court in the contemporary era rejected claims that schools had violated the constitutional free speech rights of students. In* Bethel School Dist. No. 403 *(1986), the Supreme Court sustained the suspension of a student who had relied heavily on sexual innuendo during a speech at a school assembly. Chief Justice Burger's majority opinion held that while "the First Amendment guarantees wide freedom in matters of adult public discourse, . . . , simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point," did not entail that the same latitude must be permitted to children in a public school. Given that one function of schools was to teach high standards of behavior, Burger concluded, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." Noting how shocked the American public was in 1939 when Clark Gable on the big screen declared, "Frankly, my dear, I don't give a damn," Justice Stevens dissented on the ground that Matthew Fraser did not have reasonable notice that his speech violated school rules. Justice Marshall dissented on the ground that no evidence was presented that the speech disrupted school activity.*

Two years later, a majority of justices on the Supreme Court agreed that a high school principal had the right to forbid the school newspaper to run a story on teenage pregnancy. Justice White's majority opinion in Hazelwood School Dist. v. Kuhlmeier (1988) *distinguished* Tinker v. Des Moines Independent Community School District *(1969) on the ground that the student newspaper was a school-sponsored activity. "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities," White wrote, "so long as their actions are reasonably related to legitimate pedagogical concerns." Justice Brennan's dissent insisted that a principal was not attempting to exercise control over a school-sponsored activity, but silencing the personal opinions of individual students. "Censorship," he wrote, "in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."*

The Supreme Court by a 5-4 vote upheld the decision to suspend Fredrick. Chief Justice Roberts's majority opinion held that the suspension was a reasonable attempt to discourage drug use and pro-drug advocacy in the schools. How did Morse v. Frederick *treat previous precedents on student speech? Did Justice Roberts create a new exception to* Tinker *or did he merely apply* Tinker *and subsequent decisions to a new factual circumstance? Are there any circumstances after* Morse *in which a principal could not find a constitutional reason for restricting student speech? Was Justice Thomas correct that principals should have a free hand when restricting speech? On what grounds did Justices Kennedy and Alito dispute Justice Thomas's conclusions? Was this a family dispute among originalists, different kinds of originalists, or some other kind of dispute?*

Despite losing in the highest court in the land, Frederick was able to obtain some vindication. In November 2008, he settled his state constitutional claims against the Juneau School District for $45,000. The settlement also

required the school district to pay up to $5,000 for an expert on constitutional law to preside over a discussion of student speech rights at Juneau-Douglas High School.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

. . .

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.* (1969) . . . At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser* (1986) . . ., and that the rights of students "must be 'applied in light of the special characteristics of the school environment.' "*Hazelwood School Dist. v. Kuhlmeier* (1988). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

. . .

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." . . . But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

. . .

. . . At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits . . ."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. . . .

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. . . . Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

. . . Frederick [does not] argue[] 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

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

. . .

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school." . . . . In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. . . . Drug abuse can cause severe and permanent damage to the health and well-being of young people:

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message [about the dangers of drugs]. . . . Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that

students are more likely to use drugs when the norms in school appear to tolerate such behavior. . . . Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment," . . . and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." . . . The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, . . . extends well beyond an abstract desire to avoid controversy.

. . . The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

. . . Stripped of rhetorical flourishes, . . . the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

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. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

. . .

JUSTICE THOMAS, concurring.

. . . I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.* (1969) . . . is without basis in the Constitution.

. . .

In light of the history of American public education, it cannot seriously be suggested that the First Amendment "freedom of speech" encompasses a student's right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools' authority to make rules and to discipline students for violating those rules. Several points are clear: (1) under *in loco parentis,* speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.

It might be suggested that the early school speech cases dealt only with slurs and profanity. But that criticism does not withstand scrutiny. First, state courts repeatedly reasoned that schools had discretion to impose discipline to maintain order. The substance of the student's speech or conduct played no part in the analysis. Second, some cases involved punishment for speech on weightier matters, for instance a speech criticizing school administrators for creating a fire hazard. . . . Yet courts refused to find an exception to *in loco parentis* even for this advocacy of public safety.

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. . . . If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules

apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. Instead, it imposed a new and malleable standard: Schools could not inhibit student speech unless it "substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." . . . . Inherent in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. . . . Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.

. . .

. . . In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools. "Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools." . . . We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either "[g]ibberish," . . . or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to "surrender control of the American public school system to public school students."

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.

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." . . .

The opinion of the Court correctly reaffirms the recognition in *Tinker v. Des Moines Independent Community School Dist.* (1969) . . . of the fundamental principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court is also correct in noting that *Tinker,* which permits the regulation of student speech that threatens a concrete and "substantial disruption," . . . does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.

But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to *Tinker,* the decision in the present case allows the restriction of speech advocating illegal drug use; *Bethel School Dist. No. 403 v. Fraser* (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood School Dist. v. Kuhlmeier* (1988) allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. 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.

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." . . .

During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The "educational mission" argument would give public school authorities a license to

suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.

For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

Speech advocating illegal drug use poses a threat to student safety. . . . As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

JUSTICE BREYER, concurring in the judgment in part and dissenting in part.

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more.

Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. . . . To say that school officials might reasonably prohibit students during school-related events from unfurling 14-foot banners (with any kind of irrelevant or inappropriate message) designed to attract attention from television cameras seems unlikely to undermine basic First Amendment principles. But to hold, as the Court does, that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" (and that "schools" may "restrict student expression that they reasonably regard as promoting illegal drug use") is quite a different matter. . . . This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.

One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. . . . What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court's rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? . . . [S]peech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

Legal principles must treat like instances alike. Those principles do not permit treating "drug use" separately without a satisfying explanation of why drug use is *sui generis*. To say that illegal drug

use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms. . . .

Although the dissent avoids some of the majority's pitfalls, I fear that, if adopted as law, it would risk significant interference with reasonable school efforts to maintain discipline. What is a principal to do when a student unfurls a 14-foot banner (carrying an irrelevant or inappropriate message) during a school-related event in an effort to capture the attention of television cameras? Nothing? In my view, a principal or a teacher might reasonably view Frederick's conduct, in this setting, as simply beyond the pale. And a school official, knowing that adolescents often test the outer boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish when a student has gone too far.

. . .

All of this is to say that, regardless of the outcome of the constitutional determination, a decision on the underlying First Amendment issue is both difficult and unusually portentous. And that is a reason for us *not to decide* the issue unless we must.

. . .

[Justice Breyer then asserted that Morse enjoyed qualified immunity, that she could not be sued because her actions, even if unconstitutional after investigation, did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

. . .

. . . [T]he First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed.

. . .

Two cardinal First Amendment principles animate both the Court's opinion in *Tinker v. Des Moines Independent Community School Dist.* (1969) and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification. . . .

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. . . .

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. . . . The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner. . . .

It is also perfectly clear that "promoting illegal drug use" . . . comes nowhere close to proscribable "incitement to imminent lawless action." Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship. . . .

No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. . . .

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on "any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . ." . . . Given that the relationship between schools and students "is custodial and tutelary, permitting a degree of supervision

and control that could not be exercised over free adults," . . . it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while conventional speech may be restricted only when likely to "incit[e] imminent lawless action," . . . it is possible that our rigid imminence requirement ought to be relaxed at schools. . . .

But it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. . . .

. . .

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willful[ly]" infringed on anyone's rights or interfered with any of the school's educational programs. . . . [J]ust as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

. . . To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy.

. . .

To the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use—in other words, that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. . . . But most importantly, it takes real imagination to read a "cryptic" message . . . with a slanting drug reference as an incitement to drug use. 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. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

. . .

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use. . . . If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting drugs.

. . .

Even in high school, 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. . . . In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.