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Keynote Address

Justice John Paul Stevens (Ret.)

REMARKS

Keynote Address

JUSTICE JOHN PAUL STEVENS (RET.)*

Thank you for that very kind introduction and nice welcome. It's always a pleasure to address an audience in this forum. I've been here before and I've always enjoyed it, and I hope I'll enjoy it today.

As I understand it we are celebrating the University of Miami law school's program. The topic for discussion at this symposium is "The Constitution on Campus: Do Students Shed their Rights at the Schoolhouse Gates?" Because the question closely parrots the excerpt from the Supreme Court's opinion in the student speech case *Tinker v. Des Moines Independent Community School District*,[1] I infer that among the principle rights at issue are those protected by the First Amendment. Mr. Justice Fortas' opinion and the Court provided a categorical answer to the question. He wrote: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] But then rather surprisingly, instead of citing cases interpreting the First Amendment, he continued:

> This has been the unmistakable holding of this Court for 50 years. In *Meyer v. Nebraska* and *Bartels v. Iowa*, this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevented States from forbidding the teaching of a foreign language to young students.

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* Associate Justice of the Supreme Court of the United States, 1975–2010.

1 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

2 *Id.* at 506.

> Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.[3]

Thus, the *Tinker* case, which at first seemed to point only at First Amendment rights, actually suggests our topic should be more encompassing.

The answer to the question whether students have shed their constitutional rights necessarily depends on what rights the student seeks to exercise in the setting in which he does so. Clearly no student has the right during a mathematics class to argue at length and without interruption of the importance of minimizing global warming. But it is equally clear that she cannot be punished for expressing her views about that issue in response to a question in a science class. And even assuming that five members of the Supreme Court correctly held that the Second Amendment protects the citizen's right to possess a handgun in his home,[4] it does not follow that the right has been shed if a court concludes it does not extend to carrying the weapon in such places as a college campus. In short, it is necessary to determine the scope of a given right before deciding whether the right has been shed or impermissibly burdened in a school setting.

Presumably students have the same fundamental rights as those enjoyed by other members of the public. On at least two occasions, however, a majority of the Court has drawn those principles into question, at least as it pertains to high school students. In both cases, I dissented from the majority's discussion and decision limiting the constitutional rights of public school students. In 1986, I dissented from Chief Justice Berger's opinion for the Court in *Bethel School District No. 403 v. Fraser*.[5] In that case, a Washington high school student named Matthew Fraser had given a speech at a school assembly nominating a classmate for student elective office.[6] Fraser's speech contained sexual innuendo and suggestive conduct.[7] The

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[3] *Id.*

[4] *See generally* Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

[5] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[6] *See id.* at 677.

[7] *See id.* at 677–678.

school suspended him for violating a rule prohibiting the use of obscene language on campus.[8] A majority of the Supreme Court upheld the disciplinary action.[9] Although I agreed that Fraser did not necessarily have a constitutional right to deliver his speech at a school assembly, I thought it clear that he had not received adequate notice that he might be punished for doing so.[10] The school agreed that Fraser had violated the rule against "disruptive conduct," but in my view that prohibition was insufficient to notify Fraser that his speech would illicit disciplinary consequences, particularly as there was no evidence Fraser's speech had caused any material disruption to the school's educational activities.[11] In light of the interest in free expression protected by the First Amendment and the interest in fair procedure protected by the Fourteenth Amendment, I would have held the constitution barred the school's punitive response to Fraser's speech.

In 2007, I dissented from Chief Justice Roberts' opinion for the Court in *Morse v. Frederick*.[12] In that case, Alaska high school student Joseph Frederick was disciplined for displaying a fourteen-foot banner bearing the puzzling phrase, "BONG HiTS 4 JESUS."[13] You have to pause for a minute and reflect on the meaning of that message. That case was quite remarkable because the majority first concluded that Frederick's ambiguous message could reasonably be construed as advocating the use of illegal drugs and then held that his message could be censored for that very reason.[14] Contrary to a mountain of precedent, the majority determined that the First Amendment did not merely permit censorship based on the content of the student's message, but more perversely, that it permitted censorship based on disagreement with the speaker's viewpoint. The majority's opinion in *Morse* limited protection for student speech in a manner that was wholly unsupported by the Court's First Amendment jurisprudence. Conversely, *Morse* adopted a blanket rule that student speech may be censored anytime a public school official

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8 *See id.* at 678.
9 *See id.* at 685.
10 *See id.* at 696 (Stevens, J., dissenting).
11 *Id.*
12 Morse v. Frederick, 551 U.S. 393 (2007).
13 *Id.* at 393.
14 *See id.* at 394–395.

reasonably perceives that speech as advocating illegal drug use. As an initial matter, I doubt that Frederick's original phrase, "BONG HiTS 4 JESUS," could be reasonably understood as advocating anything. In any event, the principal of Frederick's high school interpreted the words on his banner as encouraging marijuana use, [15] a message with which he disagreed. Under First Amendment doctrine, viewpoint based regulation of speech is presumptively unconstitutional, and advocacy of illegal conduct may be punished only when the advocacy is likely to invite lawless action.[16] Yet, the majority ignored those basic First Amendment principles and upheld Frederick's punishment based on school officials' opposition to his message, or one possible interpretation of his message.

Before *Morse*, "the beliefs of third parties reasonable or otherwise"[17] never dictated which messages amount to proscribable advocacy. That's a quote from my dissent. I see no reason why the subjective views of state officials should control the extent of First Amendment protection on campus when listeners' perceptions do not determine the scope of First Amendment rights in other contexts. Even if Frederick had intended to promote marijuana use, there was no indication that his speech would have any persuasive influence on his classmates. As I noted in my dissent,

> Most students. . . 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 persuade even the average student or even the dumbest one to change his or her behavior is most implausible.[18]

The majority opinion in *Morse* is particularly troublesome given that the *Tinker* decision had already established that basic First Amendment protections apply in public schools. In *Tinker*, several public school students in Des Moines, Iowa planned to wear black armbands to express their opposition to the Vietnam War.[19] The Des

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15 *See id.* at 398.

16 *See id.* at 436 (Stevens, J., dissenting).

17 *Id.* at 441 (Stevens, J., dissenting).

18 *Id.* at 444 (Stevens, J., dissenting).

19 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

Moines public school district adopted a policy calling for the suspension of any student who refused to remove the armband.[20] The students challenged the policy on First Amendment grounds and the Court determined the policy violated the constitution.[21] The school district had argued that its censorship was justified because it feared the students' expression of a controversial and unpopular opinion would generate disturbances.[22] But the Court held that the school district's purported fear of disturbance, without more, cannot justify the suppression of student speech.[23]

Rather, the Court explained in order for public school officials to justify prohibition of a particular expression of opinion, they must be able to show that their action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[24] Where there is no showing that the forbidden conduct would materially infringe on rights of others or disrupt schools' educational programs, the censorship cannot be sustained. *Tinker* thus stands for the proposition that nondestructive student speech cannot be banned merely because it expressed a viewpoint that is unpopular or contradictory to the school's message. I would have applied this rule in the *Morse* case to hold that Frederick could not be punished for displaying his banner.

The *Tinker* rule is not only consistent with the First Amendment doctrine, but also has the important benefit of protecting students' intellectual openness and exchange. When the *Tinker* students wore their black armbands in 1965, mainstream public opinion regarded opposition to the Vietnam War as "unpatriotic, if not treason."[25] As I noted in my *Morse* dissent, Des Moines school district was not unreasonable for fearing that the arm bands might start an argument or cause a disturbance.[26] Nevertheless, the *Tinker* Court insisted that

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20 *See id.*
21 *See id.* at 514.
22 *See id.* at 508.
23 *See id.* at 514.
24 *Id.* at 509.
25 *Id.* at 526 (Harlan, J., dissenting).
26 *See* Morse v. Frederick, 551 U.S. 393, 447 (2007) (Stevens, J., dissenting).

under the constitution, we must take that risk.[27] It is this sort of hazardous freedom, this kind of openness that is the basis of our national strength, and the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

It seems to me that protecting this openness is no less important on campus than elsewhere in society. For 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. Ironically on the same day that the chief justice announced the decision upholding viewpoint based discrimination in *Morse*, he also announced the judgment of the Court in *Federal Election Commission v. Wisconsin Right to Life*.[28] That case was a 5-4 decision that later paved the way for the Court's most unfortunate decision in *Citizens United*.[29] In *Wisconsin Right to Life*, the Court declared that when it comes to defining what speech qualifies as unprotected advocacy, "we give the benefit of the doubt to speech, not censorship."[30] Students of the First Amendment might wonder why that rule applies to corporate entities that wish to contribute unlimited funds to influence elections for a public office, but not to students who wish to express an unpopular point of view inside the schoolhouse gate.

Thank you very much.

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[27] *See id.*

[28] Federal Election Com'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).

[29] *See generally* Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010).

[30] *Wisconsin Right to Life*, 551 U.S. at 482.