Montana Law Review

Volume 69
Issue 2 *Summer 2008*

Article 4

7-2008

Morse v. Frederick: Locking the "Schoolhouse Gate" on the First Amendment

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NOTES

MORSE v. FREDERICK: LOCKING THE "SCHOOLHOUSE GATE" ON THE FIRST AMENDMENT

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I. INTRODUCTION

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech."[1] Nonetheless, the judiciary branch—specifically, the United States Supreme Court—has been slowly chipping away the rights of students to freely speak their minds at school. In *Tinker v. Des Moines Independent Community School District*,[2] the Supreme Court's first landmark case addressing students' free speech rights, the Court upheld the rights of students to wear black armbands to protest the Vietnam War and recognized their fundamental right under the First Amendment to speak and express unpopular views at school.[3] However, since *Tinker*, the Court has slowly receded from its initial stance, instead giving more deference to school officials censoring the speech and expression of students.[4] With the Court's recent ruling in *Morse v. Fred-*

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1. U.S. Const. amend. I.

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

3. *Id.* at 506, 514.

4. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

erick,[5] the educational environment—which should be a forum for free exchange of thought—instead now includes First Amendment restrictions similar to those experienced during the Civil War era, and those currently experienced in prison.[6]

Student speech is an area of law long marked by debate and controversy, and the Supreme Court's holding in *Morse* adds to this discord. In *Morse*, the Court addressed two issues pertaining to the breadth of a student's constitutional right of free speech while at a school-sanctioned event.[7] The first issue the Court looked at was whether the respondent, Joseph Frederick, had a First Amendment right to display a banner stating "BONG HiTS 4 JESUS" at a school-sanctioned event.[8] The second question the Court addressed was whether the petitioner, high school principal Deborah Morse, could be held liable for monetary damages if it was determined that Frederick's constitutional rights were violated.[9]

This note examines the U.S. Supreme Court's recent decision in *Morse v. Frederick*. Part II recites the key facts of *Morse*. Part III explains the majority's opinion, as well as the dissent. Part IV discusses the law the Court used to support its opinion. Part V analyzes why the majority wrongly decided *Morse* and how the dissent correctly interpreted the First Amendment. Part VI concludes.

II. FACTS

On January 24, 2002, Frederick, an eighteen-year-old high school senior at Juneau-Douglas High School ("JDHS") attended the Olympic Torch Relay in downtown Juneau, Alaska.[10] JDHS students were permitted to leave class to watch the relay from either side of the street while being supervised by teachers and administrators.[11] During this event, Frederick and several of his friends displayed what they believed to be a humorous banner at

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

6. *See generally* Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Duke U. Press 2000); *Turner v. Safley*, 482 U.S. 78 (1987); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Shaw v. Murphy*, 532 U.S. 223 (2001) (holding that prison officials have discretion to restrict a prisoner's speech).

7. *Morse*, 127 S. Ct. at 2624.

8. *Id.* at 2622, 2624.

9. *Id.*

10. Respt.'s Br. at 1, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

11. *Morse*, 127 S.Ct. at 2622.

the Olympic Torch event.[12] The fourteen-foot banner plainly read, "BONG HiTS 4 JESUS."[13] Frederick had previously observed this phrase on a snowboard and explained that he "wasn't trying to spread any idea. [He] was just trying to assert [his] right."[14]

Upon seeing the display of the banner, Morse immediately asked Frederick and his friends to take it down, but Frederick refused to comply with Morse's request.[15] Morse subsequently confiscated the banner and demanded that Frederick report to her office where she suspended him for ten days.[16] She believed the banner "violated [JDHS's] policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs."[17] Juneau School Board Policy 5520 stated, "[t]he Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ."[18] Juneau School Board Policy 5850 additionally stated, "[p]upils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program."[19]

Because the Juneau School District receives federal funding, the policies enacted by the School Board must be consistent with federal law.[20] The Federal Safe and Drug-Free Schools and Communities Act requires recipient schools to "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful."[21] The term "bong" is a slang term for drug paraphernalia commonly used for smoking marijuana,[22] while a "bong hit" is a term that refers to the act of inhaling marijuana.[23] Based on this common understanding, Principal Morse concluded that the banner supported the use of illegal drugs, which violated JDHS's policy.[24]

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12. Respt.'s Br. at 2, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).
13. *Morse*, 127 S. Ct. at 2622.
14. Respt.'s Br. at 2, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).
15. *Morse*, 127 S. Ct. at 2622.
16. *Id.*
17. Petr.'s Br. at 6, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).
18. *Id.* at 2.
19. *Id.*
20. *Id.* at 7.
21. Safe and Drug-Free Schools and Communities Act, 20 U.S.C. § 7101, 7114(d)(6) (2006).
22. Petr.'s Br. at 4, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).
23. *Id.*
24. *Id.* at 6.

After exhausting his internal administrative remedies, Frederick filed a 42 U.S.C. § 1983 action in the U.S. District Court for the District of Alaska.[25] Frederick claimed that Principal Morse's actions violated his First Amendment right of free speech.[26] The district court disagreed and granted the school's motion for summary judgment.[27]

The Ninth Circuit Court of Appeals reversed the district court's decision.[28] It determined that Frederick acted during a "school-authorized activit[y]," and "proceed[ed] on the basis that the banner expressed a positive sentiment about marijuana use."[29] Despite this particular finding, the Ninth Circuit held that the school violated Frederick's First Amendment rights because it punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption."[30] The Court further held that Frederick's right to express his message was "so 'clearly established' that a reasonable principal in Morse's position would have understood that her actions were unconstitutional."[31]

III. HOLDING

The United States Supreme Court granted certiorari to review two constitutional questions.[32] First, the Court asked whether Frederick had a First Amendment right to wield his banner, and second, if so, whether that right was so clearly established that Morse could be held liable for damages.[33] Since the Court resolved the first question in favor of the school district, the Court did not need to address the second issue regarding whether Morse was liable for damages.[34]

On June 25, 2007, Chief Justice Roberts issued the opinion of the Court. The opinion began by immediately rejecting Frederick's contention that this was not a school speech case.[35] The Court established that this was indeed a school speech case by listing several key facts: watching the passage of the Olympic

25. *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007).
26. *Id.*
27. *Id.*
28. *Frederick v. Morse*, 439 F.3d 1114, 1125 (9th Cir. 2006).
29. *Id.* at 1118.
30. *Id.* at 1123.
31. *Morse*, 127 S. Ct. at 2624 (citing and quoting *Frederick*, 439 F.3d at 1124–25).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

Torch occurred during normal school hours; the event was considered an approved social event or class trip; teachers and administrators congregated with students and supervised them during the event; and the high school band and cheerleaders performed at the event.[36] The Court also noted that in light of these facts, Frederick made a conscious decision to display his banner in a way that was visible to most students.[37] After establishing that this was a school speech case, the Court then considered whether a principal may, consistent with the First Amendment, restrict student speech at a school event if the speech reasonably appears to encourage illegal drug use.[38] The Court held that a principal may do so, and relied on precedent to support its analysis.[39]

Justice Thomas, in his concurrence, claimed that "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[40] Based on this context, Justice Thomas identified the prior *Tinker* ruling as a new standard the Court carved out specifically for student speech in public schools.[41] Justice Thomas found that *Tinker* "substitute[d] judicial oversight of the day-to-day affairs of public schools,"[42] thereby "undermin[ing] the traditional authority of teachers to maintain order in public schools."[43] Thus the *Tinker* standard, according to Justice Thomas, is not supported by the Constitution, nor is there any constitutional requirement that public schools must allow all types of student speech.[44]

Justice Stevens was joined by Justices Souter and Ginsburg in writing the dissent. They argued the fundamental purpose of the First Amendment is to prohibit the government from censoring "the expression of an idea simply because society finds the idea itself offensive or disagreeable."[45] The dissent also focused on the test set forth in *Tinker* and found that Morse's actions did not meet the *Tinker* standards.[46] The dissent noted that the new

36. *Id.*
37. *Morse*, 127 S. Ct. at 2624.
38. *Id.* at 2625.
39. *Id.*
40. *Id.* at 2630.
41. *Id.* at 2633 (citing *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969)).
42. *Id.* at 2635.
43. *Morse*, 127 S. Ct. at 2636.
44. *Id.* at 2634–35.
45. *Id.* at 2645.
46. *Id.* at 2644.

test set forth by the majority—allowing "schools [to] restrict student expression that they reasonably regard as promoting illegal drug use"—actually constitutes a form of viewpoint discrimination.[47]

The dissent also relied on the Court's holding in *Brandenburg v. Ohio*,[48] which distinguished "mere advocacy" of illegal conduct from "incitement to imminent lawless action" by requiring the government to establish that "the advocacy is likely to provoke the harm that the government seeks to avoid" when punishing illegal conduct.[49] In *Morse*, the dissent found it highly unlikely that Frederick's "nonsensical message" would actually incite another student to ingest illegal drugs.[50] The dissenting Justices were not persuaded that JDHS had proven that Frederick's "advocacy" made "otherwise-abstemious students try marijuana."[51]

The dissent also took issue with the majority's argument that the school may legally restrict expression that "advocates the use of substances that are illegal to minors" because of a school's compelling interest to protect students from illegal drugs.[52] The dissent distinguished restricting speech that actively advocates drug use from restricting speech that is simply infused with a drug-themed message.[53] This is an important point, especially in light of the State of Alaska's legalization of marijuana.[54] The overly broad opinion of the majority—which permits censoring any student speech that mentions drugs if it is perceived to be a pro-drug message—was extremely troubling to the dissent.[55]

IV. LEGAL BACKGROUND

The Supreme Court has addressed a student's right to free speech and expression in the public education system in three seminal cases: *Tinker*, *Bethel School District No. 403 v. Fraser*,[56] and *Hazelwood School District v. Kuhlmeier*.[57] The Court began

47. *Id.* at 2645.
48. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
49. *Morse*, 127 S.Ct. at 2645 (citing *Brandenburg*, 395 U.S. at 449).
50. *Id.* at 2643 (stating that Frederick's banner was used to try to receive television attention).
51. *Id.* at 2647.
52. *Id.* at 2646.
53. *Id.*
54. *Id.* at 2649.
55. *Morse*, 127 S.Ct. at 2649.
56. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
57. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

with a broad interpretation of the breadth of student speech with its *Tinker* opinion in 1969.[58] However, by the time the Court issued its opinion in *Kuhlmeier*, over twenty years had passed, and the result was far-removed from its original holding in *Tinker*. This no doubt had a grave effect on the Court's interpretation of the holding in *Morse*.

A. Tinker v. Des Moines Independent Community School District: *Establishing Ground-Rules for Student Speech*

In *Tinker*, three students were suspended for protesting the Vietnam War by wearing black armbands to school.[59] The Court looked at the constitutionality of the school's actions and specifically reviewed the issue in the context of students' right to exercise the First Amendment when their expression is counter to rules prescribed by school officials.[60]

The Supreme Court reversed the lower court's decision, holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[61] The Court also held that in order for school officials to censor a student's First Amendment right, it must be demonstrated that the expressive conduct will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[62] The Court found that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[63]

The *Tinker* Court looked at a variety of cases for guidance. The Court took note of its previous holding in *West Virginia State Board of Education v. Barnette*,[64] in which the Court held that a student at a public school cannot be compelled to salute the American flag.[65] However, the Court also recognized the need for school officials to be able to control student conduct in school.[66] As a result, the Court created a test for establishing whether a school correctly restricted a student's First Amendment rights: the

58. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).
59. *Id.* at 504.
60. *Id.* at 507.
61. *Id.* at 506.
62. *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).
63. *Id.* at 508.
64. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
65. *Tinker*, 393 U.S. at 507 (citing *Barnette*, 319 U.S. at 642).
66. *Id.* (citing *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)).

school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[67] By creating this test the Court was, in essence, recognizing that students should not be subjected solely to the viewpoints that schools wish to support.[68]

B. Bethel School District No. 403 v. Fraser*: Expanding the School's Authority to Infringe on Student Speech*

The Supreme Court did not further establish the government's power to control student speech until almost twenty years later in *Bethel School District No. 403 v. Fraser*.[69] In *Fraser*, the Court looked at whether the First Amendment "prevent[ed] a school from disciplining a student for giving a lewd speech at a school assembly."[70] Matthew Fraser, a student at Bethel High School, sued the school after he was suspended for giving a lewd speech at a school-sponsored event.[71] At the time, Bethel High School explicitly prohibited the use of obscene language, stating, "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[72] The district court held that Bethel High School violated Fraser's freedom of speech and that the school policy was vague and overbroad.[73] The Ninth Circuit Court of Appeals affirmed the district court, expressly rejecting the school's argument that Fraser's speech was disruptive to the school's educational process.[74]

The Supreme Court reversed the lower court.[75] The Court based much of its reasoning on the foundation of the American public education system, reasoning that public schools have a duty to "inculcate the habits and manners of civility" upon students.[76] Yet, the Court emphasized that the "freedom to advocate unpopular and controversial views . . . must be balanced against the society's countervailing interest in teaching students the boundaries

67. *Id.* at 509.
68. *Id.* at 511.
69. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
70. *Id.* at 677.
71. *Id.* at 678.
72. *Id.*
73. *Id.* at 679.
74. *Id.*
75. *Fraser*, 487 U.S. at 680.
76. *Id.* at 681.

of socially appropriate behavior."[77] Failure to do so would no doubt have a chilling effect on the First Amendment.

Nonetheless, the Court held that First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings."[78] The Court further held that the role of schools to appropriately socialize youth should override students' First Amendment rights.[79] This recognition by the Court allows a school to disassociate itself from any speech or conduct that is "inconsistent with the 'fundamental values' of public school education."[80] As a result, a school is not constitutionally prohibited from determining certain vulgar and lewd speech "undermine[s] the school's basic educational mission."[81]

C. Hazelwood School District v. Kuhlmeier: *Further Defining the School's Authority to Police the First Amendment*

The last case in the trilogy of landmark student speech cases, *Hazelwood School District v. Kuhlmeier*,[82] addressed the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.[83] Three student staff members of the school newspaper alleged their First Amendment rights were violated when two pages of articles were deleted from the school newspaper because school officials believed the material was inappropriate for younger readers.[84]

The Supreme Court first addressed whether a student newspaper is a forum for public expression.[85] The Court determined that school facilities are public forums if authorities "have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"[86] As a result, the Court held that the school did not "deviate in practice" because the school newspaper was not a "public forum;" rather, it was a component of the educational

77. *Id.*
78. *Id.* at 682.
79. *Id.* at 683.
80. *Id.* at 685–86.
81. *Fraser*, 487 U.S. at 685.
82. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1998).
83. *Id.* at 262.
84. *Id.* at 262–63.
85. *Id.* at 267.
86. *Id.* (quoting *Perry Educ. Assn. v. Perry Loc. Educators' Assn.*, 460 U.S. 37, 47 (1983)).

curriculum that school officials regulated.[87] The Court next looked at the issue of whether the First Amendment requires a school to affirmatively promote the particular student speech exercised by the student newspaper.[88] The Supreme Court reversed the lower court's finding, and held the school was authorized to censor the content of the student newspaper so long as its actions were "reasonably related to legitimate pedagogical concerns."[89]

As in *Fraser*, the Court reasoned that the controlling legitimate pedagogical concern in this situation was that schools are primary agents of socialization. Because of this responsibility, schools are afforded a greater right to exercise control over freedom of speech and expression in the school setting.[90] In emphasizing the importance of the school's role in a student's life, the Court concluded that the *Tinker* standard need not be the standard used "for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[91]

When the *Morse* Court reviewed *Kuhlmeier*, it determined that it was not controlling case law.[92] However, the Court did find *Kuhlmeier* to be instructive by establishing that *Tinker* is not the sole standard to be used in student speech cases.[93] For this reason, this note will give little attention to the *Kuhlmeier* holding when analyzing the Court's decision.

V. ANALYSIS

The Supreme Court's decision in *Morse* makes a clear statement to the American public that the First Amendment only protects student speech in public schools when school officials determine that the speech is not too controversial. Instead of sending this message to the public, the Court should have re-affirmed *Tinker* by holding that Principal Morse violated Frederick's First Amendment rights when she punished him for displaying his banner.

Students should not be punished for expressing an unpopular personal viewpoint on the school premises or during school-spon-

87. *Id.* at 268–70.
88. *Kuhlmeier*, 484 U.S. at 270–71.
89. *Id.* at 273.
90. *Id.* at 271–72.
91. *Id.* at 272–73.
92. *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007).
93. *Id.*

sored activities[94] unless school officials reasonably believe the expression will "substantially interfere with the work of the school."[95] Unfortunately, there was no such showing in Frederick's case. Frederick's banner did not impinge on or disrupt JDHS' pedagogical purpose. By displaying the banner, Frederick did not incite students to disrupt the passage of the Olympic Torch; he did not arouse students to disobey school officials; and he did not encourage students to start using illegal drugs. JDHS did not present any evidence demonstrating substantial interference. Instead, JDHS relied on *Fraser*, arguing it should be allowed to censor such student speech because it is contrary to a critical educational objective of public schools.[96]

Tolerating diverse and alternative views can create a healthy and successful educational environment. Instead of punishing a student for speaking about an unorthodox view, educators should use the opportunity to create a greater forum of discussion. Assuming the view expressed by Frederick was as socially and morally reprehensible as the Court and JDHS believed, there are other methods the JDHS administration could have used to control the situation. For example, JDHS could instead have used the opportunity to create in-classroom discussions about the harmful effects of drug use. Suspending Frederick was an overly broad answer to the situation, as was creating a school policy forbidding *any* type of speech that "advocates the use of substances that are illegal to minors." In fact, by this definition, minors are forbidden to talk about drinking alcohol, smoking cigarettes, or any other status offense.[97]

The rule established in *Fraser*—that a school has a right to disassociate itself from any speech or conduct inconsistent with the fundamental values of public school education[98]—is inconsistent with the beliefs held by the people of Alaska. In fact, such a blanket prohibition on this type of student expression counters the values previously expressed by Alaskan citizens. In 1975, the Alaskan Supreme Court held it is legal for adults to possess less

94. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

95. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

96. Petr.'s Br. at 21–23, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

97. *See Black's Law Dictionary* 496 (Bryan A. Garner ed., 2d Pocket ed., West 2001) (defining a status offense as "a minor's violation of the juvenile code by doing some act that would not be considered illegal if an adult did it").

98. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

than four ounces of marijuana for personal use.[99] Alaskan citizens also voted by ballot initiative to de-criminalize marijuana for medicinal purposes.[100] Even when "applied in light of the special characteristics of the school environment,"[101] JDHS's policy forbidding certain forms of speech appears to be directly counter to the social and moral values of the majority of Alaskan citizens. The citizens of Alaska have clearly established that it is socially and culturally acceptable to de-criminalize marijuana and to ingest it in small quantities.[102]

In addition to Alaska's de-criminalization of marijuana, public schools have a responsibility to teach and train Alaskan students to abide by the current social and legal rule of the State. Instead of upholding Morse's actions as constitutional, the Supreme Court should have given deference to the State, and the people of the State in particular.[103] This deference should be granted "even when [social norms] deviate from constitutional guarantees, because local residents are in a better position to balance liberty and order in light of local circumstances."[104] As a result, the Court should have considered Alaska's cultural norms like it did those in *Tinker*. Instead, the Supreme Court created a wide-reaching prohibition that now affects *every* minor child educated in a public school with no consideration of each individual community's social norms and values.

The Supreme Court has previously interpreted student speech cases based on context and the specific facts of the case. The majority in *Morse* should have done the same. For example, in *Fraser*, the Court found it was constitutional for the school to punish Fraser and disassociate itself from his student speech based on the specific context of that particular situation.[105] The Court found Fraser's speech to be so vulgar and lewd that it was "inconsistent with the 'fundamental values' of public school education."[106] The Court also decided that Fraser's vulgar and lewd speech was more disruptive to the school's pedagogical purpose

99. *Morse v. Frederick*, 127 S. Ct. 2618, 2650 n. 8 (2007).

100. *Id.*

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

102. *Morse*, 127 S. Ct. at 2650 n. 8 (citing 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), 11 Alaska Stat. 882 (codified at Alaska Stat. §§ 22.71.090, 17.37.010-17.37.080 (2007)).

103. Richard C. Schragger, *The Limits of Localism*, 100 Mich. L. Rev. 371, 372 (2001).

104. *Id.*

105. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

106. *Id.*

than Tinker's political protest because of the young age of some of the audience members.[107]

However, in Frederick's case, his actions were far from being so obscene as to offend the fundamental values of the public education system. The term "vulgar" derives from the Latin language and, although once meant "of the common people," has since metamorphosed into a negative meaning—"crudely indecent."[108] The term "lewd" is defined as "preoccupied with sex" or "obscene and indecent."[109] It is doubtful that either today's youth or Alaskan citizens—who voted to de-criminalize marijuana—would consider the slogan "BONG HiTS 4 JESUS" to meet either of those definitions. Nonetheless, the Court used *Morse* to create a *per se* rule that a principal may restrict student speech if it is viewed as promoting illegal drug use and essentially equated Frederick's slogan to being vulgar and lewd.[110] What if, for instance, Frederick's banner read, "LEGALIZE SMOKING MARIJUANA?" Under the majority's holding in *Morse*, this would now be clear grounds for a school official to restrict this form of expression and speech, even if smoking marijuana has already been de-criminalized by the State.

As Justice Thomas argued, it is the responsibility of school officials, not the federal government, to oversee the daily activities of the school. However, just as the Supreme Court should have deferred to the community's social norms, the school administrators also should have deferred to the values established by Alaskan citizens. Censoring a student's ability to speak about an act that is legal in Alaska is a blatant abuse of power and a violation of the First Amendment.

Interestingly, Morse's prohibition of Frederick's speech is similar to the South's attempt to suppress abolitionists' speech during the Civil War era. Between 1835 and 1837, a major concern for U.S. citizens was whether the government would prohibit abolitionists from criticizing slavery and demanding its elimination.[111] During this time, several southern states enacted laws that suppressed antislavery speech and press.[112] For example, Virginia

107. *Id.* at 683.

108. *The American Heritage Dictionary of the English Language* (4th ed., Houghton Mifflin Co. 2006) (available at http://dictionary.com/browse/vulgar).

109. *Id.* (available at http://dictionary.com/browse/lewd).

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

111. Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–1837*, 89 Nw. U. L. Rev. 785, 786 (1995).

112. *Id.* at 787.

passed a law requiring mandatory imprisonment for any individual who advocated for the eradication of slavery or against masters' property rights to their slaves.[113] The reasoning used to support these laws was based on the idea that speaking and writing about abolition would incite slaves to rebel in the South.[114] White masters were fearful of the consequences of a slave rebellion; however, the right of abolitionists to speak out against slavery is at the very core of the First Amendment.[115] Just as southern legislatures attempted to prohibit speech they found offensive, so too did JDHS suppress what it considered an inappropriate message.

The overbroad rule resulting from the Court's decision in *Morse* gives school authorities far-reaching discretion to determine what types of expression and speech that may be prohibited. This is also not unlike the amount of authority and discretion that the Supreme Court grants prison officials in regulating inmates' First Amendment rights.[116] The language used in *Turner v. Safley*[117] eerily mirrors the language used in *Morse*, stating that prison authorities may restrict a prisoner's speech if it is "reasonably related to legitimate penological interests," while simultaneously recognizing that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[118]

Turner also sets forth a variety of factors to determine when censoring inmate-to-inmate correspondence is constitutional. These factors include: "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it";[119] "whether there are alternative means of exercising the right that remain open to prison inmates";[120] "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally";[121] and "the absence of ready alternatives[, which] is evidence of the reasonableness of a prison regulation."[122]

113. *Id.* at 805.
114. *Id.* at 802.
115. *Id.* at 787.
116. *See Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (stating that "prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" (citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))).
117. *Turner v. Safley*, 482 U.S. 78 (1987).
118. *Id.* at 84, 89.
119. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).
120. *Id.* at 90.
121. *Id.*
122. *Id.*

The Court may have had valid reasons for giving prison officials wide latitude to censor a prisoner's speech, but it is unreasonable for the Court to create a parallel test to censor a student's right of free speech while he is attending school. Creating similar tests for these two different populations is simply not warranted.

VI. CONCLUSION

What exactly does it mean, then, when the Supreme Court similarly restricts the First Amendment rights of students and prisoners? One would hope the Court is not analogizing the American public school system to prisons; however, the Court's holding in *Morse* leaves room for one to wonder. To place such stringent and unreasonable restrictions on students' rights to exchange and express ideas insults the public school system and belittles the rights afforded by the Constitution that these schools seek to teach.

The full ramifications of *Morse* remain to be seen. Whether this case will be a historical anomaly among student speech cases or foreshadows future attacks on students' free speech rights is unknown. What is known is that students in public schools must now adhere to speech restrictions that mirror those experienced by abolitionists and modern-day prisoners.