OPINION

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■ 'MORSE V. FREDERICK'

A narrow win for schools

By Clay Calvert & Robert D. Richards SPECIAL TO THE NATIONAL LAW JOURNAL

IF JOSEPH FREDERICK had added just two words to his handcrafted banner displaying the message "Bong Hits 4 Jesus," the outcome of *Morse v. Frederick*, 127 S. Ct. 2618 (2007), might have been completely different. What are the words? "Legalize pot."

In January 2002, Frederick, then a public high school student in Juneau, Alaska, hoped to attract television attention when he showed up to a parade near school grounds and unfurled his sign just as the Olympic torch passed by him and some friends.

Instead, he attracted the wrath of his principal, Deborah Morse, and gained national notoriety through his federal lawsuit against her that ultimately boiled down to one question before the U.S. Supreme Court: "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."

The 5-4 majority, in ruling in favor of the school and reversing the opinion of the 9th U.S. Circuit Court of Appeals, made clear in *Morse* "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."

But two justices in that narrow majority made equally and forcefully clear that political messages—such as the kind protected in the landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)—remain at the core of protected student expression.

Justice Samuel A. Alito Jr., joined by Justice Anthony M. Kennedy, voted in favor of the majority's opinion but wrote separately to convey his "understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"

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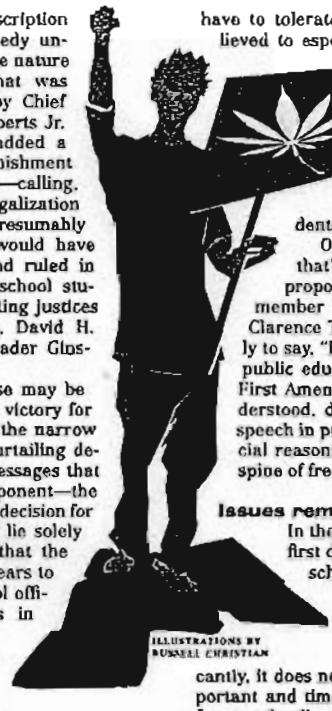
The specific proscription by Alito and Kennedy underscores the fragile nature of the majority that was cobbled together by Chief Justice John G. Roberts Jr. If Frederick had added a political admonishment about drug laws—calling, perhaps, for the legalization of marijuana—presumably those two jurists would have switched camps and ruled in favor of the high school student, as did dissenting justices John Paul Stevens, David H. Souter and Ruth Bader Ginsburg.

Although the case may be considered a minor victory for schools—limited to the narrow circumstances of curtailing decidedly pro-drug messages that lack a political component—the broader value of the decision for administrators may lie solely in the recognition that the Supreme Court appears to tilt in favor of school officials over students in the speech arena.

The case marks the third loss for student litigants before the Supreme Court since the landmark *Tinker* case in 1969—not a good record considering that the court has heard exactly three student-speech cases during that 38-year period.

Other than the vote count in the schools' favor, however, neither administrators nor students in their charge come out of this term's decision with a greater understanding of the broader issue of how much protection student speech deserves. The trilogy of cases that has governed student expression for nearly two decades—*Tinker*; *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)—remains intact, even as the Supreme Court appears to be slowly nibbling away at *Tinker*'s protection for student expression.

Morse adds nothing more to the legal landscape other than saying schools do not have to tolerate speech reasonably believed to espouse a nonpolitical, pro-drug message such as "Smoke pot." The court's decision doesn't advance, overrule, diminish or even substantively tweak any of the earlier precedents.



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On one level, perhaps that's a good thing for speech proponents, given that one member of the majority, Justice Clarence Thomas, wrote separately to say, "In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools." That judicial reasoning sends shivers up the spine of free speech advocates.

Issues remain unanswered

In the end, though, the court's first decision regarding public school speech rights in nearly two decades is vastly disappointing. It breaks no new real ground. More significantly, it does nothing to answer the important and timely question of just how far a school's authority may reach in punishing expression, such as the kind that students transmit through electronic means like homemade Web pages, social-networking sites, text messages and e-mail—arguably the most muddled area of student speech rights today. Indeed, just a month after *Morse*, two different federal courts had to wrestle with this very question in *Wisniewski v. Board of Education of Weedsport Central School Dist.*, No. 06-3394-cv 2007 U.S. App. Lexis 15924 (2d Cir. July 5, 2007), and *Layshock v. Hermitage School Dist.*, No. 2:06-cv-116, 2007 U.S. Dist. Lexis 49709 (W.D. Pa. July 10, 2007).

Courts have split on whether off-campus expression that discusses on-campus issues and people—quite often in stark, unflattering terms—can be punished by school officials. Students are well equipped with the technology that transports messages far more quickly and broadly than Frederick's primitive, sophomoric banner. *Morse v. Frederick* is no help in determining the scope of the administrator's jurisdiction—unless, of course, the speech in question can be reasonably viewed as pro-drug.

Consequently, students and administrators are right back where they were before Joseph Frederick sought his 15 minutes of fame on that January day—that is, grappling with decades-old precedent decided before today's technology-savvy youngsters were born.