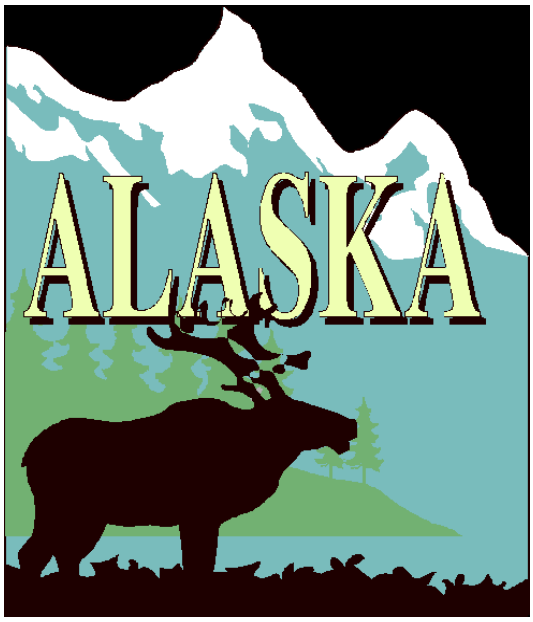

MORSE V. FREDERICK

SUPREME COURT OF THE UNITED STATES
No. 06-278
June 25, 2007
[5 - 4]

OPINION: ROBERTS/SCALIA/KENNEDY/THOMAS/ALITO…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**. Consistent with established school policy prohibiting such messages **at school events**, the principal directed the students to take down the banner. **One student**—among those who had brought the banner to the event—**refused to do so**. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*[1]. At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (*Bethel School Dist. No. 403 v. Fraser*[2]) and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood School Dist. v. Kuhlmeier*[3]. Consistent with these principles, we hold that **schools may take steps to safeguard those entrusted to their care from speech that can reasonably be**

[1] Case 1A-S-18 on this website.
[2] Case 1A-S-33 on this website.
[3] Case 1A-S-36 on this website.

regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an **approved social event or class trip**. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event…As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because **she thought it encouraged illegal drug use**, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that…advocates the use of substances that are illegal to minors." In addition, Juneau School Board Policy No. 5850 subjects "pupils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (8 days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." He further explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs."

The superintendent continued:

> "The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [His] speech was potentially disruptive to the event and clearly disruptive of and

> inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use."

Relying on our decision in *Fraser*, the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." The Juneau School District Board of Education upheld the suspension. Frederick then filed suit, alleging that the school board and Morse had violated his First Amendment rights…The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity."

The Ninth Circuit reversed…, [holding that] the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption" [and]…concluded that Frederick's right to display his banner was **so "clearly established" that a reasonable principal in Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity.**

Arrogance at work, again. "Frederick's 'right to display' the banner was so 'clearly established' that this principal should have realized her actions were unconstitutional?", or so concludes the Ninth Circuit Court of Appeals. First, when I started this journey almost three years ago, I was not expecting to reach the conclusion I have reached; that is, that almost nothing has been "clearly established" in the constitutional sense. That is especially true when the major cases are 5-4 affairs. Query: If her actions were so "clearly unconstitutional," why did her superintendent, her school board and the District Court support her position?

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. We resolve the first question against Frederick, and therefore have no occasion to reach the second.

Well, there you have it. Looks like the Ninth Circuit was put in its place. I am betting, however, that the Supreme Court Majority is much more diplomatic in its message than the Ninth Circuit was with this High School Principal. We shall see.

At the outset, we reject Frederick's argument that this is not a school speech case…The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip" and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, **during school hours**, at a school-sanctioned

activity and claim he is not at school." There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but **not on these facts**.

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. **Frederick himself claimed "that the words were just nonsense meant to attract television cameras."** But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as **advocating or promoting** illegal drug use"—in violation of school policy. ("I told Frederick and the other members of his group to put the banner down because I felt that it violated the school policy against displaying…material that advertises or promotes use of illegal drugs").

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits…"—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. **The best Frederick can come up with is that the banner is "meaningless and funny."** The dissent similarly refers to the sign's message as "curious," "ambiguous," "nonsense," "ridiculous," "obscure," "silly," "quixotic," and "stupid." Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." But that is a description of Frederick's motive for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue" **as if to suggest that the banner is political speech.** But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, **this is plainly not a case about political debate over the criminalization of drug use or possession.**

No, technically, it is not; however, let's not kid ourselves. This Court's judgment would not likely be any different if the banner had said, "Legalize Bong Hits for Jesus" or, simply, "Legalize Marijuana." In fact, the Court appears to be inviting the next Joseph Frederick to alter the wording just a bit and give it another try.

The question thus becomes 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. We hold that she may…

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Viet Nam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black* (2003)[4]. The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

This Court's next student speech case was *Fraser*. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." Analyzing the case under *Tinker*, the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. This Court reversed, holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate." ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express").

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, ***Fraser's*** **holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.** *Cohen v. California* (1971)[5]. In school,

[4] Case 1A-S-46 on this website.
[5] Case 1A-S-20 on this website.

however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*…

Our most recent student speech case, *Kuhlmeier*, concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under *Tinker*, ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. This Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur.

Let us pause for a moment of instructive contemplation. "No one would reasonably believe that Frederick's banner bore the school's imprimatur." Really? Anyone care to discuss *Lynch v Donnelly* (1984) or *Allegheny County v Greater Pittsburgh ACLU* (1989) or *Lee v Weisman* (1992)? Many Justices feel that the mere presence of a Nativity scene implies government imprimatur. If the Principal does not take action to remove this banner, does not that at least imply the same imprimatur that those Justices so readily attribute to the permitted presence of religious symbols? Consistency, please.

The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech "even though the government could not censor similar speech outside the school." And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights…at the schoolhouse gate,'…**the nature of those rights is what is appropriate for children in school.**" *Vernonia School Dist. 47J v. Acton* (1995)[6]. In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey v. T. L. O.* (1985)[7]. See *Vernonia* ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere…")…

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important— indeed, perhaps compelling" interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people…Just five years ago, we wrote: "The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse."

[6] Case 4A-8 on this website.
[7] Case 4A-5 on this website.

The problem remains serious today…About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. Nearly one in four 12th graders has used an illicit drug in the past month. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year.

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use…Thousands of school boards throughout the country— including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that **students are more likely to use drugs when the norms in school appear to tolerate such behavior.** Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment" (*Tinker*) and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing "serious violence to the First Amendment" by authorizing "viewpoint discrimination," the dissent concludes that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting." Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting "imminent" lawless action. ("It is possible that our rigid imminence requirement ought to be relaxed at schools"). And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. Stripped of rhetorical flourishes, then, **the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.**

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of

established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed…

CONCURRENCE: JUSTICE THOMAS…The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that **the standard set forth in *Tinker* is without basis in the Constitution.**

The First Amendment states that "Congress shall make no law…abridging the freedom of speech." As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech; instead, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." ***Chaplinsky*[8]. ** In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.

I wonder if Justice Thomas has overstated his case? The First Amendment does not protect student speech in public schools **at all**? Perhaps, as originally understood, it is fairer to suggest that, in a public school setting, the First Amendment limits the extent of free speech normally found in other times and places. But, there is no doubt that Justice Thomas would never permit a student to be disciplined for taking a controversial political stance at the appropriate time in a civics class.

Although colonial schools were exclusively private, public education proliferated in the early 1800's. By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.

During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand. Public schooling arose, in part, as a way to educate those too poor to afford private schools. Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. **Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas.** Rather, teachers instilled "a core of common values" in students and taught them self-control. ("By its discipline it contributes, insensibly, to generate a spirit of subordination to lawful authority, a power of self-control, and a habit of postponing present indulgence to a greater future good…[E]arly education activists, such as Benjamin Rush, believed public schools "helped control the innate selfishness of the individual").

[8] Case 1A-S-8 on this website.

Teachers instilled these values not only by presenting ideas but also through strict discipline. Schools punished students for behavior the school considered disrespectful or wrong… Children were punished for idleness, talking, profanity, and slovenliness. Rules of etiquette were enforced, and courteous behavior was demanded. To meet their educational objectives, schools required absolute obedience. ("I consider a school judiciously governed, where order prevails; where the strictest sense of propriety is manifested by the pupils towards the teacher, and towards each other…")

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order. Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order…

"*in loco parentis*": in place of a parent.

As early as 1837, state courts applied the in loco parentis principle to public schools: "One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits… The teacher is the substitute of the parent;…and in the exercise of these delegated duties, is invested with his power." *State v. Pendergrass*, 19 N.C. 365 (1837).

Applying in loco parentis, the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order. *Sheehan v. Sturges* (1885). Thus, in the early years of public schooling, schools and teachers had considerable discretion in disciplinary matters…

Courts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals. For example, the Vermont Supreme Court upheld the corporal punishment of a student who called his teacher "Old Jack Seaver" in front of other students. *Lander v. Seaver*, 32 Vt. 114 (1859). The court explained its decision as follows:

> "Language used to…stir up disorder and subordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools."

…The doctrine of in loco parentis limited the ability of schools to set rules and control their classrooms in almost no way. It merely limited the imposition of excessive physical punishment. In this area, the case law was split. One line of cases specified that punishment was wholly

discretionary as long as the teacher did not act with legal malice or cause permanent injury. *Boyd v. State* (1890) (allowing liability where the "punishment inflicted is immoderate or excessive, and…it was induced by legal malice, or wickedness of motive"). Another line allowed courts to intervene where the corporal punishment was "clearly excessive." Under both lines of cases, courts struck down only punishments that were excessively harsh; they almost never questioned the substantive restrictions on student conduct set by teachers and schools.

Tinker effected a **sea change** in students' speech rights, **extending them well beyond traditional bounds**…[U]nless a student's speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable. ("The school must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

Justice Black dissented, criticizing the Court for "subjecting all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." He emphasized the instructive purpose of schools: "[T]axpayers send children to school on the premise that at their age they need to learn, not teach." In his view, the Court's decision "surrendered control of the American public school system to public school students."

Of course, *Tinker's* reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling, a role limited by in loco parentis. Perhaps for that reason, the Court has since scaled back *Tinker's* standard, or rather set the standard aside on an ad hoc basis. In *Bethel School Dist. No. 403 v. Fraser*, a public school suspended a student for delivering a speech that contained "an elaborate, graphic, and explicit sexual metaphor." The Court of Appeals found that the speech caused no disruption under the *Tinker* standard, and this Court did not question that holding. The Court nonetheless permitted the school to punish the student because of the objectionable content of his speech. ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students"). Signaling at least a partial break with *Tinker*, *Fraser* left the regulation of indecent student speech to local schools.

Similarly, in *Hazelwood School Dist. v. Kuhlmeier*, the Court made an exception to *Tinker* for school-sponsored activities. The Court characterized newspapers and similar school-sponsored activities "as part of the school curriculum" and held that "[e]ducators are entitled to exercise greater control over" these forms of student expression. Accordingly, the Court expressly refused to apply *Tinker's* standard. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulations of student speech that are "reasonably related to legitimate pedagogical concerns."

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. **I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.**

Like I say, maybe a bit strong. But, I would have no problem recognizing a serious deference to school boards to run their own schools. Voters can take care of most abuses. And, if not, why not? Is this what Jefferson feared? Voters who would not stay educated – who would not stay involved?

In light of the history of American public education, it cannot seriously be suggested that the First Amendment "freedom of speech" encompasses a student's right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools' authority to make rules and to discipline students for violating those rules. Several points are clear: (1) under in loco parentis, speech rules and other school rules were treated identically; (2) the in loco parentis doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules…

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. **But I see no constitutional imperative requiring public schools to allow all student speech**. Parents decide whether to send their children to public schools…**If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.**

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. Instead, it imposed a new and malleable standard: Schools could not inhibit student speech unless it "substantially interfered with the requirements of appropriate discipline in the operation of the school." Inherent in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. (Black, J., dissenting) (arguing that the armbands in fact caused a disruption). Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.

And because *Tinker* utterly ignored the history of public education, courts (including this one) routinely find it necessary to create ad hoc exceptions to its central premise. This doctrine of exceptions creates confusion without fixing the underlying problem by returning to first principles. Just as I cannot accept *Tinker's* standard, I cannot subscribe to *Kuhlmeier's* alternative. Local school boards, not the courts, should determine what pedagogical interests are "legitimate" and what rules "reasonably relate" to those interests.

Justice Black's…dissent in *Tinker* has proved prophetic. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools. **"Once a society that generally respected the authority of teachers, deferred**

to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools." Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools (1996). We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either "[g]ibberish" or an open call to use illegal drugs. **To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to "surrender control of the American public school system to public school students."** *Tinker* (Black, J., dissenting). I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether…

CONCURRENCE: JUSTICE ALITO/KENNEDY…I join the opinion of the Court on the 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."

I have no problem with a healthy debate on the wisdom of legalizing marijuana. But, really, Justice Alito, are you suggesting that when students take field trips, all manner of political banners may be unfurled. Is it "let's make a statement time" on the way to the museum?

…In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; *Fraser* permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood School Dist. v. Kuhlmeier* allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground

that the buttons signified approval of war. **The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.**

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis.

For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger. In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. *Brandenburg v. Ohio*[9]. But due to the special features of the school environment, school officials must have greater authority to intervene **before** speech leads to violence. And, in most cases, *Tinker's* "substantial disruption" standard permits school officials to step in before actual violence erupts. Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

CONCURRENCE/DISSENT: JUSTICE BREYER…This Court…should simply hold that qualified immunity bars the student's claim for monetary damages and say no more…This holding, based as it is on viewpoint restrictions, raises a host of serious concerns. One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. Illegal drugs, after all, are not the

[9] Case 1A-S-17 on this website.

only illegal substances. What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court's rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging illegal drug use." But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

The Constitution would no more protect a person's "right" to parade a banner saying "Legalize Bong Hits" into a church during a sermon than it should protect a student's "right" to unfurl a banner **of any nature** during a school sponsored event without prior permission.

It is not "banner unfurling time." The time to advocate a change in such laws is during a course discussion that lends itself to such matters. We are talking discipline in schools, here, not Frederick's right to unfurl his banner in front of the courthouse during nonschool hours. Such a message is more about disrespect of authority than it is a serious advocacy of changes in the law. The First Amendment absolutely protects anyone's quest to change the law **in the proper setting**. Frederick has any number of meaningful constitutional methods by which to get his message across, if he has a meaningful message at all.

Legal principles must treat like instances alike. Those principles do not permit treating "drug use" separately without a satisfying explanation of why drug use is sui generis. To say that illegal drug use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms. During a real war, one less metaphorical than the war on drugs, the Court declined an opportunity to draw narrow subject-matter-based lines. *West Virginia Bd. of Ed. v. Barnette* (1943)[10]. We should decline this opportunity today.

Sui generis: "one of a kind; unique"

Although the dissent avoids some of the majority's pitfalls, I fear that, if adopted as law, it would risk significant interference with reasonable school efforts to maintain discipline. What is a principal to do when a student unfurls a 14-foot banner (carrying an irrelevant or inappropriate message) during a school-related event in an effort to capture the attention of television cameras? Nothing? In my view, a principal or a teacher might reasonably view Frederick's conduct, in this setting, as simply beyond the pale. And **a school official, knowing that adolescents often test the outer boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish when a student has gone too far.**

…Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence. As the majority rightly points out, the circumstances here called for a quick decision…But this consideration is better understood in terms of qualified immunity than of the First Amendment…

[10] Case 1A-S-9 on this website.

Students will test the limits of acceptable behavior in myriad ways better known to school-teachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office…

The defense of "qualified immunity" requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The defense is designed to protect "all but the plainly incompetent or those who knowingly violated the law."

Qualified immunity applies here and entitles Principal Morse to judgment on Frederick's monetary damages claim because she did not clearly violate the law during her confrontation with the student…

DISSENT: JUSTICE STEVENS/SOUTER/GINSBURG…A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau-Douglas High School (JDHS). On January 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message—"BONG HiTS 4 JESUS"—to his fellow students. He just wanted to get the camera crews' attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed "Glaciers Melt!"

I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

Enough, please. This student, who even he agrees had nothing to say, should have had enough wisdom and respect for Morse to yield to her demand to take the banner down. This is not about saying anything of value to Frederick. It is about appropriate discipline at the local level. It can be argued that this is not a First Amendment case. Justice Stevens, common old fashioned values that used to be instilled in public schools "demand more, much more."

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults; and second, that deterring drug use by schoolchildren is a valid and terribly important interest. As to the first, I take the Court's point that the message on Frederick's banner is not necessarily protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that

the pressing need to deter drug use supports JDHS's rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to minors." But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

Another attempt by Justice Stevens to break down an orderly society. Why do I suggest that is true? Look, the intent of the speaker is not the issue in this case. If that were the law, it would only engender clever attempts by high school students with nothing better to do than to arrange their chosen words in such a way as to send a message that they can argue was "never intended" and, thereby, thumb their noses at authority, courtesy of Justice Stevens "intent theory." How about an example: Behold a banner, "TAKE DRUGS." Would Justice Stevens permit a defense to school discipline (and $ damages against the school) that, "I only meant to encourage my fellow students to take prescription medication as directed" or, "I meant to encourage my fellow students to 'take drugs' away from small children." After all, I didn't say, "TAKE ILLEGAL DRUGS."

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor **expressly** advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed…

First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> "Discrimination against speech because of its message is presumed to be unconstitutional…when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. View-point discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector*.

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. *Brandenburg* (distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action")…

Justice Stevens is back at it. Please, we are talking about children, here, in a highly-volatile hormone-intense-lack-of-responsibility setting. Justice Stevens, would you really permit a high school student to unfurl a banner during school with a Confederate flag on it that says, "Bring back the KKK?"

Don't school boards have an interest in preventing dangerous situations on campus? Don't the other students have a right to be "secure" at school?

Or, would you like to see such banners unfurled in the name of free speech until death and destruction follow? You, Justice Stevens, are no expert when it comes to discipline in high schools, admittedly a place of fewer free speech rights than off campus during non-school hours.

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. ("Schools may restrict student expression that they reasonably regard as promoting illegal drug use"). The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner, a viewpoint, incidentally, that Frederick has disavowed. Unlike our recent decision in *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*, 551 U. S. ___, ___ (2007), the Court's holding in this case strikes at "the heart of the First Amendment" because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*[11].

It is also perfectly clear that "promoting illegal drug use" comes nowhere close to proscribable "incitement to imminent lawless action." *Brandenburg*. Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship:

> "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability…Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon." *Whitney v. California*[12].

No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, "has no chance of starting a present conflagration." *Gitlow v. New York*[13] (dissenting opinion).

RWV! I respectfully disagree! Justice Stevens, your near unlimited "right" to students in high school to advocate whatever they wish whenever they wish is, indeed, the beginning of a "present conflagration" in the breakdown of everything this Country holds dear in public education. Your attitude towards family values and children is a primary cause of the near complete break down of values we used to instill in our youth, such as respect. Disagree as often as one wishes, I will never understand most of the jurisprudence of Justice Stevens.

[11] Case 1A-S-37 on this website.
[12] Case 1A-S-4 on this website.
[13] Case 1A-S-3 on this website.

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on "any assembly or public expression that…advocates the use of substances that are illegal to minors…" Given that the relationship between schools and students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," *Vernonia School Dist. 47J v. Acton* (1995)[14], it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while conventional speech may be restricted only when likely to "incite imminent lawless action," *Brandenburg*, it is possible that our rigid imminence requirement ought to be relaxed at schools. *Bethel School Dist. No. 403 v. Fraser* ("The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

But it is one thing to restrict speech that advocates drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. *Masses Publishing Co. v. Patten*, 244 F. 535 (SDNY 1917) (Hand, J.) (distinguishing sharply between "agitation, legitimate as such" and "the direct advocacy" of unlawful conduct).

I have little doubt that Justices Stevens, Souter and Ginsburg would permit a suit for damages against a principal who disciplined a student for refusing to take down a banner with a drawing of a marijuana plant on it or just the word, “Marijuana.” Schools must have the backing of the law to punish such conduct that intentionally taunts the very rules that even Congress endorses; i.e., just say “no” to illegal drugs.

Even the school recognizes the paramount need to hold the line between, on the one hand, non-disruptive speech that merely expresses a viewpoint that is unpopular or contrary to the school's preferred message, and on the other hand, advocacy of an illegal or unsafe course of conduct. The district's prohibition of drug advocacy is a gloss on a more general rule that is otherwise quite tolerant of nondisruptive student speech:

> "Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program. The Board will not permit the conduct on school premises of any willful activity…that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits…any assembly or public expression that… advocates the use of substances that are illegal to minors…"

[14] 4A-8

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willfully" infringed on anyone's rights or interfered with any of the school's educational programs. On its face, then, the rule gave Frederick wide berth "to express [his] ideas and opinions" so long as they did not amount to "advocacy" of drug use. If the school's rule is, by hypothesis, a valid one, it is valid only insofar as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that "sweeps in a great variety of conduct under a general and indefinite characterization" may not leave "too wide a discretion in its application." *Cantwell v. Connecticut* (1940). Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

But instead of demanding that the school make such a showing, the Court punts. Figuring out just how it punts is tricky…On occasion, the Court suggests it is deferring to the principal's "reasonable" judgment that Frederick's sign qualified as drug advocacy. At other times, the Court seems to say that it thinks the banner's message constitutes express advocacy. Either way, its approach is indefensible.

To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. **The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy**. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, *Brandenburg*, yet would permit a listener's perceptions to determine which speech deserved constitutional protection.

Such a peculiar doctrine is alien to our case law. In *Abrams v. United States* (1919), this Court affirmed the conviction of a group of Russian "rebels, revolutionists, [and] anarchists" on the ground that the leaflets they distributed were thought to "incite, provoke, and encourage resistance to the United States." Yet Justice Holmes' dissent—which has emphatically carried the day—never inquired into the reasonableness of the United States' judgment that the leaflets would likely undermine the war effort. The dissent instead ridiculed that judgment: "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." In *Thomas v. Collins* (1945) we overturned the conviction of a union organizer who violated a restraining order forbidding him from exhorting workers. In so doing, we held that the distinction between advocacy and incitement could not depend on how one of those workers might have understood the organizer's speech. That would "put the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." In *Cox v. Louisiana* (1965), we vacated a civil rights leader's conviction for disturbing the peace, even though a Baton Rouge sheriff had "deemed" the leader's "appeal to… students to sit in at the lunch counters to be 'inflammatory.'" We never asked if the sheriff's in-person, on-the-spot judgment was "reasonable." Even in *Fraser*, we made no inquiry into whether the school administrators reasonably thought the student's speech was obscene or profane; we rather satisfied ourselves that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed, to any mature person."…

To the extent the Court independently finds that "BONG HiTS 4 JESUS" objectively amounts to the advocacy of illegal drug use—in other words, that it can most reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that…Frederick's credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything. But most importantly, it takes real imagination to read a "cryptic" message (the Court's characterization, not mine) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point…

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use. *Tinker* ("Students may not be confined to the expression of those sentiments that are officially approved"). If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting drugs.

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." (expressly defining "drugs" to include "all alcoholic beverages"). Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SIPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

> Of course it would. The tie goes to the principal, or it should. Otherwise, a clever student's intended message that would otherwise be subject to discipline would always be camouflaged in "Stevens' Speak."

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. Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others—fighting words, obscenity, and commercial speech, to name a few. Rather than reviewing our opinions discussing such categories, I mention

two personal recollections that have no doubt influenced my conclusion that it would be profoundly unwise to create special rules for speech about drug and alcohol use.

The Viet Nam War is remembered today as an unpopular war. During its early stages, however, "the dominant opinion" that Justice Harlan mentioned in his *Tinker* dissent regarded opposition to the war as unpatriotic, if not treason. That dominant opinion strongly supported the prosecution of several of those who demonstrated in Grant Park during the 1968 Democratic Convention in Chicago and the vilification of vocal opponents of the war like Julian Bond…In 1965, when the Des Moines students wore their armbands, the school district's fear that they might "start an argument or cause a disturbance" was well founded. Given that context, there is special force to the Court's insistence that "our Constitution says we must take that risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." As we now know, the then-dominant opinion about the Viet Nam War was not etched in stone.

Again, we are in a public school setting, where parents are compelled to send their children and expect "government" to keep them reasonably safe. Has "this sort of hazardous freedom" you espouse in this setting contributed to public school chaos around the Country? Kids shooting kids and teachers on a frequent basis?

Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our anti-marijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Viet Nam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of voters in each of the several States that tolerate medicinal uses of the product, lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney*; *Abrams*; *Tinker*. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular. I respectfully dissent.

Perhaps you forgot the facts of the case, Justice Stevens. This has nothing to do with a debate about legalizing marijuana. Also, your dire concerns imply a near end of freedom. I think you are off the deep end, here. This high school student has the absolute right to unfurl his banner on the sidewalk during a parade that is not also part of a field trip. He can organize a club to advocate whatever he wishes and hold rallies off campus or maybe even on campus when school is not in session. But, he cannot decide for himself how elected educators run his school, at least not on these facts. So, you see Justice Stevens, Frederick's world has not come to an end.