

## FIRST AMENDMENT: FREE SPEECH AND SCHOOL CONDUCT

---

This activity is based on the Supreme Court case *Morse v. Frederick*, 551 U.S. \_\_\_, 127 S. Ct. 2618 (2007). The case focuses on the First Amendment and students' rights to express their views when they are interpreted by school authorities as promoting illegal drug use.

### About These Resources

- Analyze the [facts and case summary](#) for *Morse v. Frederick*.
- Build arguments for both sides, starting with these [talking points](#).
- Use critical thinking skills and share reflections on the [discussion questions](#).

### How to Use These Resources

This activity is a modified [Oxford style debate](#).

1. To get started, have participants read the *Morse v. Frederick* [facts and case summary](#).
2. Assign student attorneys to the issues listed in the [talking points](#). They are suggested points– not a script– for the debate. Student attorneys are encouraged to add their own arguments.
3. All other students are jurors who deliberate (and may refer to these talking points) during the open floor debate. They debate among themselves in the large group or smaller groups and come to a verdict after the attorneys present closing arguments.

## FACTS AND CASE SUMMARY: MORSE V. FREDERICK

---

Facts and case summary for *Morse v. Frederick*, 551 U.S. \_\_\_, 127 S. Ct. 2618 (2007)

School authorities do not violate the First Amendment when they stop students from expressing views that may be interpreted as promoting illegal drug use.

<b>FACTS</b>	Joseph Frederick, a senior at Juneau-Douglas High School, unfurled a banner saying "Bong Hits 4 Jesus" during the Olympic Torch Relay through Juneau, Alaska on January 24, 2002. Frederick's attendance at the event was part of a school-supervised activity. The school's principal, Deborah Morse, told Frederick to put away the banner, as she was concerned it could be interpreted as advocating illegal drug activity. After Frederick refused to comply, she took the banner from him. Frederick originally was suspended from school for 10 days for violating school policy, which forbids advocating the use of illegal drugs.
<b>PROCEDURE</b>	The U.S. District Court for the District of Alaska ruled for Morse, saying that Frederick's action was not protected by the First Amendment. The U.S. Court of Appeals for the Ninth Circuit reversed and held that Frederick's banner was constitutionally protected. The U.S. Supreme Court granted certiorari.
<b>ISSUES</b>	Whether a principal violates the Free Speech Clause of the First Amendment by restricting speech at a school-supervised event when the speech is reasonably viewed as promoting illegal drug use.
<b>RULING</b>	No.
<b>REASONING</b>	<p>In <i>Tinker v. Des Moines</i> (1969), the Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." <i>Tinker</i> held that the wearing of armbands by students to protest the Vietnam War was constitutionally protected speech because it was political speech. Political speech is at the heart of the First Amendment and, thus, can only be prohibited if it "substantially disrupts" the educational process.</p> <p>On the other hand, the Court noted in <i>Bethel v. Fraser</i>, 478 U.S. 675, 682 (1986) that "the constitutional rights of students at public school are not automatically, coextensive with the rights of adults." The rights of students are applied "in light of the special characteristics of the school environment," according to the U.S. Supreme Court in <i>Hazelwood School District v. Kuhlmeier</i>, 484 U.S. 260, 266 (1988).</p> <p>In the present case, the majority acknowledged that the Constitution affords lesser protections to certain types of student speech at school or school-supervised events. Finding that the message Frederick displayed was by his own admission not political in nature, as was the case in <i>Tinker</i>, the Court said the phrase "Bong Hits 4 Jesus" reasonably could be viewed as promoting illegal drug use. As such, the state had an "important" if not "compelling" interest in prohibiting/punishing student speech that reasonably could be viewed as promoting illegal drug use. The Court, therefore, held that schools may "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" without fear of violating a student's First Amendment rights.</p>
<b>CONCURRENCES</b>	<b>Justice Thomas</b> Justice Clarence Thomas concurred with the majority, but argued that, instead of making exceptions to the holding in <i>Tinker</i> , <i>Tinker</i> should be overturned. Citing various scholarly

sources on the history of public education, Justice Thomas argued that the First Amendment was never meant to protect student speech in public schools.

**Justices Alito and Kennedy**  
 Justices Alito and Kennedy concurred with the majority, but were careful to note that the majority's decision was at the outer parameters of constitutionally protected behavior. These justices were concerned that the majority's decision permitting the suppression of speech promoting illegal drug use could be used to punish those advocating constitutionally permissible, but unpopular, political ideas, e.g., legalizing medicinal marijuana use.

**CONCURRENCE  
and DISSENT**

**Justice Breyer**  
 Justice Stephen Breyer argued that the majority did not need to decide this case on its merits, but could have decided it on the basis of the doctrine of "qualified immunity." Qualified immunity prevents government officials, such as a school principal, from being sued for actions taken in their official capacities. This protection is in place as long as the legality of the conduct is open to debate. Since Justice Breyer argued that it was not clear whether Frederick's speech was constitutionally protected, Morse was entitled to qualified immunity. This decision would demonstrate judicial restraint, i.e., not having a court decide a larger issue if deciding a smaller issue could dispose of the case.

Under current Supreme Court precedent, issues of qualified immunity cannot be decided unless a Court first determines that a constitutional violation occurred. Justice Breyer took the position that this precedent should be overturned. Since the majority decided that no constitutional violation occurred, it did not address the issue of qualified immunity.

**DISSENT**

**Justice Stevens**  
 Justice John Paul Stevens took the position that the school's interest in protecting students from speech that can be reasonably regarded as promoting drug use does not justify Frederick's punishment for his attempt to make an ambiguous statement simply because it refers to drugs. Justice Stevens made several points in his dissent. First, he argued that prohibiting speech because it advocates illegal drug use, unless it is likely to provoke the harm sought to be avoided by the government, violates the First Amendment because it impermissibly discriminates based upon content. Second, even if the school had a compelling interest to prohibit such speech, Frederick's banner was so vague that a reasonable person could not assume that it advocated illegal drug use. Finally, the dissent took issue with the majority's justification that the speech could "reasonably be perceived as promoting drug use" because the constitutionality of speech should not depend on the perceptions of third parties.

## TALKING POINTS

---

### Question:

Do school authorities violate the Free Speech Clause of the First Amendment by restricting student speech at a school-supervised event when the speech may be viewed as promoting illegal drug use?

#### Morse

#### Frederick

### 1. Do school officials have the authority to restrict student speech that they perceive as harmful to other students?

#### **Affirmative.** Yes.

Although students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” school administrators must have the ability to restrict speech that is harmful to other students, in this instance promoting illegal drug use. Frederick displayed his banner at a school event. It was the duty of the principal to take action against him.

#### **Negative.** No.

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Here, a student was punished only because his message was deemed unpopular/controversial by school principal Morse. The banner did not disrupt the school-related event. The principal’s actions were based solely on opposition to the content of the banner, and the First Amendment protects against such acts of censorship.

### 2. If the banner could be interpreted as promoting illegal drug use, do schools have a compelling interest in preventing such messages at school-supervised events?

#### **Affirmative.** Yes.

Illegal drug use can have serious adverse consequences on users, including death. The school has a responsibility to discourage the use of illegal drugs. Frederick was advocating illegal drug use. The state has a compelling interest in preventing such messages. Even if Frederick’s message were nonsensical, it could easily be interpreted as promoting illegal drug use – “bong hits.” Thus, the school’s compelling interests remain.

#### **Negative.** No.

The “Bong Hits 4 Jesus” banner did not explicitly promote illegal drug use. It is a nonsensical phrase. Any interpretations are a result of the viewer’s perceptions. Even if the banner did have a pro-drug message, Frederick, was not engaging in illegal conduct. The state may not censor his message simply because it is unpopular. After all, how could one advocate for change in the law if one cannot advocate for making something legal that currently is illegal?

### 3. Should student speech be restricted if it can be interpreted as a distasteful, school-endorsed message?

#### **Affirmative.** Yes.

Perceptions by others can have a role to play in restricting speech. The term “bong hits” is usually associated with illegal drug use and schools have a compelling interest in preventing a student from advocating illegal drug use. The fact that Frederick displayed the banner at a school event gives the school reason to remove it so that no one would think that the school either explicitly or implicitly endorsed its message.

#### **Negative.** No.

Speech should not be restricted simply because it can be misinterpreted by others. If this is the criteria for restricting speech, then all speech can potentially be restricted since speech can easily be misconstrued. This interpretation would drastically undermine the protections of the First Amendment. No third party would seriously think that the school was endorsing Frederick’s message.

### 4. Does the First Amendment only protect the expression of coherent or rational thoughts?

**Affirmative. Yes.**

The First Amendment's protection of freedom of speech is meant to promote the spread of ideas. As such, it only protects coherent or rational thoughts. Nonsensical speech is not protected by the First Amendment or, at least, is given less protection than rational speech. Even if Frederick's speech were simply nonsensical, Morse could have restricted it without violating the First Amendment.

**Negative. No.**

Nonsensical speech is protected by the First Amendment. The principal does not have the right to determine what speech is or is not protected by the First Amendment. Under most circumstances, the First Amendment gives individuals the right to say whatever they wish so long as they are not harming others or interfering with their rights. No one was harmed by Frederick's actions.

**5. Should school officials be immune from legal liability when they take actions in good faith to protect other students from what they consider offensive speech?**

**Affirmative. Yes.**

School principals have to act in real time and respond to events as they arise. A principal is not a constitutional lawyer and does not know the nuances of the First Amendment. Even if Frederick's speech were protected by the First Amendment, when a principal acts in good faith to protect other students, the principal should be given immunity from civil suits for such actions.

**Negative. No.**

Those who violate the constitutional rights of others, even inadvertently, must not be immune from the consequences of their actions. Such violations restrict constitutional rights and violators must be held accountable. Therefore, Morse should be held accountable for violating Frederick's rights and compensate him as the law demands.

## DISCUSSION QUESTIONS

---

- 1. Students' Rights.** Should students be entitled to the same rights as adults while on school property or attending school-supervised events? What arguments can be made for limiting students' rights? What arguments can be made for not limiting students' rights?
- 2. The Fourth Amendment.** In the majority opinion, Chief Justice Roberts noted that schools can limit more than just a student's First Amendment rights. For instance, random drug tests of student athletes are constitutionally permissible. Is there any difference between limiting a student's rights to freedom of speech versus other rights, e.g., unreasonable searches and seizures?
- 3. Political Speech.** Who determines what constitutes political speech? What separates advocating illegal drug use (prohibited) from advocating a change in the law to legalize illegal drug use (permitted)? Does the school have an "important," if not "compelling" interest in combating the use of illegal drugs. If so, should this interest override First Amendment concerns?
- 4. Nonsensical Speech.** The dissent argued that Frederick's speech was "nonsensical." What type of speech does the First Amendment protect? Should "nonsensical" speech be included, or should it be excluded (like fighting words, obscenity, etc.)? Who decides what constitutes "nonsensical" speech?
- 5. The Principal's Actions.** Both the majority and the dissent agreed that the principal had to make a split-second decision in this case, and therefore should be granted "qualified immunity" from suit for her actions. Do you think that government officials, including principals, should be granted immunity for violating constitutional rights if, in their judgment, a situation calls for immediate action? Give some examples of such situations. Using your examples, what arguments can you make for and against this protection?