

What would Harry Potter say about BONG HiTS 4 JESUS?
Morse v. Frederick and the Democratic Implications of Using
In Loco Parentis to Subordinate *Tinker* and Curtail Student Speech

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“Using defensive spells?” Professor Umbridge repeated with a little laugh. “Why I can’t imagine any situation arising in my classroom that would require you to *use* a defensive spell, Miss Granger. You surely aren’t expecting to be attacked during class?”

“Surely the whole point of Defense Against Dark Arts is to practice defensive spells?”

“Are you a Ministry-trained educational expert, Miss Granger?” asked Professor Umbridge in her falsely sweet voice. “Older and cleverer wizards than you have devised our new program of study. You will be learning about defensive spells in a secure, risk free way.”

“What use is that?” said Harry loudly. “If we are going to be attacked it won’t be in a--”

“Hand, Mr. Potter!” sang Professor Umbridge.

From *Harry Potter and The Order of the Phoenix*¹

Is education about protection or preparation? For Professor Umbridge, students are to be taught government-prescribed age-appropriate sanitized lessons that neither scare nor challenge but rather, instill discipline and order. Harry Potter disagrees. For Harry, education should prepare students to be constructive and effective citizens in the real world they will inhabit as adults. This tension between protection and preparation is also present in the recent Supreme Court decision *Morse v. Frederick* that addresses the Constitutional limits of restricting student speech under the pretext of ensuring student safety.

In *Morse v. Frederick*,² the Supreme Court considered whether a high school principal, Morse, violated a student’s *First Amendment* right to free speech by suspending the student, Frederick, for refusing to take down a banner reading, “BONG HiTS 4 JESUS” while students were watching the Olympic torch relay pass in front of their

¹ J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX, 242 (2003).

² *Morse et. al. v. Frederick*, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007).

school. In a divided decision,³ the Supreme Court held that the school officials did not violate the *First Amendment* by confiscating the banner and subsequently suspending the student.⁴ The majority's reasoning, in large part, is based on the fact that "schools may take steps to safeguard those entrusted to their care from speech that can be reasonably regarded as encouraging illegal drug use."⁵ The majority's emphasis on the notion that schools are entrusted with the care of vulnerable minors draws on the principle of *in loco parentis*.⁶ *In loco parentis*, coming from Latin, means "in place of parent" and refers to the legal authority and obligations teachers, administrators, and other school personnel have to safeguard students.⁷ Moreover, it is significant that the majority uses this *in loco parentis* reasoning to cast aside the stringent student-centered speech test from *Tinker v. Des Moines*⁸ in favor of the more liberal school-centered speech test from *Bethel v. Fraser*.⁹ Thus, the majority explains that the principal could restrict Frederick's speech

³ See *Morse* at 294. Justice ROBERTS delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. Justice THOMAS filed a concurring opinion. Justice ALITO filed a concurring opinion, in which Justice KENNEDY joined. Justice BREYER filed an opinion concurring in the judgment in part and dissenting in part. STEVENS, J., filed a dissenting opinion, in which Justice SOUTER and Justice GINSBURG joined.

⁴ *Morse*, 168 L. Ed. at 296.

⁵ *Morse*, 168 L. Ed. at 296.

⁶ See *Morse*, 168 L. Ed. at 306 (Thomas, J., concurring). "Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order...Rooted in the English common law, *in loco parentis* originally governed the legal rights and obligations of tutors and private schools...A parent may delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."

⁷ BLACK'S LAW DICTIONARY 791 (7TH ed. 1999).

⁸ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (holding that students retain *First Amendment* expression rights at school, which may be suppressed only if authorities reasonably "forecast substantial disruption of or material interference with school activities").

⁹ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (holding that the school district permissibly sanctioned a student for his sexually explicit speech at a school assembly).

because she was keeping him and other students safe from what she reasonably interpreted as a harmful pro drug message on his banner.¹⁰

The dissent, on the other hand is concerned about the slippery slope and ensuing consequences of using *in loco parentis* with such a broad brush to cast aside the student-centered test from *Tinker* in order to curtail student speech. As Justice Stevens explains, “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?”¹¹ Moreover, the dissent raises concerns about the dangers for democracy in adopting a ruling that overly values protection over preparation-- “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...”¹² Finally, this law review article uses Princeton and University of Pennsylvania scholar Amy Gutmann’s Theory of *Democracy in Education*¹³ to discuss the implications of *Morse v. Frederick* on student speech and democracy.

*Morse v. Frederick Facts*¹⁴

The Olympic Torch Relay was passing through Juneau, Alaska, en route to the Salt Lake City Winter Olympics, in January 2002. Students were released from school so

¹⁰ Morse, 168 L. Ed. at 296.

¹¹ Morse, 168 L. Ed. at 326 (Stevens, J. Dissenting).

¹² Morse, 168 L. Ed. at 326 (Stevens, J. Dissenting).

¹³ AMY GUTMAN, DEMOCRATIC EDUCATION (1987).

¹⁴ Articulation of facts is based on both Chief Justice Roberts opinion in *Morse et. al. v. Frederick*, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 295 – 299 (2007) and the 9th Circuit opinion by Circuit Judge Kleinfeld below at *Frederick v. Morse*, 439 F.3d 1114, 1114 - 1117 (9th Cir. 2006).

that they could watch the Olympic torch pass. Principal Deborah Morse allowed school staff and students to miss class to observe the relay from either side of the street in front of the high school. The torchbearers were to proceed along a street in front of Juneau-Douglas High School while school was in session. Joseph Frederick, then an 18-year-old senior at Juneau Douglas High School, never made it to school that morning because he got stuck in the snow in his driveway. However, he made it to the sidewalk across from school where he joined his friends to watch the torch pass. As the torchbearers and camera crews came by, Frederick and his friends, unfurled a 14-foot banner with the phrase: "BONG HiTS 4 JESUS."

Principal Morse immediately crossed the street and demanded that the banner be taken down. All students complied except for Frederick who refused. When Principal Morse confronted Frederick about the banner, he asked, "What about the *Bill of Rights* and freedom of speech?" She told him to take the banner down because she "felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs." Morse grabbed the banner from Frederick and crumpled it up. Morse told Frederick to report to her office, where she suspended him for 10 days. The school superintendent upheld the suspension, explaining that Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. In answers to interrogatories, the school district never contends that the display of the banner disrupted or was expected to disrupt classroom work. Asked for all the ways in which the banner display disrupted the educational process, the school board responded:

Display of the banner would be construed by many, including students, district personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use which is inconsistent with the district's basic educational mission to promote a healthy, drug-free life style. Failure to react to the display would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior.¹⁵

The school board also upheld the suspension because it claimed that Frederick's actions violated Juneau School Board Policy No. 5520 which provides, "The Board specifically prohibits any assembly or public expression that...advocates the use of substances that are illegal to minors."

*Morse v. Frederick Procedural History*¹⁶

Frederick appealed his suspension administratively. The school board upheld the suspension but limited the punishment to time served. The superintendent justified his decision as follows:

[Frederick displayed his banner] in the midst of his fellow students, during school hours, at a school sanctioned activity. [Frederick] was not disciplined because the principal disagreed with his message, but because his speech appeared to advocate the use of illegal drugs. 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 say the banner [advocates] 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. [Frederick's] speech was potentially disruptive of and inconsistent

¹⁵ Frederick v. Morse, 439 F. 3d 1114, 1116 (9th Cir. 2006).

¹⁶ Articulation of procedural history is based on both Chief Justice Roberts opinion in Morse et. al. v. Frederick, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 297 – 299 (2007) and the 9th Circuit opinion by Circuit Judge Kleinfeld below at Frederick v. Morse, 439 F.3d 1114, 1117 – 1124 (9th Cir. 2006).

with the school's educational mission to educate students about the dangers of illegal drugs.¹⁷

Consequently, Frederick filed suit under 42 U.S.C. § 1983, alleging that the school board and Principal Morse violated his *First Amendment* right to free speech. The District Court granted summary judgment for the school board and Principal Morse, ruling that they were entitled to qualified immunity and that they had not violated *Frederick's First Amendment* right to free speech. The District Court found that the “inappropriate obscenity” test from *Bethel School District No. 403 v. Fraser*,¹⁸ as opposed to the “political speech/ substantial disruption” test from *Tinker v. Des Moines Independent Community School District*,¹⁹ governed the speech in this case.²⁰ The District Court concluded that “[Principal] Morse reasonably interpreted the banner as promoting illegal drug use – a message that directly contravened the Board’s policies relating to drug abuse prevention...[and that] Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity.”²¹

The Ninth Circuit Court of Appeals reversed the District Court’s ruling. For the Ninth Circuit, the test from *Tinker v. Des Moines Independent Community School*

¹⁷ Morse, 168 L. Ed. at 297.

¹⁸ *BETHEL SCHOOL DISTRICT NO. 403 v. FRASER*, 478 U.S. 675, 685, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (holding that the school district permissibly sanctioned a student for his sexually explicit speech at a school assembly).

¹⁹ *TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*, 393 U.S. 503, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (holding that students retain *First Amendment* expression rights at school, which may be suppressed only if authorities reasonably “forecast substantial disruption of or material interference with school activities”).

²⁰ *Frederick v. Morse*, 439 F. 3d 1114, 1117 (9th Cir. 2006).

²¹ Morse, 168 L. Ed. at 297.

*District*²² is more relevant to this case than the test from *Bethel School District No. 403 v. Fraser*.²³ As such, under the *Tinker* test, the Ninth Circuit held:

Thus, the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor nondisruptive, off-campus speech by students during school authorized activities because the speech promotes a social message contrary to the one favored by the school. The answer under controlling, long-existing precedent is plainly “No.”²⁴

In *Tinker*, the Supreme Court held that wearing black arm bands in high school, “unaccompanied by any disorder or disturbance on the part of [the students wearing the arm bands]” and unaccompanied by “interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone,” was constitutionally protected speech.²⁵ *Tinker* held that “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”²⁶

Thus, the 9th Circuit concludes that

Tinker disposes of the School Board’s argument that “school administrators were entitled to discipline Frederick’s attempt to belittle and undercut this critical mission” of preventing use of illegal drugs by a sign that was “a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs.” Under *Tinker*, a school cannot censor or punish students’ speech merely because the students advocate a position contrary to government policy. The

²² TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

²³ BETHEL SCHOOL DISTRICT NO. 403 V. FRASER, 478 U.S. 675, 685, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986).

²⁴ Frederick v. Morse, 439 F. 3d 1114, 1118 (9th Cir. 2006).

²⁵ *Tinker*, 393 U.S. at 508.

²⁶ *Tinker*, 393 U.S. at 511.

Tinker armbands were about war. Government has no mission in which victory is so important as war. The federal government was, at the time of the facts giving rise to the Tinker case, prosecuting a war. Government policy was to support and advance the effort to win the war. The black armbands in Tinker expressed hostility to the war. By doing so, they legitimized opposition and undermined support for the war. Yet the students in high school had a constitutional right to express their opposition to this critically important mission of the federal government.²⁷

The 9th Circuit uses the *Tinker* (political speech) test and explains that the *Bethel v. Fraser* (inappropriate speech) test does not apply. *Bethel v. Fraser* held that a high school student did not have a First Amendment right to give a sexually suggestive nominating speech for a candidate for student office at a school assembly that was part of a school-sponsored program in self-government “where disruption immediately ensued as the student gave the speech.”²⁸ The Supreme Court in *Bethel v. Fraser* made it clear that a high school student’s right to free speech is not coextensive with a an adult’s right to free speech and that “pervasive sexual innuendo” that is “plainly offensive...to any mature person” can be marked off as impermissible incivility within the school context.²⁹

In choosing to apply *Tinker* over *Bethel*, the 9th Circuit explains:

Our case differs from *Fraser* in that Frederick’s speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly. Also, it is not so easy to distinguish a speech about marijuana from political speech in context of a state where referenda regarding marijuana legalization repeatedly occur and controversial state court decision on the topic had recently issued. The phrase “BONG HiTS 4 JESUS” may be funny, stupid, or insulting, depending on one’s

²⁷ Frederick v. Morse, 439 F. 3d 1114, 1118 (9th Cir. 2006).

²⁸ BETHEL, 478 U.S. at 677-678.

²⁹ BETHEL, 478 U.S. at 683.

point of view, but it is not “plainly offensive” the way sexual innuendo is...the question is how far Tinker goes to protect such student speech as Frederick’s, and how far Fraser goes to protect school authority to censor and punish student speech that “would undermine the school’s basic educational mission.” There has to be some limit on the school’s authority to define its mission in order to keep Fraser consistent with the bedrock principle of Tinker that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Had the school in that case defined its mission as instilling patriotic duty or promoting support for national objectives, it still could have punished the students for wearing black armbands. All sorts of missions are undermined by legitimate and protected speech -- a school’s anti gun mission would be undermined by a student passing around copies of John R. Lott’s book *More Guns, Less Crime*, a school’s anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school’s traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents. Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself. What schools are entitled to do, as Fraser makes clear, is suppress speech that disrupts the good order necessary to conduct their educational function. No educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event.³⁰

Thus, the Ninth Circuit held that even assuming *arguendo* Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the principal and school board violated Frederick’s *First Amendment* right to free speech because the school “punished Frederick without demonstrating that his speech threatened substantial disruption.”³¹ It also concluded that Principal Morse was not entitled to qualified immunity because Frederick’s right to display the banner was so clearly established that a reasonable principal in Morse’s position would have understood that her actions were unconstitutional. The Supreme Court granted certiorari to determine, among other things, whether Petitioner Principal Morse violated Respondent Frederick’s *First Amendment* right to Free Speech.

³⁰ Frederick v. Morse, 439 F. 3d 1114, 1119 (9th Cir. 2006).

³¹ Frederick v. Morse, 439 F. 3d 1114, 1118 (9th Cir. 2006).

Majority Reasoning Based on Pro-Drug Message

Chief Justice Roberts rejects the Ninth Circuit’s conclusion that the BONG HiTS 4 JESUS banner is political speech. Chief Justice Roberts explains:

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster [a] “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.³²

Chief Justice Roberts’ finding that the BONG HiTS 4 JESUS banner is not political speech is based on Frederick’s statement of his purpose in displaying the banner – “to get on television” as well as the reasonable interpretive import of the speech –the encouragement of illegal drug usage. This finding seems somewhat precipitous. Chief Justice Roberts uses a superficial fact-based analysis in determining that “there is no serious argument that Frederick’s banner is political speech.”³³ Thus, because he quickly presumes that the BONG HiTS 4 JESUS banner is *not* political speech, Chief Justice Roberts applies the “more appropriate” and more lenient “offensive speech” test from *Bethel v. Fraser* as opposed to the more stringent “substantial disruption” test from *Tinker*.

Chief Justice Roberts describes the test from *Tinker* as follows:

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

³² Morse, 168 L. Ed. at 299.

³³ Morse, 168 L. Ed. at 301.

Vietnam 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.” 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.”³⁴

The majority distinguishes *Tinker’s* political speech test from the test used in *Bethel v.*

Fraser.³⁵ Chief Justice Roberts describes *Bethel v. Fraser* as follows:

Matthew Fraser was suspended for delivering a speech before a high school assembly in which employed what this Court called “an elaborate, graphic, and explicit sexual metaphor.” Analyzing the case under *Tinker*, the District Court and the 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 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.”...*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*.³⁶

Thus, Chief Justice Roberts suggests that *Bethel v. Fraser* stands for the proposition that the “substantial disruption” test only applies to political speech and that schools can more easily regulate offensive speech when it is not political.

According to the majority, under the *Fraser* test, the BONG HiTS 4 JESUS banner can be regulated because it is not only “offensive” but also poses a “serious and

³⁴ Morse, 168 L. Ed. at 300.

³⁵ *Bethel Sch, Dist. v. Fraser*, 478 U.S. 675 (1986)

³⁶ Morse, 168 L. Ed. at 300 – 301.

palpable” danger as it can reasonably be interpreted as promoting a pro drug message.³⁷

Specifically, Chief Justice Roberts explains:

The “special characteristics of the school environment” 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 view point.” 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.³⁸

Thus, based on *Bethel v. Fraser*, the majority rejects that this is political speech so that the *Tinker* “substantial disruption” test would not apply. Instead, the majority uses a *Bethel v. Fraser* type test based on the school’s reasonable interpretation of student danger. While he does not refer to *in loco parentis* directly, Chief Justice Roberts uses an *in loco parentis* type rationale to conclude that the language on the banner is not only obscene but promotes unsafe and illegal drug usage and therefore can be regulated. The problem with this argument is that it creates a slippery slope, which enables school administrators, under the pretext of *in loco parentis*, to regulate almost anything they reasonably perceive as dangerous. As Chief Justice Roberts explains:

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

³⁷ Morse, 168 L. Ed. at 303.

³⁸ Morse, 168 L. Ed. at 303.

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.³⁹

Thus according to Chief Justice Roberts, in the name of protecting students from danger, schools have wide latitude to restrict student speech. Justice Thomas goes even farther. For Justice Thomas, who personifies Professor Umbridge from *Harry Potter*, this latitude given to schools to protect students from danger has no limits.

Justice Thomas as Professor Umbridge

Justice Thomas, who agrees with the majority opinion, also writes a concurring opinion in which he explicitly connects reasoning of the majority opinion to the concept of *in loco parentis*. For Justice Thomas, free speech in public schools undermines the order and discipline administrators and teachers must maintain. As Justice Thomas explains:

Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order...Applying *in loco parentis*, the judiciary was reluctant to interfere with the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order...The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way...*Tinker* effected a sea change in students' speech rights, extending well beyond traditional bounds...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.⁴⁰

In fact, Justice Thomas' infatuation, in a Professor Umbridge way, with *in loco parentis* leads not just to a slippery slope. Justice Thomas' reasoning creates a mudslide, and if

³⁹ Morse, 168 L. Ed. at 304.

⁴⁰ Morse, 168 L. Ed. at 306 – 308 (Thomas, J., concurring).

fully followed would result in the complete eradication of *Tinker* and *all First Amendment* if not Constitutional rights for public school students. As Justice Thomas opines:

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...In my view, the history of public education suggests that the *First Amendment*, as originally understood, does not protect student speech in public schools...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.⁴¹

One may be tempted to dismiss, Justice Thomas' sweeping denial of current law as an aberration. After all, he nostalgically refers to a time to support his argument that also included the legalization of slavery and corporally punishing one's wife. On the other hand, the dissent does not dismiss Justice Thomas' anachronisms so easily. In a vocal dissent, Justice Stevens suggests that Justice Thomas' views are not way out there, but rather the logical end-point of the majority's slippery slope opinion. An opinion that will result, as Justice Thomas points out, in the "scaling back" and "setting aside" of *Tinker* on an *ad hoc* basis.

In Loco Parentis Threatens Tinker and Democracy

In a strongly worded dissent, Justice Stevens, expresses concern about the impact of this *in loco parentis* – rationale on *Tinker* and democracy. As Justice Stevens laments:

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests...The Court's test invites stark viewpoint discrimination...It is also perfectly clear that "promoting illegal drug use" comes nowhere close to proscribable "incitement to imminent lawless action."...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

⁴¹ Morse, 168 L. Ed. at 304 – 305 (Thomas, J., concurring).

its feared consequences...The Court rejects outright...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*.⁴²

Thus, Justice Stevens is worried about the majority using an *in loco parentis* rationale, thereby placing an “unusual importance of protecting children” to undermine *Tinker* and the “values protected by the *First Amendment*.” Like Harry Potter, Justice Stevens is concerned about the slippery slope of the majority’s *in loco parentis* rationale and its vulnerability to abuse of power. Justice Stevens asks poignantly about the logical conclusion of the Court’s opinion, “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.”⁴³ Thus, Justice Stevens expresses concern about the broad sweep of the majority’s *in loco parentis* analysis and its impact on the *Tinker* precedent.

Moreover, Justice Stevens links free speech to democracy and is concerned about a student speech restriction that “sweeps in a great variety of conduct under a general and indefinite characterization...[and thus may leave] too wide a discretion in its

⁴² Morse, 168 L. Ed. at 321 (Stevens, J., dissenting).

⁴³ Morse, 168 L. Ed. at 326 - 327 (Stevens, J., dissenting).

application.”⁴⁴ For Justice Stevens, the majority mocks *Tinker* and *First Amendment* jurisprudence by not requiring the school to show “some likely connection” between the BONG HiTS 4 JESUS banner and a “meaningful chance of making students try marijuana.”⁴⁵ Justice Stevens worries about the democratic implications of whittling down *Tinker* stating, “the Court’s ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students.”⁴⁶ Justice Stevens warns, “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. 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.”⁴⁷ Thus for Stevens, student speech prepares students to participate and be constructive members of our democracy.

Democracy and 1st Amendment

One of the most “fashionable”⁴⁸ theories in favor of a right to free speech is that it promotes this “citizen participation in a democracy.”⁴⁹ As Justice Brandeis explained in the case of *Whitney v. California*:

⁴⁴ Morse, 168 L. Ed. at 323 (Stevens, J., dissenting).

⁴⁵ Morse, 168 L. Ed. at 323 (Stevens, J., dissenting).

⁴⁶ Morse, 168 L. Ed. at 326 (Stevens, J., dissenting).

⁴⁷ Morse, 168 L. Ed. at 328 (Stevens, J., dissenting).

⁴⁸ ERIC BARENDT, FREEDOM OF SPEECH 18 (2d ed. 2005).

⁴⁹ ERIC BARENDT, FREEDOM OF SPEECH 18 (2d ed. 2005).

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth;... that the greatest menace to freedom is an inert people; that public discussion is a political duty; and this should be a fundamental principle of American government.⁵⁰

Specifically, the *First Amendment* right to free speech has been argued as necessary to “protect the right of all citizens to understand political issues in order to participate effectively in the working of democracy.”⁵¹ Thus, a right to freedom of speech exposes citizens to diverse viewpoints so that those citizens can make informed choices about their government. In addition according to Ronald Dworkin, free speech ensures that political institutions “respect the right of all citizens to be treated with equal respect and concern, including members of minority groups and parties who are entitled to participate in public discourse and debate.”⁵² Thus free speech is necessary for active, constructive, and equal participation in democracy. It would only make sense, therefore, that *First Amendment* free speech in public schools was necessary to teach students about being participatory, constructive, and egalitarian adults in our democracy.

Amy Gutmann’s Theory of Democracy and Education

Surly, under Amy Gutmann’s Theory of Democracy and Education, an approach to student speech that undermined *Tinker* would be of concern; Gutmann values preparation over protection so that students can get a “political education” to prepare them to “participate” in “democratic society.”⁵³ For Gutmann, a view of *the First*

⁵⁰ *Whitney v. California*, 274 U.S. 357, 375 – 378 (1927) as cited in ERIC BARENDT, *FREEDOM OF SPEECH* 18 (2d ed. 2005).

⁵¹ ERIC BARENDT, *FREEDOM OF SPEECH* 18 (2d ed. 2005).

⁵² ERIC BARENDT, *FREEDOM OF SPEECH* 18 (2d ed. 2005).

⁵³ AMY GUTMANN *DEMOCRATIC EDUCATION* 287 (1997).

Amendment consistent with *Tinker* would be important to cultivate the “virtues, knowledge, and skills necessary for political participation.”⁵⁴ Amy Gutmann uses the example of book banning to specifically address students’ *First Amendment* free speech rights. Gutmann states that the “crucial test of the legitimacy” of book banning is whether the practice of book banning, “restricts rational deliberation of competing conceptions of the good life and good society...[and shields] students from reasonable (not correct or uncontroversial) political views represented by the adult citizenry or from censoring reasonable challenges to those views.”⁵⁵ Gutmann believes that a student’s *First Amendment* right to free speech is necessary to “guarantee the democratic character of the popular will: assembly, debate, elections, and so on.”⁵⁶ For Gutmann, if student speech is not protected in public school, it will threaten adult speech as foundational for democracy.

Like Harry Potter, Amy Gutmann would be very concerned *about Morse v. Frederick*. She would not be concerned necessarily about protecting the language on the banner “BONG HiTS 4 JESUS.” What would concern Gutmann would be the process with which the school was allowed to restrict such language. The majority enabled the school to use its view of “reasonable danger” to avoid any stringent free speech test. Thus, as Justice Thomas pointed out *Tinker* becomes whittled away on an *ad hoc* basis. The problem is that *Morse v. Frederick* is not just about some stupid sign for the television cameras; it is about affirming or in this case, denying, student speech rights.

⁵⁴ AMY GUTMANN DEMOCRATIC EDUCATION 287 (1997).

⁵⁵ AMY GUTMANN DEMOCRATIC EDUCATION 98 (1997).

⁵⁶ AMY GUTMANN DEMOCRATIC EDUCATION 98 (1997).

Without a right to free speech in public schools, how can students learn the skills necessary to constructively and meaningfully participate in democracy? If Professor Umbridge or Justice Thomas got their way, students would not learn these skills. They would much prefer these students to be seen and not heard.