

BONG HITS 4 JESUS AS A CAUTIONARY TALE OF TWO CITIES

by
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*In September of 1987, several high school students in Tigard, Oregon wore various T-shirts allegedly promoting the use of alcohol. In January of 2002, a number of students in Juneau, Alaska held up a banner with the words “BONG HiTS 4 JESUS” on it while the Olympic torch passed by their school. Both groups of students claimed their First Amendment rights were violated when they were summarily punished for their actions; however, the processes and the end result in each case were quite different. This Article recounts how the Tigard High administration turned the situation into a learning experience. A mock Supreme Court was convened, with high school students acting as attorneys on both sides of the issue. The author then compares the treatment and outcome of the Oregon T-shirt incident with that of the Alaska banner incident, concluding that the administration in the “Bong Hits” case missed a valuable learning opportunity, ultimately resulting in dire consequences for student speech. The Article analyzes the five separate opinions in *Morse v. Frederick* and criticizes the United States Supreme Court for diluting student rights. The author draws important lessons from different Justices’ views to suggest what the future may portend for the direction of the current United States Supreme Court.*

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"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way"¹

"Teach your children well, . . . Teach your parents well . . ."²

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."³

I. INTRODUCTION

September 1987, Tigard, Oregon—several students at Tigard High School wore various T-shirts to school in apparent violation of the principal's dress code prohibiting clothing with alcohol or drug related advertising, symbols, or logos.

January 2002, Juneau, Alaska—a number of students from Juneau-Douglas High School unfurled the now infamous "BONG HiTS 4 JESUS" banner across the street from their school while the Olympic Torch was being carried by on its way to the Winter games in Salt Lake City, Utah.

The two high school principals each chose to impose disciplinary action against some of their students involved in these events. In both situations, the circumstances of the events and the discipline meted out became the subject of dispute before a supreme court. There the similarity of the handling of the two cases came to an end, and the interesting and instructive tale of two cities that is the subject of this Article properly began.

Part II of this Article discusses the Tigard High School incident and its resolution in some detail. Other than brief contemporaneous reports in the local media⁴ and a short mention in the ABA Journal,⁵ this is the first published account of what transpired in 1987. I recount the facts and circumstances, discuss the behavior of the students and the conduct of the principal, and analyze the briefs, argument, and moot Supreme Court opinion. With this earlier example in mind, Part III looks closely at the 2002 Juneau incident and the resulting decision of the United States Supreme Court in *Morse v. Frederick*.⁶ This part of the Article suggests

¹ CHARLES DICKENS, A TALE OF TWO CITIES (Oxford Univ. Press 1998) (1859).

² CROSBY, STILLS, NASH & YOUNG, *Teach Your Children, on DÉJÀ VU* (Atlantic 1970).

³ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

⁴ See, e.g., Martha Allen, *Tigard 'Court' to Decide if T-shirts Are a Right or Wrong*, OREGONIAN, Nov. 13, 1987, at F12 [hereinafter Allen, *Tigard Right or Wrong*]; Tom Hill, *'Spuds' Kicked Off Campus*, TIGARD-TUALATIN TIMES, Oct. 8, 1987, at 1A.

⁵ Nancy Blodgett, *Law Suits Students to a T-(Shirt)*, 74 A.B.A. J. 22 (1988).

⁶ *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

other ways the Supreme Court could and should have handled *Morse* in a manner more consonant with constitutional principles and precedent. I draw important comparative lessons from the Oregon and Alaska experiences, ultimately concluding that both the school administration and the Supreme Court badly missed the boat in the Alaska case, with negative consequences for freedom of speech, student rights, education, and the desirable inculcation of responsible civic values for our rising generation of new adult citizens. The Conclusion of the Article draws two additional lessons: (a) that *discretion* by all actors at all levels in the Alaska case would have been far preferable for what passed instead as misplaced *valor*; and (b) that adherence to the simple homespun wisdom of Miss Manners, or the venerable Chinese emperor Kangxi's warning against litigation, would have prevented the Supreme Court from the error of its way. All will be explained in the fullness of time, if not sooner, in the remaining pages of this Article.

II. THE 1987 TIGARD, OREGON HIGH SCHOOL T-SHIRT CASE

Mr. C. A. "Al" Zimmerman started as the new principal of Tigard High School in Tigard, Oregon⁷ at the beginning of the 1987–1988 school year. Principal Zimmerman, in concert with his administrative team, adopted and promulgated a school dress code as a part of the administrative regulations for students.⁸ This new rule was published in the 1987–1988 Student-Parent Handbook. The relevant parts of the rule read as follows:

School Dress

A. The learning process of any educational institution is best met when students, teachers, and administrators follow high standards of cleanliness, neatness, and quality of grooming of head and person.

⁷ Tigard is a small city in the suburbs of Portland, Oregon. For lawyers, cities sometimes become known because of a famous legal case. *See, e.g.,* Topeka, Kansas in *Brown v. Board of Education*, 347 U.S. 483 (1954). For Tigard, national legal fame—such as it is—has come not from the T-shirt case discussed here, but from the United States Supreme Court's later decision in a conditional takings case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994). I hope to partially redress the earlier slight by singing praise over Tigard's exemplary handling of its T-shirt "crisis" in 1987. Hey, they didn't make a federal case out of it.

⁸ For more detailed facts of the Tigard T-shirt incident, see generally *J.R. Thomas v. Tigard High School District 23J*, 1 Moot S. Ct. of Tigard High Sch. 1, 2–4 (1987); Oregon Law-Related Education Project, Statement of the Case, *J.R. Thomas vs. Tigard High School District 23J*; Plaintiff-Petitioner's Brief, *J.R. Thomas v. Tigard High Sch. Dist. 23J*, 1 Moot S. Ct. of Tigard High Sch. 1 (1987); Defendant-Respondent's Brief, *J.R. Thomas v. Tigard High Sch. Dist. 23J*, 1 Moot S. Ct. of Tigard High Sch. 1 (1987); and Blodgett, *supra* note 5, at 22. Plaintiff-Petitioner's and Defendant-Respondent's Briefs are available in their entirety from the author, from the Classroom Law Project, and from the law library at Lewis & Clark Law School.

B. School clothes shall be in good taste and shall not constitute a safety or health hazard to the student.

1. Clothing decorated or marked with illustrations, words or phrases which are in poor taste will not be acceptable. **Clothing which displays alcohol or drug related advertising, symbols or logos is also unacceptable.**

C. Students violating this policy will be referred to the main office and will not be allowed to continue in the school program.⁹

Ah, the ingenuity of our high school students. After presumably whiling away the last days of summer vacation, gathering school supplies and back to school clothes, and possibly celebrating the long labor day weekend with friends or a family picnic, they showed up at the doors of Tigard High School on that early September 1987 opening day for all of Oregon's schools. Each student received a copy of the new student-parent handbook containing, inter alia, the dress code rule. Principal Zimmerman also held an all-school assembly on opening day where he personally announced the new rule. The students apparently got the message; but their response was quite different from what Principal Zimmerman had hoped for. On the very next day, the second day of school, a number of students wore a variety of interesting T-shirts: a sampling includes a commercially produced "Corona" beer T-shirt, a "Corona Extra" shirt, a "Corona Beach Club" shirt in the same style as the beer shirt already noted, a Club Corona shirt, a shirt bearing the likeness of Budweiser's commercial hound "Spuds McKenzie," a city pride shirt reading "Munich, Deutschland" with an image of a beer stein, and my favorite hands down, a homemade shirt with small letters "root" on one line, and letters in approximately ten times larger font size "Beer" on the next line.¹⁰

root

beer

Talk about creatively testing the limits.¹¹ And talk about a baptism of fire for a new principal. It was indeed "the best of times, the worst of times."

⁹ *Thomas*, 1 Moot S. Ct. of Tigard High Sch. at 2 n.2 (quoting TIGARD HIGH SCHOOL, 1987-1988 STUDENT-PARENT HANDBOOK (1987)) (emphasis added).

¹⁰ *Thomas*, 1 Moot S. Ct. of Tigard High Sch. at 3. According to the students, another classic shirt that successfully "skirted" discipline was worn by a female student and was emblazoned with the words: "Objects under this shirt are larger than they appear." See, e.g., Blodgett, *supra* note 5, at 22.

¹¹ While undoubtedly a pain in the neck, and intended to be so, as every parent, teacher, and principal instinctively knows, such behavior is also the necessary marker

By the way, Principal Zimmerman was not just a fuddy-duddy about dress and washing your hands after using the bathroom, etc. In fact, he adopted the dress code rule primarily to “address the problem of teenage drinking which affected the education of Tigard students.”¹² And to that one should add the even more serious and tragic problem of teenage drinking and driving, and the untimely deaths that sadly and inevitably follow. Drugs, of course, are no picnic either.

Great boundary-testing moments, especially with teenagers, require great decisions and uncommon wisdom. There is rarely a chance to get a second bite at the apple to get things right unless a base of trust already has been established. What was to be done by a brand new principal whose authority was clearly being challenged? J.R. Thomas, the student wearing the commercially manufactured “Corona” beer T-shirt on the critical second day of school, was sent to the principal’s office. Principal Zimmerman informed student Thomas that he was in violation of the dress code rule, and he was driven home to change his shirt. The students wearing the “root BEER” shirt, and the “Spuds McKenzie” shirt were also disciplined.¹³ Paradoxically, however, the students wearing the “Corona Beach Club” and “Munich Deutschland” shirts were not punished. Heavy is the burden, and heavy hangs the heart, of the law administrator. I guess you just had to be there. Students unsuccessfully attempted to meet with the school administration to seek clarification of these apparent inconsistencies and for further interpretation of the rule. Said request was allegedly denied by the Associate Principal on the grounds that “there was no issue of vagueness.”¹⁴ In fairness, would you have wanted to meet with and argue with these enterprising students about the rule?

The school newspaper took up the cudgel and wrote about the controversy in an article cleverly titled “Corona-Gate.”¹⁵ The students

of intelligence, creativity, and the entrepreneurial style that fuels success in science, technology, business, and participatory constitutional democratic governance.

¹² Oregon Law-Related Education Project, Statement of the Case, *supra* note 8. Other descriptions of Principal Zimmerman’s purpose in promulgating the dress code rule are quite similar. *See, e.g.*, Defendant-Respondent’s Brief, *supra* note 8, at 1 (“The Rule was adopted to address a problem with teenage drinking, which affects the education of Tigard students.”); Blodgett, *supra* note 5, at 22 (“[The principal] was concerned that wearing [the T-shirts] would appear to condone the use of drugs or alcohol.”)

¹³ Discipline varied from case to case. Some students, including Mr. Thomas, were sent home to change, as noted earlier. Others were “ordered to cover [the offending T-shirts] up with . . . overcoat[s] or, in some cases, suspended.” Blodgett, *supra* note 5, at 22.

¹⁴ *Id.*

¹⁵ Good training no doubt for the next generation’s Woodward or Bernstein. The administration did not attempt to censor the student newspaper article. Query whether they could have done so, at least under the parameters of the Supreme Court’s misguided decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which allowed school officials to delete two “controversial” articles from a

decided to pursue the matter and stand up for what they believed were their rights, and they contacted the Oregon American Civil Liberties Union (ACLU). Enter the lawyers; perhaps this would morph into a federal case after all. This was the moment of truth for Principal Zimmerman. Did he act as a bureaucrat? Hunker down with a touch of paranoia? Ratchet up the pressure with more severe sanctions and threats? No, no, and no. Instead, he metaphorically must have counted to ten, at least, and decided to use the controversy as a true teaching moment. He, with help from Oregon's Law-Related Education Project (OLREP) and the ACLU, designed an all-school assembly, on condition that the students would take the matter seriously, study up, write legal briefs on both sides of the case, and argue in moot court style before a mock Supreme Court to be composed of local volunteer lawyers and law professors. This is my cue; where I come in.

Perhaps because I was serving as Dean of Lewis & Clark Law School at the time, or had been President of the Oregon ACLU Board from 1979–1981, I was selected to be the Chief Justice of the “Tigard Supreme Court.” The students were ably advised throughout by cooperating ACLU attorney, Jonathan Hoffman, on the plaintiff's side, and by OLREP volunteer attorney, Michael J. Scott, on the defendant-respondent's side. I just discovered in going through the old files that attorney Hoffman was actually “paid” by his student clients with the “Spuds MacKenzie” T-shirt. Ah, the way of the world; real lawyers get paid. Academics pretend to get paid, but like the old Russian proverb, I guess a bit of the compensating truth is that we also pretend to work. Sh! Don't tell anyone. Anyway, I would have preferred the “root BEER” shirt, and feel no jealousy about the “Spuds” shirt. As I recall, Budweiser had so many printed up to promote Bud Lite they could hardly give them away.

The T-shirt controversy being deemed by all a matter of the utmost importance and urgency, we set an accelerated schedule for briefs and argument. Briefs were timely filed at the beginning of November, the case was argued November 12, 1987, and the Tigard Supreme Court rendered its written decision eight days later on November 20, 1987, just over two months after the incident occurred. *Steel Seizure*, *Nixon* tapes, or *Bush v. Gore* anyone?¹⁶ The Juneau case started in January 2002, and

school newspaper dealing with teen pregnancy and the impact on students of parental divorce. The Supreme Court relied on a pitifully weak First Amendment bar, allowing school regulation of student journalistic speech in any reasonable manner, rather than adhering to the tougher and more appropriate standard in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). We certainly wouldn't want our high school students talking seriously, responsibly, and realistically about teen pregnancy or parental divorce, would we? Who knows, if kids write and read about these things, they might “catch” them.

¹⁶ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952) (President Truman ordered the seizure on April 9, 1952; the District Court issued a preliminary injunction April 30 against the Secretary's action; the Supreme Court granted certiorari on May 3, heard argument May 12, and issued its written decision

resulted in a United States Supreme Court decision (admittedly a bit longer than the Tigard opinion) on June 25, 2007. Let's see, two and one-half months versus five and one-half years. And you be the judge as to which is the better result.

A. *The Student Briefs and Oral Arguments*

The students picked up the gauntlet that Principal Zimmerman had thrown down with alacrity and an impressive seriousness of purpose. Working with their respective advisors,¹⁷ nine students on each side of the controversy¹⁸ researched and wrote sixteen- and fifteen-page legal briefs.¹⁹ Not surprisingly, it was easier to find students willing to argue for other students, while "students willing to represent the school were harder to

June 2, 1952); *United States v. Nixon*, 418 U.S. 683 (1974) (The Supreme Court granted certiorari on May 31, 1974 while the case was pending before the Court of Appeals, heard argument on July 8, and rendered its decision on July 24, 1974, while impeachment proceedings were underway in the House Judiciary Committee); *Bush v. Gore*, 531 U.S. 98 (2000) (The case effectively ended the complicated political and legal maneuvering of the Bush and Gore campaigns to resolve the disputed November 2000 presidential election. Between the close of Florida's polls early in November 2000, and this per curiam decision by the Supreme Court on December 12, 2000, there were numerous state court proceedings and an earlier trip to the United States Supreme Court.). For somewhat puzzling criticism of the speed of the Supreme Court's actions in the *Nixon* case, see Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974). Though I disagree with Gerry's conclusion in this matter, I have enormous respect for everything that he wrote, and I would concede that perhaps if the Supreme Court had taken a more cautious approach on prudential grounds the political impeachment process probably would have worked, and the Court would have been less likely to stumble into the Bush-Gore controversy. That is, there is a point to the old aphorism that "haste makes waste," though my rejoinder is that sometimes delay means death and destruction, or as it is more commonly phrased, "justice delayed is justice denied."

¹⁷ Again, ACLU cooperating attorney Jonathan Hoffman served as principal advisor to plaintiff-petitioner students. OLREP volunteer attorney Michael J. Scott served as principal advisor to respondent-defendant students representing the school. Enormous additional credit for the quality of this entire educational exercise should be given to Marilyn Cover, long-time executive director of OLREP, Richard Sanders, chief OLREP staff member working on this project, and the other OLREP staffers; Tigard High School teachers Joe Calpin, who alerted OLREP to the controversy, and Cliff Shelton, a social studies teacher who helped the school administration organize the project; senior Oregon Court of Appeals Judge (former Chief Judge) Herbert Schwab; and senior Multnomah Circuit Court Judge John Beatty (a former chair of the nearby Portland Public School Board), both of whom advised on the creation of the moot Supreme Court.

¹⁸ Students representing plaintiffs J.R. Thomas, et al. were Sonja Olsen, Jeff Ichikawa, Anders Brown, Talli Fankell, Scott Dillinger, Tracie Bernklau, Pete Coleman, J.D. Brands, and Kelly Cole. Students representing defendant Tigard School District were Jeff Ball, Kevin Bonham, Dwayne Boyce, Jeff Chism, Paul Furnanz, Eric Lund, Ami Miller, Michael Russell, and Jennifer Sedivy.

¹⁹ Plaintiff-Petitioner's Brief, *supra* note 8; Defendant-Respondent's Brief, *supra* note 8.

come by.”²⁰ Despite their initial reluctance, the students tasked with representing the school were just as diligent and energetic as their colleagues on the more popular side. It is truly an understatement of major proportion to mention that all of the students did an exceptional job in writing and oral argument. It was a pleasure and an honor to judge their presentations.

1. Plaintiff-Petitioner's Brief

Petitioner's brief on behalf of the disciplined students began with a Table of Authorities, including thirteen cases relied on in the brief, a detailed yet concise Statement of Facts, and a very brief Summary of Argument.²¹ In addition to the facts already recounted, petitioner asserted, *inter alia*, that Principal Zimmerman failed to follow past administrative practice in adopting the new dress code in that he did not seek review by either the Student Council or the faculty; that alcohol advertisements were prevalent in school lockers and were not removed or punished; that lots of other materials relating to alcohol (and drugs) were permitted in the school library; that the administration had no evidence that the offending T-shirts led to teen alcohol (or drug) consumption, motor vehicle accidents, or drug or alcohol-related injuries; that other T-shirts of questionable taste did not result in discipline for the students wearing them;²² that the school sponsored an “Illegal T-shirt Day,” allowing alcohol related shirts on that one day and awarding school spirit points; and that the Tigard High Band sang Miller Lite Beer's famous “Tastes Great, Less Filling” jingle at football games and other places without punishment.²³ The student brief also asserted that there was no “disruption caused” by any of the T-shirts worn by the students.²⁴

The body of the student brief properly began with an argument that the school's actions violated the Oregon Constitution's protection of free expression,²⁵ which has been interpreted consistently by the Oregon Supreme Court to be more protective of free expression than the similar

²⁰ Blodgett, *supra* note 5, at 22.

²¹ Plaintiff-Petitioner's Brief, *supra* note 8, at ii–iii, 1–3.

²² These shirts allegedly included the aforementioned “objects under this shirt . . .,” *see supra* note 10; and two others: “The word for the day is legs, spread the word”; and “If you don't like my music you can kiss my” followed by a picture of a donkey's buttocks. Plaintiff-Petitioner's Brief, *supra* note 8, at 2.

²³ *Id.* at 1–3.

²⁴ *Id.* at 3.

²⁵ OR. CONST. art. I, § 8. The students were way ahead of many practicing lawyers who, to this day, often fail to rely first on their own state constitutions before arguing federal constitutional grounds, despite the fact that many state supreme courts are willing to interpret their own constitutions more protectively than the U.S. Supreme Court interprets the Federal Constitution. Of course, a state supreme court decision protecting an individual right on the basis of the state constitution is immune from federal court review under the independent and adequate state law federalism doctrine.

but less expansive First Amendment to the United States Constitution has been interpreted by the United States Supreme Court. The students effectively noted, for example, that obscenity is protected under the Oregon Constitution but not under the First Amendment, and they argued by analogy that if obscenity is to be protected then surely the offending T-shirts should be protected.²⁶ They also cleverly argued that commercial speech in Oregon, assuming that there is any commercial content in some of the punished T-shirts, is entitled to the same high level of constitutional protection as non-commercial speech in Oregon, thereby anticipating and rebutting the school's contention that it should have significant authority to control commercial advertising of deleterious products.²⁷ The student brief also correctly suggested that the burden for showing adverse consequences (the danger of harm or disruption) should be on the censorial school authorities, and noted that the administration merely "assumed" that such harm would ensue without any evidence of harm or likely harm.²⁸

The second argument in the student brief addressed substantive First Amendment issues. The brief correctly identified the incorporation doctrine as the vehicle making the First Amendment and its interpretations fully applicable to this local incident, and demonstrated that the dress code rule as written and applied was not limited to a matter of style or good taste, but amounted to direct content control suppressing a particular set of ideas.²⁹ The brief cited and relied upon *Tinker v. Des Moines Independent Community School District*,³⁰ and contended that the T-shirts did not cause any disruption and therefore were fully protected even in the schoolhouse under *Tinker*.³¹ The students understood that mere offensiveness to some, political incorrectness, or impropriety subjectively defined by others, do not present sufficient grounds for suppressing expressive ideas.³² Sadly, adults—and even occasionally Justices of the United States Supreme Court—far too often forget this wisdom of our framers.

²⁶ Plaintiff-Petitioner's Brief, *supra* note 8, at 5.

²⁷ *Id.* at 4–6.

²⁸ *Id.* at 5.

²⁹ *Id.* at 6–7.

³⁰ 393 U.S. 503 (1969).

³¹ Plaintiff-Petitioner's Brief, *supra* note 8, at 7–8. *Tinker* of course upheld student rights to wear black armbands to school protesting the Vietnam War. Justice Fortas, writing for the majority, famously said: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. While recognizing a good deal of discretion for school administrators, the Court affirmed the importance of unfettered free expression of ideas in the school setting when there is no disruption or disturbance by the student speakers, and where there is no interference with the school's work or infringement of the rights of other students, including their right to be let alone. *Id.* at 503.

³² Plaintiff-Petitioner's Brief, *supra* note 8, at 7–8.

Even literary classics are sometimes deemed “offensive” and “unsuitable” by those in positions of power. This unfortunate reality is evidenced by another 1987 school incident in Oregon that was not handled nearly as well as the Tigard incident. Vocal critics succeeded in prohibiting the student theater production of John Steinbeck’s *Of Mice and Men* at Rex Putnam High School in Milwaukie, Oregon, despite accommodative changes made by the school drama instructor and approval from a community advisory committee called in to review the controversy.³³ Apparently the critics objected to some of Steinbeck’s “profane” language. As one disappointed teacher wrote in response to the successful censors:

Those who object to the play need not attend. The mother could forbid her son from performing in it. That is their right. But they then take away our rights by forbidding any of us from viewing it until the play is acceptable by their standards. . . .

Are our freedoms . . . deemed invalid if one person . . . takes offense? Censorship has become the new fundamental tyranny.³⁴ History has shown us too many times what this can lead to.

Returning to petitioner’s brief in the Tigard case, the students distinguished *Bethel v. Fraser*³⁵ on the sensible grounds that no disruption was shown in Tigard and the language, at least on the banned T-shirts, was neither offensive, lewd, or indecent.³⁶

The students’ third argument in their brief, although not fully developed, persuasively asserted that the ban was quite vague, both as written and as applied.³⁷ Further support for this argument and for the related overbreadth argument next discussed, appeared later in the student brief.³⁸

Even more cursorily, the students pointed out some of the potential overbreadth problems with the dress code, noting that at least on its face it would equally ban shirts with legal drug logos as well as pictures or words extolling illegal drugs.³⁹ Though these last two arguments were brief and sketchy, at least the students had the perspicacity to raise them and give our Moot Supreme Court some important additional hooks on which to hang our constitutional hats.

³³ Steven Bell, Letter to the Editor, *Tyranny of Minority*, OREGONIAN, Nov. 21, 1987, at B7.

³⁴ *Id.*

³⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding school discipline of a student speech at an assembly, where the speech was deemed offensively lewd and indecent because of repeated and varied sexual innuendos and deemed by the majority of the Supreme Court to have caused actual disruption of the school function).

³⁶ Plaintiff-Petitioner’s Brief, *supra* note 8, at 8.

³⁷ *Id.* at 9–10.

³⁸ *Id.* at 13–14.

³⁹ *Id.* at 10.

The fifth argument in petitioner's brief creatively argued due process administrative law violations in the failure of the school administration to adhere to its traditional rulemaking process, and in its failure to give adequate advance notice to some of the students penalized that their conduct might lead to discipline.⁴⁰ The brief specifically highlighted the "root BEER" shirt wearer, and contrasted his "no-warning" punishment with the circumstances in *Fraser*, where the school process of having first warned Fraser before he publicly delivered his speech was lauded by the Supreme Court and offered as one justification for upholding the sanction there against Fraser's First Amendment claims.⁴¹

The sixth and final argument in the brief asserted parental rights to control their own children's school dress, at least absent disturbance, interference with the educational mission, or a need for uniformity for safety or identity for extra-curricular events such as athletic teams.⁴²

In addition to the specific legal arguments noted above, several general passages in the student brief demonstrate beyond peradventure that they truly got the fundamental nature of free societies and the values of a system of free expression:

1. Pure content or idea control/censorship is not permissible.⁴³
2. Idea or viewpoint discrimination is highly disfavored.⁴⁴
3. Thought censorship is and should be abhorred in a free society.⁴⁵
4. Rights are not given by governments or those in authority, but belong to people inherently and naturally, and are unalienable, at least on the enlightenment theory of our founding Declaration of Independence.⁴⁶
5. The government or school censor teaches ineluctably, and teaches the opposite message of what needs to be taught and inculcated for the sound development of our students and thinking citizens.⁴⁷

⁴⁰ *Id.* at 10–11.

⁴¹ *Id.* at 11.

⁴² *Id.* at 12–14.

⁴³ *Id.* at 6.

⁴⁴ "[The dress code and the discipline meted out seek] to single out the idea of alcohol and prevent that idea from being communicated." *Id.* at 7. Compare, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁴⁵ Plaintiff-Petitioner's Brief, *supra* note 8, at 12.

⁴⁶ *Id.*

⁴⁷ *Id.* at 12, 15.

6. Discipline, uniformity, and censorship solely for their own sake, no matter how tempting, are impermissible and contrary to our most basic notions of a free, democratic, and diverse society.⁴⁸

7. The best response to “bad” speech, whenever feasible, is not fear or suppression, but more “good” speech.⁴⁹

It is fitting to close this section by returning to the popular song lyric, “teach your children well, . . . teach your parents well.” At the end of the day, Principal Zimmerman was courageous enough to choose to teach his students well; and the students were perspicacious enough to teach their parents and all the rest of us well too. It didn’t take special prodigies, or lawyers, or Supreme Court Justices, just normal, motivated high school students to realize and state in their brief’s conclusion: “Part of education is learning about one’s individuality, . . . including the questioning of standards and rules set by society Suppressing young minds or punishing them for disagreeing with society hurts democracy along with students.”⁵⁰

2. *Defendant-Respondent’s Brief*

Respondent’s brief also began with a recitation of the facts,⁵¹ albeit a sparser version than that contained in petitioner’s filing. The brief then cleverly attempted to define the issue narrowly as to whether the school could constitutionally prohibit a commercially produced Corona beer shirt at school.⁵² Acknowledging that both the First Amendment and the similar speech protection provision of the Oregon Constitution applied, respondent’s brief then confined itself to the federal constitutional issues,⁵³ thereby intentionally or inadvertently placing focus on the more winnable issues since, as noted earlier, Oregon provides more complete protection for expression compared with the protection afforded under the Federal Constitution.⁵⁴

Respondent’s first argument in the brief emphasized the appropriately broad discretion granted to local school officials over educational matters including, at least to some extent, student dress at school. This argument was bolstered with an appealing bow to federalist

⁴⁸ *Id.* at 15.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Defendant-Respondent’s Brief, *supra* note 8, at 1.

⁵² *Id.* at 2. Instinctively or otherwise, all of the students on both sides seemed to have an almost unerring sense for the heart of the matter and what moves courts and decides cases. Here respondents must have sensed that only such a narrow presentation of the issue would give them their most appealing argument. It is of course often the case that the framing of the issue goes a long way to determining the legal outcome of a dispute. As will be seen in Part III *infra*, Chief Justice Roberts defined the issue in Alaska quite narrowly on the way to the Court’s decision in *Morse v. Frederick* upholding the student suspension in the Alaska case.

⁵³ *Id.* at 2.

⁵⁴ See *supra* notes 25–27 and accompanying text.

diversity, decentralization of decision making more generally to respond to local conditions, and the normally greater institutional competence of school officials to make educational and disciplinary decisions in comparison with the courts.⁵⁵ The students also emphasized the school's unquestioned responsibility to regulate illegal activities at school, including illegal drug and alcohol activities, and argued effectively that the dress code rule at issue here was only a modest extension or means of carrying out this clear power and responsibility.⁵⁶

Still on their first argument, the students got to the heart of the substantive First Amendment concerns. They made the indisputable point that First Amendment free speech "is not absolute."⁵⁷ And they made a strong analogy to the commercial speech prohibition of liquor advertising upheld at the time of their research in some instances by a variety of lower courts.⁵⁸ (The Supreme Court's more recent decision in *44 Liquormart, Inc. v. Rhode Island*⁵⁹ of course now raises some serious doubts about respondent's legal position, but there is no way the students should have been expected to anticipate the Supreme Court's much later ruling.) If liquor ads encouraging legal drinking by adults could be banned, the students sensibly argued, then surely the school should be able to prohibit ads targeting kids who cannot legally drink alcohol and ads promoting illegal drugs.⁶⁰ They proceeded to argue accurately that although speech rights are not extinguished for students at school, they are somewhat diminished.

Respondent also relied on *Fraser*, drawing a very different lesson for the Moot Supreme Court than was drawn by petitioner. In respondent's considered view, *Fraser* limited the *Tinker* protective rule to overtly political content and viewpoint, leaving school officials free to regulate matters of the style, decency, or manner of student speech, or to prohibit student "advertising" of alcoholic beverages.⁶¹ Respondent argued candidly for an open balancing test for free speech in the schools, and

⁵⁵ Defendant-Respondent's Brief, *supra* note 8, at 2–3.

⁵⁶ Shades of Chief Justice Marshall's famous argument for implied governmental powers in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), though of course Marshall was careful to point out that such implied powers could not be extended so far as to infringe on constitutionally protected individual rights.

⁵⁷ Defendant-Respondent's Brief, *supra* note 8, at 4.

⁵⁸ *Id.*

⁵⁹ 517 U.S. 484 (1996). A flat ban on signboard liquor advertising might fare somewhat better than the ban on price advertising rejected in *44 Liquormart*, under the majority's reasoning in *44 Liquormart*.

⁶⁰ Defendant-Respondent's Brief, *supra* note 8, at 4.

⁶¹ *Id.* at 5. The students probably should have gotten extra credit for so skillfully trying to lure the court down the primrose path, ignoring and trying to divert attention from the predicate question of whether in fact all of the offending shirts could even conceivably be called commercial advertising. Hence, I assume for this reason, they focused solely on the commercially produced Corona beer T-shirt, while essentially ignoring all of the other shirts.

contended that the administration acted reasonably in the balance it struck between the putative right of self-expression or communication in wearing a particular T-shirt versus the deleterious impact on the school community and the other “captive” students.⁶² Finally, respondent pointed to the power and responsibility of the school to actively inculcate socially desirable values and civility, and argued that the dress code did not prevent the discussion of any idea, including a debate for or against drinking alcohol, or teen drinking, or for or against the administration’s dress code.⁶³

The students representing respondent did an excellent job with their second argument of documenting the serious problems associated with alcohol abuse and especially teen drinking and driving.⁶⁴ Reprising the importance of the vital function of inculcating good and safe values and behaviors, the students drove home their point, and argued that the T-shirt ban was an effective part of an overall comprehensive program that the school pursued throughout its educational program to discourage irresponsible and unsafe teenage behaviors including drinking, especially in conjunction with driving.⁶⁵ They then continued their second argument by anticipating and rebutting two straw arguments they expected to be raised by petitioner.⁶⁶ The point-counterpoint went something like this: If T-shirts are harmless; then why does the industry spend millions of dollars on its advertising logos, etc. and the T-shirts themselves? The T-shirts may be intended by their wearers as fashion statements, not advertisements; even if so, the viewers (other students) will consciously or subliminally see them as advertisements, else again why would the companies bother? This argument presented another worthy example of the students’ effective rhetorical technique relied upon and used by them with sophistication. The students concluded their second argument with the contention that permitting alcohol and drug-related apparel would undermine the finely wrought and carefully woven approved educational curriculum and co-curricular activities and clubs/groups relating to drugs and alcohol.⁶⁷ Certainly this was an effective final flourish to persuade that the school was acting reasonably and well within constitutional norms.

Respondent’s brief argued thirdly that the dress code rule was a permissible health and safety regulation, since alcohol for teens is in effect an illegal and deleterious drug; since the offending shirt was tantamount to a pure advertisement, without other protected content,

⁶² *Id.* at 5–6.

⁶³ *Id.* at 6–7.

⁶⁴ *Id.* at 7–9.

⁶⁵ *Id.* at 7–11.

⁶⁶ *Id.* at 9–10.

⁶⁷ *Id.* at 10.

for “illegal conduct”; and since the T-shirts encouraged actions endangering “the health[, welfare,] or safety of students.”⁶⁸

The students used their fourth and final argument to amplify, recapitulate, and further support what they perceived to be the strongest elements of their earlier arguments, to wit:

1. The First Amendment is not absolute, especially when the content of expression is commercial advertising and especially when expression occurs in a school setting involving minor children.
2. The offending T-shirt in this case is pure commercial advertising, and it in effect advertised an “illegal” product in the context of teenagers.
3. The student viewers constituted an involuntary captive audience and the school authorities acted more than reasonably in shielding them from unprotected and harmful expression.⁶⁹

Upon rereading the briefs, one can only marvel and say that both sides made about the best of the arguments available to them given the state of the law at the time.

As you can therefore imagine, our court found the fine student briefs to be extremely helpful as we prepared for oral argument and thereafter.

3. *Oral Argument*

Tigard High School had no trouble getting good school attendance on November 12, 1987. It was a blustery, cloudy Oregon fall Thursday,⁷⁰ and the morning had been set aside for the students’ oral arguments at an all-school assembly. Various accounts put attendance at 1,600 to

⁶⁸ *Id.* at 12 (quoting *Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980)).

⁶⁹ See Defendant-Respondent’s Brief, *supra* note 8, at 12–14, for the students’ articulation of these three points. Meaning no disrespect to the students, it must be noted that their reliance on *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), for their legal assertions relating to commercial speech was somewhat misplaced. Cases subsequent to *Pittsburgh Press* of course have modified the old rule and make clear that commercial speech is entitled to fairly robust protection in most circumstances. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); or, of much more relevance since they were decided well before the students wrote their brief, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). Still, the students’ main point that commercial speech is entitled to somewhat lesser protection compared with non-commercial speech, and that purely commercial advertising of an outright illegal product is not protected by the First Amendment, is still correct under the Federal Constitution.

⁷⁰ I was hoping to be able to report on a crisp, beautiful blue day, or in the alternative a “dark and stormy night,” but Oregon State Climatologist George Taylor assures me that November 12, 1987, was in fact the more prosaically normal Oregon late fall day as recounted in the text above.

2,000;⁷¹ in either event, I can say from personal recollection that the gym was packed to the gills, and that an electric sense of anticipation was palpable. The gymnasium had been turned into an appellate court room. The nine student advocates for each side (all dressed in coats and ties, suits or dresses—rather than normal school attire or “T-shirts”) were seated at long tables arrayed to the left and right of a stand-up lectern with a microphone, and facing the bench. The nine enrobed Tigard High School Supreme Court Justices⁷² were seated behind an elevated bench looking down at the student advocates and over a sea of expectant faces. Each side was given thirty minutes to present its arguments, but with introductions, announcements, and administrative details, the assembly consumed most of the morning, nearly two hours in all. The students’ arguments and spirited dialogue with members of the court were unquestionably the central act of this drama that effectively “ke[pt] 1600 high school students [and the other attendees] spell bound”⁷³ and “several [of the] judges said they had never seen a group of students so totally involved as [the] entire student body was.”⁷⁴

After the crowd settled in and preliminary matters were concluded, the court was called into formal session by the student bailiff. As Chief Justice, I announced that on this occasion of the bicentennial year of our Constitution, the assembled throng was about to see “constitutional law applied to a real, everyday problem[,]”⁷⁵ and that the appointed time had arrived for oral argument in Case number 1, *J.R. Thomas, Petitioner v. Tigard High School District 23J, Respondent*. Student attorneys for both parties acknowledged that they were ready to proceed. “Mr. Chief Justice and may it please the court” intoned the first advocate for petitioner J.R.

⁷¹ Compare Press Release, Oregon Law-Related Education Project, Tigard Ruling (Nov. 20, 1987) (on file with author) with Allen, *supra* note 4, at F12. I am inclined to credit Martha Allen’s larger estimate of 2,000 for three reasons: 1) Tigard High School had 1600 students and by all accounts virtually all of them were in attendance; 2) There were quite a number of additional interested spectators including parents, interested members of the Tigard community, members of the legal profession, and the media; and 3) Martha Allen was present and both her and my own sense of the crowd put it in the range of 2,000.

⁷² The Court was composed of Chief Justice Stephen Kanter—that was me—dean and professor of law of Lewis & Clark Law School; and the following Associate Justices: Jenny Cooke, appellate lawyer; Barbara Safriet, professor of law and later associate dean at Yale Law School; Dan Ellis, chair of the State Employment Relations Board; Emily Simon, trial and appellate lawyer; Diana Stuart, criminal defense attorney; Roberta Hutton, Oregon School Boards Association; Owen Blank, attorney; and Betsy Coddington, with OLREP. Allen, *supra* note 4, at F12.

⁷³ Richard Sanders, OLREP, Internal Memorandum, Tigard Moot Court as an OLREP Service Model, at 2 (Dec. 18, 1987).

⁷⁴ The justices’ comments were cited in a December 18, 1987, letter to Principal Zimmerman from OLREP commending everyone involved for the exemplary manner in which the entire matter was handled. Letter from Richard Sanders, Or. Law-Related Educ. Project, to Al Zimmerman, Principal, Tigard High Sch. (Dec. 18, 1987) (on file with author).

⁷⁵ Allen, *supra* note 4, at F12.

Thomas from the lectern in a clear, slightly nervous, yet commanding voice. This was followed by a well orchestrated argument driving home the importance of substantive free expression protections of both the Oregon and United States Constitutions.⁷⁶ The student advocates also gave separate and quite vigorous emphasis to their contention that Principal Zimmerman's dress code rule was unconstitutionally and unfairly vague and overbroad as written and applied. At several relevant points, as one of their colleagues was arguing from the lectern, three of the students rose from petitioner's counsel table and held up a number of the T-shirts for demonstrative purposes. The evident similarity of the shirts, some of which were deemed improper and some proper under the dress code, was a most effective forensic approach and it caused Associate Justice Emily Simon to ask perplexedly: "But which one is illegal?"⁷⁷ The student advocates had scored a telling rhetorical and constitutional point.⁷⁸

Next came respondent's turn, with nine student advocates standing up and arguing for their school district and principal, and courageously against their fellow students. They worked to shift the court's attention to ground more favorable to their assigned cause. They pushed hard on the desirability and necessity for broad educative discretion to be left in the hands of local school officials, without the debilitating fear that legal Monday morning quarterbacks would be looking over the educators' shoulders after the fact. Respondent students also graphically emphasized the dangerous reality of the cocktail of drugs, alcohol, and teen behaviors. And they labored mightily to persuade that the offending T-shirts had very little communicative value aside from merely advertising products that were illegal, or at least illegal for underage teens.

The court was active; probing and challenging the student arguments from both sides, and necessarily taking the students to uncomfortable depths off script. Impressively, the student advocates on both sides gave as good as they got. Like well-trained relay teams, the students at the lectern seamlessly handed the rhetorical baton to another of their colleagues, almost always at what seemed to be just the right moment.

The justices pressed petitioner's student attorneys hard, asking them to concede that drug and alcohol abuse was disruptive of the educational process, a very serious societal problem, and that teen drinking and driving was an all too common cause of tragic death. Student attorney Brown responded:

⁷⁶ OR. CONST. art. I, § 8; U.S. CONST. amend. I.

⁷⁷ Allen, *supra* note 4, at F12.

⁷⁸ It is interesting to compare this effective demonstrative argument with the ham-handed effort by O.J. Simpson's prosecutors (real, allegedly experienced lawyers) that opened the door for Johnnie Cochran to rhyme in his closing argument, "If it doesn't fit, you must acquit."

There is no proof that wearing these shirts is disruptive to the . . . learning environment, though [it may be] threatening to the administration. Wearing shirts is not advocating the drinking of alcohol. It's a way of expressing rebellion, or a social fad, or even cultural heritage, in the case of Corona symbols. It's expressing an idea, not advocating consuming alcohol.⁷⁹

Taking on directly the issue of teen drinking and driving that was the utmost and evident concern for many members of the court (and one of the principal's main stated reasons for the rule), petitioner's attorneys intelligently conceded that this was a serious problem, but argued strongly that it was a mistake to connect this problem to the wearing of expressive T-shirts. Counsel contended that in order to justify restrictions in this case, the school should be required to carry the burden of showing causation between the T-shirts and the harm at the highest level of "clear and present danger." Instead, they argued, it had not been established that "[t]here [was] . . . even the mere possibility of something happening to students as a result of wearing the shirts."⁸⁰

The justices bore in on respondent's arguments just as vigorously. Pointed questions expressed justices' concerns that respondent's position, if adopted, could undermine the core value of the individual right to student speech and self-expression. And one of the justices expressed skepticism about any sufficient countervailing interest, asking: "Who is harmed by these T-shirts?" Student Sediwy acknowledged that the T-shirt wearers had rights, but she urged the court to take account of the fact that the other students had to be in school, in some sense as a captive audience, and that they had rights too. She urged the court to weigh the rights of the relatively few petitioners "against the rights of many[.]"⁸¹ As to the question of whether these apparently prosaic shirts, symbols, and logos were any more than harmless fashion, student Ball noted the sophistication and effectiveness of advertising, that big business invested lots of money in the logos, and that even if student wearers "think of their shirts [only] as fashion, . . . that doesn't take away the impact of the logo."⁸² Student Bonham backed up his colleague and amplified further in response to the court's questions that students are taught powerfully by "example and atmosphere[.]" and that "[w]earing these T-shirts represent statements that subvert the educational process."⁸³ Respondent's counsel concluded by urging the court to uphold the rule and the discipline imposed, and reemphasized their contention that the shirts were nothing more than advertising of illegal and dangerous products and behaviors, contrary to the school's

⁷⁹ Allen, *supra* note 4, at F12.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

educative message “in health and psychology classes,” and well within the school’s power to prohibit.⁸⁴

Court was adjourned, the justices left the gymnasium to go into conference, and the audience was abuzz with congratulations for the participants, and anticipation as to how the court would resolve the matter. In conference, the court unanimously directed Mr. Sanders, who was serving as chief law clerk, to put out a statement once an opinion had been rendered, “commending the student attorneys.”⁸⁵ There was no hyperbole in the court’s expressed sentiment that all of the student advocates did an “exemplary job of presenting both sides of the complex issue well.”⁸⁶ This was followed up in the opening line of the court’s subsequent November 20, 1987, opinion which further recognized the “outstanding efforts of the student attorneys . . . in many ways [their] briefs and oral arguments compared favorably with those of seasoned practitioners.”⁸⁷

B. The Tigard High School Moot Supreme Court Opinion

In chambers after oral argument, the nine members of the court and the “clerk”⁸⁸ marveled at the poise of the student advocates and the profound nature of the educational event we had all just witnessed. We discussed the unique circumstance that the matter had come to us as an original jurisdiction case, without benefit of a trial court record, and we agreed that we should therefore only expressly rely on facts agreed to by all of the parties. We might consider other factual allegations from either side, but would treat them with some caution and not presume their truth. Next, we discussed the merits of the case with some vigor. Eventually a straw vote indicated that all nine justices favored a result reversing the school’s disciplinary actions, with each justice agreeing at a minimum that there were serious vagueness and overbreadth problems. Several justices suggested broader or narrower *rationales* for reversal. I assigned Associate Justice Jenny Cooke the task of drafting an opinion for the court, and encouraged others to circulate any different views they had in writing. Justice Cooke circulated her first draft on Tuesday, November 17, which I then edited. I also crafted a draft concurring opinion, and Justice Owen Blank wrote another separately concurring opinion. I then met with Mr. Sanders on Wednesday, November 18, and we put finishing touches on the three separate opinions and then

⁸⁴ *Id.*

⁸⁵ Press Release, Oregon Law-Related Education Project, *supra* note 71, at 2.

⁸⁶ *Id.* In the later commendatory letter sent to Principal Zimmerman on December 18, 1987, it was correctly stated that “the work of your students who . . . argued the case was very very impressive. Every member of the court commented on their presentations.” Letter from Richard Sanders, *supra* note 74.

⁸⁷ *J.R. Thomas v. Tigard High Sch. Dist.* 23J, 1 Moot S. Ct. of Tigard High Sch. 1, 1 (1987).

⁸⁸ Richard Sanders, lead OLREP staffer for this project.

circulated them one more time to all members of the court.⁸⁹ Each member of the court assented to Justice Cooke's opinion as modified, and we had an unanimous opinion for the court. Justice Blank filed his opinion expressing his additional views as a separate concurrence, and Justice Diana Stuart signed on to my broader opinion for an additional concurring opinion. The next day, one week after argument, Thursday, November 19, Mr. Sanders met with Principal Zimmerman to share a copy of the court's opinion and alert him that it would be released the next morning. Finally, on Friday, November 20, 1987, OLREP issued a press release announcing the result and attaching the full decision of the court.⁹⁰

Justice Cooke's opinion for the court began with justifiable commendation for the student advocates, for the principal and school administration, for the student body, and with thanks to OLREP for its assistance.⁹¹ Next, the court cautioned that its decision was advisory only, and not legally binding, and that the court lacked authority to resolve factual disputes, or to make findings of fact, since it was an appellate court without the capacity to hear evidence.⁹² For purposes of rendering its decision, however, the court presumed the validity of the main facts that were essentially agreed to by all of the parties,⁹³ and mentioned several additional factual assertions made by petitioner that were not disputed, but also were not expressly agreed to, by respondent.⁹⁴

Reaching the merits and relying on the agreed upon facts, the court held that the dress code rule was unconstitutionally vague on its face; that said vagueness was, if anything, "exacerbated" by the school's uneven attempts at enforcement; and that it could not reasonably and sufficiently be clarified by judicial interpretation.⁹⁵ The court expressed "particular concern" about the rule's vagueness because its coverage and application might have tended to "chill or deter individuals from engaging in constitutionally protected expression."⁹⁶ The court also more briefly held

⁸⁹ This was before the advent of email, of course, and we relied on fax machines and the willingness of Mr. Sanders to hand deliver some copies and get final signoff from each justice.

⁹⁰ *Thomas*, 1 Moot S. Ct. of Tigard High Sch. at 1. A copy of the full text of the decision is available from the author, from the Classroom Law Project, or from the law library at Lewis & Clark Law School.

⁹¹ *Id.* The Court "applaud[ed] the courage and creative leadership" of the school principal, and noted that "this most . . . valuable educational forum" was especially appropriate in 1987, the bicentennial year of the drafting and signing of the United States Constitution. *Id.*

⁹² *Id.* at 1-2.

⁹³ *Id.* at 2-3.

⁹⁴ *Id.* at 3-4. For a detailed description of the facts and circumstances of the Tigard incident, going somewhat beyond the facts relied upon in the Court's opinion, see *supra* notes 7-24 and accompanying text.

⁹⁵ *Id.* at 4-6.

⁹⁶ *Id.* at 5.

that the dress code rule was overbroad because it prohibited some speech that was neither disruptive nor dangerous, and that was therefore entitled to protection even in the limited setting of a public high school, where students' rights "may not be co-extensive with those of adults."⁹⁷ The court's opinion concluded that no reasonable narrowing, saving construction of the rule was possible.⁹⁸

In view of its holding that the dress code rule was unconstitutionally vague and overbroad (on its face and as applied) in violation of both the Oregon and United States Constitutions, and that it could not be saved properly by a narrowing construction, the court found it unnecessary to reach other issues, and it declined to do so.⁹⁹

Justice Blank joined the majority opinion, but wrote separately to express his view that the rule, in the context presented and on the showing made, also infringed the rights and responsibilities of parents and their children to choose clothing, within limits, for school attire.¹⁰⁰ In an admitted *obiter dictum*, Justice Blank concluded his concurring opinion with some words of wisdom:

Finally, a student may have the right to wear an illustrative T-shirt. Nevertheless, a student and his or her parents, after considering appropriate factors, may well decide that the student will not wear the T-shirt to school.¹⁰¹

Chief Justice Kanter, joined by Justice Stuart, penned a second concurring opinion. This concurrence also subscribed to the full court's "opinion and decision," but the justices wrote separately to reach and resolve the substantive free speech issues more directly and emphatically than the court had been willing to do.¹⁰² The Chief Justice's concurrence would have held explicitly that the dress code rule, "by intent and effect," sought "to control the content of student expression" without sufficient

⁹⁷ *Id.* at 6–7.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 4. These issues included the important question of whether a valid rule could have been promulgated and enforced to prohibit the conduct that was of concern to the school administration, *id.*, and the separate procedural question raised by petitioner as to whether the rulemaking process violated the school's own administrative practices to the extent that the rule should be struck down independent of its content. *Id.* at 4 n.5.

¹⁰⁰ *Id.* at 7–8 (Blank, J., concurring). In reaching this conclusion, Justice Blank noted that in this case there was no claim that the parents and children disagreed about clothing choice, with the implication that the combined right he was relying upon was therefore at its peak. He also acknowledged that this right was far from absolute and that schools could regulate student clothing "to prevent disruption of classroom activities," perhaps among other things, but that the school had not met its "great" burden to make such a showing in the instant case. *Id.*

¹⁰¹ *Id.* at 8. Justice Blank gave this as an exemplar of the general fundamental proposition that "precisely" because our hard earned constitutional rights are "so precious, we should [all] use [particularly] good judgment when we exercise them." *Id.*

¹⁰² *Id.* at 8.

justification, and that the rule therefore should be struck down on its merits as a violation of article I, section 8 of the Oregon Constitution, and as a violation of the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment.¹⁰³ The philosophical heart of the concurrence follows:

Respondent's concerns about the dangers of alcohol and drug abuse, and the attendant dangers of impaired driving, are laudatory. But the response of suppressing expression among high school students is highly unlikely to be efficacious in reducing these dangers and, in any event, runs afoul of vitally important constitutional safeguards. Our constitutions' commitment to virtually unfettered free expression is an historically bold experiment. Two hundred years of experience have established the wisdom of this experiment beyond doubt. History also teaches that even seemingly minor and well intentioned violations of free speech rights, if left unchecked, increase the risk and acceptability of more substantial and deleterious breaches. The proper antidote for noxious or wrongheaded expression is, as Justice Holmes so aptly put it, more expression and the full airing of competing views, rather than the heavy hand of imposed silence. This commitment to full expression is especially appropriate for an educational environment.

This case itself demonstrates the wisdom of the framers' choice. We are confident that the robust disagreement and discussion around the "T-shirt" controversy has done more than imposed drab attire and silence ever could have done to raise the level of knowledge and responsibility about the risks of drug and alcohol abuse in the Tigard High School community. Even more, we are persuaded that the exercise has promoted the active use of and argument about our constitutions. A more fitting bicentennial birthday gift is hard to imagine.

The students and community are fortunate to have a principal and staff committed to an exchange of ideas and the rule of law, rather than fiat, to resolve this issue.¹⁰⁴

III. THE 2002 JUNEAU, ALASKA "BONG HITS 4 JESUS" BANNER CASE

It is a safe bet that the weather in Juneau, Alaska, on January 24, 2002, was a good deal colder than the weather had been in Tigard, Oregon in September or on November 12, 1987. Nonetheless, intrepid torch bearers kept to their appointed rounds and carried the Olympic flame along the street passing in front of Juneau-Douglas High School (JDHS) on its long journey to the Salt Lake City Winter Olympiad.

¹⁰³ *Id.* at 8–9.

¹⁰⁴ *Id.* at 9–10.

Principal Deborah Morse decided, cold or no, to take advantage of this relatively rare moment of national “northern exposure,” and she allowed students to leave their classrooms and staff members to leave their posts to go outside and watch the “relay from either side of the street.”¹⁰⁵ Joseph Frederick, a senior, was not in school to hear the principal’s announcement. He was, in the common vernacular, absent, tardy, truant; curiously, Chief Justice Roberts put it more ambiguously that he “was late to school that day.”¹⁰⁶ Frederick took up a position on the opposite side of the street facing the school where he joined up with some of his friends, including one who was not a student at JDHS.¹⁰⁷ It may not have been a good day for *bananafish*,¹⁰⁸ but to Frederick and his buddies it looked to be a good day to get on national TV. “As the torchbearers *and camera crews* passed by, Frederick and his friends unfurled a fourteen-foot banner bearing the phrase: ‘BONG HiTS 4 JESUS.’”¹⁰⁹ Mission accomplished. The TV cameras rolled; really what else was there to cover?

Principal Morse sprang into action (no doubt warming her blood in the cause), crossed the street, and “demanded that the banner be taken down. Everyone but Frederick complied.”¹¹⁰ (One wonders how he held up a fourteen-foot banner all by himself, or did he just hold up his part with the rest drooping sadly to the ground?) In any event, Principal Morse prevailed as she “confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days.”¹¹¹ Frederick filed an administrative appeal with the Superintendent which was denied on the merits, though the Superintendent did commute the sentence to eight days suspension, time served.¹¹² The Board of Education upheld the suspension. This was not the end of the matter.

Frederick (or his parents) obtained counsel, and a federal case was born. He filed a section 1983 action in Federal District Court in Alaska appropriately seeking declaratory and injunctive relief, but also seeking compensatory damages in an unspecified amount and attorneys’ fees (of course) and even punitive damages against principal Morse and the

¹⁰⁵ Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

¹⁰⁶ *Id.* This ambiguity of course made it far easier for the Chief Justice to assert that student Frederick was present and participating in a school activity, rather than that he had blown off school and showed up as a citizen on a public thoroughfare to watch the torch pass by and take his shot at fifteen minutes (seconds more likely) of fame on national TV.

¹⁰⁷ *Id.*

¹⁰⁸ With apologies to J.D. Salinger, but given his rather reclusive nature, perhaps apologies are superfluous.

¹⁰⁹ Morse, 127 S. Ct. at 2622 (emphasis added).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 2623.

school board.¹¹³ The District Judge granted summary judgment for defendants, Frederick appealed, and the Ninth Circuit reversed.¹¹⁴ With the tables turned, defendants then petitioned the Supreme Court for a writ of certiorari, which was granted.¹¹⁵ Finally, almost five and one-half years after the torch passed by JDHS and after several more Olympic games were concluded, the Supreme Court issued its decision on June 25, 2007, reversed the Ninth Circuit, and ruled that Frederick's First Amendment rights had not been violated. The case was remanded for proceedings consistent with the Supreme Court's opinion, that is for dismissal of the lawsuit.¹¹⁶

Joseph Frederick's clever but "immature antic"¹¹⁷ has consumed the efforts of renowned legal talent and produced from the Supreme Court something of a "fractured fairy tale" opinion.¹¹⁸ Although Chief Justice Roberts did manage a bare majority of five for his opinion, the truth is that of the five separate opinions penned by different Justices, none commanded full adherence from more than two other Justices without qualification or reservation. Justice Stevens's dissent obtained full support from Justices Souter and Ginsburg, two of the four Justices who resisted the urge to take up the pen. The Chief's opinion for the Court actually only garnered one other unqualified adherent, Justice Scalia, who also somehow managed to resist the temptation to write on this fun topic.

Justices Alito and Kennedy were in sync with each other, joining the majority opinion, but working hard in concurrence to qualify and limit the reach of the decision to a very narrow category of facts. Justice Thomas, concurring, and Justice Breyer, concurring in the judgment in part but also dissenting in part, each traveled the lonely path of staking out their own positions without gaining support from anyone else on the Court. Justice Thomas ostensibly joined the majority opinion, then spent the rest of his concurrence explaining why the majority's jurisprudence and understanding of the First Amendment were fundamentally wrong. Joseph Frederick, where are you now? You surely got more than the fifteen seconds or minutes of fame for which you were hoping.

¹¹³ *Id.* Where are the pro bono attorneys willing to file principled test cases when we need them?

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2624.

¹¹⁶ *Id.* at 2629. Perhaps turnabout will seem to be fair play to the principal and school board, and they now will seek attorneys' fees and costs from Mr. Frederick.

¹¹⁷ *Cf.* *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., with whom Burger, C.J., and Black, J., join, dissenting).

¹¹⁸ If you are at a loss with respect to this reference to *The Adventures of Rocky and Bullwinkle*, a TV show, you may be culturally deprived and are advised to take immediate remedial steps at your local video store.

A. *Chief Justice Roberts's Majority Opinion for the Court*

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use.¹¹⁹

Chief Justice Roberts opened his fifteen-page opinion for the Court with the above sentence. Any astute reader knew as soon as he reached the end of the sentence that school was out for Joseph Frederick and that the principal and the school board had won a complete victory from the Supreme Court. If the opening sentence did not fully decide the case, it at least framed the issue in a way that colored the analysis and led almost ineluctably to the Court's result in favor of the defendants.¹²⁰ As explained later,¹²¹ the Chief's assertion (distressingly accepted by all nine members of the Court) that Joseph Frederick should be treated as a student participant in a school-sanctioned event was quite probably wrong. It is said that "hard cases make bad law;" it may even be more true that "bad or inaccurate record facts make bad law."

The reason for the Chief's likely "error" was that the Superintendent (administratively), the board, and both the district court and the Ninth Circuit, all previously had accepted the same factual conclusion, either as a finding of fact or as an assumed or already decided fact. The Supreme Court is not a trial court, does not take evidence, and normally accepts historical record facts found in proceedings below.¹²² Still, at a minimum, Chief Justice Roberts should have discussed the facts more critically.

¹¹⁹ *Morse*, 127 S. Ct. at 2622.

¹²⁰ It is of course frequently true that the framing of an issue, or the statement of the questions before a court, go a long way toward determining the outcome of a case. For further discussion of this point that often proves so important for effective advocates, see Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 686–87 (2006).

¹²¹ See *infra* note 133, and text accompanying notes 240–41.

¹²² The Supreme Court does take evidence—most often through a special master—in original jurisdiction and a few other kinds of cases, and reserves to itself in all other cases the right to disregard findings of fact that are unsupported by the record or have other serious defects. The Supreme Court even occasionally rejects stipulations of the parties accepted by the courts below. See, e.g., *Powell v. Texas*, 392 U.S. 514, 521 (1968). But these are rare exceptions that prove the general rule. Of course, the Supreme Court appropriately must make its own final determination of "constitutional facts," conclusions of constitutional law or mixed questions of historical record facts and law. These later considerations are especially important in First Amendment cases. See, e.g., *Miller v. California*, 413 U.S. 15, 25–37 (1973) (holding that obscenity is not protected First Amendment speech; approving a framework and procedures for States to define and punish obscenity, including allowing for some national variance through reliance on local community standards ascertained by properly instructed jurors; but ultimately reserving to the Supreme Court the final authority and responsibility to make its own determination of obscenity *vel non* and to reverse convictions when the Court concludes that the speech is protected and not obscene); see also *Jenkins v. Georgia*, 418 U.S. 153 (1974).

Chief Justice Roberts's second assertion in his opening sentence, that principal Morse reasonably read the message on the banner as simply and directly promoting illegal drug use, is even more problematic, and did raise some objection from his colleagues.¹²³ The Chief Justice was being a good advocate for his ultimate position in choosing phraseology the way he did for his first sentence; a consummate skill he mastered in his former career as one of our nation's most effective appellate attorneys. It is not clear, unfortunately, that he was in this instance being a good judge, whose highest duty should be to state the case with objective neutrality.¹²⁴

Once having set the case in a warming light favorable to defendants, and adding further insulation by noting that principal Morse was reasonably following established school board policy,¹²⁵ the Chief Justice amplified the facts a little further,¹²⁶ then proceeded to his legal analysis.

The majority acknowledged that students and teachers do not entirely "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,"¹²⁷ and then made the unremarkable, qualifying point that "constitutional rights of students in . . . school are not . . . coextensive with [those] of adults in other settings."¹²⁸ In order to

¹²³ Two problems with the Chief Justice's conclusion, *inter alia*, are that the banner speaks for itself and its "reasonable interpretation" should primarily be a matter of law and not historical record fact; and that it is dangerous and inimical to the values of free expression to allow the protected nature of expression to depend upon the views, even reasonable views, of a viewer or listener, rather than focusing on the words themselves and the intent of the speaker.

¹²⁴ This is not quite the same notion as Herbert Wechsler's *neutral principles*, but it partakes of the same legitimacy and appearance of fairness concerns. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹²⁵ *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007). A good and faithful soldier and bureaucrat in the school versus student tug-of-war deemed to be was she.

¹²⁶ One set of additional facts he mentioned are particularly instructive. "Not all the students waited [for the torch parade] patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates." *Morse*, 127 S. Ct. at 2622. Tellingly, there is no mention that these clearly disruptive students were disciplined in any way, whereas Joseph Frederick's "act" of *defiantly* holding up a banner and potentially embarrassing the school on national TV, or opaquely and obliquely urging others to smoke marijuana, warranted a ten-day suspension! The Chief presumably gave us these facts to persuade that this was a volatile situation in need of some control; ironically, he far more clearly made the point that the principal's punishment of Frederick was unnecessary, disproportionate, unjustified, and out-of-control.

¹²⁷ *Morse*, 127 S. Ct. at 2622 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (upholding the right of non-disruptive students to wear black arm bands to school to protest the Vietnam war, and reversing school discipline imposed on said students).

¹²⁸ *Morse*, 127 S. Ct. at 2622 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)) (upholding the discipline of a student for making a speech at a school assembly with repeated sexually charged innuendos and double entendres, after having been specifically warned to change the speech and warned that giving the speech without change would result in sanctions).

calibrate the degree to which retained student rights are modified from adult rights, it is necessary to account for the students' youth, and for any relevant "special characteristics of the school environment."¹²⁹ The Chief Justice appropriately quoted this language contained in *Tinker* as well, but began to get into somewhat more dangerous and deleterious water by citing *Hazelwood School District v. Kuhlmeier*,¹³⁰ quoting *Tinker* for this last proposition, rather than just quoting *Tinker* directly.¹³¹ This was an unfortunate choice since the result and, even more, the underlying philosophy in *Kuhlmeier*, have contributed perniciously to the Court's recent wrong-headed direction with respect to student rights in public schools.¹³²

Chief Justice Roberts reiterated that Frederick "cannot . . . claim he [was] not at school[.]" and that this case should therefore be treated as a school speech case.¹³³ The Chief Justice forthrightly but perhaps *unwisely*¹³⁴ conceded that the suspension must be justified, if at all, on the ground that it was imposed as a response to Frederick's speech-related expressive banner, and not to other non-speech related misbehavior in which he may have engaged.¹³⁵ The opinion then turned to the large, but enigmatic, banner itself and to the interpretation of its message.¹³⁶ The Chief described the message alternately as "cryptic," "offensive," "amusing," or meaningless to various observers; claimed "nonsense" to get on TV by the speaker Frederick; but that Principal Morse thought that others viewing the banner would see it "as promoting illegal drug

¹²⁹ *Tinker*, 393 U.S. at 506.

¹³⁰ 484 U.S. 260 (1988).

¹³¹ *Id.* at 266.

¹³² See *supra* note 15 and *infra* notes 146–48 and accompanying text, and *infra* note 165.

¹³³ *Morse*, 127 S. Ct. at 2624. But suppose hypothetically that Frederick had not been confronted by the principal, and he left after the torch parade without ever entering the school. Query whether he could have complained if he had been marked absent for the full day?

¹³⁴ I mean to use "unwisely" somewhat ironically and only in the sense of the Chief otherwise seeming to advocate a result favoring defendants. See *supra* note 120 and 124, and accompanying text.

¹³⁵ *Morse*, 127 S. Ct. at 2624. The Chief Justice found it necessary to make this concession to avoid the possibility that the case could have been resolved on qualified immunity grounds, as urged by Justice Breyer. Justice Breyer's approach would have vitiated the need and justification for reaching and deciding the merits of the free speech issues. In this regard, discretion might have proved to be the better part of valor, assuming (as was apparently not the case) that five Justices would have been willing to resolve the case in this minimalist and more restrained manner.

¹³⁶ It might have been well at this point for everyone to have remembered Marshall McLuhan's aphoristic wisdom, "the medium is the message," and recognized that the medium here (i.e. the "silly" banner, **large enough** to catch the hungry eye of TV) was indeed the crux of the message, or, at least, more important to all concerned than any imagined content of the message.

use.”¹³⁷ In fixing on the principal’s interpretation, more precisely her perception of what others were likely to perceive when observing the banner, the majority also noted that Frederick tried to claim the banner was “meaningless and funny,” and that the dissenting Justices described the message as “curious,” “ambiguous,” “nonsense,” “ridiculous,” “obscure,” “silly,” “quixotic,” and “stupid.”¹³⁸ Sounds kind of like the teenager’s point to me; maybe Frederick did a pretty good job of communicating his intent after all.

Curiously, the majority seemed to accept, at least *arguendo*, that the student’s intent or “motive” was just to display an outrageous nonsense banner to get on TV,¹³⁹ but then discounted the importance of speaker intent or motive. At the same time, the majority credited and deemed nearly conclusive the principal’s subjective, if reasonable, guess about what other viewers would take as the message of the banner. This runs counter to the usual First Amendment focus on speaker intent and a stricter-than-usual scienter requirement, as safeguards against trapping the unwary or chilling valuable protected speech by the timid among us.¹⁴⁰ The majority’s analysis elevates dangerously the perception of the viewer/listener above the actual content of the expression and the intent of the speaker, risking a sort of heckler’s veto or a reduction of public discourse to the most sensitive sensibilities among us.¹⁴¹

The majority did go to some pains to assure us that this was not a case of political speech, suggesting rather strongly that they would refrain from using their weakened mode of analysis in such a case. I have some sympathy with the Court’s conclusion that Frederick’s expression was not pure political speech, though the line between what is political/religious/social issue speech and what is not is far from clear. Normally speaking, in any event, erring on the side of latitude on this and other questions is one of the cardinal safeguards protecting a robust system of free expression.¹⁴²

¹³⁷ *Morse*, 127 S. Ct. at 2624. Again, the majority avers that the principal’s conclusion in this regard was “plainly . . . reasonable.” *Id.*

¹³⁸ *Id.* at 2625.

¹³⁹ *Id.*

¹⁴⁰ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Smith v. California*, 361 U.S. 147 (1959).

¹⁴¹ Compare *Morse* with, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Feiner v. New York*, 340 U.S. 315 (1951); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

¹⁴² Chief Justice Roberts emphatically made exactly this point in another First Amendment opinion he issued on the same day as *Morse*. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (noting that if the “First Amendment is implicated, the tie goes to the speaker”). The Chief Justice attempted to avoid (unsuccessfully and without much explanation in my opinion) the consequences of this salutary bedrock principle of First Amendment jurisprudence by exempting school speech and possibly all non-political speech situations from its operation. *Morse*, 127 S. Ct. at 2625.

The majority next conducted a quick tour through the Court's relatively few modern-era student speech cases. *Tinker* was distinguished because it unimpeachably dealt with core political speech on the most contentious, galvanizing political issues of its day,¹⁴³ while Frederick's banner allegedly only promoted illegal drug usage without advocating legalization, or at best was simply irreverently silly. *Fraser*, as is acknowledged by the Court, lacked clarity in its mode of analysis, on the one hand suggesting that some content control is permissible in student speech cases, while on the other hand suggesting that it was just the arguably inappropriate time, place, or manner of Fraser's sexual innuendos that prevented his speech from being protected.

The *Morse* Court declined the opportunity to clarify *Fraser*, thereby postponing a big and crucial question for another day, and giving some legs to the broader and more damaging interpretation.¹⁴⁴ Instead, the majority found use in *Fraser* (before kicking it rather unceremoniously to the side) for the already noted verity that kids' school rights are not the same, or as robust, as adults' speech rights.¹⁴⁵ Next, the majority repeated *Fraser's* quote from *Tinker* presumably trying to give emphasis to the constitutional significance of "special characteristics" presented in a school setting.¹⁴⁶ This was just an appetizer for the Court's more troubling reliance on *Kuhlmeier*, which, together with *Fraser*, was

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2626.

¹⁴⁵ As noted, this is because of the students' youth, and also because of the school setting. (Frederick himself was actually eighteen at the time of the incident and was an adult, not a juvenile, under Alaska law. The majority mentions this fact, then largely ignores its significance, focusing instead on the underage students in the "audience" viewing the Bong Hits banner.) The school setting does have three characteristics that are relevant to student speech rights: (1) The primary function is to carry out an effective educational program that would be impaired by any untoward "material and substantial disruption"; (2) The schools have a desirable role in helping to inculcate civic values to prepare the next generations of voting citizens (but in general this is done best in an atmosphere of robust academic freedom where a good deal of play is allowed for the discussion, exploration, and practice of rights and responsibilities); and (3) Students other than the speaker may in some senses and to some extent be considered a captive audience. The mere incantation of a school setting is not, however, a general justification for reduced student rights, unless the reduction is analytically moored, justified, and carefully tailored to one or more of these three factors. While adults have "full constitutional rights," it may be worth noting that even their free speech rights are more limited in certain fora that do not share the characteristics of the quintessential public parks, public streets, or the public square. *Compare, e.g.,* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) *with* *Greer v. Spock*, 424 U.S. 828 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Adderley v. Florida*, 385 U.S. 39 (1966).

¹⁴⁶ *Morse*, 127 S.Ct. at 2626. Am I the only one who feels the chill of similarity of the "special needs" doctrine being imported from our troubled Fourth Amendment jurisprudence, or the related "public safety" exception grafted onto our Fifth Amendment jurisprudence in the ill-fitting facts of *New York v. Quarles*, 467 U.S. 649 (1984)?

employed by the Chief Justice for the general, non-specific proposition that *Tinker* would not be viewed as a test for all seasons of student speech.

As the majority put it directly, “the mode of analysis set forth in *Tinker* is not absolute.”¹⁴⁷ What they meant unfortunately was that the *Tinker* analytical framework need not be followed **at all** in some classes of school speech cases. It is not possible to confine the majority’s meaning to either the somewhat less troubling possibility that the Court was just tailoring the *Tinker* analysis, rather than allowing outright exemptions to it, to fit circumstances different from those presented or contemplated in *Tinker*, or to read the majority for the entirely unremarkable proposition that neither *Tinker* nor any other Supreme Court decision gives absolute protection for all speech. More particularly, the majority at least implicitly reiterated and strengthened the most troubling aspects of *Fraser* and *Kuhlmeier* by asserting that in addition to the specific grounds relied on in those cases for suppressing student expression (which one would have hoped were fully limited to their own factual circumstances and categories) the cases also should be read as providing general license to find other new bases and exceptions for regulating student expression.

These new censorial prohibitions would need only to rely on “special characteristics,” said characteristics to be determined at a later time, that would serve to exempt the speech from a *Tinker*, or even a *Fraser* or *Kuhlmeier* analysis. The problem is that there are almost always “special characteristics,” “special needs,” or apparently weighty balancing factors offered up whenever government officials are tempted to suppress speech. This is a dangerous path to tread, and it runs afoul of the Court’s hard-won and carefully constructed categorical approach best epitomized in Justice Harlan’s insightful and speech-protective opinion in *Cohen v. California*.¹⁴⁸

The majority acknowledged that *Kuhlmeier*, relying as it did on a claimed school editorial control akin to that of an owner/publisher, and also relying on a fear that the student journalists’ speech would be falsely attributed to the school or to other students with different views, could not control the instant case because the school obviously did not have editorial control over Joseph Frederick’s banner, and no one would assume his message came from the school or had its “imprimatur.”¹⁴⁹ Instead, and more ominously, *Fraser-Kuhlmeier* are being extended beyond their narrow—even if misguided—exceptions to a potentially broader invitation to circumscribe student speech in a whole new variety of ways.

¹⁴⁷ *Morse*, 127 S.Ct. at 2627.

¹⁴⁸ 403 U.S. 15 (1971).

¹⁴⁹ *Morse*, 127 S. Ct. at 2627. Ironically, Justice Stevens, though dissenting, seemed more willing to embrace the possibility that others might think badly of the school if it allowed Frederick’s banner to be seen on national TV, suggesting somehow that the school’s imprimatur might be inferred by the viewing audience. *Id.* at 2643 (Stevens, J., dissenting).

Further fuel was added to this First Amendment fire, as one might reasonably have feared, when the majority cited and aligned itself with *Vernonia School District 47J v. Acton*¹⁵⁰ and *Board of Education v. Earls*.¹⁵¹ These cases authorized suspicionless drug testing of public school students, rather than insisting on the objectively reasonable suspicion that would have been more consonant with prior Fourth Amendment doctrine relating to searches whose primary purposes were other than gathering evidence for criminal prosecution. *Acton*, *Earls*, and *Morse* are fundamentally of a piece and they all make the same category mistake. The undoubtedly evil specter of the problem of drug abuse and teenagers, and the too facile incantation of the “special needs” and “special characteristics” of public schools, clouded the Court’s analytical judgment and caused it to reflexively allow the schools to “protect” from, and “teach” about, these evils by diktat rather than with reasoned and moral discourse and persuasion.

The collateral damage is, if largely unnoticed by the Court, severe. The students may, or may not, get some message against drugs, but they surely get by example in a more powerful form the worse message that the free speech and unreasonable search and seizure protections of the Constitution are reduced to mere scarecrows,¹⁵² at least in the context of our public schools, which next only to the home are the most important experiential learning laboratories for our nation’s children. This is not a good way to teach the fundamental tools needed for constructive citizenship.

The majority properly emphasized the dangers and harms from drugs, especially for children.¹⁵³ It reiterated that deterring drug usage is therefore an important or even compelling governmental interest.¹⁵⁴ From this truth, but without carefully assessing whether censoring speech is necessary or even helpful to achieve the desired end, or carefully considering the countervailing damage to fundamental principles of a robust system of free expression for students, the majority moved quickly to its conclusion. The majority held that schools may “restrict student speech” that school officials “reasonably regard[]” as “encouraging” or “promoting illegal drug use.”¹⁵⁵

¹⁵⁰ 515 U.S. 646 (1995).

¹⁵¹ 536 U.S. 822 (2002).

¹⁵² Thomas Jefferson used language similar to this, in an entirely different context, when he described the threat to impeach federalist Supreme Court Justices for largely political reasons as having been reduced to a “farce” or “scare-crow” after the Republican Senate’s vote not to remove impeached Associate Justice Samuel Chase from the Supreme Court. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 12 (15th ed. 2004).

¹⁵³ *Morse*, 127 S. Ct. at 2628.

¹⁵⁴ *Id.* (citing *Vernonia*, 515 U.S. at 661).

¹⁵⁵ *Id.* at 2622, 2625, 2629.

It is interesting that in the twelve years from the time the Court embarked upon this most recent general course vis-à-vis diminished public school student constitutional rights in 1995 in *Vernonia*, the Court's own assessment, as informed by external empirical studies, is that the drug problem among the nation's youth grew worse at least until 2002 and "remains serious today."¹⁵⁶ It seems that the Court's response has been to reduce student rights further, rather than reassessing and concluding, as history so often painfully teaches, that sacrificing rights almost never helps to solve the initial problem and almost always exacts a terrific burden in lost and sometimes irreplaceable liberty.

Once having labored to reach its holding, partially opening a Pandora's box in the bargain, the Court did helpfully try to close the box back up, or at least limit the opening. Chief Justice Roberts accomplished this vital partial repair job by flatly rejecting Dean Starr's enormously broad argument on behalf of petitioners that the Court should sanction the power of school officials to censor student speech simply because it is "offensive."¹⁵⁷ Such an extreme exception, of course, would almost entirely swallow up the rule that students retain speech rights after entering the schoolhouse gate, or more precisely would become the new rule; one of virtually unbridled discretionary censorship. The Chief Justice also helpfully distanced himself further from the more extreme speech-restrictive implications in some of the arguments, and in his own opinion language, in tossing an olive branch or line of accommodation to the dissent, when he described the difference between his view and what he perceived to be the view of the dissenters, as a "relatively narrow" one.¹⁵⁸

Some of the dichotomous tension between different parts of the Chief Justice's opinion may be explicable on grounds other than his view of proper First Amendment doctrine. The rather rigid views of Justice Thomas in this case, together with Justice Breyer's insistence on ducking the merits, partially recast the Chief Justice's opinion for the Court and suggest that he may have been facing a rather tricky dilemma. Given his conclusion that it was correct to decide for the principal and against the student on the facts of the instant case, and further speculating that he was intent on holding together a majority and avoiding a cobbled-together judgment, Chief Justice Roberts's options were quite constrained. Justice Thomas, who provided the essential fifth vote, made clear beyond doubt that he would not have joined a majority opinion along the lines of Justice Alito's concurrence, which attempted to tie off the *Fraser-Kuhlmeier-Morse* exceptions to *Tinker* with an effective rhetorical tourniquet after just this one more exception. The three dissenters obviously were unwilling to sign off on the majority's result, and Justice

¹⁵⁶ *Id.* at 2628.

¹⁵⁷ *Id.* at 2629.

¹⁵⁸ *Id.*

Breyer refused to be a pickup for either side. If the Chief Justice wanted to retain the pen for the Court and avoid the disarray of a plurality opinion and an even more fractured Court in *Morse*, as seems likely, he may have felt he had little choice in the matter. He had to craft a somewhat inconsistent opinion to make clear on the one hand that *Tinker* was being cut back, but on the other hand leaving conflicting ambiguity about how far it was being cut back, or how far it might be cut back in the future.

B. Justice Alito's Promising Concurrence

Justice Alito's four-page concurring opinion, joined by Justice Kennedy,¹⁵⁹ is quite important in that it stems the possible tide of erosion of the speech-protective doctrine enunciated in *Tinker*. The two Justices made clear that they were willing to sign on to the majority opinion only on the basis of three limiting understandings:¹⁶⁰

1. The decision "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use";¹⁶¹
2. The decision "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue";¹⁶² and
3. The decision "reaffirms . . . the fundamental principle [recognized]"¹⁶³ in *Tinker*, acknowledges the subsequent *Fraser*¹⁶⁴ and *Kuhlmeier*¹⁶⁵ exceptions, and further allows "restriction of speech advocating illegal drug use[.]"¹⁶⁶ but does not mean that

¹⁵⁹ *Id.* at 2636.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* Justices Alito and Kennedy expressly noted, for example, that they would vote to protect student comments favoring the legalization of marijuana or disputing the policy wisdom of the "war on drugs." *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2637. While accepting *Fraser*, Justice Alito helpfully, and in my judgment correctly, gave it a narrow reading as only permitting the regulation of the "manner" of Fraser's speech "delivered in a lewd or vulgar" way during a "middle school program." *Id.* (emphases added).

¹⁶⁵ *Id.* Justice Alito also gave *Kuhlmeier* an encouragingly narrow reading, describing the suppressed student speech as "in essence the school's own speech, that is, articles that appear in a publication that is an official school organ." *Id.* While I strongly disagree with *Kuhlmeier*, Justice Alito's view at least attempts to confine it by grounding it solely on the school's right to speak or refrain from speaking in its own publications over which it retains "editorial" and "ownership" control, rather than any broader reading allowing restriction of student views.

¹⁶⁶ *Id.* This is Justice Alito's first condition noted above. See *supra* note 161 and accompanying text.

there are any other exceptions to the *Tinker* analysis than the two (or three) now established.¹⁶⁷

That is, Justices Alito and Kennedy joined the majority only on condition that any “special characteristics of the public schools” do not give school administrators a blank check to censor student speech, emphatically do not give the courts an open door to create new exceptions to *Tinker* in the future,¹⁶⁸ and certainly do not give the courts general license to abandon the *Tinker* substantial disruption requirement and replace it with a less speech-protective, ad-hoc balancing approach.

After preserving *Tinker* as the presumptive rule and mode of analysis for in-school student speech, and effectively cabining the *Fraser*, *Kuhlmeier*, and *Morse* exceptions to *Tinker*’s analytical framework, Justices Alito and Kennedy categorically rejected another broad censorial argument advanced by counsel for the principal, the school board, and the United States.¹⁶⁹ Said argument, if adopted by the Court, would have permitted school officials to censor student speech whenever it interfered with the school’s self-defined “educational mission.”¹⁷⁰ Justice Alito perceptively noted that this doctrine would be subject to dangerous manipulation by school authorities because the authorities would be able to define their school’s educational mission in various ways to justify suppression of almost any student speech they did not like.¹⁷¹ “The argument [which Justice Alito forcefully rejected] strikes at the very heart of the First Amendment.”¹⁷²

Justice Alito’s opinion also flatly rejected, at least in the student speech First Amendment context, the validity or applicability of an *in loco parentis* doctrine based on a fiction that parents delegate control of their children’s expression to school officials.¹⁷³ As discussed below, the almost complete reliance on this doctrine by Justice Thomas in his concurrence is one of the factors that led him astray in this case and caused him to essentially call for the elimination of student free speech rights.

Having done yeoman’s work to rebut Justice Thomas’s views and to limit the applicability of the majority’s opinion to the facts at hand, the concurring Justices nonetheless agreed to uphold Joseph Frederick’s suspension. Justice Alito largely grounded this decision on the partially captive aspect of public school attendance for the other students, and on his more questionable assumption that speech “advocating illegal drug use poses . . . a grave and in many ways **unique** threat to the physical

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

safety of students.”¹⁷⁴ Fortunately, however, he directly limited the reach of this assumption by concluding that the school’s actions in the instant case were at the outermost bounds “of what the First Amendment permits” and he joined the Court only “with the understanding that the opinion does not endorse any further extension.”¹⁷⁵

Clearly, given the stated views of the three dissenting Justices,¹⁷⁶ Justices Alito and Kennedy make five Justices at least¹⁷⁷ who can be counted on to stand as a bulwark against any further erosion of the *Tinker* principles in future cases. I agree with so much of Justice Alito’s good sense in his opinion that I want to be careful not to overemphasize my disagreement with him on the proper outcome of the case.

As encouraging as I find Justice Alito’s recognition of the importance of First Amendment values and his careful analysis of the proper principles for the resolution of most other public school student speech cases, I find even more promise in what his short but significant concurring opinion may portend for his future role on the Court. The Court is generally at its best when it functions as a genuinely collegial body. This is the healthy institutional condition when differing analytical views and modes of judicial interpretation are debated openly and respectfully, and when Justices with different points of view are genuinely listening to and learning from each other. Conversely, the Court is often weakened when all of the Justices are in lock-step, or there are such entrenched opposing camps that blocs of Justices are largely talking past each other and form overly predictable voting groups. There is of course a fine line between robust, open analytical debate and fractured, unstable doctrinally chaotic times.

My point is that we are most likely to approach the goldilocks position on this continuum when the Court is composed of a mix of Justices, some with strongly held, yet not self-righteous, views on opposite sides, and with some of the other Justices forming a shifting center. Critically, this works best for all concerned when the center fairly reliably is composed of more than a lone Justice. When there is a lone Justice in the center, undue attention is given to that Justice and untoward pressures are placed upon her. Worse, it becomes too easy when there is no center, or only a single Justice in the center, for the other Justices to form rigid and unhelpful ideological blocs. The Court has experienced all of these different alignments at different times in its 218-year history. It is beyond the scope of this Article to look at all of the alignments and attempt to correlate them with the quality and worth of the Court’s work

¹⁷⁴ *Id.* at 2638 (emphasis added). Tragic school shootings and all too common violence are far more serious threats to student physical safety.

¹⁷⁵ *Id.*

¹⁷⁶ *See infra* Part III.E.

¹⁷⁷ Justice Breyer could make a sixth such Justice, but his views on the merits and the contending views are a bit more murky, given that he would have resolved this case without reaching the merits. *See infra* Part III.D.

during each era, though that would be a worthy project for another day, but it is useful to take a quick look at recent history since 1970 through an impressionistic lens.

Starting with President Nixon's appointment of Justice Harry Blackmun, there have been thirteen new Supreme Court Justices appointed by six different Presidents, and two different Justices serving in each seat on the Court.¹⁷⁸ At varying times in their careers on the Supreme Court since 1970, at least the following Justices have formed shifting centrist groupings in the Court's internal dynamics:

1. Justices Stewart, Powell, White, and Blackmun in the early to mid 1970s, especially Justices Stewart and Powell. From the mid 1970s until 1981, Justices Stewart, Powell, and Stevens even more clearly occupied a flexible center.

2. The early 1980s are somewhat harder to characterize. By the mid 1980s Chief Justice Rehnquist, and Justices Scalia and White were forming a fairly tight bloc on one end; while Justices Brennan, Marshall, Blackmun, and Stevens were coalescing into a reasonably predictable bloc on the other. Justices O'Connor and Kennedy, after his appointment in 1988, were close to the new Chief Justice, but were beginning a journey toward their ultimate positions as key new centrists.

3. The late 1980s and especially the early 1990s, with the addition of Justices Souter and Thomas, now had Justice O'Connor more and more frequently, and Justice Kennedy sometimes, and the two then joined by Justice Souter as a reformulated center.

4. Once President Clinton's two appointees, Justices Ginsburg and Breyer, joined the Court in 1993 and 1994, the Court had no further change in membership for eleven years until 2005.¹⁷⁹ During these eleven years, the Court fell into an increasingly

¹⁷⁸ At the beginning of 1970, the Court was composed of Chief Justice Warren Burger, and Associate Justices Hugo Black, William Brennan, William Douglas, Thurgood Marshall, Byron White, John Harlan, and Potter Stewart, with one unfilled vacancy created by the resignation of Justice Abe Fortas in 1969. Justice Harry Blackmun was appointed to fill this vacancy by President Nixon in 1970. Lewis Powell (appointed by Nixon in 1972) replaced Black. William Rehnquist (also appointed by Nixon in 1972) replaced Harlan. John Paul Stevens (appointed by President Ford in 1975) replaced Douglas. Sandra Day O'Connor (appointed by President Reagan in 1981) replaced Stewart. William Rehnquist was elevated to Chief Justice by Reagan in 1986, replacing Burger. Antonin Scalia (also appointed by Reagan in 1986) filled the Associate Justice slot vacated by Rehnquist when he was promoted to Chief Justice. Anthony Kennedy (appointed by Reagan in 1988) replaced Powell. David Souter (appointed by the first President Bush in 1990) replaced Brennan. Clarence Thomas (appointed by Bush in 1992) replaced Marshall. Ruth Bader Ginsburg (appointed by President Clinton in 1993) replaced White. Stephen Breyer (appointed by Clinton in 1994) replaced Blackmun. John Roberts (appointed by the second President Bush in 2005) replaced Chief Justice Rehnquist. Samuel Alito (appointed by Bush in 2006) replaced O'Connor.

¹⁷⁹ This is one of the longest such periods in the Court's history.

predictable and rigid pattern, with Justices Scalia and Thomas, and Chief Justice Rehnquist, often joined by Justice Kennedy (with some important notable exceptions) forming a so-called conservative bloc. At the same time, Justices Stevens, Ginsburg, Souter (with some important notable exceptions), and Breyer (with exceptions) formed an almost equally predictable so-called liberal bloc. This left Justice O'Connor more and more as the lone centrist, and essentially as the decider of many of the most controversial cases. She did an exemplary job in this role, but in my opinion the quality and craft of the opinions of the other Justices sometimes suffered as a result of their relatively entrenched and predictable positions, regrettably obviating the need for them to really engage each other's views to try to achieve a working majority.

5. The appointments in 2005 and 2006 of Chief Justice Roberts and Justice Alito to replace Chief Justice Rehnquist and Justice O'Connor respectively led many to hastily assume that a new predicted four to four bloc split would become even more rigid, and that Justice Kennedy would move into a lone centrist position as the Court's new decider. Advocates and scholars increasingly pitched their views to their imagined Justice Kennedy, maintaining an almost polite, but not quite benign, neglect of the other members of the Court. Early days of the Roberts Court seemed to bear out the wisdom of such an approach, with Justice Kennedy casting the deciding vote in every significant 5-4 decision, and thereby establishing the operative rule of law and analytical framework for each of those cases.

Justice Alito's independent views and analytical work in *Morse*, and the craft and fine writing he displays in his opinion, portend a much more interesting Court. Particularly given his *partnering-up* with Justice Kennedy in *Morse*, there is cause to hope that he and Justice Kennedy might form the core of a new, flexible center, at least in some doctrinal areas of the Court's work, that could begin to thaw the assumed icebound coalitions on the Court's left and right flanks. If such a happy eventuality occurs, it is not fanciful to imagine Justice Breyer and others moving in and out of the newly more open center on the Court. This would promote engaged intellectual cross-pollination among the Justices, and stimulate them to do their best thinking and writing, rather than just their easiest. One of the advantages of a center core is that it frees up the other Justices to break out of their molds more often and explore jurisprudential ideas with fresh and sometimes more perceptive eyes.

Supreme Court Justices are not inconvincible ideologues, and it does a disservice to the Court, to the country, and to our constitutional jurisprudence to assume that they are, or to have conditions on the Court that foster a self-fulfilling prophecy encouraging them to act as if they are. Time will tell, but I predict that we may well look back at Justice Alito's concurrence with Justice Kennedy in *Morse v. Frederick* as much more than just an imperfect resolution of BONG HITS 4 JESUS.

C. *Justice Thomas's Alternate Universe*

While Justices Alito and Kennedy pulled the majority in the student speech-protective direction of *Tinker*, Justice Thomas tugged hard in the opposite direction with his concurring opinion in *Morse*. In fact, he apparently only grudgingly joined the majority opinion “because it [at least] erodes *Tinker*’s hold in the realm of student speech.”¹⁸⁰ Justice Thomas made no bones about the fact that he would have gone much further and overruled *Tinker* completely, and wiped its student speech-protective mode of analysis away all together.¹⁸¹ If he can persuade four of his colleagues on the Court in the future (a most unlikely eventuality), he is quite prepared to “do so.”¹⁸²

Justice Thomas has increasingly penned some provocative and thoughtful opinions in recent years, whether or not one agrees with his historical conclusions, modes of constitutional analyses, or results.¹⁸³ Notable examples include, inter alia, his attempts to work out a coherent and principled view of federalism in the Term Limits,¹⁸⁴ California Medical Marijuana, and Oregon Death with Dignity cases;¹⁸⁵ his calls for a fresh and potentially reinvigorating look at the long shuttered Fourteenth Amendment Privileges or Immunities Clause;¹⁸⁶ and his poignant comments that it smacks of soft bigotry to suggest or imply that

¹⁸⁰ *Morse*, 127 S.Ct. at 2636 (Thomas, J., concurring).

¹⁸¹ *Id.* Justice Thomas would be prepared to give *Tinker* a particularly unceremonious and undignified burial, as is evidenced by his comment that *Tinker* “is without basis in the Constitution.” *Id.* at 2630.

¹⁸² *Id.* at 2636.

¹⁸³ Frankly, I generally disagree with him on all three counts, but I do not judge his worth on the Court (or at least I try hard not to) primarily based on my agreement or disagreement with him. My point is that after a very cautious start on the Court, probably stemming from his contentious confirmation hearings, where he largely kept his head down and let Justice Scalia do all of the talking and most of the writing for him, Justice Thomas has begun in general to make a more significant contribution to the work of the Court. It remains an open question whether he will continue to develop in this direction, or whether he will increasingly become a lone voice for a highly rigid, uninspired form of jurisprudence that would serve neither the country nor Justice Thomas’s legacy well. Let us hope that *Morse v. Frederick*, far from his finest hour, is a temporary retrenchment.

¹⁸⁴ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845–926 (1995) (Thomas, J., dissenting).

¹⁸⁵ *Gonzales v. Raich*, 545 U.S. 1, 57–74 (2005) (Thomas, J., dissenting); *Gonzales v. Oregon*, 546 U.S. 243, 299–302 (2006) (Thomas, J., dissenting). For good or ill, Justice Thomas would leave the states largely free to serve as experimental laboratories whether he personally agreed with their specific policy choices or not. In this regard, he would also essentially eliminate the Dormant Commerce Clause doctrine, and sharply circumscribe Congressional Commerce Clause powers, even as extended by the Necessary and Proper Clause. *Id.*

¹⁸⁶ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989). See also generally Kanter, *supra* note 120, at 689–96.

black institutions are of inherently inferior quality.¹⁸⁷ Unfortunately, Justice Thomas's concurrence in *Morse* does not fit this pattern and goes almost completely off the rails.

In *Morse*, Justice Thomas articulated a Dickensian view of the world, especially in the public school setting, with virtually no room for student rights. He would break up and destroy the entire suite of student rights based upon an "overly constrained . . . strict originalist theor[y] of rights."¹⁸⁸ In this instance at least, Justice Thomas is so wedded to his questionable version of historicism that he eschews the usual strands of textualism that find their way into his other opinions, and he largely ignores the broad, uncompromising reach of the First Amendment's injunction that there shall be "no law . . . abridging the freedom of speech."¹⁸⁹

To some extent, I suppose, one might ascribe this to a quirky, originalist view of the Bill of Rights, including the First Amendment, as limits upon only the federal government and as having no applicability to state or local government actions. Such an anachronistic view ignores the reality that the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments that followed, substantially altered the original federalist plan, reflected a sharp reduction in the trust placed in the states to protect individual rights, curtailed state powers in this regard, and increased judicially enforceable federal constitutional rights against offending, censorial state actions.¹⁹⁰ It has certainly been a long time since anyone even remotely argued that the free speech protections of the First Amendment were not in some fashion binding on the states and

¹⁸⁷ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349–78 (2003) (Thomas, J., concurring in part and dissenting in part); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment).

¹⁸⁸ Kanter, *supra* note 120, at 650. For a discussion of some of the flaws and problems with a strict originalist approach to constitutional interpretation, see, e.g., *id.* at 650 n.108, 645 n.89, and accompanying text.

¹⁸⁹ Justice Thomas opened Part I of his opinion by quoting this text from the First Amendment, but then waved it away by noting, and apparently accepting, the Court's pronouncements that there are categorical exceptions allowing the punishment of certain types of speech. *Morse v. Frederick*, 127 S. Ct. 2618, 2630 (2003) (Thomas, J., concurring). I have no quarrel with the categorical exceptions approach, assuming it is carefully limited and used primarily as a shield against attempts to restrict unpopular speech, rather than as a sword to cut increasingly large swaths through the fabric of a system of robust free expression by creating ever new and expanding exceptions that would eventually threaten to swallow up the rule. But I do find it interesting and quite troubling that Justice Thomas was so willing to rely on and stretch 1942 and 1965 precedents having absolutely nothing to do with student speech (*Chaplinsky* and *Cox*) to limit the reach of the First Amendment, while being even more willing to discard the 1969 *Tinker* precedent directly concerned with student speech, and confine it to his dustbin of history.

¹⁹⁰ For a general discussion of these points and of the related doctrine of incorporation, see Kanter, *supra* note 120, at 655–60, 674, 676–77.

their political subdivisions.¹⁹¹ In any event, Justice Thomas did not rely on this error of federalism, but went much further and construed the First Amendment as substantively not affording protection at all for “student speech in public schools.”¹⁹²

Justice Thomas wrote page after page of his concurring opinion to persuade us that far from being “places for freewheeling debates or exploration of competing ideas,”¹⁹³ public schools were, and constitutionally, permissibly still are, places that could be run not by the students but by the teachers and administrators “with an iron hand.”¹⁹⁴ Government could “educate and discipline children,” teaching “self-control . . . [and] ‘subordination to lawful authority,’” and deferred gratification “through strict discipline” and “absolute obedience.”¹⁹⁵ “In short, . . . [t]eachers commanded, and students obeyed.”¹⁹⁶

Justice Thomas asserted that the legal doctrine of *in loco parentis* enshrined this almost feudal, hierarchical relationship between the public schools and students, into a fixed universe undisturbed by the concepts of liberty and free expression that form such important components of our constitutions.¹⁹⁷ Commanding obedience, controlling stubbornness, quickening diligence, punishing disobedience, and penalizing speech deemed by the teacher or school “contrary to the interests of the school and its educational goals,” are all apparently to be taken as the order of the day, past and present.¹⁹⁸ This could include corporal punishment for some offenses, or expulsion for giving a speech criticizing “the administration for having an unsafe building,” even when the building may in fact have been fire unsafe.¹⁹⁹ The only limit to the schools’ unbridled control over students that Justice Thomas could discern, and he was not so sure even about that one, was that corporal punishment could not be imposed excessively, that is, it could not be inflicted with “malice or cause permanent injury . . . [or in some other fashion be shown to be clearly] excessively harsh.”²⁰⁰

Tinker, for Justice Thomas, broke incorrectly with this *historical* constitutional tradition (effecting a “sea change”) in recognizing a “fundamental right [of students, absent disruption,] to speak their minds

¹⁹¹ Justice Thomas’s own view as to whether the First Amendment should be deemed incorporated and applicable to the States is somewhat ambiguous. *Morse*, 127 S. Ct. at 2630 n.1 (Thomas, J., concurring).

¹⁹² *Id.* at 2630.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 2630–31.

¹⁹⁶ *Id.* at 2631.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 2631–32.

¹⁹⁹ *Id.* at 2632.

²⁰⁰ *Id.* at 2633.

... even on matters the school disagreed with or found objectionable.”²⁰¹ Justice Thomas did have a conceivably valid point when he said: “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don’t[.]”²⁰² Not a very stable or satisfactory brand of jurisprudence to be sure, but Justice Thomas’s cure that “the Constitution does not afford students a right to free speech in public schools,”²⁰³ is far worse than any perceived disease of temporary ambiguity in Supreme Court doctrine.

Justice Thomas is apparently so convinced of the correctness of his solo position that he did not exhibit even a small dose of humility by calling the question a close one; because for him “it cannot seriously be suggested that the First Amendment . . . encompasses a student’s right to speak in public schools.”²⁰⁴ Or, as he continued, “I see no constitutional imperative requiring public schools to allow all student speech.”²⁰⁵ One cannot help but be sympathetic to Justice Thomas’s lament that we are a lesser society for having lost some of our traditional respect for teachers, and have too often replaced it with tolerance of “defiance, disrespect, and disorder.”²⁰⁶ But even historically, true respect for teachers always was earned and learned, not imposed by the stern tip of the rod as Justice Thomas seems to imagine. Respect is a two-way street and respect for student rights, especially the right of free speech, is a vital component of respect for teachers, a vibrant educational system, and the inculcation of citizenship values in our rising generations.

Justice Thomas did acknowledge that we are no longer in the nineteenth century, and that there would be little support for treating children as they were treated in that very different culture of well more than 100 years ago.²⁰⁷ But his opinion would constitutionally authorize just such treatment. After relegating parents, and their children/students who might find themselves so treated, to the ministrations of the school boards and legislatures²⁰⁸—which certainly ought to be the first, and,

²⁰¹ *Id.*

²⁰² *Id.* at 2634. Though as noted earlier, the concurrence of Justice Alito, joined by Justice Kennedy, makes fairly clear that the current Court will adhere to *Tinker* and its constitutional mode of analysis, except in *Fraser*, *Kuhlmeier*, and *Morse* circumstances.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 2635. Do I detect a faint hint here that Justice Thomas’s inclusion of the conditioning word “all” in this sentence leaves open the possibility that he might after all partially relent and consider some student speech constitutionally protected? (The rest of his opinion, as noted, regrettably sounds more as if this was a typographical error, and that what Justice Thomas really meant to say was: “I see no constitutional imperative requiring public schools to allow student speech at all.”) Let’s hope for the best.

²⁰⁶ *Id.* at 2636.

²⁰⁷ *Id.* at 2635.

²⁰⁸ *Id.*

hopefully, usually sufficient, recourse—Justice Thomas offered no remaining constitutional right as a check on these institutions when they, as we all know they at least occasionally do, give in to excess. At this point, his opinion devolved from harsh Dickensian visions of childhood to Marie Antoinette’s less-than-sensitive alleged sobriquet—“let them eat cake”—that contributed to the loss of her head at the Jacobins’ guillotine: “If parents do not like the rules imposed by those [public] schools, . . . they can send their children to private schools or home school them; or they can simply move.”²⁰⁹

D. Justice Breyer’s Attempt to Build a Consensual Bridge

Justice Breyer wrote a separate opinion attempting to bridge the divide between the five Justices in the majority and the three dissenters.²¹⁰ His opinion was apparently driven by an inherently reasonable instinct to find a way, any way, to get rid of the case, and to make sure that neither side would come away feeling fully vindicated with a clear victory. He sided with the majority’s result insofar as it deprived the student and his attorneys of any possibility of recovering damages, punitive damages, or attorneys fees. On the other hand, he refused to either affirmatively approve the constitutionality of principal Morse’s censorial action (as the majority did), or declare the action taken against student Frederick to be unconstitutional (as the dissenters did). Instead, he tried to persuade the Court to avoid the merits of what he saw as a “difficult First Amendment issue . . . [, and to] hold that qualified immunity bars the student’s claim for monetary damages and say no more.”²¹¹

Justice Breyer’s attempt to create a tent big enough for the entire Supreme Court was entirely unsuccessful. He urged his colleagues to rely, in effect, on what he perceived to be one of the passive virtues of courts,²¹² but he was unable to gain even one other adherent for his proposed temporizing, intermediate approach. The majority dismissed Justice Breyer’s opinion in a single footnote, justifiably noting that even if one agreed with him on qualified immunity grounds to eliminate the damages portions of the case, it was almost certainly still necessary to reach the substantive First Amendment merits to resolve the declaratory and injunctive relief claims.²¹³ Justice Thomas, as discussed, was hardly in

²⁰⁹ *Id.* Justice Thomas notwithstanding, these are not easy, or so cavalier, options for many parents.

²¹⁰ *Id.* at 2638 (Breyer, J. concurring in the judgment in part and dissenting in part).

²¹¹ *Id.*

²¹² See, e.g., Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 112 (1962)

²¹³ *Morse*, 127 S.Ct. at 2624 n.1. Justice Breyer attempted to avoid the hydraulic force of this argument by arguing that maintaining an official record of student Frederick’s suspension “may well be justified on non-speech-related grounds.” *Id.* at

a mood for temporizing. The dissenters agreed that the principal should not be held liable for damages, but they also would have held that the First Amendment protected the student from discipline for his expression.²¹⁴ Since Justice Breyer's attempt to dispose of the case on qualified immunity grounds precluded the second part of the dissenters' proposed holding, they were not candidates to join his opinion either.

Frankly, given Justice Breyer's failure to gain even one other vote for his proposed disposition of the case, one must conclude that his opinion did not serve the prudential *passive virtue*, if it be that, of postponing or avoiding a decision on the merits. Nor was his vote necessary to help resolve the issue of damages, since there were five other votes for the Court's judgment precluding damages based on a broad holding on the merits fully vindicating the constitutionality of the school board's and principal's actions. In the end, then, all the opinion achieved was to protect Justice Breyer from having to disclose (or decide) his views on the merits of the substantive First Amendment issues, and to prevent the rest of us from knowing how he stands. Complete reliance on qualified immunity and the refusal to take a position on the merits by a single Justice under these circumstances is virtually "useless, if not improper."²¹⁵

Qualified immunity in the form employed by Justice Breyer can arguably serve only two purposes: (a) to shield good-faith, non-malevolent public employees from the fear of personal damages that would both be unfair and might chill their energetic job performance;²¹⁶ and (b) to allow the courts to avoid or at least postpone to a more propitious time the decision on difficult and important issues of

2643. While Justice Breyer would have remanded, rather than extinguished the student's attempt to expunge his record, the majority seems to have the better of this issue in candidly concluding that Frederick was indeed suspended primarily for the content and manner of his expression, and not for any unrelated misconduct. Compare *id.* at 2624 n.1, with *id.* at 2643. It may also be worthy of note that had Justice Breyer's view prevailed, this already long in the tooth five-and-one-half-year-old case might have dragged on years longer absent a settlement from parties that had shown no such inclinations to date. (To be sure, even this might have been preferable to what I believe to have been the crystallization of bad law.)

²¹⁴ *Id.* at 2643.

²¹⁵ Cf. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 512 (1868) (I am merely borrowing the phrase from *McCordle*, a case dealing with the entirely unrelated issue of Congressional power to strip Supreme Court appellate jurisdiction under the exceptions clause of Article III). For a somewhat more apt analogy, see Justice Rehnquist's criticism of Justice White for ducking the substantive First Amendment issue addressed by the other eight members of the Court in *Board of Education v. Pico*, 457 U.S. 853, 904 n.1 (1982) (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). Justice Rehnquist contended that Justice White's vote for the judgment of the Court without resolving the First Amendment issue violated the spirit of the rule of four for granting *certiorari*.

²¹⁶ In this regard, no one could quarrel with Chief Justice Roberts's observation that "[s]chool principals have a difficult job, and a vitally important one." *Morse*, 127 S. Ct. at 2629.

constitutional law that might be better decided in a different context or after more reflection by lower courts and scholars.

Justice Breyer's reliance on the doctrine in *Morse* advanced neither of these purposes. For good or ill, as already noted, principal Morse and her colleagues in the administration and on the school board won outright on the merits in a majority decision from a full Supreme Court, with no immediate prospect of any change in membership on the Court. It would have been different, and more appropriate, for Justice Breyer to stick to his position, even after failing to gain adherents in conference or during the Court's other internal deliberations, if instead one of the five majority Justices had announced his plans to retire or was likely soon to leave the Court for other reasons. Justice Breyer's opinion would also make more sense if he alone, or with other adherents, provided the necessary vote(s) on the damages question to form a coalition with a plurality (rather than an outright majority as was the case here) wishing to decide in favor of the principal on the merits. Then it could truly be said that Justice Breyer was protecting the principal from the threat of damages, while preserving the Court's flexibility or keeping its powder dry on the merits for another day.

Similarly, even if Justice Breyer was correct in believing that the law was unclear in 2002 and that it would be unfair to hold a principal liable in that uncertain environment, it turned out that qualified immunity was not needed to protect the principal from the unfair retroactive application of a newly toughened or clarified legal standard. The law respecting BONG HiTS 4 JESUS is now clear; it unequivocally favors school administrators, and qualified immunity is an unnecessary refuge for principals acting in 2002 or in the future.

I say all this without meaning to disparage Justice Breyer,²¹⁷ or to discount the commonsense wisdom of his intuition that a way should have been found out of this five-and-one-half-year long morass precipitated by the events of the January 2002, Juneau, Alaska controversy. Justice Breyer was in a bit of a pickle, not necessarily of his own making unless he voted to grant certiorari. His opinion does raise a number of perceptive points and questions²¹⁸ but ultimately he, Hamlet-like, refused to engage and answer them. His demurrer was no doubt tempting and somewhat understandable. Nonetheless, qualified immunity was not the first, the right, or the complete way out of this fine mess.

²¹⁷ In fact, as I have mentioned previously, Justice Breyer is a likely candidate to become an integral part of any newly formed pragmatic, thinking center core on the Court. See *supra* text accompanying notes 179–80.

²¹⁸ *Morse*, 127 S. Ct. at 2638.

E. Three Dissenters Led by Justice Stevens

Justice Stevens's dissent, joined by Justices Souter and Ginsburg, is persuasive—as far as it goes—and I agree with much of what he said. Although there are a few places where Justice Stevens conceded more than was necessary or prudent, he managed to thread the eye of the needle in wisely concluding that while the Bong Hits controversy should not result in damages against the principal or school board,²¹⁹ it was nonetheless constitutionally improper for the principal to have punished the student for his expression.²²⁰ At the beginning of Part III of his opinion, Justice Stevens got near the heart of the Juneau matter with his sensible lament that a 2002 youthful street *farce* was being converted through five and one-half years of tortured events into something of a First Amendment *tragedy*:

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.²²¹

The core of Justice Stevens's opinion hit the right notes in rehearsing the philosophy and structure of the Court's hard won speech-protective First Amendment jurisprudence. He correctly framed *Tinker* not as safely allowing an innocuous, passive wearing of unobtrusive black arm bands, but as a brave recommitment to robust, powerful speech on the most divisive topic of its day, Vietnam.²²² Speech that is non-controversial needs no constitutional protection; ineffectual speech will often need protection, but those holding the dominant viewpoint are unlikely to get too exercised when the courts afford that protection.²²³

²¹⁹ *Id.* at 2643.

²²⁰ *Id.*

²²¹ *Id.* at 2650.

²²² *Id.* at 2644.

²²³ There are many reasons to protect “ineffectual” speech. These include, inter alia: the facts that otherwise effectual, important speech may be mischaracterized intentionally or otherwise by the dominant cultural viewpoint as “ineffectual” and therefore subject to suppression; the desirability of allowing a free zone of self-expression or even self-actualization through trivial or nonsense speech (why do you think we are drawn to silly TV programs and magazines?); the space to spew nonsense as a head-clearing device to allow for more creative thinking and analysis; the fact that the emotive contents of free speech are as important as the cognitive aspects, as was perceptively noted by Justice Harlan in his wonderful opinion for the Court in *Cohen v. California*, 403 U.S. 15 (1971); and the ineluctable historical truth that the censor's nose, once allowed inside the tent, expands more rapidly and surely than did Pinocchio's, doing a lot more damage than could be done by a wooden boy, or even a real boy. For more classical arguments along the last of these lines, see, e.g., JOHN MILTON, *AREOPAGITICA* (1644); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963).

The true test of the First Amendment's value is when the courts are called upon to employ it to protect controversial, unpopular, powerful and potentially persuasive speech whose correctness or incorrectness can only be accurately evaluated after the passage of time and the unfolding of events. It is on these occasions, the worst of times, when the Court must serve as the often-final bulwark to protect our risky experiment of allowing potentially dangerous speech. This optimistic experiment in human society depends, as it must, on a general trust in the ultimate common sense of the audience (the nation's people) except in those rare circumstances when there is no time or chance for other speech to join the fray to do fair combat with the potentially deleterious speech. Justice Stevens makes these fundamental points,²²⁴ though perhaps without the timeless eloquence of a Holmes²²⁵ or Brandeis.²²⁶

On a more practical jurisprudential level, Justice Stevens explicated two of the most important corollaries from this metaphilosophical base. First, governmental content control, especially when it constitutes viewpoint discrimination, is particularly inimical to the First Amendment, and "is subject to the most rigorous burden of justification," that is, the strictest form of judicial scrutiny.²²⁷ Second, even advocacy of illegal

²²⁴ *Morse*, 127 S. Ct. at 2650–51 (Stevens, J., dissenting).

²²⁵ *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting):

Persecution for the expression of opinions seems to me perfectly logical. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more . . . that the ultimate good desired is better reached by free trade in ideas That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the . . . pressing purposes of the law that an immediate check is required to save the country.

²²⁶ *See, e.g., Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; They believed liberty to be the secret of happiness and courage to be the secret of liberty. . . . that the greatest menace to freedom is an inert people They recognized the risks to which all human institutions are subject. But they knew that . . . it is hazardous to discourage thought, hope and imagination; . . . and that the fitting remedy for evil counsels is good ones.

. . . .

Those who won our independence by revolution were not cowards. . . . They did not exalt order at the cost of liberty. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by . . . education, the remedy to be applied is more speech, not enforced silence.

²²⁷ *Morse*, 127 S. Ct. at 2644 (Stevens, J., dissenting).

conduct is protected unless the expression meets the very strict requirements of the *Brandenburg* incitement test exception.²²⁸

Justice Stevens acknowledged, as he was obliged to do, that some modification or watering down of these rules must occur in the school-speech setting.²²⁹ But he eschewed the dangerous notions that the mere incantation of “school setting,” “special characteristics of schools,” or “juvenile” were enough to eliminate (as Justice Thomas would), as opposed to cautiously modify, student free speech rights; or to justify the invention “out of whole cloth” of an entirely new exception (as he contended the majority did), rather than tailor an existing exception to account for any demonstrably truly unique characteristics of the public school setting.²³⁰ These last points are really the fulcrum of the central analytical issue in student speech cases.

Factual assumptions and circumstances, and differing perspectives about them (the discussion of which occupied much of the rest of Justice Stevens’s opinion)²³¹ properly go far in determining the actual outcome of any individual case. In this regard, the dissent concluded that the principal’s actions constituted intentional viewpoint discrimination since she disciplined Frederick only because of her probably mistaken view that he was espousing a pro-drug message.²³² What, if anything, the Bong Hits banner meant, the dissent was persuaded that it did not amount to direct advocacy of illegal drug use.²³³ The linguists have started to weigh in: at least one entertaining blogger has done the analysis and concluded that the “slogan is in fact meaningless” and did not advocate “the use of marijuana.”²³⁴

I agree with the dissent’s proposed disposition of the case (no damages, but no suspension either), and acknowledge the value of Justice Stevens’s generally fine opinion. Nonetheless, it is necessary to catalog the dissent’s concessions to the extent that they are potentially detrimental to fundamental precepts of a robust system of free expression. I count at least the following full or qualified concessions:

1. The principal would have been justified in removing the banner even if it had said “Glaciers Melt!”²³⁵
2. The “message on Frederick’s banner [was] not *necessarily* protected speech,” given its location.²³⁶

²²⁸ *Id.* at 2645 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

²²⁹ *Id.* at 2645.

²³⁰ *Id.* at 2645, 2650.

²³¹ *See, e.g., id.* at 2649.

²³² *Id.* at 2645.

²³³ *Id.* at 2649.

²³⁴ Bill Poser, The Supreme Court Fails Semantics (July 7, 2007), <http://itre.cis.upenn.edu/~myl/languageblog/archives/004696.html>. I would like to thank my colleague, Professor Joseph S. Miller, for directing me to this internet posting.

²³⁵ *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting).

3. The assumption (though Justice Stevens limited the concessionary nature of this assumption by declaring it *arguendo*) that the “powerful interest in protecting . . . students . . . supports [the school’s] restriction on . . . ‘public expression [advocating] the use of substances that are illegal to minors.’”²³⁷

4. The almost *sub silentio* accession to the Chief Justice’s assertion that this was an official school event.²³⁸

I have already expressed my fundamental disagreement with the assumptions in the first three points.²³⁹ One of the main problems is that there has been little or no showing required that posters, banners, or logos, symbols, or written messages on clothing materially influence the use of illegal drugs or alcohol by students at school. Any serious attempt to make such a showing is almost certainly going to fail, especially given the pervasive nature (one might almost say saturation) within our music, internet, film, media, advertising, and popular culture of drug and alcohol information.²⁴⁰

Justice Stevens’s concession in point four and his reference to location in point two raise issues of context, manner, and location. These are legitimate concerns in evaluating claims of free expression, but the concessions here are too hasty and ill-conceived. Joseph Frederick was an eighteen-year-old adult, was not on school property or curtilage, and most significantly did not come to the public torch parade from school or directly as result of a school activity. There can be little doubt that if this controversy had not erupted, Frederick would have been marked absent from school and justifiably considered by both the school and himself as not a participating member of the school community on that day.

The banner was displayed outside of the school perimeter. The fact that it was readable from the opposite sidewalk running in front of the school does not bolster the *Morse* Court’s assumption, or Justice Stevens’s concession, about the significance of location. As the presence of the one non-JDHS student helping to hold up the banner demonstrated, this banner or others could have been displayed by other parade viewers or

²³⁶ *Id.* at 2643.

²³⁷ *Id.* at 2646.

²³⁸ *Id.* at 2622 (majority opinion). Most of Justice Stevens’s opinion proceeded on the assumption that this was a school speech case. He did rather quietly and obliquely raise some doubt about the Chief Justice’s unqualified assertion, *see id.* at 2647 n. 2 (Stevens, J., dissenting), however without directly confronting or rebutting the vital predicate misstep that went far in leading the Court astray in the case.

²³⁹ *See generally supra* Part II. *See also* notes 102–04, 126, 140–41, 150–55, 174 and accompanying text.

²⁴⁰ On a somewhat related issue, a recent study conducted at the Oregon Health and Science University strongly suggests that programs of suspicionless drug testing of high school athletes does not reduce drug usage among them. *See* Rachel Bachman, *Testing Not a Check on Drug Use, Teens Say*, OREGONIAN, Oct. 18, 2007, at A1.

members of the torch bearing party themselves. Surely, no one would seriously contend that such individuals could be ordered to take down their signs to “protect” the school children. At most, if the principal wanted, she could have called the students back into school and away from the sidewalk.

Most significantly, the Court implicitly treats all school related locations as essentially identical. It is understandable why the Court allows the writ of the school to extend beyond the school building to some extent for co-curricular and extra-curricular social and athletic events held at locations beyond school property. But lumping all activities and locations together does not reflect the finer tuning of analysis characteristic of First Amendment jurisprudence. Even within the school building, there is a big difference between the algebra classroom and the common hallways, cafeteria and playground. And for school sanctioned events off-campus, there is surely a huge difference between events that are created by the school and publicly established events that the school merely chooses to observe or in which students are encouraged to participate. For these and other reasons, I think that Justice Stevens’s concessions were over generous, a bit unwise, and certainly unnecessary to the dissent’s proposed resolution of the case.

IV. CONCLUSION

A creative friend wryly suggested that the sub-rosa lesson of the Bong Hits case is that *smart aleck slackers* are not entitled to the same First Amendment protections as are more upstanding members of society. A cartoonist had fun with a judge explaining to Joseph Frederick, “Had you formed a 527 group before displaying your message on T.V. you’d be ok . . . provided Jesus isn’t running for office.”²⁴¹ I wouldn’t go that far, even in jest, but I would say that the Justices in *Morse* missed an opportunity to strengthen rather than weaken First Amendment rights.

There were many missteps along the way in Bong Hits. Joseph Frederick could have chosen a slightly different venue, or a more meaningful message. He could have acted more maturely as an eighteen-year-old young adult. Deborah Morse could have shown the wisdom of restraint, and calmed down a bit before acting. She could have let the essentially harmless situation play out, and marked Frederick tardy or absent depending on whether he deigned to make it to school later in the day. Subsequently, she could have admonished him for his immaturity, and suggested that he was only hurting himself and that it was time to grow up if he really wanted attention and respect. In the best of circumstances, she could have found a creative way to make this a

²⁴¹ OREGONIAN, July 2, 2007 (reprinting a cartoon from AKRON BEACON J.). The cartoonist is of course humorously referencing the Supreme Court’s campaign finance reform case, *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007). The slacker rule proponent is Robert A. Cantor.

productive learning experience. The superintendent or the school board could have expunged rather than just shortened the disciplinary suspension.

Joseph Frederick and his lawyers could have restricted their legal claims to injunctive and declaratory relief or, if they were worried about potential mootness overtaking these claims, sought only nominal damages and voluntarily waived more substantial damages and especially punitive damages. These lawyers could have done a better job of persuading the district court that there was at least an issue of fact as to whether this controversy should be treated as a full-on school speech case. The district court could have shielded the school officials from personal liability, but ruled that there was insufficient cause alleged by defendants to justify the suspension. The Ninth Circuit could have reversed on the merits of the First Amendment issue, but left the district court's qualified immunity ruling undisturbed. Counsel for petitioners in the Supreme Court, though they ultimately prevailed, might have been well advised to take a somewhat more restrained view of the school's powers over the students than they did.

The Supreme Court could have denied certiorari. Once having taken the case, I suppose they could have followed Justice Breyer's lead and reversed the Ninth Circuit only on qualified immunity grounds, perhaps giving the principal the benefit of the doubt in the heat of a moment with an older subjective good faith standard of immunity, while remanding other aspects of the case. None of these things happened. I have argued in Part III of this Article that, under these circumstances, the Supreme Court should have decided the case differently.

More fundamentally, the major premise of the Article has been to explain two very different approaches to the free expression rights of young people, one in Tigard, Oregon in 1987, and another running from Juneau, Alaska in 2002 through the Supreme Court of the United States in Washington, D.C. in 2007. The Tigard model will not work to resolve every dispute of this kind, and there is a necessary place for all-out litigation at times. The Tigard process and resolution does have a lot to offer and, in this instance at least, the school officials in Tigard and the local "Supreme Court" got things far more right than did the officials in Juneau or the Supreme Court in *Morse*. At the end of the day, a lot depends on what it is that we are intending to teach children in state run public schools for their future role as citizens and participants in a complicated world. Guide them surely we must. Trust and respect them and generally they will live up to or exceed our expectations. Fail to trust them and we are likely to reap bitter constitutional and societal results.