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Comment

MORSE V. FREDERICK: STUDENTS' FIRST AMENDMENT RIGHTS RESTRICTED AGAIN[†]

I. INTRODUCTION

In most circumstances, the First Amendment of the United States Constitution allows individuals to express themselves through their speech without fear of punishment.¹ However, the First Amendment has provided little protection to students in public schools. Although the first United States Supreme Court decision involving student speech and the First Amendment, *Tinker v. Des Moines Independent Community School District*,² seemed to protect students' freedom of speech rights, two Supreme Court decisions following *Tinker* significantly restricted these rights.³ In these cases, *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*, the Court created exceptions to the standard established in *Tinker*, thereby allowing for greater censorship of student speech and unsettling this area of First Amendment jurisprudence. Then, in 2007, the Supreme Court granted certiorari in *Morse v. Frederick* to determine whether it should create another exception to *Tinker* by allowing schools to restrict student speech when such speech promotes illegal drug use.

Part II of this Comment first lays out the facts in *Frederick*. Part III then examines student speech jurisprudence, focusing on the three major Supreme Court decisions involving student speech: *Tinker*, *Fraser*, and *Kuhlmeier*. Part IV analyzes the appropriateness of the Supreme Court's decision in *Frederick* despite the opinion's flaws and the possible extended interpretations it created.

[†] Winner of the 2008 Valparaiso University Law Review Case Comment Competition.

¹ See U.S. CONST. amend. I. The First Amendment states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

³ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (allowing a school to restrict student speech in its school sponsored newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (allowing a school to restrict lewd student speech during a school assembly).

II. THE FACTS IN *MORSE V. FREDERICK*

On January 24, 2002, Deborah Morse (“Morse”), the principal of Juneau-Douglas High School (“JDHS”) in Juneau, Alaska, permitted students to leave class to observe the Olympic Torch Relay as it passed on the streets near the school by classifying the activity as a social event or class trip.⁴ As camera crews and torchbearers passed the school, Joseph Frederick (“Frederick”), a senior at JDHS who had been watching the activities from across the street of the school, and a group of his friends displayed a large, fourteen-foot banner, which read “BONG HiTS 4 JESUS.”⁵ Because this banner was easily visible from the other side of the street, Principal Morse crossed the street and insisted that the students take the banner down because she believed its message promoted illegal drug use, thereby violating school policy.⁶ Frederick refused to comply with Principal Morse’s request and was suspended for ten days; the superintendent later reduced the suspension to the eight days that Frederick had already served.⁷

Frederick then filed suit against both Principal Morse and the school board under 42 U.S.C. § 1983⁸ alleging a violation of his First Amendment⁹ rights and seeking declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney’s fees.¹⁰ The District Court granted summary judgment for Morse and the school board.¹¹ However, the Court of Appeals for the Ninth Circuit

⁴ *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

⁵ *Id.*

⁶ *Id.* at 2622–23. The Juneau School Board Policy No. 5520 stated, “The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors[.]” *Id.* at 2623. In addition, Juneau School Board Policy No. 5850 subjected “[p]upils who participate in approved social events and class trips to the same student conduct rules that apply during the regular school program.” *Id.*

⁷ *Id.* at 2623.

⁸ 42 U.S.C. § 1983 (2000). See 42 U.S.C. § 1983, stating:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

⁹ See *supra* note 1 (quoting language of the First Amendment).

¹⁰ *Frederick*, 127 S. Ct. at 2623.

¹¹ *Id.*

reversed and found that the school board had violated Frederick's First Amendment rights.¹² Morse and the school board appealed, and the United States Supreme Court granted certiorari.¹³

III. LEGAL BACKGROUND OF *MORSE V. FREDERICK*

Prior to its decision in *Frederick*, the Court had decided only three major cases addressing freedom of speech in public schools. The first of these, decided in 1969, was *Tinker*.¹⁴ In *Tinker*, students were suspended for refusing to remove the black armbands that they wore to show their disapproval of the Vietnam War.¹⁵ The *Tinker* Court held that the symbolic act of wearing the armbands was protected speech under the Free Speech Clause of the First Amendment.¹⁶ In reaching its decision, the Court reasoned that the school could limit student speech only if it could prove that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," and not simply because the school desired to avoid the discomfort attached to the speech.¹⁷ The Court decided that students do not lose their constitutional rights to freedom of speech and expression just because they are at school.¹⁸ As a result, the standard the *Tinker* Court created for determining when student speech could be censored seemed to ensure the protection of these very important rights.

Although *Tinker* attempted to protect the freedom of speech and expression rights of students, the Court restricted these rights in 1986 in *Fraser*.¹⁹ In *Fraser*, a high school student, Matthew Fraser ("Fraser"), used an explicit sexual metaphor in a speech he gave during a school assembly.²⁰ The *Fraser* Court held that the school did not violate Fraser's First Amendment rights by punishing him for his lewd speech.²¹ The Court concluded that the school board had the power to determine what type of speech was inappropriate in its schools²² and also that students in

¹² *Id.*

¹³ *Id.* at 2624.

¹⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁵ *Id.* at 504.

¹⁶ *Id.* at 505-06.

¹⁷ *Id.* at 509.

¹⁸ *Id.* at 506.

¹⁹ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁰ *Id.* at 677-78.

²¹ *Id.* at 685. In doing so, the *Fraser* Court distinguished the facts in *Fraser* from those in *Tinker* on the grounds that unlike *Tinker*, the penalties in *Fraser* were not related to a political viewpoint; accordingly, the First Amendment did not prevent the school from regulating Fraser's speech under the belief that allowing such speech would undermine the school's educational mission. *Id.*

²² *Id.* at 683.

public schools do not automatically enjoy the same constitutional rights as adults in other settings.²³

The Court's decision in *Kuhlmeier* in 1988 restricted the freedom of speech and expression rights of students once again.²⁴ In *Kuhlmeier*, a high school principal decided to delete two pages of the school-sponsored newspaper that contained information he found to be inappropriate.²⁵ The *Kuhlmeier* Court upheld the censorship of the student speech finding that students' First Amendment rights are not violated when school officials exercise control over speech that is part of school-sponsored activities so long as school officials act in furtherance of legitimate educational concerns.²⁶ The *Kuhlmeier* Court differentiated the central issue in *Kuhlmeier* from that in *Tinker*, noting that *Kuhlmeier* involved "promot[ing]" a particular student's speech, not just "tolerat[ing]" it, thereby carving out another exception to *Tinker*.²⁷

Although *Tinker* created a definitive standard regarding when student speech could be regulated,²⁸ the two decisions regarding student speech that followed, *Fraser* and *Kuhlmeier*, blurred the line. Therefore, the Court granted certiorari in *Frederick* to determine whether the First Amendment prohibited a school principal from restricting student speech reasonably believed to promote illegal drug use.²⁹

²³ *Id.* at 682.

²⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

²⁵ *Id.* at 263. The principal deleted the first article because he was concerned that it failed to properly protect the identity of the students about whom it was written and contained information that was inappropriate for younger students. *Id.* The principal deleted the second article because he believed that it failed to allow the parents of the child about whom it was written to consent to publication or respond to the commentary in the article. *Id.*

²⁶ *Id.* at 273.

²⁷ *Id.* at 270-71. The *Kuhlmeier* Court reasoned that the question in *Tinker* was whether schools were required under the First Amendment to "tolerate" a particular form of student speech, whereas the question addressed in *Kuhlmeier* was whether schools were required to "promote" a specific student's speech under the First Amendment. *Id.* In making this distinction, the *Kuhlmeier* Court determined that schools have greater authority to regulate the type of speech presented in *Kuhlmeier* to ensure the educational process is accomplished and students are not subjected to inappropriate material. *Id.* at 271.

²⁸ See *supra* note 17 and accompanying text (discussing the *Tinker* Court's reasoning).

²⁹ *Frederick*, 127 S. Ct. at 2625. The Supreme Court granted certiorari to decide 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." *Id.* at 2624.

IV. ANALYSIS OF THE DECISION IN *MORSE V. FREDERICK*A. *The Morse v. Frederick Opinion*

Chief Justice Roberts, writing for the majority in *Frederick*, began the opinion by first addressing Frederick's claim that this was not a case about school speech.³⁰ The opinion casually dismissed this claim based on the fact that when Frederick had displayed the banner, he was standing amongst fellow students during school hours at what was considered an approved social event or class trip.³¹ The opinion then examined possible interpretations that could be drawn from Frederick's banner and concluded that it was reasonable to believe that the banner promoted illegal drug use.³²

The majority opinion then briefly analyzed each of its three prior decisions regarding student speech restrictions and the First Amendment—*Tinker*, *Fraser*, and *Kuhlmeier*. The Court first acknowledged the principle established in *Tinker* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³³ Although the Court recognized the holding of *Tinker*—that school officials could not suppress student speech unless they reasonably concluded that such speech would “materially and substantially disrupt the work and discipline of the school[]”³⁴—the Court distinguished the *Tinker* facts from those in *Frederick*, noting that *Tinker* involved political speech and that the speech at issue in *Frederick* was not political in nature.³⁵ The opinion next considered the Court's decision in *Fraser*, noting that the analysis used to decide *Fraser* was not clearly set forth by the Court; however, the *Frederick* Court did acknowledge *Fraser*'s two main principles: (1) the method of analysis in *Tinker* is not absolute, and (2) students in public schools do not have all

³⁰ *Id.* at 2624. Chief Justice Roberts wrote the majority opinion joined by Justices Scalia, Kennedy, Thomas, and Alito. *Id.* at 2621. Justices Thomas and Alito also filed concurring opinions. *Id.* Justice Breyer filed an opinion concurring in the judgment in part and dissenting in part. *Id.* A dissenting opinion was also written by Justice Stevens in which Justices Souter and Ginsburg joined. *Id.*

³¹ *Id.* at 2624.

³² *Id.* at 2625. The Court found that Frederick's sign could be interpreted as “[take] bong hits . . . [.]” “bong hits [are a good thing],” or “[we take] bong hits[.]” *Id.*

³³ *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506).

³⁴ *Id.* at 2626 (quoting *Tinker*, 393 U.S. at 513).

³⁵ *Frederick*, 127 S. Ct. at 2626. The *Frederick* Court noted that *Tinker* was based on political speech and that political speech was “at the core of what the First Amendment is designed to protect.” *Id.* (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

of the same rights as adults have in other settings.³⁶ Chief Justice Roberts then looked at *Kuhlmeier* and determined that even though *Kuhlmeier* was not controlling because Frederick's banner could not reasonably be seen as being sponsored by the school, it was still significant because it demonstrated that schools could censor some speech even if the government could not censor the same speech in another setting.³⁷

The majority then relied on its prior decision in *Veronia School District 47J v. Acton*³⁸ to demonstrate the important governmental interest in deterring illegal drug use by schoolchildren, primarily noting the damaging effects caused by such drug use.³⁹ The majority also noted that the Safe and Drug-Free Schools and Communities Act of 1994 required schools to provide education for students about the dangers of illegal drug use.⁴⁰ It is true that *Tinker* held that schools could not limit student speech merely because of "undifferentiated fear or apprehension of disturbance or a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁴¹ However, the *Frederick* Court found that the school in *Frederick* acted within its authority by limiting speech pertaining to drug use because the goal of preventing drug abuse by students is much different than an attempt to avoid a controversial viewpoint, which was what occurred in *Tinker*.⁴²

Justice Alito's concurring opinion focused on ensuring that the Court's decision would not be expanded beyond the facts of *Frederick*.⁴³

³⁶ *Id.* *Fraser* established that the method of analysis in *Tinker* was not absolute and also that students in public schools did not necessarily have the same rights as adults in other settings. *Id.* at 2626-27.

³⁷ *Id.* at 2627.

³⁸ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). *Veronia* involved a random urinalysis requirement for participation in interscholastic athletics. *Id.* In determining that this urinalysis requirement was not a violation of the students' Fourth Amendment rights, the court considered the negative effects drugs have on young adults' bodies as well as the fact that a person's school years are the time when the effects of drugs are most severe. *Id.* at 661. The Court also found it was necessary for the state to act because it had undertaken a special responsibility to care for and provide direction for the children within its school system. *Id.* at 662.

³⁹ *Frederick*, 127 S. Ct. at 2629.

⁴⁰ *Id.* at 2628. See 20 U.S.C. § 7114(d)(6) (2002) (requiring schools that receive federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 to certify their drug prevention programs and provide "an assurance that drug and violence prevention programs supported under [20 U.S.C. § 7114(d)(6) (2002)] convey a clear and consistent message that acts of violence and the illegal use of drugs are wrong and harmful[]").

⁴¹ *Id.* at 2629 (quoting *Tinker*, 393 U.S. at 508-09) (internal quotation marks omitted).

⁴² *Id.*

⁴³ *Id.* at 2636 (Alito, J., concurring). Justice Alito stated as follows:

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

Justice Alito emphasized that despite the special circumstances present in public schools, speech restrictions not already recognized by the Court are not automatically justified.⁴⁴ Justice Alito reasoned that a “special characteristic” of the school setting must be present in order to restrict a student’s speech, and in this case, he determined this characteristic to be the threat of the physical safety of the students resulting from the speech advocating illegal drug use.⁴⁵ Therefore, Justice Alito determined that public schools have the power to ban student speech promoting illegal drug use, but found this to be at the far end of the spectrum of what is permitted by the First Amendment.⁴⁶

The dissent, written by Justice Stevens, insisted that the school violated Frederick’s First Amendment rights, noting that the school board disciplined Frederick for his attempt to gain attention from the television cameras merely because Frederick’s sign made a reference to drugs.⁴⁷ Justice Stevens reasoned that the First Amendment protects student speech when the message of the speech neither violates a rule nor expressly advocates conduct that is illegal and harmful to students.⁴⁸ According to Justice Stevens, the Court’s holding in *Frederick* allowed for viewpoint discrimination,⁴⁹ thereby undermining the decision in *Tinker*.⁵⁰

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.”

Id.

⁴⁴ *Id.* at 2637.

⁴⁵ *Id.* at 2638 (quoting *Tinker*, 393 U.S. at 508–09). Justice Alito stated, “[D]ue 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.” Justice Alito continued,

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.

Id.

⁴⁶ *Id.* See *supra* note 45 (quoting from Justice Alito’s concurring opinion in *Frederick*).

⁴⁷ *Id.* at 2643 (Stevens, J., dissenting).

⁴⁸ *Id.* at 2644.

⁴⁹ *Id.* See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“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.”).

Justice Stevens also asserted that even though speech that encourages illegal drug use may increase the possibility that a student will experiment with illegal drugs, such speech does not necessitate censorship.⁵¹ Additionally, the dissent regarded Frederick's banner as a "nonsense message, not advocacy[]" and found that because Frederick was simply attempting to get on television, he lacked the intent to persuade his audience to use illegal drugs; therefore, it was not reasonable to conclude he was advocating for drug use.⁵² For these reasons, Justice Stevens found that the Court created an unnecessary extension of power, allowing schools to censor any student speech as long as it is possible for someone to interpret that speech as containing a pro-drug message.⁵³

B. The Far-Reaching Scope of Morse v. Frederick

Rather than clarifying the already confusing realm of student speech protected under the First Amendment, *Frederick* created more uncertainty and may effectively diminish students' free speech rights. While the Court decided that a school principal could restrict student speech at a school event if the speech could reasonably be believed to promote illegal drug use, this ambiguous language has left room for interpretation. Although Justice Alito concurred in the opinion, he recognized that the Court's decision had the possibility of creating far-reaching consequences on student speech.⁵⁴ He focused on the threat that illegal drugs posed to the physical safety of children, whereas the majority opinion focused on the dangerous effects of drug use and the need to protect children in public schools. Regardless of which of these two approaches is taken, *Frederick* established a standard that allows schools to increasingly attempt to restrict student speech.

Because of the majority's approach—articulating that schools can restrict student speech as long as the speech can reasonably be regarded as promoting illegal drug use—schools now have virtually unlimited discretion in prohibiting student speech relating to drugs.⁵⁵ Giving schools this broad power creates situations in which students could be

⁵⁰ *Frederick*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

⁵¹ *Id.* at 2645.

⁵² *Id.* at 2649.

⁵³ *Id.* at 2650.

⁵⁴ See *supra* notes 43–46 and accompanying text (discussing Justice Alito's concurring opinion).

⁵⁵ See *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 295, 300 (2007) (arguing that because schools are encouraged to create programs educating students about the dangers of illegal drug use, they view any messages that contradict their own message as encouraging drug use).

punished for innocent actions. For example, a student who, during a school presentation about drug use, points out that a cited statistic or fact is inaccurate could be deemed as undermining the school's anti-drug message and could therefore be reprimanded.⁵⁶ Although the *Frederick* Court probably did not intend to allow schools to forbid such an action, *Frederick's* "reasonably related" language likely allows schools to do so.

Justice Alito's concurring opinion, which focused on the threat of violence that illegal drug use poses to students, while attempting to limit the scope of the Court's decision, still allows for the possibility of similar unintended consequences. Because a number of other activities can also be interpreted as posing a threat of violence against students, such as banners or t-shirts encouraging students to skip school or engage in sexual activity, schools may also seek to censor this type of speech.⁵⁷ Therefore, despite Justice Alito's attempt to prevent these results, the *Frederick* decision has created an opportunity for school officials to prohibit more types of student speech.⁵⁸

C. *Morse v. Frederick Allows for Viewpoint Restrictions*

The *Frederick* Court's decision is flawed because it allows a school to engage in viewpoint discrimination in a public forum.⁵⁹ It has long been held that government officials cannot discriminate against speech merely because of the content of the message.⁶⁰ *Frederick* was disciplined because the principal interpreted *Frederick's* banner as advocating illegal drug use and she disagreed with the message.⁶¹ Although students do not necessarily enjoy the same constitutional rights as adults enjoy in other situations, the Court failed to address that *Frederick's* speech took place on a public sidewalk. Although allowing the students to view the Olympic torchbearers as they passed by the school was an approved school activity that occurred during the school day, *Frederick's* speech

⁵⁶ *Id.* See also *Frederick*, 127 S. Ct. at 2650 (Stevens, J., dissenting) (arguing that students everywhere could be punished for any comment if a reasonable observer could view it as promoting drugs).

⁵⁷ Erwin Chemerinsky, *How Will Morse v. Frederick Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 21 (2008).

⁵⁸ *Id.* at 22. Chemerinsky stated that he fears that principals, school boards, and lower courts will read *Frederick* as giving them more authority to punish student speech. *Id.*

⁵⁹ *Id.* at 18.

⁶⁰ See *supra* note 49 (quoting *Rosenberger* regarding government speech in the context of viewpoint discrimination). See also Chemerinsky, *supra* note 57, at 19 (indicating that the government should not be able to advance a particular position by silencing those individuals who hold an opposing view).

⁶¹ *Frederick*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

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still took place on a public sidewalk and not in a classroom or school auditorium.⁶²

Viewpoint discrimination is not allowed in a public forum, and yet, *Frederick* clearly upheld such discrimination.⁶³ While slight viewpoint discrimination tolerance may be needed in the public school setting,⁶⁴ because *Frederick*'s speech took place outside of the schoolhouse and on a public sidewalk, a viewpoint restriction should not have been upheld unless it could survive strict scrutiny.⁶⁵ *Frederick* was punished because his banner was interpreted as promoting illegal drug use.⁶⁶ The Court justified this by acknowledging the school's responsibility to educate students about the harmful effects of illegal drug use.⁶⁷ However, *Frederick* was punished for the viewpoint he chose to express in a public forum; therefore, the school's decision to punish *Frederick* contradicts the concept of the First Amendment. By allowing viewpoint discrimination in *Frederick* the Court has created the possibility for school principals to exercise their power to punish students for any speech they do not like, especially when the speech is from students they may not like, thereby further limiting the freedom of speech and expression rights of students.⁶⁸

V. CONCLUSION

While the *Frederick* Court's decision to restrict student speech once again is consistent with the Court's two most recent decisions dealing with student speech—*Kuhlmeier* and *Fraser*—*Frederick*'s ambiguous language created an opportunity for schools to restrict student speech even further than the Court likely anticipated. By determining that student speech could be censored if it could possibly be interpreted as reasonably relating to promoting illegal drug use, the Court created a standard whereby school officials could have the power to restrict student speech that had no intention at all of promoting illegal drug use.

⁶² Chemerinsky, *supra* note 57, at 19. See *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (indicating that *Frederick* watched the torchbearers pass by from the sidewalk across the street from the school).

⁶³ Chemerinsky, *supra* note 57, at 19.

⁶⁴ *Frederick*, 127 S. Ct. at 2646 (Stevens, J., dissenting).

⁶⁵ Chemerinsky, *supra* note 57, at 19.

⁶⁶ *Frederick*, 127 S. Ct. 2618 at 2629 (indicating that *Frederick*'s speech was reasonably viewed as promoting illegal drug use). See also *The Supreme Court, 2006 Term—Leading Cases*, *supra* note 55, at 305 (stating, in regard to *Frederick*, that “[t]he school . . . explicitly decided to punish *Frederick* because of the perceived content of his speech, not because of the inappropriateness of his choice of time, place, or verbal medium[]”).

⁶⁷ *Frederick*, 127 S. Ct. 2618 at 2629.

⁶⁸ Chemerinsky, *supra* note 57, at 25.

Moreover, because *Frederick* allowed for viewpoint discrimination, school officials may punish speech solely because they do not agree with it, which could create serious problems for courts.

It is important to note that although both the Court's reasoning and the standard established in *Frederick* were flawed, the outcome of the decision was appropriate. School principals should have the power to restrict certain student speech, such as the type of speech *Frederick* engaged in, based on the circumstances surrounding the speech, regardless of whether the message was intended to promote illegal drug use or was merely a juvenile attempt to get on television.⁶⁹ However, rather than focusing on the content of *Frederick's* speech, the *Frederick* Court should have based its decision on the inappropriateness of *Frederick's* actions considering the magnitude of the event in which he chose to display his message.

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⁶⁹ See *Frederick*, 127 S. Ct. at 2643 (Stevens, J., dissenting) (“[C]oncern 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!’”).

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