

# Justices to look at “Bong Hits 4 Jesus” Case

Joseph Frederick, a senior at Juneau-Douglas High School, unfurled a banner saying "Bong Hits 4 Jesus" during the Olympic Torch Relay through Juneau, Alaska on January 24, 2002. Frederick's attendance at the event was part of a school-supervised activity. The school's principal, Deborah Morse, told Frederick to put away the banner, as she was concerned it could be interpreted as advocating illegal drug activity. After Frederick refused to comply, she took the banner from him and suspended him for 10 days. <sup>1</sup>

She justified her actions by citing the school's policy against the display of material that promotes the use of illegal drugs. Frederick sued under 42 U.S.C. 1983, the federal civil rights statute, alleging a violation of his First Amendment right to freedom of speech. The District Court found no constitutional violation and ruled in favor of Morse. The U.S. Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit cited *Tinker v. Des Moines Independent Community School District*, which extended First Amendment protection to student speech except where the speech would cause a disturbance. Because Frederick was punished for his message rather than for any disturbance, the Circuit Court ruled, the punishment was unconstitutional.<sup>2</sup>

"What the banner said was, 'Look here, I have the right to free speech and I'm asserting it.' I wasn't trying to say anything religious, anything about drugs," Frederick said in a telephone news conference from China, where he now teaches English and studies Mandarin.

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<sup>1</sup> <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-morse-v-frederick>

<sup>2</sup> <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-lessons/morse-v-frederick-2007/>

An array of groups, from advocates of drug law changes to gay rights backers to supporters of religious freedom, have lined up behind him. "This case is not about drugs. This case is about speech," said Douglas Mertz of Juneau, Frederick's lawyer.

The Bush administration, school boards, anti-drug groups and former drug control directors William Bennett and Barry McCaffrey are supporting the Juneau schools and principal Deborah Morse. They say that the court should support school administrators who impose reasonable limits on student expression and that those limits should extend to promotion of illegal drugs.

"It was the wrong message, at the wrong time and in the wrong place," said former independent counsel Kenneth Starr, who is representing the school district free of charge, in court papers.

Frederick had previous run-ins with school administrators before the banner dispute. He said he first saw the slogan on a snowboard and thought it would make a good test of his rights because, though meaningless, it sounds provocative.

He chose to display the banner during a school-sanctioned event to watch the Olympic torch relay as it passed through Juneau on its way to the 2002 Winter Games in Salt Lake City.

Among the factors that could weigh in the decision, Frederick was standing on public property, not school grounds when he displayed the banner. The school said students were allowed to leave class to see the torch pass by, making the event school-sanctioned.<sup>3</sup>

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<sup>3</sup> [http://www.nbcnews.com/id/17648725/ns/us\\_news-life/t/bong-hits-jesus-case-heads-high-court/#.WDI2R-ErJE4](http://www.nbcnews.com/id/17648725/ns/us_news-life/t/bong-hits-jesus-case-heads-high-court/#.WDI2R-ErJE4)

# Morse vs. Frederick (2007)

## Issues

Whether a principal violated the Free Speech Clause of the First Amendment by restricting speech at a school-supervised event when the speech is viewed as promoting illegal drug use.

## Ruling

**No. 5-4 Decision.** The Conservative Justices (Scalia, Alito, Thomas, Roberts, Kennedy) voted against the question while the Liberal Justices (Ginsburg, Breyer, Stevens, and Souter) voted for.

## Reasoning

In *Tinker v. Des Moines* (1969), the Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* held that the wearing of armbands by students to protest the Vietnam War was constitutionally protected speech because it was political speech. Political speech is at the heart of the First Amendment and, thus, can only be prohibited if it "substantially disrupts" the educational process.

On the other hand, the Court noted in *Bethel v. Fraser* that "the constitutional rights of students at public school are not automatically, coextensive with the rights of adults." The rights of students are applied "in light of the special characteristics of the school environment," according to the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*.

In the present case, the majority acknowledged that the Constitution affords lesser protections to certain types of student speech at school or school-supervised events. Finding that the message Frederick displayed was by his own admission not political in nature, as was the case in *Tinker*, the Court said the phrase "Bong Hits 4 Jesus" reasonably could be viewed as promoting illegal drug use. The Court agreed with Morse that those who viewed the banner would interpret it as advocating or promoting illegal drug use, in violation of school policy. At least two interpretations of the banner's words—that they constitute an imperative encouraging viewers to smoke marijuana or, alternatively, that they celebrate drug use—demonstrate that the sign promoted such use.

As such, the state had an "important" if not "compelling" interest in prohibiting/punishing student speech that reasonably could be viewed as

promoting illegal drug use. The Court, therefore, held that schools may "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" without fear of violating a student's First Amendment rights.

**Answer:** How did the Justices use the two cases we have studied so far (Tinker and Fraser) to make a decision in this case?

## Concurrences

### Justice Thomas

Justice Clarence Thomas concurred with the majority, but argued that, instead of making exceptions to the holding in Tinker, Tinker should be overturned. Citing various scholarly sources on the history of public education, Justice Thomas argued that the First Amendment was never meant to protect student speech in public schools.

(for next year, add an excerpted version of this: During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand. R. Butts & L. Cremin, *A History of Education in American Culture* 121, 123 (1953) (hereinafter Butts). Public schooling arose, in part, as a way to educate those too poor to afford private schools. See Kaestle & Vinovskis, *From Apron Strings to ABCs: Parents, Children, and Schooling in Nineteenth-Century Massachusetts*, 84 *Am. J. Sociology* S39, S49 (Supp. 1978). Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled "a core of common values" in students and taught them self-control. Reese 23; A. Potter & G. Emerson, *The School and the Schoolmaster: A Manual* 125 (1843) ("By its discipline it contributes, insensibly, to generate a spirit of subordination to lawful authority, a power of self-control, and a habit of postponing present indulgence to a greater future good..."); D. Parkerson & J. Parkerson, *The Emergence of the Common School in the U. S. Countryside* 6 (1998) (hereinafter Parkerson) (noting that early education activists, such as Benjamin Rush, believed public schools "help[ed]

control the innate selfishness of the individual”). Teachers instilled these values not only by presenting ideas but also through strict discipline. Butts 274–275. Schools punished students for behavior the school considered disrespectful or wrong. Parkerson 65 (noting that children were punished for idleness, talking, profanity, and slovenliness). Rules of etiquette were enforced, and courteous behavior was demanded. Reese 40. To meet their educational objectives, schools required absolute obedience. C. Northend, *The Teacher’s Assistant or Hints and Methods in School Discipline and Instruction* 44, 52 NEW YORK STATE SOCIAL STUDIES RESOURCE TOOLKIT 19 (1865) (“I consider a school judiciously governed, where order prevails; where the strictest sense of propriety is manifested by the pupils towards the teacher, and towards each other....” (internal quotation marks omitted)).<sup>2</sup> In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order

**Answer:** How does Justice Thomas view the Tinker case? Why did he side against the student in this case?

### **Justices Alito and Kennedy**

Justices Alito and Kennedy concurred with the majority, but were careful to note that the majority's decision was at the outer parameters of constitutionally protected behavior. These justices were concerned that the majority's decision permitting the suppression of speech promoting illegal drug use could be used to punish those advocating constitutionally permissible, but unpopular, political ideas, e.g., legalizing medicinal marijuana use.

**Answer:** Though Alito and Kennedy sided with Justice Thomas against the student, they disagreed with him about their reasoning. Explain how Alito and Kennedy’s opinion is different from Thomas’.

## **Dissent**

### **Justice Stevens**

Justice John Paul Stevens took the position that the school's interest in protecting students from speech that can be reasonably regarded as promoting drug use does not justify Frederick's punishment for his attempt to make an ambiguous statement simply because it refers to drugs. Justice Stevens made several points in his dissent. First, he argued that prohibiting speech because it advocates illegal drug use, unless it is likely to provoke the harm sought to be avoided by the government, violates the First Amendment because it impermissibly discriminates based upon content. Second, even if the school had a compelling interest to prohibit such speech, Frederick's banner was so vague that a reasonable person could not assume that it advocated illegal drug use. Finally, the dissent took issue with the majority's justification that the speech could "reasonably be perceived as promoting drug use" because the constitutionality of speech should not depend on the perceptions of third parties.

**Answer:** Explain in your own words Justice Stevens' main arguments.

**Answer:** Do you agree with the Supreme Court that the student's rights were not violated when he was suspended for his actions? Explain your thoughts.