PAPER SYMPOSIUM

OUR LIBERTARIAN COURT: *BONG HITS* AND THE ENDURING HAMILTONIAN-JEFFERSONIAN COLLOQUY

by
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The Supreme Court's decision in Morse v. Frederick, *otherwise known as the* "Bong Hits 4 Jesus" *case, highlights the non-realization of Chief Justice Roberts's goal of greater cohesion and unanimity among the nine Justices.* Bong Hits *is an example of the Chief Justice appearing increasingly among the majority, Justice Stevens speaking vigorously for the minority, and Justice Thomas's iconoclastic approach to constitutional issues. Importantly, the case also reveals a trend of alliance between Justices Kennedy and Alito and their shared Hamiltonian skepticism of local power, as well as Chief Justice Roberts' unsuccessful attempts to limit constitutional questions to narrow grounds of decision. This Essay explores the divided factions of the Court through the lens of* Bong Hits *and offers further insight into the Justices' constitutional jurisprudence.*

I. INTRODUCTION

Morse v. Frederick,[1] the now-legendary *Bong Hits* case, was handed down in the waning days of a tumultuous June, when the "era of good

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[1] 127 S. Ct. 2618 (2007).

feeling" on the Roberts Court crashed and burned.[2] Although lacking the explosive divisiveness of the Seattle-Louisville pupil assignment cases,[3] *Morse v. Frederick* presented the Roberts Court with an early opportunity to examine a little-visited but highly practical area of constitutional law—the Free Speech rights of students in a public school setting. Even as to student speech rights, the internal fissures that became starkly evident during the course of the October 2006 Term engulfed the deeply divided Court, where the nine Justices are clearly marching to the beat of decidedly different drummers. Chief Justice Roberts's publicly-stated dream of greater unanimity—achieved through the minimalist approach of deciding cases on the narrowest possible ground[4]—evaporated as the June opinions came cascading out of the Court.[5] Judicial feelings were running high, and sentiments of cheerful unanimity largely disappeared. There was dissension even on a seemingly straightforward issue: Can a school official at school events, acting under authority of a school board or school administrator, prohibit messages deemed to be promoting drug use?

II. A COURT OF WARRING CAMPS

Bong Hits helpfully reveals the warring jurisprudential camps on the Court. Chief Justice Roberts, writing for the majority, sought to keep the decision quite narrow. The case, in his view, was limited to the issue of public school administrators' ability to keep the educational process free

[2] The case was decided on June 25, 2007, only two days before the Court rose for its summer recess. *Id.*

[3] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

[4] *See, e.g.*, Jeffrey Rosen, *John Roberts Centrist? Partial Solution*, THE NEW REPUBLIC, Dec. 11, 2006, at 8 ("[A]s he approached the end of his first term on the bench, Chief Justice John Roberts declared that his goal was to promote unanimity and collegiality on the Court, encouraging his colleagues to decide cases as narrowly as possible so that liberal and conservative justices could converge on common results.").

[5] Of the twenty-seven decisions released in June 2007, nine of them were 5-4 decisions, and seven were filed on the last two days of the term (June 25 and 28, 2007). *See* Panetti v. Quarterman, 127 S. Ct. 2842 (2007); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Nat'l. Ass'n. of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007); Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007); FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007); Morse v. Frederick, 127 S. Ct. 2618 (2007); Bowles v. Russell, 127 S. Ct. 2360 (2007); Uttecht v. Brown, 127 S. Ct. 2218 (2007). One-third of the term's 5-4 decisions were issued in June. During the entire term, twenty-four of the Court's seventy-two cases resulted in a 5-4 vote. *See* Memorandum from Ben Winograd, Akin Gump Strauss Hauer & Feld LLP (June 28, 2007) (regarding "End of Term Statistics and Analysis—October Term 2006), http://www.scotusblog.com/movabletype/archives/MemoOT06.pdf [hereinafter Akin Memorandum].

from messages about illegal drugs.[6] He wrote in a very narrow fashion so as to leave for another day larger questions about controversial speech, as with T-shirt displays conveying messages that inevitably divide the student body.[7] Looking to the record, the Chief Justice fashioned a narrow rule—drawing from the Court's student speech jurisprudence[8]—that permitted school administrators broad discretion to keep out of the educational environment (including a ceremony during school hours and adjacent to school grounds) antisocial messages celebrating drug use.[9]

Chief Justice Roberts examined long-established school speech precedent beginning with the *Tinker* rule, which provided that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[10] He then looked to *Fraser* and its principle that "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[11] He reasoned that, applied against the backdrop of *Kuhlmeier*'s recognition that the school environment is a special characteristic that must be considered as a factor in speech cases, these precedents allow schools to take steps to protect students from "speech that can reasonably be regarded as encouraging illegal drug use."[12] The Chief Justice thus concluded that the school principal, Deborah Morse, was within her rightful authority in interpreting the words "Bong Hits 4 Jesus" adorning the fourteen-foot banner as conveying a pro-drug message.[13] That sort of message, presumably along with communications with respect to alcohol and tobacco, could be proscribed by school boards and administrators consistent with the otherwise broad berth of student rights.[14]

A. Concurring Opinions

Justice Alito. The Chief Justice's minimalist approach commanded a narrow majority, but not without sharp dissension within the prevailing camp. Fissures within the majority were deep. Two pivotally important members of the majority—Justices Kennedy and Alito—sounded a pro-free speech warning. Speaking through Justice Alito, these two influential voices expressed deep concern with respect to the breadth of discretion

[6] *Morse*, 127 S. Ct. at 2622.

[7] *Id.* at 2626–27, 2629.

[8] *Id. (citing* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)*;* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).

[9] *Morse*, 127 S. Ct. at 2628–29.

[10] *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506).

[11] *Morse*, 127 S. Ct. at 2622 (quoting *Fraser*, 478 U.S. at 682) (quotation marks omitted).

[12] *Morse*, 127 S. Ct. at 2622. *See Kuhlmeier*, 484 U.S. at 266.

[13] *Morse*, 127 S. Ct. at 2629.

[14] *Id.* at 2628–29.

enjoyed by school boards.[15] In their view, school boards and school administrators might dangerously employ their authority in ways inimical to Free Speech rights of students.[16] Because schools are quintessentially agents of the state, they called it a "dangerous fiction to pretend that parents simply delegate their authority" to public school officials.[17]

Consequently, Justice Alito rejected Justice Thomas' *in loco parentis* argument, and instead advocated that restrictions on student speech exist not because of a delegation of parental duties, but rather because of the special characteristics of public schools.[18] Justice Alito drew on the principles announced by *Brandenburg* and *Tinker* to overcome his hesitation towards allowing local authorities to determine the constitutional rights of students.[19] In 1969, in a per curiam opinion, *Brandenburg* held that the government could limit speech that "presents a threat of violence."[20] *Tinker* extended the government's authority by allowing school officials to limit speech before violence erupts, and when it substantially interferes or disrupts school activities.[21] Employing these principles, Justice Alito found that school officials may suppress speech that celebrates illegal drug use because it presents a "unique threat to the physical safety of students."[22]

Justice Thomas. Consistent with his iconoclastic approach to constitutional issues,[23] Justice Thomas called for a housekeeping in the Court's student free speech cases.[24] He would return to the fountainhead case of *Tinker*, the Vietnam Era armband case, and inter it on the grounds stated in dissent by Justice Black.[25]

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[15] *Id.* at 2637–38 (Alito, J., concurring).

[16] *Id.* (Alito, J., concurring).

[17] *Id.* (Alito, J., concurring).

[18] *Id.* at 2638 (Alito, J., concurring). *See Kuhlmeier*, 484 U.S. at 266.

[19] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). *See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

[20] *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring) (citing *Brandenburg*, 395 U.S. 444).

[21] *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring) (citing *Tinker*, 393 U.S. at 508–09).

[22] *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

[23] Justice Thomas frequently assails what he deems erroneous interpretations of the Constitution, and largely rejects the power of stare decisis in constitutional adjudication. In his view, Justices are duty bound to decide constitutional issues by examining the text and history of the Constitution. His vigorous originalism results in his rejecting large swaths of constitutional jurisprudence, even if developed over decades. For example, as Justice Thomas indicated in his concurrence in *Morse*, "*Tinker* effected a sea change in students' speech rights, extending them well beyond traditional bounds" and its "reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling, a role limited by *in loco parentis*." *Id.* at 2633, 2634 (Thomas, J., concurring).

[24] *See id.* at 2636 (Thomas, J., concurring).

[25] *Id.* at 2633–36 (Thomas, J., concurring). Quoting Justice Black in *Tinker*, Justice Thomas stated that the Court's current school speech jurisprudence subject

Justice Thomas based his concurrence on his view of the original purpose and protection of the Constitution. Because public schools "were not places for freewheeling debates or exploration of competing ideas" at the Constitution's inception, in Justice Thomas' view public school students do not enjoy First Amendment protections.[26] Justice Thomas expressed concern with the competing principles in *Fraser*, *Kuhlmeier*, and *Tinker*. He disliked the majority's creation of yet another exception to *Tinker*.[27] Justice Thomas used the origins of the Constitution to rule that students do not have a right to Free Speech in public schools, and that the school should be the sole authority in setting the limits on speech.[28] Justice Thomas joined *Morse*'s majority even though he "think[s] the better approach is to dispense with *Tinker* altogether" because at least it "erodes *Tinker*'s hold in the realm of student speech."[29]

Justice Breyer. Embracing a very vigorous minimalism in concurrence, Justice Breyer skirted the free speech issue entirely by focusing on the second issue in the case, the resolution of which united the otherwise fractious Court.[30] In Justice Breyer's view, the entire case could be resolved on the ground that, in light of the relative indeterminancy of free speech jurisprudence, the school principal could not properly be held liable for damages in taking disciplinary action against the student wielder of the "Bong Hits" banner.[31] Since qualified immunity, properly interpreted, protected Principal Morse, the Court could sidestep the thorny free speech issues.[32] Justice Breyer addressed Chief Justice Roberts's concern that qualified immunity would only solve the issue of

"all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.* at 2633–34 (citation omitted).

[26] *Id.* at 2630 (Thomas, J., concurring). Justice Thomas firmly believes in the idea of *in loco parentis*, which he argues is the vehicle that limits student speech in the public school setting, because a parent has every right to control their child's speech. *Id.* at 2631. Historically, through *in loco parentis*, public schools gave teachers complete control over the student body, which was not limited to school rules, but also included speech. *Id.* at 2631, 2635. As a result, schools should be able to maintain their discretion in regulating student rights in the school setting. *Id.* at 2635.

[27] *Id.* at 2634 (Thomas, J., concurring). *Tinker* provides that students do not lose their rights to free speech just because they are in school. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). However, *Fraser* and *Kulhmeier* placed limits on these rights. *Fraser* held that a student's indecent speech was not protected, because student rights are not synonymous with those of adults in a different setting. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). *Kulhmeier* further provided that "[e]ducators are entitled to exercise greater control over [certain] form[s] of student expression," and that schools generally are authorized to limit speech when it is "reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988).

[28] *Morse*, 127 S. Ct. at 2634, 2636 (Thomas, J., concurring).

[29] *Id.* at 2636 (Thomas, J., concurring).

[30] *Id.* at 2638, 2641 (Breyer, J., concurring in part and dissenting in part).

[31] *Id.* at 2638, 2640–41 (Breyer, J., concurring in part and dissenting in part).

[32] *Id.* at 2640–42 (Breyer, J., concurring in part and dissenting in part).

monetary damages, and not the injunctive relief sought, by emphasizing that Frederick had already served his suspension, and that the school had other legitimate reasons for suspending him.[33]

B. The Dissenters

Speaking for himself, Justice Souter, and Justice Ginsburg, Justice Stevens embraced a very robust theory of First Amendment rights of students.[34] The "Bong Hits 4 Jesus" message was, in the dissenters' view, "ambiguous," and indeed was sheer "nonsense" and "quixotic."[35] But the "silly" message[36] neither violated a permissible rule nor expressly advocated conduct that was illegal and harmful to students. As the dissenters saw the case, the student had been punished for simply expressing a view with which Juneau school authorities disagreed.[37] Deferring to the principal's interpretation of the banner, in the dissenters' view, constituted an abdication of judicial responsibility: "[i]ndeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct . . . yet would permit a listener's perceptions to determine which speech deserved constitutional protection."[38]

The dissenters believed in the vitality of *Tinker* and thought that the case should be decided on the basis of whether Frederick's message substantially disrupted or interfered with a school activity.[39] The dissent would find that disruption existed if the speech was likely to provoke the kind of harm the government wishes to prevent, a rule originally fashioned by the *Brandenburg* court.[40] Justice Stevens underscored that "promoting illegal drug use comes . . . nowhere close to proscribable incitement to [the] imminent lawless action" to which *Brandenburg* referred.[41] Justice Stevens noted that, in his view, there was no evidence to suggest that Frederick's banner interfered with the school activity.[42] It was, additionally, implausible that the banner advocated anything at all.[43]

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[33] *Id.* at 2643 (Breyer, J., concurring in part and dissenting in part). The superintendent justified the suspension based on issues independent of speech, which included Frederick's "disregard of a school official's instruction, his failure to [timely] report to the principal's office on time, his 'defiant [and] disruptive behavior,' [as well as a] 'belligerent attitude.'" *Id.* (citation omitted).

[34] *Id.* at 2643–44 (Stevens, J., dissenting).

[35] *Id.* at 2649–50.

[36] *Id.* at 2649.

[37] *Id.* at 2623.

[38] *Id.* at 2647–48 (citation omitted).

[39] *Id.* at 2645.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 2647.

[43] *Id.* at 2649.

The dissenters did not believe that a "silly" message should permit the Court to "invent[] out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs . . . [if] someone could perceive that speech to contain a latent pro-drug message."[44]

III. WHAT *BONG HITS* TEACHES

The Roberts Court has no unifying vision animating its jurisprudence. Yet, in the closely divided cases, the Chief Justice tended to prevail.[45] The extraordinary loser was Justice Stevens, who found himself—as in *Bong Hits*—frequently (and at times bitterly) in dissent.[46] But most notably, Justice Kennedy found himself at the center of power. As Justice Kennedy went, so went the Court.[47] His centrist position in *Bong Hits*, in the face of a narrower, minimalist approach that resolves the case quickly and efficiently, confirms what the early voting in the Roberts Court suggests—that the immediate future of American constitutional law will be in the hands of a single Justice. This is, for now, the Kennedy Court.

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[44] *Id.* at 2650.

[45] *See, e.g.*, Akin Memorandum, *supra* note 5. For example, of the twenty-four 5-4 decisions in the 2006 Term, Chief Justice Roberts was in the majority sixteen times. *Id.* However, Justice Kennedy's voting pattern is worth noting. Out of these twenty-four decisions, Justice Kennedy was in the majority all twenty-four times. *Id.* He is followed by Justice Alito, who was in the majority seventeen times, and then Chief Justice Roberts with a majority opinion sixteen times. *Id.* Justices Scalia and Thomas were tied with fourteen times, followed by Justice Breyer with eleven times, Justice Souter with nine times, and Justice Ginsburg with eight. *Id.* Justice Stevens was with the majority the least often, at seven times. *Id.*

[46] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797–99 (2007) (Stevens, J., dissenting). In *Parents Involved*, Justice Stevens wrote about the "cruel irony" of the majority opinion's "reliance on [the Court's] decision in *Brown v. Board of Education*" because such reliance effectively "rewrites the history of one of this Court's most important decisions." *Id.* at 2797–98. *See also* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007) (Stevens, J., dissenting). In *National Ass'n. of Home Builders*, Justice Stevens's dissenting opinion states that the majority "fails" at the task of giving two competing statutes full effect, and that the result is "inconsistent with the text and history" of the statutes in question. *Id.* at 2538 (Stevens, J., dissenting). *See also* Uttecht v. Brown, 127 S. Ct. 2218, 2243–44 (2007) (Stevens, J., dissenting). In *Uttecht*, Justice Stevens's dissent argued that the majority has "fundamentally redefined—or maybe just misunderstood—the meaning of 'substantially impaired,' and, in doing so, has gotten it horribly backwards," referring to the Court's deference to the trial court's observations of a juror's beliefs and confusion in a death penalty case. *Id.* at 2243 (Stevens, J., dissenting).

[47] *See* Ben Winograd, Akin Gump Strauss Hauer & Feld LLP, 5-4 Decisions in OT06 (2007), http://www.scotusblog.com/movabletype/archives/Final5-4visual.pdf. In fact, Justice Kennedy was only in the minority in two cases throughout the whole Term. Akin Memorandum, *supra* note 5.

Yet, Justice Kennedy chose not to write separately, but to join his colleague Justice Alito in concurrence expressing skepticism as to school board power. In these early Terms of the Roberts Court, the potential alliance of Justice Kennedy and Justice Alito is well worth observing with particular interest. For what was evident in *Bong Hits* appeared elsewhere as well.[48] These two Justices, with quite different backgrounds, seem frequently to find happy concord in their respective ways of looking at the Constitution.[49]

A. A Hamiltonian Distrust of Local Authority

Both Justices Kennedy and Alito stand in the grand tradition of Alexander Hamilton in lifting up the primacy of national institutions and embracing a deep skepticism toward local power. The Hamiltonian vision famously found judicial voice in the Great Chief Justice,[50] who along with Washington and Franklin proved indispensable to the successful launch of the American experiment. But for General Washington and Dr. Franklin, the Constitution likely would not have emerged from the fractious gathering in Philadelphia. So too, without John Marshall's unparalleled leadership of the Article III branch, the ability of the central government to carry on its functions might well have been seriously compromised and the inherent centrifugal forces in the federal republic given early (and destabilizing) expression.[51]

Justices Kennedy and Alito appear, at this early stage of Roberts Court jurisprudence, to be the most ardent, consistent inheritors of that tradition. *Bong Hits* buttresses that early impression, but it only reinforces what was manifested in two pivotally important examples of their kindred, Hamiltonian souls. To be sure, Hamilton would likely not have been particularly solicitous of Free Speech rights (especially of schoolchildren) had the question been presented. But it cannot seriously

[48] Of all the cases heard by both Justice Kennedy and Justice Alito, the two agreed as to the judgment ninety-one percent of the time. Akin Memorandum, *supra* note 5. Furthermore, each Justice joined the other's opinions nine times during OT 2006. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007); *Uttecht*, 127 S. Ct. 2218; *Nat. Ass'n. of Home Builders*, 127 S. Ct. 2518; Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007); Winkelman v. Parma City School Dist., 127 S. Ct. 1994 (2007); Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007); James v. United States, 127 S. Ct. 1586 (2007); Ayers v. Belmontes, 127 S. Ct. 469 (2006).

[49] *See, e.g., Hein*, 127 S. Ct. 2553. For example, in his opinion in *Hein*, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, declined to expand Article III standing to sue for violation of the Establishment Clause to include "discretionary Executive Branch expenditures." *Id.* at 2568. Instead, it declared that such standing is only present if the Executive spends money "pursuant to congressional mandate." *Id.*

[50] *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835, at 124, 125–26, 486 (1991).

[51] *See id.* at 486–87.

be suggested that he would have been cheerfully deferential to local school boards in the face of an assertion (as in *Bong Hits*) of a supervening constitutional authority.

In short, a way of looking at *Bong Hits* is to view the decision against the backdrop of the enduring battle in American constitutional law between pro-state power forces (the Jeffersonian-late Madisonian vision) and national forces (the Hamiltonian-Marshallian perspective).

In his majority opinion, Chief Justice Roberts tried largely to sidestep this recurring jurisprudential civil war. Indeed, to that end, the Chief Justice mustered a majority for the proposition that, within the existing (if limited) body of the Supreme Court's Free Speech jurisprudence, pro-drug messages in schools could appropriately be proscribed.[52] To accomplish that, of course, especially in the face of the dissenters' assertion of authoritative national (judicial) power to interpret the meaning of the "Bong Hits" message, Chief Justice Roberts required only that the school administrator's interpretation be "reasonable."[53] Drilling into the school principal's affidavits, and divining at least two possible pro-drug interpretations of the "Bong Hits" banner,[54] the Chief Justice-led majority deemed the school administrators' (and School Board's) pro-drug reading of the message not only as "reasonable," but as the most plausible. Dismissing the dissenters' unkind but nonetheless socially harmless interpretation of the "Bong Hits" message, Chief Justice Roberts opined: "The dissent refers to the sign's message as 'curious,' 'ambiguous,' 'nonsense,' 'ridiculous,' 'obscure,' 'silly,' 'quixotic,' and 'stupid.' Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs."[55]

Reasonableness of message interpretation was all that was required, and the Juneau school officials' reading of the "Bong Hits" banner was both more plausible and at all events manifestly "reasonable."[56]

This was scarcely a ringing endorsement of public schools' ability to educate the children and shape the school culture in which the daily educational process is carried out. The Chief Justice's minimalism contrasted sharply with that of the only other Chief Justice to address the issue of student speech, namely Chief Justice Burger in *Fraser*.[57] In that case from a generation ago, the *Fraser* majority sustained the school board's punishment of the student speaker and in the process offered an unabashed paean to public educators seeking to inculcate values of

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[52] Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).

[53] *Id.*

[54] *Id.* at 2625 (Roberts, C.J.).

[55] *Id.* (citations omitted).

[56] *Id.* at 2624, 2629.

[57] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

civility.[58] In short, in the Burger Court's view, local educational authorities were to be granted a wide berth to shape the public school culture. Indeed, and ironically, Chief Justice Burger in *Fraser* drew freely from Justice Black's dissent in *Tinker*, in which the Warren Court's iconic figure lamented the intrusion of the federal judiciary into the educational role of public schools.[59]

But the Burger Court's unrigorous deferentialism was no longer the order of the day. In *Bong Hits,* the Justice Stevens-led three dissenters were loudly libertarian in denouncing the anti-free speech result.[60] Justice Thomas was eager to throw the entire body of free speech jurisprudence overboard and defer entirely to school boards.[61] But as against these two polar positions (commanding, to be sure, four votes between them) stood the centrist concurrence of the Kennedy-Alito alliance.[62] And their view was deeply Hamiltonian—courts were to be watchful in monitoring local assertions of power. School boards were not to be trusted. They could become, in the early Madisonian vision, pockets of oppression.

B. A Burgeoning Alliance

Before further exploring the Alito-Kennedy concurrence, two other cases from the October 2006 Term bear noting in divining the Hamiltonian impulse that seems to animate these two Justices. Both involve the power of the States as against the authority of the federal government, either through national laws (passed by Congress pursuant to its enumerated powers under Article I, Section 8) or through the federal judiciary's muscular use of the nationalizing power under the Dormant Commerce Clause.

The first is *Watters v. Wachovia Bank*.[63] There, a sharply divided Court[64] rejected the attempt by state banking authorities to regulate the national-banking activities of nationally chartered banks operating through state-chartered subsidiaries.[65] Justices Kennedy and Alito were firmly in the camp of sustaining national power (joining Justices Souter, Ginsburg and Breyer). In their view, even though the activity in question was carried out by state-chartered corporations, state regulatory authorities were powerless to regulate the substantive bank-related

[58] *Id.* at 680–81, 683–86.

[59] *Id.* at 685–86. *See supra* note 25.

[60] *Morse*, 127 S. Ct. at 2643–51 (Stevens, J., dissenting).

[61] *Id.* at 2629–36 (Thomas, J., concurring).

[62] *Id.* at 2636–38 (Alito, J., concurring).

[63] 127 S. Ct. 1559 (2007).

[64] Justice Ginsburg wrote the majority opinion, in which Justices Kennedy, Souter, Breyer, and Alito joined. *Id.* at 1564. Justice Stevens wrote a dissent in which Chief Justice Roberts and Justice Scalia joined. *Id.* at 1573 (Stevens, J., dissenting). Justice Thomas took no part in the decision. *Id.*

[65] *Id.* at 1565–66.

activity (specifically, in the case at hand, mortgage lending) of the national banks' subsidiaries.[66] Joining in Justice Stevens's dissent, Chief Justice Roberts, in the spirit of his predecessor Chief Justice William H. Rehnquist, would have allowed state regulatory authorities to work their will in the context of state-chartered entities.[67] Justices Kennedy and Alito declined to countenance that balkanizing regime. To the contrary, those two Justices in the nationalist ascendancy lifted up the Hamiltonian-Marshallian vision of a national banking system unencumbered with state regulatory measures. This was the stuff of the Great Chief Justice and *McCulloch v. Maryland*.[68]

The second is *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority (United Haulers)*.[69] In that case, the Jeffersonians carried the day and limited judicial doctrine under the Dormant Commerce Clause by allowing a city to require, inefficiently, all garbage to be processed at a city-owned facility. Here, most of the liberal Justices[70] switched to embrace the Jeffersonian leave-the-States-alone position articulated (this time, successfully) by Chief Justice Roberts.[71] Beneath the parsing of a case central to the analysis, *C.A. Carbone, Inc. v. Clarkstown*,[72] was the recurring conflict of visions as between state versus federal power. Once again, although this time in dissent, Justices Kennedy and Alito were aligned in favor of national power.[73]

C. Rejecting the Jeffersonian Vision

The centrality of Justice Kennedy's voice—and the harmony with Justice Alito in the Hamiltonian-Jeffersonian divide—counsels in favor of a close analysis of the Alito-Kennedy concurrence in *Bong Hits*. A pivotal characteristic of that concurrence looms at the very outset—its purpose was to condition the two Justices' "join," not simply to emphasize or elucidate a particular point or perspective. Without their "join," the Chief Justice's opinion would have been relegated to the undesirable (and destabilizing) nature of a plurality.

The opening sentence of the Alito-Kennedy concurrence makes pellucidly clear the contingent nature of their "join":

> [We] join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict

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[66] *Id.*

[67] *Id.* at 1573–74 (Stevens, J., dissenting).

[68] 17 U.S. 316 (1819).

[69] 127 S. Ct. 1786 (2007).

[70] Justices Souter, Ginsburg, and Breyer joined in Chief Justice Roberts's opinion. *Id.* at 1790.

[71] *Id.* at 1790, 1795–96.

[72] 511 U.S. 383 (1994).

[73] *United Haulers*, 127 S. Ct. at 1803 (Alito, J., dissenting).

> 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 . . . .[74]

The concurrence wholeheartedly embraces the pro-libertarian vision of *Tinker*, namely that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[75] Providing, however, rule limiting commentary on the majority's opinion, the two concurring Justices emphasized that speech regulation must fit within the parameters of the Court's existing jurisprudence. In fact, Justices Alito and Kennedy flatly rejected the argument, advanced both by the School Board (which I had the honor of representing) and the United States (as amicus), that school officials could "censor any student speech that interferes with a school's 'educational mission.'"[76] Even though that formulation was embedded in the Court's student speech jurisprudence, the two Hamiltonian Justices would have none of it. The reason: official power could be abused.

> [The] argument [that school boards enjoy broad power to enhance the educational mission] can easily be manipulated in dangerous ways, and [we] would reject it before such abuse occurs . . . . [S]ome public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.[77]

Or consider this passage from Justices Alito and Kennedy: "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed."[78]

Again and again, the Hamiltonian Justices sounded a nationalist anti-state alarm. Dangers to freedom lurked, but they lay not in potential drug or alcohol use by minors. To the contrary, the danger to our constitutional order lay in the power of governing authorities to impose on schoolchildren a reign of political or ideological orthodoxy: "It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities."[79] And the perceived dangers of a deferential *in loco parentis* perspective were deepened by the unjustifiable, benign view that schoolteachers were daytime subrogees to parents: "It is even more dangerous to assume that such a delegation of

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[74] Morse v. Frederick, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring).

[75] *Id.* at 2636–37 (citation and quotation marks omitted).

[76] *Id.* at 2637.

[77] *Id.*

[78] *Id.*

[79] *Id.*

authority somehow strips public school authorities of their status as agents of the State."[80]

In the view of the two concurring Justices, state and local power holders could readily abuse their authority; it was thus the province of the federal courts to guard against state excesses. State power was therefore limited by a national-power-maximizing principle: State authorities had power to regulate only that speech which could lead to violence.[81] *Tinker*, as narrowly embraced by the two concurring Justices, permitted "school officials to step in before actual violence erupts."[82] This, then, was to be a very modest state power to police student speech, and a robust federal judicial power to guard against abuses in local school systems.

IV. COMING TOGETHER

In the fractured opinion, the Roberts Court achieved unanimity (if only unstated) on the qualified immunity question.[83] Faced with the exigent need for an on-the-spot command decision, then-Principal Deborah Morse determined that the "Bong Hits" banner had to come down and acted accordingly. All nine Justices seemed sympathetic with her plight—a view consistent with the Justices' varied expressions more generally of disfavor as to the liability-creating dimensions of the federal civil justice system.[84]

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[80] *Id.*

[81] *Id.* at 2638.

[82] *Id.* (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

[83] "In resolving the underlying constitutional question, we produce several differing opinions. It is utterly unnecessary to do so. Were we to decide this case on the ground of qualified immunity, our decision would be *unanimous*[.]" *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

[84] The Supreme Court's October 2006 Term demonstrated a business-friendly approach. For example, in *Philip Morris v. Williams*, the Court dismissed an $80 million punitive damage verdict, ruling that juries could not use a single victim's suit to punish a company for harm done by its products to thousands of others. 127 S. Ct. 1057 (2007). In *Credit Suisse Securities (USA) LLC v. Billing*, the Court held that antitrust laws do not apply to the syndication and marketing techniques used in initial public offerings. 127 S. Ct. 2383 (2007). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* made it easier for corporate defendants to seek and win dismissal of lawsuits filed by investors alleging securities fraud or market manipulation. 127 S. Ct. 2499 (2007). *Ledbetter* established that employment discrimination suits must be filed within the 180-day deadline set by Congress, otherwise they are time-barred, which meant that new paychecks did not constitute new instances of pay discrimination. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007). *Safeco v. Burr* was another business-friendly victory. Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007). The Court ruled that companies did not have to notify consumers that they were using the consumer's credit ratings to influence rates. *Id.*

To be sure, the five-member majority did not have occasion to address square on the immunity question.[85] After all, Principal Morse prevailed on the substantive Free Speech issue, and thus the immunity question necessarily dropped out of the case. In contrast, Justice Breyer concurred in the judgment solely on the ground of qualified immunity.[86] He found the First Amendment issues "difficult," and neither Chief Justice Roberts's opinion for the Court nor the dissenting opinion of Justice Stevens satisfying.[87] Drawing on the values of constitutional avoidance,[88] Justice Breyer embraced with enthusiasm the concept of qualified immunity to protect the quick-acting high school principal from the prospect of civil liability: "The principle of qualified immunity fits this case perfectly . . . ."[89]

Canvassing the body of prior substantive law beginning with *Tinker*, Justice Breyer emphasized that, in contrast to the Ninth Circuit, various courts had found the body of student speech case law "complex and often difficult to apply."[90] Indeed, the very fact of division within the Supreme Court on the substantive constitutional issue suggested that "the answer as to how to apply prior law to [the *Bong Hits*] facts was unclear."[91]

As did Justice Breyer, the three dissenting Justices dismissed the substantive liability issue.[92] Indeed, the dissenters did so in a single sentence: "[We] agree with the Court that the principal should not be held liable for pulling down [the student's] banner."[93] Not a single Justice, in short, would allow liability as to the principal, who had lived for years with the grim possibility of both compensatory and punitive damages.

The Justices also came together, more substantively, on the continuing vitality of *Tinker*. Eight of the nine Justices would embrace the *Tinker* framework, and thus stare decisis values carried the day. Only Justice Thomas would have scuttled the entire enterprise and begun

[85] "Justice Breyer would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is . . . that it is inadequate to decide the case before us." *Morse*, 127 S. Ct. at 2624 n.1 (Roberts, C.J.). The reason it is inadequate: Frederick sought both monetary damages and an injunction, and qualified immunity only applies to monetary damages. *See id.*

[86] *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

[87] *Id.* (Breyer, J., concurring in part and dissenting in part).

[88] *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part) (quoting Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)) ("The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.").

[89] *Id.*

[90] *Id.* at 2641.

[91] *Id.*

[92] *Id.* at 2643 (Stevens, J., dissenting).

[93] *Id.*

anew.[94] His iconoclasm would win no adherents among his eight colleagues.

V. CONCLUSION

Bong Hits now stands as a paradigm example of the Roberts Court at the close of its second Term. The unanimity the Chief Justice dreamed of dissolved. Instead of winning adherents to a narrowly crafted rule, the Chief's majority opinion was tempered by three sharp concurrences and a vigorous dissent. Indeed, of the Justices joining the Chief's minimalist opinion, Justices Alito and Kennedy did so with express reservations as to the breadth of discretion being given to local authorities. Justice Thomas did not so much agree with the Chief's rule as he desired to revisit the Court's school speech jurisprudence. The Chief Justice may have been able to find unanimity on the qualified immunity issue, but Justice Breyer was the only member of the Court willing to limit the decision to the less controversial area of the law. While the Chief was ultimately able to avoid a destabilizing plurality opinion and win a majority in the face of a strong dissent, it fell short of a ringing victory.

Still, *Bong Hits* represents yet another decision in the Chief Justice's ever-growing "win" column. While failing to achieve unanimity, Chief Justice Roberts consistently finds himself with a majority. Justice Stevens remains deeply in the minority. Justice Thomas unwaveringly sticks to his iconoclast approach to constitutional issues. Most notably, *Bong Hits* offers additional evidence of a jurisprudential alliance between the Justice in the center—Justice Kennedy—and the newest member of the Court, Justice Alito. Applying a Hamiltonian distrust of local authority, both Justice Kennedy and Justice Alito seem willing to have courts exercise their authority to guard against states that would abuse their power. A Kennedy-Alito alliance, in short, has enormous potential to influence the destiny of the Roberts Court in its opening decade.

[94] *Id.* at 2636 (Thomas, J., concurring).