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The Other *Tinker* Test:

Analyzing the Conflict between Student Free Speech Rights and a School's Obligation to Maintain a Safe and Secure Environment

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Schools trying to deal with Twenty-First century mandates to adopt anti-discrimination and anti-bullying measures, accommodate the surge of LGBTQ students, and roll with the ever-changing Establishment Clause landscape are increasingly finding themselves the targets of student free speech "I can say what I wanna say" lawsuits. We will explore the legal framework for analyzing the dichotomy between private student speech and school government speech, to determine when schools seeking to promote the greater good can say, "No, you can't."

> This case highlights a tension that exists between public school anti-bullying policies and the First Amendment's guarantee of free speech. Far from being irreconcilable, however, this tension merely illustrates the well-established principle that public schools must endeavor to balance competing interests: public schools must strive to provide a safe atmosphere conducive to learning for all students while fostering an environment that tolerates the expression of different viewpoints, even if unpopular, so as to equip students with the tools necessary for participation in a democratic society. This delicate balancing act has led the Supreme Court of the United States to recognize that while the First Amendment undoubtedly applies to students in public schools, school officials have greater authority to regulate speech than government officials in other settings.

Glowacki v. Howell Public School District, 2013 WL 31482172, at *1 (E.D. Mich. 2013)

Types of Student Speech (pre 2007)

"School-tolerated speech"	"School-sponsored speech"	"Vulgar or obscene speech"
• Speech that merely happens to occur on school property • a school can regulate "school-tolerated" speech only where the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." • ***Tinker v. Des Moines Indep.Comm. Dist.***, 393 U.S. 503, 89 S. Ct. 733 (1969).	• Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school • a school can place restrictions on "school-sponsored" speech so long as the restrictions are "reasonably related to legitimate pedagogical concerns" • ***Hazelwood School District v.Kuhlmeier***, 484 U.S. 260, 108 S.Ct. 562, 569-70 (1988).	• Speech that is "vulgar, lewd, obscene, and plainly offensive," although not necessarily legally "obscene" • a school may prohibit "vulgar speech," regardless of whether the speech causes a substantial disruption • ***Bethel School District No. 403v. Fraser***, 475 U.S. 675,

"Bong Hits 4 Jesus": A Fourth Test?

***Morse v. Frederick*, 127 S. Ct. 2618 (2007).**

Facts: Joseph Frederick was a high school student in Juneau, Alaska. During the Olympic torch relay, Frederick's school was let out to watch the torch pass by in front of the school. Frederick and some friends bided their time, and then unfurled a banner that read "Bong Hits 4 Jesus" in what they admitted was an attempt to get on national television. Deborah Morse, the high school principal, crossed the street, grabbed the banner, crumpled it, and then suspended Frederick for ten days. Even though Frederick admitted that the banner was intended to be "meaningless and funny," he brought suit under the First Amendment, challenging his suspension. Morse testified that she was not necessarily motivated by fear that the banner would disrupt school, but instead because she felt that it violated the school's policy against displaying offensive material, including material that promoted the use of illegal drugs.

- Chief Justice Roberts raised serious doubt as to whether *Tinker* is the default test for every student speech situation that does not clearly fall under *Fraser* or *Kuhlmeier*. *See id.* at 2627 ("like *Fraser*, it [*Hazelwood*] confirms that the rule of *Tinker* is not the only basis for restricting student speech.")

- Justice Alito agreed, noting that "[t]he Court is also correct in noting that *Tinker,* which permits the regulation of student speech that threatens a concrete and "substantial disruption," does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Id.* at 2637 (Alito, J., concurring).

- Justice Thomas wrote separately to express his opinion that *Tinker* is not and never has been good law. *See id.* at 2630 (Thomas, J. concurring) ("I write separately to state my view that the standard set forth in *Tinker* [citation omitted] is without basis in the Constitution.").

- The Chief Justice then rejected the Ninth Circuit's rejection of the argument that the banner undermined the school's basic educational mission of discouraging illegal drug use. *See id.* at 2622 ("we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

- Holding of the Court: "[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." *Id.* at 2618.

    - A possible restriction on the majority holding?

    - Justice Alito, joined by Justice Kennedy, issued a concurring opinion in which he stated that he joined the majority opinion "on the understanding that (1) [the majority opinion] 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 (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Morse,* 551 U.S. at 422, 127 S.Ct. 2618 (Alito, J., concurring).

So Is Morse a Fourth Test?

> 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.

Morse, 127 S. Ct. at 2634 (Thomas, J. concurring).

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