BONG HiTS 4 JESUS: The First Amendment Takes a Hit

*Hans Bader**

I. Introduction

In 1969, the Supreme Court observed that students do ''not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.''[1] But thirty eight years later, the Court gave school officials authority to ban speech even beyond the schoolhouse gate in *Morse v. Frederick*.[2]

In *Morse*, the Supreme Court held that a school may restrict student speech it reasonably views as promoting illegal drug use.[3] Creating a new exception to free speech in schools, the Court upheld disciplinary action against Joseph Frederick, a high school senior who was suspended after he displayed a banner reading ''BONG HiTS 4 JESUS'' across the street from his school in Juneau, Alaska, during the Winter Olympics Torch Relay. The Court for the first time countenanced viewpoint-based restrictions on speech that would clearly be protected from punishment if the speech occurred among citizens in society at large.

The Court failed to provide any clear test for when to carve out exceptions to free speech in school, beyond stating the general premise that school officials have broader power over student speech than the government has over speech in general. Moreover, in its zeal to give the government a win in the ''War on Drugs,'' the Court upheld censorship of speech that posed little risk of causing drug use, and decided the case in a way that showed inadequate respect for procedural safeguards mandated by federal court rules. The

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[1] Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969).

[2] 127 S. Ct. 2618 (2007).

[3] *Id.* at 2629.

Court's decision did nothing to make schools safer or more orderly, since it is other legal challenges, not the First Amendment, that have undermined school discipline.

There were two bright spots for free speech advocates. One was the justices' recognition that political speech advocating the legalization of drugs could not be banned under their ruling. Another was the Court's implicit rejection of some lower court rulings that students' speech must be on matter of ''public concern'' to enjoy any protection.

II. Background

On January 24, 2002, students and teachers were allowed to leave classes at Juneau-Douglas High School to watch the Olympic torch pass by. Frederick, who was late for school that day, joined some classmates on the sidewalk across from the high school, off school grounds. Frederick and his friends waited for the television cameras that accompanied the Olympic torch so they could unfurl a fourteen-foot banner reading ''BONG HiTS 4 JESUS.'' When they displayed the banner, Principal Deborah Morse immediately crossed the street and seized it.[4]

Morse initially suspended Frederick for five days for violating the school district's policy against advocating drug use, but increased his suspension to ten days after he quoted Jefferson on free speech and refused to give the names of his fellow participants.[5] Frederick administratively appealed his suspension to the superintendent, who denied his appeal but limited his suspension to the time he had already spent out of school prior to his appeal (eight days). Frederick then appealed to the Juneau School Board, which upheld his suspension.[6] In April 2002, Frederick filed a lawsuit against the principal and the school board in federal court, claiming they violated his free speech rights.

III. The Lower Courts Rule In Favor of the Student

The federal district court in Alaska ruled in favor of the school board and Principal Morse, holding that Frederick's speech was

[4] *Id.* at 2622.

[5] David Savage, Free Speech on Campus Is Debated, Los Angeles Times, March 20, 2007, at A9, available at 2007 WLNR 5245985.

[6] Morse, 127 S. Ct. at 2622–23.

unprotected, and granting summary judgment against him.[7] On appeal, the Ninth Circuit Court of Appeals unanimously reversed the district court's decision in 2006. It held that Frederick's speech was protected, because it did not fall into any of three kinds of speech that the Supreme Court has held school officials can prohibit.

First, it held that Frederick's speech was not disruptive within the meaning of the Supreme Court's 1969 *Tinker* decision, which recognized that students enjoy free speech, provided the speech does not disrupt school activities, in ruling that students could wear black armbands to protest the Vietnam War.[8] Second, it held that the speech was not lewd or vulgar within the meaning of the Supreme Court's 1986 *Fraser* decision, which upheld a boy's discipline for an address to a school assembly laced with sexual innuendos.[9] Third, it held that the speech was not itself school-sponsored within the meaning of the Supreme Court's 1987 *Kuhlmeier* decision, which gives schools a free hand in controlling the content of school newspapers and other speech by the school.[10]

The Ninth Circuit held that even if Frederick's banner could be construed as a positive message about marijuana use, ''in the absence of concern about disruption of educational activities,'' the school could not punish or censor his speech because it promoted a social message contrary to one favored by the school.[11]

IV. The Supreme Court Rules In Favor of the School

In 2007, the Supreme Court reversed the Ninth Circuit, and ruled that the school board did not violate Frederick's First Amendment rights by confiscating his ''Bong Hits 4 Jesus'' banner and suspending him for it.

A. The Majority Opinion

The Court, in an opinion by Chief Justice Roberts for five justices, recognized that Frederick's banner did not fall within the kinds of

[7] Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689 (D. Alaska May 27, 2003).

[8] Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006) (citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969)), rev'd, 127 S. Ct. 2618 (2007).

[9] *Id.* at 1119 (citing Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)).

[10] *Id.* at 1119–20 (citing Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)).

[11] *Id.* at 1118–19.

school speech that the Court had previously held were unprotected in its *Hazelwood* and *Fraser* rulings. So the Court created a new exception to First Amendment protection for pro-drug speech that is not political in nature.

It conceded that although Frederick's speech occurred near the school it was not itself school-sponsored expression, and thus was not subject to restriction under *Kuhlmeier,* because ''no one would reasonably believe that Frederick's banner bore the school's imprimatur.''[12]

Similarly, the Court recognized that Frederick's speech was not lewd or vulgar like the speech the Court allowed schools to restrict in *Fraser*. The Court also recognized that the school's contrary argument for extending *Fraser* beyond lewd or vulgar speech to other ''plainly 'offensive''' speech such as pro-drug speech ''stretches *Fraser* too far'' and if accepted, would endanger ''much political and religious speech.''[13]

But it noted that the Supreme Court had previously created a new, school-specific exception to free speech in *Fraser*, which itself involved a category of speech—vulgar or lewd speech—which is generally protected in society at large, showing that students have fewer free speech rights than citizens in society at large.[14] Based on its prior precedent creating free speech exceptions for students, the Court concluded that it could create yet another exception, this time for student speech that schools ''reasonably regard as promoting illegal drug use.''[15] The Court justified its new exception for drug-related speech by citing the government's ''important—indeed, perhaps compelling interest'' in deterring drug use by students, observing that ''[d]rug abuse can cause severe and permanent damage to the health and well-being of young people.''[16]

The Court then placed Frederick within its new exception for pro-drug speech in schools. Although the opinion admitted that the banner's message was ''cryptic,'' and ''probably means nothing at

[12] Morse v. Frederick, 127 S. Ct. 2618, 2627 (2007).

[13] *Id*. at 2639.

[14] *Id*. at 2626 (citing Cohen v. California, 403 U.S. 15 (1971) (''Fuck the Draft'' T-shirt was protected)).

[15] *Id*. at 2629.

[16] *Id*. at 2628.

all'' to some people, it declared that it was nevertheless undeniably a ''reference to illegal drugs'' and the principal reasonably concluded that it ''advocated the use of illegal drugs.''[17] Although it conceded that Frederick was not on school grounds, it concluded that his ''Bong Hits'' banner was still displayed during a school event, since the Olympic Torch Relay occurred during normal school hours, attendance was encouraged by the school, and teachers, administrators, the school band, and cheerleaders were present. Thus, his speech qualified as ''school speech'' properly regulated by the school rather than a normal case of speech on a public street.[18] Finally, the Court emphasized the non-political nature of the speech, observing that ''not even Frederick argues that the banner conveys any sort of political or religious message.''[19]

B. Justice Thomas's Concurrence

Justice Thomas wrote a concurrence that argued that students in public schools do not have a right to free speech and that *Tinker*, which held to the contrary, should be overturned. He argued that schools stand in the shoes of parents, who voluntarily send their children to school, and thus should enjoy parental prerogatives in restricting speech,[20] even as to the 18-year old Frederick, who was not a minor:[21]

> 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.[22]

He complained that ''*Tinker* has undermined the traditional authority of teachers to maintain order in public schools,'' resulting in ''defiance, disrespect, and disorder.''[23]

[17] *Id*. at 2629.

[18] *Id*. at 2624.

[19] *Id*. at 2625.

[20] *Id*. at 2631 (Thomas, J., concurring).

[21] *Id*. at 2631 n.3; see also Frederick v. Morse, 439 F.3d 1114, 1117 n.4 (9th Cir. 2006) (noting that Frederick was not a minor under Alaska law).

[22] Morse v. Frederick, 127 S. Ct. 2618, 2635 (2007) (Thomas, J., concurring).

[23] *Id*. at 2636 (citations omitted).

C. Justice Alito's Concurrence

By contrast, two other justices, who provided the deciding votes for the majority's holding that the school board had not violated the First Amendment, wrote a very different concurring opinion that attempted to limit the reach of the Court's decision. Justice Alito, joined by Justice Kennedy, wrote a concurrence indicating that he agreed with the majority opinion to the extent 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.''[24]

The concurrence rejected the school board's argument that ''the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,''' observing that that ''argument can easily be manipulated in dangerous ways,'' because ''some public schools have defined their educational missions as including the inculcation of whatever political and social views'' are held by school officials.[25]

Justice Alito pointed out that under that broad reasoning, schools could ban whatever speech they choose:

> 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

[24] *Id*. at 2636 (Alito, J., concurring).

[25] *Id*. at 2637 (citing Brief for Petitioner at 6, Morse v. Frederick, 127 S. Ct. 2618 (2007) (filed Jan. 16, 2007), available at 2007 WL 118979).

> on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.[26]

His concurrence also rejected, as a ''dangerous fiction,'' Justice Thomas's argument that parents' act of sending their children to public schools constitutes a delegation, to public school educators, of parents' power to restrict their children's speech. He observed that ''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.''[27] Instead, he grounded his concurrence in a ''health'' rationale, arguing that ''altering the usual free speech rules'' is necessary because (a) ''illegal drug use presents a grave and in many ways unique threat to the physical safety of students,'' and (b) students are rendered more vulnerable to such threats by the fact that they cannot leave school grounds or look to their parents for protection during school hours.[28]

D. Justice Breyer's Concurrence in Part and Dissent in Part

Justice Breyer concurred in the judgment in part and dissented in part, arguing that the Court should not have ruled on the First Amendment issue, but rather dismissed Frederick's claim based on qualified immunity. Qualified immunity protects individual government officials who violate the Constitution from being sued for damages if the law was not ''clearly established'' when they acted.[29] Because he felt that the Court's prior decisions did not make clear whether the principal's actions in taking down the banner violated the First Amendment, Breyer would have issued a narrow ruling that she was shielded by qualified immunity, without deciding whether Frederick's free speech rights were actually violated.[30]

[26] *Id*. at 2637 (Alito, J., concurring).

[27] *Id*. at 2637–38.

[28] *Id*. at 2638.

[29] *Id*. at 2640 (Breyer, J., concurring in the judgment in part and dissenting in part).

[30] *Id*. at 2638–42. Frederick also sought a court order that the school erase his suspension from his record, a remedy not subject to a qualified immunity defense, but Breyer doubted that such relief would be appropriate for reasons having nothing to do with the First Amendment. See *id*. at 2642–43.

E. The Dissent

Justice Stevens dissented in an opinion joined by Justices Souter and Ginsburg. Stevens criticized the majority decision for upholding ''a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint,''[31] flouting traditional First Amendment norms both by permitting viewpoint discrimination and by depriving speech of First Amendment protection based on the perceptions of listeners and speculation that the speech may cause harm.

Past First Amendment rulings, he noted, had recognized that '''viewpoint discrimination is . . . an egregious form of content discrimination''' forbidden by the First Amendment,[32] and that '''the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'''[33] And under the Supreme Court's *Brandenburg* decision, ''punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.''[34]

In light of that tradition, Stevens argued that ''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.''[35] Indeed, Stevens argued, it would be ''profoundly unwise to create special rules for speech about drug and alcohol use,'' citing the historical example of resistance to Prohibition in the 1920s.[36] Pointing to the current debate over medical marijuana (marijuana use is illegal under federal law, but permitted under Alaska state law), Stevens concluded, ''[s]urely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.''[37]

[31] *Id.* at 2645 (Stevens, J., dissenting).

[32] *Id.* at 2644 (quoting Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828–829 (1995)).

[33] *Id.* at 2645 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[34] *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (distinguishing ''mere advocacy'' of illegal conduct from ''incitement to imminent lawless action'')).

[35] *Id.* at 2646.

[36] *Id.* at 2650.

[37] *Id.* at 2651.

Moreover, Stevens mocked the majority's interpretation of the banner, which merely contained an ''ambiguous statement'' that ''contained an oblique reference to drugs,''[38] as being a dangerous 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.[39]

Stevens noted the irony of the Court's decision to defer to school officials' perceptions about the ambiguous meaning of Frederick's banner and whether to punish him based on one possible interpretation of his speech. He noted that a decision the Supreme Court issued on the very same day had done just the opposite, enunciating the rule that when the ''First Amendment is implicated, the tie goes to the speaker,'' and that ''when it comes to defining what speech'' is prohibited by campaign finance laws, ''we give the benefit of the doubt to speech, not censorship.''[40]

V. Discussion

The Court's opinion in *Morse* was disappointing in many respects. Its decision was a marked departure from its prior First Amendment rulings, in permitting viewpoint discrimination and censorship based on speculation about the consequences of speech. Justice Thomas's concurrence was still worse, advocating that school administrators receive blanket power to restrict student speech, based on constitutional theories he himself has rejected elsewhere as dangerous and unfounded.

Ironically, although the justices rejected the school district's arguments for restricting speech—the idea that any speech which interferes with a school's ''basic educational mission'' or is ''plainly offensive'' can be prohibited—as too broad, the Court's own justification

[38] *Id*. at 2643.

[39] *Id*. at 2649.

[40] *Id*. at 2650 (quoting Federal Election Commission v. Wisconsin Right to Life, Inc., 129 S. Ct. 2652, 2669, 2674 (2007)).

for restricting speech—that it would advance an important state interest—is almost as sweeping.

The Court's decision to adopt school officials' contested interpretation of Frederick's speech and claim that it occurred in a school-sponsored activity gave short shrift both to established summary judgment standards, by making factual findings that should have been made only after giving the plaintiff the opportunity to prove his case at trial, and to the Court's constitutional obligation under the First Amendment to make an independent judgment about the meaning of his speech after a full hearing of the evidence.

A. Morse *Wrongly Permits Viewpoint Discrimination*

Whatever other limits the Supreme Court had placed on students' free speech rights in the past, it had never countenanced viewpoint discrimination of student speech prior to *Morse*, as lower courts recognized.[41] ''[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message,''[42] and like others, ''students are entitled to freedom of expression of their views.''[43]

As the Supreme Court emphasized in its 1995 *Rosenberger* decision, ''viewpoint discrimination is . . . an egregious form of content discrimination'' that is forbidden even in contexts where content discrimination is permitted, such as a college's decisions about which student publications to fund.[44] Thus, even when a school's educational mission gives it extra leeway to restrict speech, it still cannot discriminate based on viewpoint.[45]

[41] See, e.g., Castorina v. Madison County School Board, 246 F.3d 536, 540 (6th Cir. 2001) (under *Tinker* and its progeny, ''viewpoint-specific speech restrictions are an egregious violation of the First Amendment''); Pyle v. South Hadley School Committee, 861 F. Supp. 157, 170–74 (D. Mass. 1994) (upholding general ban on indecency, but striking down harassment code's restriction on certain views); East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999).

[42] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[43] Tinker v. Des Moines School District, 393 U.S. 503, 511 (1969).

[44] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995).

[45] See Board of Regents v. Southworth, 529 U.S. 217, 229 (2000) (although university's educational mission enables it to use student activities fees for ideological purposes that would be forbidden in other contexts, it is nevertheless governed by the core ''requirement of viewpoint neutrality'').

Its 1943 *Barnette* decision holding that dissenting students could not be forced to salute the flag emphasized that ''[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.''[46]

Nor was there any reason to relax this rule against viewpoint discrimination in the schools, which form part of the ''marketplace of ideas.''[47] As the Supreme Court observed long ago in *Barnette*, that school boards ''are educating the young for citizenship is a 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.''[48] Indeed, punishing views on drug legalization can undermine the educational process by stifling debate.[49]

When the justices upheld a student's discipline for making sexual innuendos in an address to a school assembly in their 1986 *Fraser* decision, which created an exception for lewd or vulgar speech, they did so precisely because ''the penalties imposed in th[at] case were unrelated to any political viewpoint,''[50] and school officials did not ''regulate [the student's] speech because they disagreed with the views he sought to express.''[51] Indeed, the offensiveness of Fraser's speech, such as his claim that a student government candidate was ''firm in his pants'' and would ''go to . . . the climax,'' was not based on his viewpoint.[52] If instead of calling the candidate ''firm,'' he had called him ''flaccid,'' it would have been just as vulgar, and just as punishable, even though it would have expressed the opposite view. *Fraser* drove this point home by likening the rules for appropriate

[46] West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

[47] See Tinker, 393 U.S. at 512 (''The classroom is peculiarly the 'marketplace of ideas''') (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

[48] Barnette, 319 U.S. at 637.

[49] Blum v. Schlegel, 18 F.3d 1005, 1011 (2d Cir. 1994) (professor's advocacy of marijuana legalization was protected, given need for ''free and open debate'' and harm from ''excessive [speech] regulation of speech'').

[50] Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[51] *Id*. at 689 (Brennan, J., concurring).

[52] See *id*. at 687 (quoting the speech).

communication in a school to the rules of conduct for debates promulgated in each house in Congress, where the broadest possible range of viewpoints can be discussed freely.[53]

B. Morse *Wrongly Strips Speech of Protection Based on a Small, Speculative Risk of Harm*

The Court's decision to allow viewpoint discrimination was bad enough. Perhaps even worse was its decision to allow speech to be banned based on sheer speculation that it would cause harm in the form of drug abuse. As Justice Stevens observed in his dissent, ''most students . . . do not shed their brains at the schoolhouse gate,'' and ''the notion that the message on [Frederick's] banner would actually persuade either the average student or even the dumbest one to change his or her behavior [to use drugs] is most implausible.''[54]

Generally, even speech that expressly advocates illegal conduct cannot be prohibited unless the speaker deliberately incites imminent unlawful action.[55] Yet the Court permitted Frederick's banner to be banned based on its fear that it would somehow promote drug use—even though the Court itself admitted that Frederick's message was ''cryptic,'' and ''probably means nothing at all'' to some people,[56] and even many of the school board's defenders admitted that it might simply be '''jabberwocky' or 'nonsense.'''[57] It did so even though scholars disagree about whether Frederick's banner endorsed drugs even obliquely.[58]

[53] *Id.* at 681–82.

[54] Morse v. Frederick, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting).

[55] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Hess v. Indiana, 414 U.S. 105 (1973).

[56] Morse, 127 S. Ct. at 2629.

[57] Brief of Amici Curiae National School Boards Association, et al., in Support of Petitioners at 22–23, Morse v. Frederick, 127 S. Ct. 2618 (2007) (filed Jan. 16, 2007), available at 2007 WL 14099.

[58] Compare Bill Poser, The Supreme Court Fails Semantics, Language Log, July 7, 2007, at http://itre.cis.upenn.edu/~myl/languagelog/archives/004696.html (language expert concludes banner did not endorse drugs), with Eugene Volokh, The Morse v. Frederick Dissent, Volokh Conspiracy, June 26, 2007, at http://volokh.com/posts/1182873609.shtml (law professor concludes banner was plausibly interpreted as pro-drug, and its message was so interpreted by high school students he showed it to).

But as the Supreme Court has observed in its past school decisions, ''censorship or suppression of expression is tolerated by our Constitution only when the expression presents a clear and present danger'' of harm,[59] not just ''undifferentiated fear or apprehension of disturbance'' or other harm.[60] ''Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone,'' since First Amendment freedoms ''need breathing space to survive.''[61]

The Court's decision to allow Frederick's speech to be suppressed merely because it was viewed as obliquely encouraging drug use does not begin to comply with that standard, especially since students can be prevented from using drugs without any restrictions on speech.[62]

Moreover, in deferring to the principal's perception about the meaning of Frederick's banner, the Court also departed from its usual practice of basing First Amendment protection on speech's objective meaning, not subjective perceptions, no matter how reasonable, as Justice Stevens noted.[63] In past cases, the Court has warned that ''deference to a legislative finding'' that certain types of speech are harmful ''cannot limit judicial inquiry when First Amendment rights are at stake,''[64] and that ''an appellate court has an obligation to make an independent examination of the whole record''[65] without

[59] West Virginia Board of Education v. Barnette, 319 U.S. 624, 633 (1943).

[60] Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969).

[61] NAACP v. Button, 371 U.S. 415, 438 (1963); see Shelton v. Tucker, 364 U.S. 479, 488 (1960); Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (''For the state to enforce a content-based exclusion it must show that the regulation is necessary to serve a compelling state interest and that it is narrowly-drawn to achieve that end.'').

[62] Compare Schneider v. State, 308 U.S. 147 (1939) (state could not ban distribution of handbills to prevent litter, since the state could simply punish littering itself, rather than restricting speech).

[63] Morse v. Frederick, 127 S. Ct. 2618, 2645 (2007) (Stevens, J., dissenting) (citing, e.g., Thomas v. Collins, 323 U.S. 516, 535 (1945) (''varied understanding of [speaker's] hearers'' does not control)); Cox v. Louisiana, 379 U.S. 536, 543 (1965) (sheriff's view of speech as disturbance of peace not controlling); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[64] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978).

[65] Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 486 (1984).

deference to prevent any ''intrusion on the field of free expression.''[66] And in a decision rendered the very same day as *Morse*, the Court had done just the opposite, declaring that when the ''First Amendment is implicated, the tie goes to the speaker,'' and that ''when it comes to defining what speech qualifies as the functional equivalent of express advocacy [regulated by the campaign finance laws], we give the benefit of the doubt to speech, not censorship.''[67]

C. Morse *Disregarded Summary Judgment Rules*

Frederick denied that his banner was intended to promote drug use, claiming it was just a humorous nonsense message that was directed not at students, but at the TV cameras that followed the Olympic torch, and he submitted affidavits from students who said they did not view it as an endorsement of drug use.[68]

More importantly, he disputed whether his speech even occurred in a school-sponsored activity—an important fact, since Frederick's case had been dismissed before trial, on summary judgment, where federal rules require courts to resolve all factual disputes and draw all plausible inferences in Frederick's favor.[69]

Yet in squeezing Frederick into its exception for pro-drug speech in school-sponsored activities, the Court did nothing of the kind. Instead, it ignored record evidence that the Olympic Torch Relay at which Frederick displayed his banner was not a school event in any meaningful sense, since it was sponsored by Coca-Cola and local businesses, not the school; that his banner was aimed at the nationwide TV audience watching the Olympic Torch Relay, not students; and that students watching the event had no obligation to attend it or even remain at school, and were virtually unsupervised.[70]

[66] *Id.* at 509.

[67] Morse, 127 S. Ct. at 2650 (Stevens, J., dissenting) (quoting Federal Election Commission v. Wisconsin Right to Life, Inc., 129 S. Ct. 2652, 2669, 2674 (2007)).

[68] Joint Appendix (''J.A.'') at 28, 33, 37–38, 66–68, Morse v. Frederick, 127 S. Ct. 2618 (2007), available at 2007 WL 119039 and http://www.lawmemo.com/sct/06/Morse/app.pdf (Jan. 16, 2007).

[69] See Anderson v. Liberty Lobby, 477 U.S. 242, 255–56 (1986) (citing Federal Rule of Civil Procedure 56); Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24, 323 F.3d 375, 380 (6th Cir. 2003).

[70] See, e.g., Morse v. Frederick, 127 S. Ct. 2618, 2643 (2007) (Stevens, J., dissenting) (citing record evidence that banner was addressed to ''national television'' audience, not ''fellow students''); J.A. at 23, 27–28, 33, 36, 37–38, 66–68; Brief of Amicus Curiae Center for Individual Rights in Support of Respondents at 1–2, 18–20, Morse v.

D. Morse *Ignored Adults' Free Speech Rights*

The Court never explained why it was appropriate to apply school-based limits on free speech rights of minors to curb the speech of an adult (the eighteen-year-old Frederick) to a mostly adult audience (the nationwide TV viewers of the Olympic Torch Relay), simply because the banner's viewers also included some students.[71] The Court has traditionally rejected attempts to restrict speech in public, such as tobacco advertising, merely because it can be seen by children.[72]

E. Morse's *''Important Interest'' Exception to Censorship Is Dangerously Broad*

Instead, the Supreme Court simply justified its newfound willingness to sanction viewpoint discrimination by citing the ''important—indeed, perhaps compelling interest'' in deterring drug use by students.[73] Its ''important government interest'' justification for restricting speech was inconsistent with the results of its past decisions, and set a dangerous precedent for future First Amendment cases, since the courts treat almost any state goal as an ''important interest.''

1. The Exception Is Inconsistent with Precedent

The Court's decision paved no new ground in recognizing that the government has a compelling interest in preventing adolescent drug use.[74] But its decision went much further by allowing a school to prohibit not just drug use itself, but speech that carries the remote possibility that it might induce students to use drugs.

Frederick, 127 S. Ct. 2618 (2007) (filed Feb. 20, 2007), available at 2007 WL 550933 (listing factual disputes between the parties).

[71] See Morse, 127 S. Ct. at 2631 n.3 (Thomas, J., concurring) (Frederick was ''not a minor'').

[72] Lorillard Tobacco v. Reilly, 533 U.S. 525, 561–62 (2000) (invalidating tobacco advertising ban); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (nudity at drive-in theater protected); Reno v. ACLU, 521 U.S. 844 (1997) (indecent websites protected even though some viewers are minors).

[73] Morse, 127 S. Ct. at 2628 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[74] See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) (compelling interest in preventing school children from using drugs justifies random drug testing of student athletes); Board of Education v. Earls, 536 U.S. 822 (2002) (upholding random drug testing of students participating in extracurricular activities).

The Supreme Court's seminal school speech cases all involved speech restrictions that were struck down despite being designed to advance important state interests. The rule requiring students to salute the flag at issue in the Court's 1943 *Barnette* decision reflected an attempt to instill patriotism and a spirit of sacrifice in the midst of a terrible war against a Japanese Empire that had bombed Pearl Harbor and a Third Reich that was perpetrating the Holocaust.[75] And the black armbands the Supreme Court held were protected in its 1969 *Tinker* decision were worn in opposition to a war America was waging against a communist insurgency in the Vietnam War. That insurgency was backed by a totalitarian North Vietnamese regime that murdered or imprisoned millions of people after the United States withdrew from the conflict.

The idea that viewpoints can be restricted when they oppose or undercut important government policies is fundamentally at odds with the purpose of the First Amendment.[76] As the Court observed in *Barnette*, ''freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.''[77] The whole point of free speech is ''to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.''[78]

2. *The ''Important Interest'' Justification for Censorship Is Too Broad, Since Countless ''Important Interests'' Exist*

Allowing viewpoint discrimination because it serves an important government interest sets a dangerous precedent, because of the vast range of interests that the courts have accepted as important, and the judiciary's concomitant unwillingness to second-guess the wisdom of just about any government objective or mission.

[75] See West Virginia Board of Education v. Barnette, 319 U.S. 624, 640–41 (1943); *id*. at 636 n.16 (rationale behind uniform application of rule).

[76] See Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978) (''That the effective exercise of First Amendment rights may undercut a given government's policy on some issue is, indeed, one of the purposes of those rights.'').

[77] Barnette, 319 U.S. at 642.

[78] New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

A school board can make a plausible argument that it has an important government interest in doing almost everything—even if another school board is doing just the opposite. ''Over the years, the Supreme Court has found an enormous range of government interests to be compelling,'' many of them quite mundane and commonplace.[79] The test for what is an important interest is almost standardless, since the Supreme Court itself has confessed that ''we have never set forth a general test to determine what constitutes a compelling state interest.''[80]

The net result is that even competing interests can qualify as compelling. For example, the Supreme Court has held that there is a compelling interest in eradicating racial discrimination in education, even purely private discrimination.[81] Yet at the same time, it has held that the courts will defer to a school's conclusion that it needs to discriminate based on race to promote ''diversity,'' finding that, too, to be a compelling interest.[82] And the Court has managed to find important interests both in eradicating, and perpetuating, other forms of discrimination, such as sex discrimination, allowing states to ban discrimination by voluntary associations, while engaging in it themselves.[83] Moreover, judges have argued that the government has a compelling interest both in discriminating against gays (in the context of gay marriage)[84] and in banning discrimination against them, even in private associations.[85]

[79] David A. Strauss, Affirmative Action and the Public Interest, 1995 Sup. Ct. Rev. 1, 29, 30 n.78 (1995) (citing examples such as preventing splintered political parties and establishing professional standards).

[80] Waters v. Churchill, 511 U.S. 661, 671 (1994).

[81] Bob Jones University v. United States, 461 U.S. 574, 604 (1983) (school that banned interracial dating lost tax exemption).

[82] Grutter v. Bollinger, 539 U.S. 306, 328–33 (2003).

[83] Compare Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (state had compelling interest in banning sex discrimination in public accommodations that did not violate federal law) with Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration); Michael M. v. Superior Court, 450 U.S. 437 (1981) (upholding sex-discriminatory statutory rape law); Vorcheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1975) (upholding single-sex schools), aff'd, 430 U.S. 703 (1976).

[84] See, e.g., Andersen v. King County, 138 P.3d 963, 1007 (Wash. 2006) (Johnson, J., concurring) (citing Adams v. Howerton, 486 F. Supp. 1119, 1124 (D. Cal. 1980)).

[85] Boy Scouts of America v. Wyman, 335 F.3d 80, 92 n.5 (2d Cir. 2003) (state may have a compelling interest in banning sexual orientation discrimination, even though the First Amendment protects some such discrimination); Dale v. Boy Scouts of America, 734 A.2d 1196, 1228 (N.J. 1999) (''compelling interest in eliminating [sexual

The justices in the majority did not seem to recognize this fact. They rejected what they perceived as the school district's most sweeping arguments for restricting Frederick's speech. The majority rejected ''the broader rule'' advocated by the school district that speech could be restricted as ''plainly 'offensive''' even if it is not lewd or indecent, observing that doing so would endanger ''much political and religious speech.''[86] But it is hard to imagine anything ''plainly offensive'' to public sensibilities that would not conflict with an important government interest under the Courts' indulgent interpretation of what interests are important.

F. Justice Alito's Concurrence

1. Alito Rightly Rejected the ''Educational Mission'' Justification for Censorship

Justice Alito's concurrence went out of its way to reject the school board's argument that it could ban any speech that conflicted with its ''basic educational mission'' because that ''argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed'' simply be defining their mission as ''the inculcation of whatever political and social views are held by'' school officials.[87]

Justice Alito's concern was well-founded. As the Ninth Circuit had observed, ''All sorts of missions are undermined by legitimate and protected speech—a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime* (1998) [and] . . . a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers.''[88]

Colleges and school districts make it their mission to take sides in a host of thorny social issues, and it cannot be the case that merely by injecting themselves into a controversy, they get license to suppress opposing viewpoints.

orientation] discrimination''), rev'd on other grounds, Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[86] Morse v. Frederick, 127 S. Ct. 2618, 2639 (2007).

[87] *Id.* at 2637 (Alito, J., concurring).

[88] Frederick v. Morse, 439 F.3d 1114, 1120 (9th Cir. 2006), rev'd, 127 S. Ct. 2618 (2007).

For example, the Seattle School District used race in student assignment to promote racial balance.[89] Using race was part of the school's ''mission.''[90] But students of that very same school district have criticized that policy, both in the schools and in letters to the editor of the *Seattle Times*.[91] Can they be punished for expressing their First Amendment rights in that time-honored fashion?

Schools rightly have a mission of teaching gender equality. Does that mean that they can punish a Catholic student for arguing that the priesthood should be reserved for men? Can a school district in a state that bans same-sex marriage silence a gay student who criticizes it? Many school districts seek to promote nondiscrimination based on sexual orientation. Does that mean that they can ban members of religious denominations from defending their denomination against criticism for not hiring gays as ministers? Or make them participate in gay pride events?

Under the school district's ''basic educational mission'' argument, schools could take just such draconian measures. Justices Alito and Kennedy went out of their way to reject that argument. Cases prior to *Morse v. Frederick* mostly rejected it as well, by protecting viewpoints that ran counter to school policies, practices, and positions.[92]

[89] Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).

[90] *Id*. at 2758 n.14 (plurality opinion) (school district denounced colorblindness in public statements); *id*. at 2787 n.30 (Thomas, J., concurring) (same).

[91] See, e.g., Andrew Kaplan, letter, Reaching for Parity: Students' Dream Exclude Obstacles to Equal Opportunity, Seattle Times, Dec. 6, 2006, at B9, available at 2006 WLNR 21111614.

[92] E.g., Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) (school could not bar gay student group based on its opposition to homosexuality, at a time when gay sex was illegal); Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001) (student in state with gay rights law could wear anti-gay T-shirt); see also Seemuller v. Fairfax County School Board, 878 F.2d 1578 (4th Cir. 1989) (male chauvinist parody celebrating archaic sex roles was protected); UWM Post v. Board of Regents of Univ. of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991) (invalidating racial harassment code); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (''university could not . . . establish an anti-discrimination policy which had the effect of prohibiting certain speech [such as discussion of innate race and gender differences] because it disagreed with ideas or messages sought to be conveyed''); Thompson v. Board of Education, 711 F. Supp. 394, 398 (N.D. Ill. 1989) (criticism of schools' bilingual education program protected); but see Harper v. Poway Unified School District, 445 F.3d 1166 (9th Cir. 2006) (anti-gay T-shirt opposing school's gay-pride message unprotected), vacated as moot, 127 S. Ct. 1484 (2007).

It would be difficult to think of a mission that contemporary educators are more obsessed with than ''diversity.'' Yet the courts have consistently blocked colleges' attempts to suppress speech that is at odds with ''diversity,'' even though the Supreme Court has held that there is a compelling interest in promoting diversity.[93]

For example, Shippensburg University's restriction on speech was overturned even though it was a cornerstone of its diversity policy, under which ''Shippensburg University is committed without qualification to all aspects—moral, legal, and administrative—of racial and cultural diversity,'' a ''commitment'' that ''require[s] every member of [its student body] to ensure that the principles of these ideals be mirrored in their attitudes and behaviors.''[94] Similarly, the courts overturned George Mason University's discipline of a fraternity for an offensive blackface ''ugly woman'' skit, where ''punishment was meted out to the fraternity because its boorish message,'' which was ''antithetical to the University's mission of promoting diversity and providing an educational environment free from racism and sexism.''[95]

But the ''important government interest'' test that the Court adopted would (absent *Morse*'s caveats about political speech remaining protected) often lead to the opposite results in the K-12 context, since even most controversial ''educational missions'' would likely be deemed by judges to qualify as an important government interest.

2. Alito's Dangerous ''Health'' Rationale for Censorship

Justices Alito and Kennedy argued that an anti-drug exception was nevertheless justified because drug use threatens students' ''physical health.'' But the connection between an ambiguous ''Bong Hits 4 Jesus'' banner and students' health is very attenuated, since it assumes that the banner will somehow persuade previously law-abiding students to start using drugs, even though it contains no express advocacy.

It would not be much more of a stretch to argue that a school could ban an invitation to a birthday party at which cake will be

[93] Grutter v. Bollinger, 539 U.S. 306, 328-33 (2003).

[94] Bair v. Shippensburg University, 280 F. Supp. 2d 357, 363, 370 (M.D. Pa. 2003).

[95] Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386, 389, 392 (4th Cir. 1993).

consumed. After all, eating sweets contributes to obesity, a major health problem, and obesity in turn both affects students' health and reduces their energy and ability to learn.[96] And since fast driving can be dangerous, schools might similarly ban reference to the many movies that glorify it.[97]

Violence poses a far more direct threat to health than does drug use, yet courts have not allowed speech celebrating violence to be banned for health reasons. The Supreme Court upheld a deputy constable's right to applaud the assassination attempt on President Reagan, in which she said, ''[i]f they go for him again, I hope they get him,'' even though that was obviously in tension with her employer's mission of preventing crime.[98]

The California Supreme Court reversed on First Amendment grounds the conviction of a high school student who wrote a poem saying, ''I am dark, destructive, and dangerous'' and ''I can be the next kid to bring guns to kill students at school,'' since he did not intend the statements as a threat. Although the student's English teacher, and prosecutors, saw this as a threat, the California Supreme Court, applying its own independent judgment, found otherwise.[99] Similarly, a college's ''workplace violence'' policy was found to violate the First Amendment, as applied to a professor who celebrated imaginary violence against his college president, such as ''dropping a two-ton slate of polished granite on his head,'' and made references to ''go[ing] postal.''[100]

Almost any controversial speech can take a psychological toll on those who passionately disagree with it. For example, the Ninth

[96] See, e.g., Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108–265, § 401, 118 Stat. 729, 788 (2004) (congressional findings); Oregon School Boards Ass'n, The High Cost of Childhood Obesity, at http://www.osba.org/hotopics/atrisk/obesity/highcost.htm (obesity linked to poorer academic performance); Carol Torgan, Childhood Obesity on the Rise, The NIH Word on Health, June 2002, available at http://www.nih.gov/news/WordonHealth/jun2002/childhoodobesity.htm.

[97] Compare South Dakota v. Neville, 459 U.S. 553, 558–59 (1983) (highway safety is compelling interest).

[98] Rankin v. McPherson, 483 U.S. 378, 382–83 (1987). The Court did not defer to the government as to ''whether the speech [was] protected,'' instead deciding the issue as a ''question of law.'' See *id*. at 386 n.9.

[99] In re George T., 93 P.3d 1007 (Cal. 2004).

[100] Bauer v. Sampson, 261 F.3d 775, 780 (9th Cir. 2001).

Circuit, in a much criticized decision vacated by the Supreme Court, held that a student's anti-gay-pride T-shirt could be banned to protect the ''psychological health'' of a school's gay students, even though they were attending a school that celebrated gay pride.[101] As a lawyer who specializes in challenging college speech codes noted, ''virtually all restrictive speech policies'' challenged in court ''are justified by the prevention of serious mental or physical harm to young people.''[102]

G. Justice Thomas's Concurrence Wrongly Claims Students Have No Free Speech Rights

Justice Thomas, who joined in the majority opinion, nevertheless recognized that its test for carving out exceptions to free speech in the schools was essentially standardless. ''Today, the Court creates another exception [to free speech for students]. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. . . I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't.''[103]

To resolve this ambiguity, Thomas advocated ruling that ''the Constitution does not afford students a right to free speech in public schools.''[104] But to reach that conclusion, he had to misread legal history, embrace legal fictions, and ignore the logic of his own opinions in other First Amendment and constitutional cases.

1. Justice Thomas Misreads Legal History

Justice Thomas noted that state courts in the Nineteenth and early Twentieth centuries had declined to protect students from discipline by school officials for their speech.[105] From this, he drew the conclusion that the original intent of the First Amendment was not to place any restrictions on censorship in the schools.

[101] Harper v. Poway Unified School District, 445 F.3d 1166 (9th Cir. 2006) (student can be banned from wearing anti-gay T-shirt opposing school's gay-pride message), vacated as moot, 127 S. Ct. 1484 (2007).

[102] David French, A Bong Hit to Free Speech, National Review Online, June 25, 2007, available at http:// phibetacons.nationalreview.com/post/?q=ZDUxMjJkZWVmZTBhMjFkYjIwZWU2ZGZiZGRiMjdlM2Q=.

[103] Morse v. Frederick, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring).

[104] *Id.*

[105] *Id.* at 2632–33.

But in these cases, neither the First Amendment nor any state constitutional free speech argument was even raised, and many of them did not involve censorship at all.[106] It is black-letter law that ''cases cannot be read as foreclosing an argument that they never dealt with''[107] and that ''constitutional rights are not defined by inferences from'' such cases.[108] Moreover, as Justice Thomas admitted, ''the First Amendment did not [even] apply to the States until at least the ratification of the Fourteenth Amendment.''[109] Indeed, the Supreme Court did not consider the First Amendment applicable to state or local governments at all until around 1930, long after almost all of the cases he cited for the proposition that students have no free speech rights.[110] So most of the cases he cited had nothing to do with the First Amendment.[111] Indeed, shortly after applying the First Amendment to the states, the Court applied it to the public schools and their students.[112]

[106] E.g., Stevens v. Fassett, 27 Me. 266 (1847) (student seized teacher's desk); Sheehan v. Sturges, 53 Conn. 481 (1885) (assault and stone possession); State v. Pendergrass, 19 N.C. 365 (1837); State v. Mizner, 45 Iowa 248 (1876); Patterson v. Nutter, 78 Me. 509 (1886).

[107] Waters v. Churchill, 511 U.S. 661, 678 (1994) (plurality opinion); see Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) (striking down a law even though a similar law was previously upheld, in a case where the same constitutional attack was not made: ''the unexplained silences of our decisions lack precedential weight.'').

[108] Texas v. Cobb, 532 U.S. 162, 169 (2002).

[109] Morse v. Frederick, 127 S. Ct. 2618, 2630 n.1 (2007) (Thomas, J., concurring).

[110] See Near v. Minnesota, 283 U.S. 697 (1931) (striking down a state limit on speech for the first time; reasoning that the First Amendment, which once applied only to Congress, was extended against states by the Fourteenth Amendment's Due Process Clause).

[111] Justice Thomas justified his citation of these cases by noting that some states did have state constitutional free speech guarantees, which were presumably understood to be consistent with students having no free speech rights. Morse, 127 S. Ct. at 2630 n.1. But no state constitutional argument was raised in any of these cases, and Thomas has often rejected state court interpretations in interpreting the federal Constitution. Compare Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738, 2782–83 (2007) (Thomas, J., concurring) (using race in student assignment violates federal Constitution) with Parents Involved in Community Schools v. Seattle School District No. 1, 72 P.3d 151 (Wash. 2003) (contrary conclusion under Washington law); Roberts v. City of Boston, 5 Cush. 198 (Mass. 1849) (upholding segregation despite state constitution's ''equality'' and ''exclusive privileges'' provisions).

[112] West Virginia Board of Education v. Barnette, 319 U.S. 624, 637–38 (1943).

2. *Justice Thomas Relies on False Legal Fictions He Has Himself Rejected*

Thomas argued that parents consent to school rules, including speech rules, by sending their children to school, so courts should defer to schools' rulemaking authority under the doctrine of *in loco parentis*.[113] ''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.''[114]

But in a case decided just three days after *Morse*, Justice Thomas himself emphatically rejected the idea of ''deference to local authorities'' as a dangerous abdication of judges' ''constitutional responsibilities,'' and held that parents could challenge the application of a school's rules to their children as a violation of the Constitution.[115] Right after voting to uphold the Juneau School Board's discipline of Frederick, Justice Thomas voted with a majority of the Supreme Court to strike down the Seattle and Louisville school boards' use of race in student assignment to promote ''racial balance'' and ''diversity'' in its schools.[116] To illustrate the risks of deferring to school boards, he pointed to the bizarre ''racial theories endorsed by the Seattle school board,'' which defined ''individualism'' as a form of ''cultural racism,'' and attacked the concept of a ''melting pot'' and colorblindness, on its website.[117]

Ironically, if Justice Thomas had approached the Seattle and Louisville cases the way he did *Morse*—by asking whether Nineteenth and early Twentieth century courts had historically permitted the

[113] Morse, 127 S. Ct. at 2635 (Thomas, J., concurring) (citing tradition in which ''courts routinely deferred to schools authority to make rules,'' and ''treated identically'' both ''speech rules and other school rules''); *id*. at 2631 (parents ''delegate'' their ''parental authority'' to schools under the doctrine of in loco parentis'').

[114] *Id*. at 2635.

[115] Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738, 2783, 2788 n.30 (2007) (Thomas, J. concurring).

[116] *Id*.

[117] *Id*. at 2788 n.30. My brief in the Seattle case discussed these bizarre racial theories. Amicus Curiae Brief of Competitive Enterprise Institute in Support of Petitioner at 2–3, Parents Involved in Community Schools v. Seattle School District No. 1 127 S. Ct. 2738 (2007) (filed Aug. 17, 2006), available at http://www.cei.org/pdf/5482.pdf.

challenged school board practice, and deferring to the decisions of school officials—he would have had to reach the exact opposite result, since the use of race in student assignment was, unfortunately, consistently upheld by courts in the Nineteenth and early Twentieth centuries;[118] and remains a sadly common practice today by schools seeking to promote ''racial balance.''[119]

Justice Thomas's suggestion that parents agree with school policies if they send their children to school is belied by parents' frequent lawsuits against schools over values. For example, parents sued a Massachusetts school system for forcing their children to attend an ''AIDS awareness'' assembly at which they were barraged with crude remarks celebrating anal sex.[120]

3. Justice Thomas Contradicts His Own Rulings

Moreover, Justice Thomas himself has previously recognized that students have free speech rights, in ruling against viewpoint discrimination in the funding of student groups at the University of Virginia and the University of Wisconsin.[121] While his concurrence in *Morse* was ''limited to elementary and secondary education,''[122] and free

[118] E.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Berea College v. Kentucky, 211 U.S. 45 (1908); Lehew v. Brummell, 103 Mo. 546 (1890); People ex rel. King v. Gallagher, 93 N.Y. 438 (1883); Ward v. Flood, 48 Cal. 36 (1874); Cory v. Carter, 48 Ind. 327 (1874); State ex rel. Garnes v. McCann, 21 Ohio St. 198 (1871); Roberts v. Boston, 5 Cush. 198 (Mass. 1849); Parents Involved in Community Schools, 127 S. Ct. at 2782–83 (Thomas, J., concurring) (''My view of the Constitution is Justice Harlan's view in Plessy: 'Our Constitution is colorblind''' (quoting Plessy, 163 U.S. at 559 (Harlan, J., dissenting))).

[119] See Parents Involved in Community Schools, 127 S. Ct. at 2783 (Thomas, J., concurring) (rejecting use of race merely because it reflects ''current societal practice'' and ''societal practice and expectation''); *id*. at 2800 (Breyer, J., dissenting) (''The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the nation'').

[120] Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525 (1st Cir. 1995) (rejecting parental rights claims).

[121] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (university cannot discriminate against Christian magazine in student activities funding); Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) (using referendum to dispense student funding to political popular groups constitutes impermissible viewpoint discrimination).

[122] Morse v. Frederick, 127 S. Ct. 2618, 2631 n.3 (2007) (Thomas, J., concurring).

speech is broader at the college level,[123] the logic of his argument cannot be so limited, since the state court rulings he cited denied the existence of free speech in colleges just as in K-12 schools, as Thomas candidly conceded.[124] Indeed, his argument that voluntary attendance at a school manifests consent to its rules was made most explicitly in a case involving a college.[125]

4. Thomas Wrongly Blames Free Speech for Disorderly Schools

Thomas's concurrence closed by attacking free speech as the cause of disorder in the schools, arguing that ''*Tinker* has undermined the traditional authority of teachers to maintain order in public schools,'' resulting in ''defiance, disrespect, and disorder.''[126] But *Tinker* leaves teachers with plenty of authority to maintain order, making clear that ''conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.''[127]

Thomas cited no examples of how *Tinker* caused disorder. If free speech caused disorder, one would expect to see it most in states like Massachusetts that give students more free speech than they enjoy under Supreme Court decisions like *Fraser*.[128] But there is no

[123] See Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973) (free speech in college is ''coextensive'' with society at large); compare Papish v. Curators of the Univ. of Missouri, 410 U.S. 667 (1973) (graduate student's vulgarities protected) with Fraser, *supra* (high school student's vulgar speech was not protected).

[124] Morse, 127 S. Ct. at 2631 n.2 (Thomas, J., concurring) (colleges required ''strict obedience'').

[125] *Id.* at 2635 (citing Hamilton v. Board of Regents of University of California, 293 U.S. 245, 262 (1934) (students who chose to attend university could not challenge its military training requirement under Due Process or Privileges or Immunities Clauses)). This was the only federal case Thomas cited for his claim that students lack free speech, and the only one that raised a constitutional argument.

[126] *Id.* at 2636 (Thomas, J., concurring) (citations omitted).

[127] Tinker v. Des Moines School District, 393 U.S. 503, 513 (1969).

[128] See, e.g., Pyle v. South Hadley School Comm., 667 N.E.2d 869, 872 (Mass. 1996) (rejecting *Fraser*'s limits on students' lewd T-shirts under Massachusetts law, which allows limits on speech ''only where such expression creates a disruption or disorder within the school''); Smith v. Novato Unified School Dist., 59 Cal. Rptr. 3d 508, 516 (Cal. Ct. App. 2007) (state law protects speech unprotected under U.S. Supreme Court rulings, barring a school newspaper from censoring column on illegal immigration), citing Leeb v. DeLong, 198 Cal. App. 3d 47, 54 (Cal. Ct. App. 1988).

evidence of that. And the campus disorders of the 1960s began long before the 1969 *Tinker* decision.

Thomas's opinion reflected a misunderstanding of the challenges facing educators, which have little to do with free speech. Other legal changes—such as cumbersome disciplinary procedures mandated by state education codes and case law,[129] the Individuals with Disabilities Education Act, and disparate-impact regulations that make teachers reluctant to suspend ''too many'' disruptive minority students for fear of discrimination charges[130]—have created far more obstacles to discipline than free speech.

The worst example is the 1975 Individuals with Disabilities Education Act (IDEA).[131] It forces schools to provide schooling to all children with behavioral or other disabilities, even if they are dangerous and ''have been suspended or expelled from school'' for misconduct.[132] That is true even if the misconduct was unrelated to the student's disability, such as a murder committed by a student with a learning disability.[133]

Violent students cannot be suspended or expelled without the school first seeking a judicial hearing, if the violence supposedly

[129] See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (even though principal who suspended students for brawling in the school lunchroom personally witnessed the fight, the Court concluded he had failed to give the students an adequate hearing before suspending them).

[130] See, e.g., Edmund Janko, It Still Leaves a Bad Taste, City Journal (Summer 2006), available at http://www.city-journal.org/html/16_3_diarist.html (in response to inquiry from Office for Civil Rights, complaining that school ''had suspended black students far out of proportion to their numbers in [its] student population,'' school decided ''we needed to suspend fewer minorities or haul more white folks into the dean's office for our ultimate punishment.'' As a result, ''obscenities directed at a teacher would mean, in cases involving minority students, a rebuke from the dean and a notation on the record or a letter home rather than [the] suspension'' that white students would receive).

[131] 20 U.S.C. § 1400 et seq.

[132] 20 U.S.C. § 1412(a)(1)(A).

[133] See 20 U.S.C. §§ 1415(j), 1415(k)(4); Amos v. Maryland Department of Public Safety & Correctional Services, 126 F.3d 589, 603 n.8 (4th Cir. 1997) (''Congress amended the [IDEA] to ensure, contrary to our holding in [Virginia v.] Riley, [106 F.3d 559 (4th Cir. 1997) (en banc)], that states provide educational services to disabled children expelled from school for misconduct unrelated to their disabilities''); Riley, 106 F.3d at 562 (government said even murderers are entitled to schooling, such as being tutored in prison).

stems from a behavioral or emotional disability.[134] As a result, there are '''examples of kids who have sexually assaulted their teacher and are then returned to the classroom.'''[135] That has a big effect on school discipline, since ''special education students account for a disproportionate share of school violence and disciplinary problems.''[136] They account for about 12 percent of all children and adolescents,[137] but commit a far higher percentage of school violence.[138]

The IDEA also effectively requires school systems to ''mainstream'' many students with behavioral disabilities.[139] The ''rush to mainstream'' such children disrupts many of the classes into which they are thrust, ''alienating teachers and driving some of the best from their profession.''[140]

The IDEA has produced a flood of lawsuits. It is ''reportedly the fourth most litigated federal statute,''[141] and ''disagreements involving punishment'' under the IDEA ''often head to court.''[142] By contrast, free speech lawsuits by students are fairly rare. Getting rid of

[134]Honig v. Doe, 484 U.S. 305, 312–15, 323 (1988) (school could not unilaterally expel students for ''violent and disruptive conduct'' arising from their disabilities, since ''the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts,'' and school officials could not ''read a 'dangerousness' exception into'' the IDEA); 20 U.S.C. § 1415(j).

[135]Kay S. Hymowitz, Who Killed School Discipline?, City Journal, Spring 2000 (quoting a school board attorney), available at http://www.city-journal.org/html/10_2_who_killed_school_dis.html.

[136]See, e.g., Robert Tansho, Educating Eric, Wall Street Journal, May 12, 2007, at A1, available at 2007 WLNR 9144018.

[137]Karen Berkowitz, Attorney: Disabilities Law Confusing, Contradictory, Buffalo Grove Countryside, June 14, 2007, abstract available at 2007 WLNR 11780215.

[138]See Boston Globe, Editorial, A Clash of Rights in Education, Feb. 1, 2007, at A8, available at 2007 WLNR 3934276, (''special education students issued threats at a significantly higher rate (33 per 1,000) than regular education students (6.9 per 1,000),'' and their threats were more ''serious'').

[139]See Tansho, Educating Eric, Wall Street Journal, May 12, 2007, at A1; A Clash of Rights in Education, *supra* note 138, at n.136.

[140]See John Hechinger, 'Mainstreaming' Trend Tests Classroom Goals, Wall Street Journal, June 25, 2007, at A1, abstract available at 2007 WLNR 12072470.

[141]Walt Gardner, Letter, Special Education Abuses, New York Times, April 25, 2007, at A26, available at 2007 WLNR 7783903 (letter from veteran teacher); see 28 U.S.C. § 1415 (annotated code lists numerous court decisions involving just the IDEA section involving ''procedural safeguards'').

[142]Harriet Tramer, Awareness of Disability Law Up Among Lawyers, Families, Crain's Cleveland Business, April 16, 2007, at 15, available at 2007 WLNR 7386331.

free speech rights will do nothing about the impediment to discipline created by statutes like the IDEA. It will simply make censorship more glaring by allowing some students to be disciplined for harmless speech while other students are able to use the threat of lawsuits to avoid punishment for violence.

Indeed, censorship may actually promote disorder. Colleges with stringent speech codes often are not peaceful or harmonious places.[143] One of the cases that Justice Thomas cited with approval upheld discipline of a student for publicizing fire-safety problems.[144] Such discipline could easily cause unrest in a student body angry about school officials' indifference to their welfare. As Justice Brandeis observed, since ''repression breeds hate,'' and ''hate menaces stable government,'' ''the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies,'' not in censorship.[145]

H. The Justices Rightly Rejected Censorship of Political Speech

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. In holding Frederick's speech was not protected, the Court emphasized the non-political nature of the speech, observing that ''this is plainly not a case about political debate over the criminalization of drug use or possession'' and that ''not even Frederick argues that the banner conveys any sort of political or religious message.''[146] And the day after its ruling, the Court refused to hear an appeal of a lower court decision holding that a student's anti-Bush T-shirt was protected despite containing drug and alcohol-related images.[147]

The two justices who provided the deciding votes in favor of the school district, Justices Alito and Kennedy, emphasized that their decision ''provides no support for any restriction of speech that can

[143] See Alan Kors & Harvey Silverglate, The Shadow University (1998) (discussing speech codes).

[144] Morse v. Frederick, 127 S. Ct. 2618, 2632 (2007) (Thomas, J., concurring) (citing Wooster v. Sunderland, 27 Cal. App. 51, 52 (Cal. Ct. App. 1915)).

[145] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[146] Morse, 127 S. Ct. at 2625.

[147] See Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006), cert. denied, 75 USLW 3313 (2007).

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.''[148] Similarly, the three dissenters agreed on ''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 medical use.''[149]

As the dissenters observed, the case arose in Alaska, and ''the legalization of marijuana is an issue of considerable public concern in Alaska,'' since the ''State Supreme Court held in 1975 that Alaska's constitution protects the right of adults to possess less than four ounces of marijuana for personal use,'' a ruling the voters responded to both by voting (unsuccessfully) to ban marijuana possession in general, and by voting to decriminalize its use for medical purposes.[150] At least six other states have also held referenda on whether to legalize marijuana.[151]

Unlike Alaska state law, federal law bans marijuana possession.[152] But federal law apparently contains a religious exemption,[153] so not all marijuana use is illegal. The fact that not all marijuana use is illegal is an additional argument that Frederick could have made, but did not make, against banning pro-drug speech.[154]

[148] Morse, 127 S. Ct. at 2636 (Alito, J., concurring); see Marks v. United States, 430 U.S. 188, 193 (1977) (court's holding is ''position taken by those . . . who concurred in the judgment on the narrowest grounds'').

[149] Morse, 127 S. Ct. at 2649 (Stevens, J., dissenting); accord *id*. at 2651 (advocating protection for ''speech suggesting'' that drug war is ''futile'').

[150] *Id*. at 2649 n.8 (Stevens, J., dissenting) (citing Ravin v. State, 537 P.2d 494 (Alaska 1975)); Initiative Proposal No. 2, §§ 1–2 (effective Mar. 3, 1991), 11 Alaska Stat., p. 872 (Lexis 2006) (attempting to recriminalize marijuana) (invalidated under state law in Noy v. State, 83 P.3d 538 (Alaska App. 2003)); 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), codified at Alaska Stat. §§ 11.71.090, 17.37.010–17.37.080 (medical marijuana initiative).

[151] See Brief for Respondents, Morse v. Frederick, 127 S. Ct. 2618 (2007) (filed Feb. 20, 2007), available 2007 WL 579230 at 17 (listing states).

[152] See Gonzales v. Raich, 545 U.S. 1 (2005) (federal law bans marijuana even when state law permits it).

[153] See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) (affirming preliminary injunction against prosecuting a sect for using a hallucinogen in communion, since the Religious Freedom Restoration Act created a probable exemption to federal drug laws).

Carving out an exception for speech of political or social importance was perfectly sensible and in accord with the Court's own past precedents. The Supreme Court frequently exempts speech on matters of public concern from regulations that prohibit speech of lesser importance, recognizing that state interests that are strong enough to justify restricting ordinary speech may be inadequate to justify restricting public debate or core political speech.[155] Society has a compelling interest in ensuring that ''debate on public issues'' like drug legalization is ''uninhibited, robust, and wide open,''[156] which would be undermined by censorship.[157]

I. The Justices Rightly Did Not Apply a Threshold ''Public Concern'' Test to Student Speech

Another, smaller victory for students' rights came in the Court's tacit conclusion that students—unlike government employees—need not show that their speech addresses a matter of public concern for it to enjoy some degree of protection. The school district argued that Frederick's speech was not protected under the Supreme Court's *Tinker* decision because it was not—like the antiwar armband in *Tinker*—''political expression.''[158]

[154] See This That & The Other Gift and Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006) (since state's ban on sex toys contained a medical exemption, sex toy advertising could not be banned).

[155] Compare Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (strict liability for defamation of private figure on matter of private concern) with Rosenbloom v. Metromedia, 403 U.S. 29 (1971) (negligence required for liability for defamation on matter of public concern); see also Connick v. Myers, 461 U.S. 138, 152 (1983) (''stronger showing'' of disruption required ''if the employee's speech more substantially addresses matters of public concern''); accord Hall v. Marion School District No. 2, 31 F.3d 183, 195 (4th Cir. 1994); Miller v. California, 413 U.S. 15, 34 (1973) (exempting speech with ''serious literary, political, or scientific value'' from obscenity).

[156] New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (First Amendment reflects ''profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open''); cf. Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925, 928 (11th Cir. 1993) (''compelling interest in the unrestrained discussion of racial problems'').

[157] Blum v. Schlegel, 18 F.3d 1005, 1011 (2d Cir. 1994) (law professor's advocacy of marijuana legalization was protected, given need for ''free and open debate'' and harm to educational process from ''excessive regulation of . . . speech'').

[158] See, e.g., Petitioners' Brief, Morse v. Frederick, 127 S. Ct. 2618 (2007) (filed Jan. 16, 2007), available at 2007 WL 118979 (Frederick's ''message lay far outside the province of Tinker-protected political expression'').

In First Amendment cases in general, speech need not be political to be protected.[159] But some courts have held that students' speech must be on a matter of public concern to be protected, excluding speech deemed trivial.[160] By contrast, most courts have rejected the argument that student speech must be on a matter of ''public concern'' to be protected,[161] the way that public employees' speech must be.[162] These rulings have reasoned that the ''public concern'' limit on speech generally applies only to public employees, not First Amendment plaintiffs in general;[163] is justified by reasons that apply to employees, but not students;[164] and has never been applied by the Supreme Court in its rulings on student speech.[165]

None of the justices accepted the argument that student speech needs to be political or on a matter of public concern to be protected under *Tinker*. Indeed, three of the justices found his speech protected despite their conclusion that Frederick's banner contained nothing more than a ''nonsense message.''[166] And the majority, rather than issuing a short opinion finding Frederick's speech unprotected due to its lack of political content, subjected his banner to extended analysis before finding it unprotected due to the government's important interest in curbing drug use. The majority did, however, treat the lack of a political message as an important factor in finding that his free speech rights were outweighed by the school's interests.[167]

[159] E.g., United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[160] Marcum v. Dahl, 658 F.2d 731, 734 (10th Cir. 1981); Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005).

[161] E.g., Pinard v. Clatskanie School District, 467 F.3d 755, 765 (9th Cir. 2006); Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98, 106 (2d Cir. 2001); Qvyjt v. Lin, 953 F. Supp. 244, 247–48 (N.D. Ill. 1997).

[162] Connick v. Myers, 461 U.S. 138 (1983).

[163] Pinard, 467 F.3d at 765–66.

[164] Garcia, 280 F.3d at 106.

[165] Qvyjt, 953 F, Supp. at 247–48 (citing Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670–671 (1973)).

[166] Morse v. Frederick, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting).

[167] *Id*. at 2625 (majority opinion); *id*. at 2636 (Alito, J., concurring).

VI. Conclusion

In creating a new ''drug exception'' to free speech in the public schools, the Supreme Court's decision in *Morse v. Frederick* undermined fundamental First Amendment protections against viewpoint discrimination, and censorship based on speculative fears of harm. It did nothing to make schools safer or more orderly, since it is other legal mandates, not free speech rights, that have made schools less safe. The justices did, however, rightly reject curbs on political speech about drug legalization.