

**BONG HITS 4 JESUS: MAKING SENSE OF FREE
SPEECH IN HIGH SCHOOLS**

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The Supreme Court's most recent high school speech case, *Morse v. Fredericks*, 127 S. Ct. 2618 (2007), generated much attention, perhaps more than the specific issue before the Court was worth. Much of that attention, of course, was attributable to the informal name for the case - "Bong Hits 4 Jesus." By itself that was enough to create a groundswell of curiosity and allowed the media to make the normally dry and stuffy workings of the Supreme Court sound downright fun.

Beyond that, however, the case involved the intersection of a highly valued liberty, free speech, with the tumultuous setting of American high school life. Both free speech and high schools have a special place in the American psyche, and when the two collide we take special attention. Not surprisingly, the Court has often struggled with how to handle such situations, acknowledging that as emerging adults high school students have speech rights, and yet seeing schools as special environments whose primary purpose is education and not speech. For that reason the Court has struck a balance between these competing concerns, but one which typically favors the need to preserve order in schools over the speech rights of students.

At first glance the *Morse* decision seems to follow that pattern, and as a result has drawn a largely negative reaction, at least from civil libertarians. Once again a high school student lost on the free speech argument, with the Court unwilling to protect student speech that would be clearly protected in most other contexts. On the other hand, high school principals can certainly be happy about the outcome. As it has done in the past, the Court stressed the unique characteristics of schools, which justify a greater need to control speech. Seen in that light, the case was simply another loss for student free speech, and another victory for high school discipline, and whether that was good or not depends on your perspective.

Yet I would suggest that there is more to *Morse* than meets the eye and that *Morse* did not in any significant way erode student speech rights. Indeed, when the various opinions are taken as a whole, *Morse* reflects a sensitivity to student speech not seen in recent Supreme Court decisions. True, the student lost, but the Court's opinion was narrowly tailored to a unique factual situation. At the same time, the majority strongly affirmed student speech rights for core political and religious speech, while rejecting any rationale that granted schools broad authority over student speech. Equally important was Justice Alito's concurring opinion, joined by Justice Kennedy, which in no uncertain terms saw *Morse* as a narrow exception to the general rule that student speech, especially that involving political or social commentary, is protected in public

schools. Taken together, *Morse* can be properly viewed as an endorsement, not a rejection, of student speech rights.

Before examining *Morse*, let's first briefly review the Court's earlier cases on high school speech. The Supreme Court's first entry into the area, *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), appeared to establish a speech-protective standard. In now famous language, the Court pronounced that "students and teachers do not shed their constitutional rights at the schoolhouse gate," and held that a school could not prohibit students from wearing black armbands to school to protest the Vietnam War. Although the Court recognized that high schools are special environments for analyzing First Amendment rights, it stated that student speech was protected as long as it did not "materially and substantially interfere" with school operations.

In two subsequent decisions, however, the Court indicated that student speech rights are not nearly as broad as suggested by *Tinker*; in other words, students do in fact shed many of their rights at the schoolhouse gate. In the first case, *Bethel School District N. 401 v. Fraser*, 478 U.S. 675 (1986), the Court held that schools could prohibit lewd speech in schools, even if such speech might be protected in other contexts. The second case, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), appeared to be an even greater blow to student speech rights, holding that the First Amendment did not prohibit a school from censoring a high school newspaper. In so holding, the Court said that schools could exercise much greater control over student speech that was in effect promoted by the school, such as student newspapers, which might be perceived as bearing the school's imprimatur.

What the *Tinker*, *Fraser*, and *Kuhlmeier* trilogy established was that students retain some speech rights at school, but that high schools are special environments where the normal rules do not always apply. Rather, the scope of student speech rights must necessarily be adjusted to the special characteristics of schools, which exist for education and not speech. There is nothing remarkable nor particularly disturbing in that as a general principle. In this sense public schools are like other unique public settings, such as military bases, courtrooms, and public employment, each of which necessarily require modification of normal free speech doctrine. What is important is what those modifications are, and what the tradeoffs will be in terms of speech rights and school interests, tradeoffs which in *Fraser* and *Kuhlmeier* seemed to heavily favor schools.

It was with that background that, nearly two decades after *Kuhlmeier*, the Court decided *Morse*. The facts of *Morse* are relatively simple, if perhaps a little bizarre. In January, 2002, the Olympic Torch for the 2002 Winter games in Salt Lake City was scheduled to pass in front of Juneau-Douglas High School in Juneau, Alaska, during school hours. In order to allow students to participate in the event, the school's principal, Deborah Morse, permitted students to go outside and view the torch from both sides of the street. This was treated as a school field trip, with teachers and administrators supervising the students.

As the torch bearers approached, several students, including Joseph Frederick, held up a banner reading "BONG HITS 4 JESUS." The apparent purpose of the banner was to get themselves on national television news. Principal Morse, however, interpreted the banner as

“encourag[ing] illegal drug use” contrary to school district policy which “prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors....” She therefore told the students to take the banner down. Although the other students complied with the request, Frederick refused. As a result, Morse suspended Frederick for ten days. The district superintendent upheld the suspension, justifying it because Frederick’s message “appeared to advocate the use of illegal drugs.”

Frederick sued and lost in federal district court, but then won in the Ninth Circuit, which held that the suspension violated Frederick’s free speech rights. By the time the Supreme Court granted certiorari, though, one thing had become absolutely clear - Mr. Frederick had got his wish of national publicity, and then some. Not only did he make it onto the national news - numerous times - but his name was soon to find a permanent place in the United States Supreme Court Reports.

The Supreme Court, in a five-person majority opinion authored by Chief Justice Roberts, held that the school did not violate Frederick’s First Amendment rights when it suspended him for displaying the banner. Roberts began by briefly discussing two preliminary matters. First, he quickly stated that the case clearly involved an issue of school speech, even though the speech itself did not occur on school property. He noted that the event in question took place during normal school hours, was supervised by teachers and administrators, and was treated as “an approved social event or class trip,” which, according to school district policy, was subject to district rules. Second, Roberts also concluded that the principal’s belief that the banner promoted illegal drug use was reasonable. Roberts acknowledged the admittedly “cryptic nature” of the message, but observed that at least two interpretations – that the banner urged people to take “bong hits,” or at least suggested “bong hits” were good – are pro-drug messages, while there was a “paucity of alternative meanings.” The fact that Frederick said the message was simply for the purpose of getting on television was irrelevant, since it concerned his *motive*, not what the banner might communicate.

Roberts then proceeded to analyze what he said was the precise question before the Court: “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.” I suppose to ask the question in that way is to answer it: it’s hard to imagine the Court saying students have a constitutional right to blatantly promote drug use at a school event. After all, most Supreme Court justices have been, are, or will be parents of high schoolers, and certainly are not insensitive to the myriad of problems afflicting our public schools, with drug abuse high on the list. Even the dissenting justices, after a riff about viewpoint discrimination, showed little enthusiasm for student speech promoting drug use, instead mostly fighting the majority over what Mr. Frederick’s banner really meant (suggesting it was an obscure, nonsensical statement).

The real question, therefore, was not whether speech of that sort could be restricted, but rather how much damage would be done to the First Amendment in saying the speech was unprotected. And I would suggest the damage was far less than people imagined, if any at all. The key to my positive spin on *Morse* is two things. First, the opinion was written in a very narrow fashion, emphasizing the absence of core political and religious speech, while at the same time stressing the unique and extremely important safety concern in combating drug use in

schools. What emerges from that is a balancing test, one which more often than not will be struck in favor of student speech. Second, and perhaps more important, is Justice Alito's concurrence, joined by Justice Kennedy, which says essentially the same thing, but more emphatically. In particular, Alito sees *Morse* as a rare exception to the general principle that student speech, especially speech central to the First Amendment, is protected in schools.

The narrowness of the majority opinion can be seen in several ways, but especially with regard to the type of speech involved. Roberts was careful to stress in several places that Frederick's banner did not involve "any sort of political or religious message," and did not even involve "political debate over the criminalization of drug use or possession." The clear implication was that the speech at issue, though certainly coming within the First Amendment, was not as central as political or religious speech, and thus not given the same degree of protection that core speech is typically accorded. This point was further made when the Court discussed *Tinker*, the singular case which students have won, which Roberts characterized as "implicating concerns at the heart of the First Amendment," and involving viewpoint political speech, which is "at the core of what the First Amendment is designed to protect," a not so subtle contrast to Frederick's speech.

Roberts was also quite narrow in how he viewed the government interest justifying the restriction, rejecting any broad school authority to proscribe speech. He saw *Fraser* and *Kuhlmeier* as establishing that student speech rights are not "co-extensive with the rights of adults" and that the "substantial interference" standard of *Tinker* is not the only grounds for restricting speech. But he did not necessarily see those cases as granting schools any broad control over student speech. Instead, he focused exclusively on the "important – indeed, perhaps compelling interest" schools have in "detering drug use by schoolchildren." He went on to discuss the seriousness of drug abuse among young people, a concern that Congress and "thousands of school boards throughout the country" recognize as of the utmost importance. Roberts then concluded that drug abuse is a serious and real problem facing schools, justifying restrictions on student speech advocating illegal drug use.

Significantly, the majority rejected any hint of a broader justification for the challenged restriction. In discussing the school's important interest in combating drug use among teens, Roberts said that the interest at hand went beyond "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or a desire to avoid controversy, both of which would clearly be insufficient grounds to restrict student speech. He then specifically rejected the school's argument that the speech could be restricted because it was "offensive," stating:

After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

The Court therefore rested the school's interest squarely, and quite narrowly, on the very serious and very real problem of student drug abuse. All other justifications were rejected as inadequate.

After all is said and done, the Roberts majority opinion essentially engaged in a balancing of interests, similar to how it characterized *Tinker*, but only the reverse. Whereas Roberts saw *Tinker* as involving a viewpoint restriction on political speech “at the heart” of the First Amendment,” and the school asserting only a very weak interest (avoiding the discomfort that accompanies unpopular views), the calculus was reversed in *Morse*. The speech in question, advocacy of illegal drug use, was far removed from core “political and religious speech,” a point made by Roberts at the beginning and again near the end of the opinion. At the same time, the state’s interest in combating illegal drug use was of paramount importance. This balance clearly cut in the school district’s favor. But the distinctions drawn by the Court suggested that with a different type of student speech and a slightly less important government interest, the balance would likely cut the other direction.

This type of balance is even more apparent in Justice Alito’s concurring opinion, joined by Justice Kennedy, which can be read as very affirming of student speech rights, at least when they concern core political speech. Alito had already staked out a speech-protective stance on the issue of student speech while on the Court of Appeals, and the tone of his concurrence confirms that position. He saw Frederick’s banner as involving a narrow exception to the general rule that student speech is protected.

Alito’s affirmation of student speech in *Morse* is seen in two ways. First, he emphasized in several places that speech involving core political and social issues continues to be protected under the *Tinker* standard, distinguishing it from the speech in *Morse* that merely advocated illegal drug use. Thus, he stated at the beginning of his concurrence that the majority opinion:

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.”

Think about that statement for a moment. What Alito seems to be saying is that if Frederick had just tweaked his banner a little, all bets are off. Once speech becomes in any way political, then it is a whole new ball game (sorry for mixing metaphors), and one that strongly favors student speech.

But it gets even better, with Alito strongly rejecting any broad school authority to restrict speech, and specifically rejecting the school’s argument that it could proscribe any speech inconsistent with its “educational mission.” Alito said that such a justification would permit schools to suppress viewpoints on political and social issues, and would therefore “strike at the very heart of the First Amendment.” He then catalogued the limited restrictions the Court had previously permitted, and then said that those, together with the restriction in *Morse*, likely represent the only ones permitted under the First Amendment. He came back to this at the end of his concurrence, stating the restriction in *Morse* “stand[s] 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 restrictions.”

Keep in mind, this isn't just Alito, but also Kennedy, representing two critical swing votes on the issue of student speech, and they say *Morse* pushes school authority over student speech about as far as it will go. That's saying a lot. And they reach that conclusion through essentially the same balancing approach implicitly used by the majority, weighing the relative value of the student speech against the strength of the asserted government interest. The school could restrict Frederick's banner because it did not involve core political or social issue speech, and schools have a strong interest in combating drug abuse. But they strongly suggested that the calculus would be different if the restricted speech was more central to First Amendment values, or if the school's interest was even slightly less substantial.

So where does this all leave student speech in high schools? I think in a pretty good place, with student speech at least as protected as it was before *Morse*, and perhaps slightly more so. To be sure, the Court again emphasized that the special characteristics of schools justify restrictions on student speech. But it did it in a way that negated any broad school authority to control student speech. Instead, it essentially balanced the competing interests at stake, finding the student speech somewhat on the periphery of First Amendment values, while seeing the school's interest, combating student drug abuse, as a compelling, very real, and unique concern.

The flip side of that balance is what is important, though, where the student speech is political or religious and the school's asserted interest more tenuous. Here the majority opinion, and even more so Alito's concurrence, indicated student free speech will be accorded substantial protection, even in the special environment of schools. Indeed, both opinions suggested that a slight adjustment of the message, such as "Legalize Marijuana," might have been enough to change the analysis.

Finally, let me conclude by acknowledging one potential misgiving about the opinion, and it's a big one. I believe the above balancing methodology exhibited in the majority and Alito opinions is well suited for the thorny issue of high school speech, where the special characteristics of schools require adjustments to free speech doctrine that would not be appropriate elsewhere. Thus, if this approach is limited to resolving high school speech issues, which come along about once a decade, that's fine. But if *Morse* is an early indication of how the new Roberts Court might be approaching free speech issues in general, that is a bit troubling.

There are two reasons why applying the *Morse* balancing test to free speech outside schools is problematic. First, balancing tests are notoriously subjective and subject to easy manipulation. And in the context of free speech, balancing tends to favor government interests over speech interests, since in any particular instance it is often easy to find a government interest sufficient to justify what is often a minor intrusion on speech in the immediate case. Yet permitting such restrictions on speech, seemingly justified in isolation, can lead to significant erosion of speech rights in the grand scheme of things.

Second, and worse, the balancing in *Morse* was predicated upon viewing some types of protected speech as more important than others and calls for courts to weigh the relative worth of speech. This might be justified in the special context of public schools, where speech adjustments are inevitable and government might have a legitimate interest in controlling the mode and content of some speech, especially when important government interests are at stake. Prior to *Morse* the Court had recognized lewd speech to be of lesser value in public schools, and

to that list *Morse* added speech promoting drug use. I can think of several more candidates for inclusion on the list: hate speech, speech advocating or promoting violence, and sexually explicit speech. Although these are all protected speech contents under the First Amendment, it is not unreasonable to view them as less central to the First Amendment, and thus more likely to be restricted in the context of public schools.

But weighing the relative worth of speech outside of schools is a different matter, and a dangerous road for the Court to go down. In most contexts the Court has been reluctant to make such judgments, and for good reason. As Justice Harlan observed in *Cohen v. California*, “one man’s vulgarity is another’s lyric.” Better in most instances to let the marketplace of ideas to sort out the relative worth of speech, rather than legislatures, school principals, or courts. Though not without its critics, this hands-off approach to weighing the relative worth of speech is central to our concept of free speech and an approach that has served our nation well.

Thus, to the extent that the *Morse* balancing reflects the new Roberts Court approach to resolving the difficult problem of high school speech, I am supportive. And I am particularly pleased by the tone of *Morse*, especially the Alito concurrence, which seems quite protective of student speech. But if this is a harbinger of the Court’s broader approach to free speech issues, I take back all the good things I said about the opinion. In that event, free speech will have set down on a very disturbing path.