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ARTICLE

Visions of Public Education In *Morse v. Frederick*

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As legal rules go, the US Supreme Court's 2007 decision [Morse v. Frederick](#) (2007)^[2] will be fairly easy for school administrators to apply. The First Amendment allows a public school principal to "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." Justice Alito's concurring opinion explained that the rule "goes no further" than speech advocating drug use, and does not authorize punishment for "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." The rule may be straightforward, but the reasoning that generated it is harder to follow.

The case arose from idiosyncratic but entertaining facts. The 2002 Olympic Torch relay ran directly past Juneau-Douglas High School in Juneau, Alaska. Students were excused from class to watch the event, supervised by staff. As the excitement reached a climactic point, Joseph Frederick and some friends unfurled a large banner containing the phrase BONG HITS 4 JESUS. According to Frederick, their goal was to make a surreal joke, a titillating non sequitur that would show up on the evening news. Principal Deborah Morse ordered the students to drop the banner and tore it from their hands when they refused. She then suspended Frederick from school for ten days, relying on a school board policy forbidding students from participating in "any assembly or public expression that ... advocates the use of substances that are illegal to minors."

Supreme Court cases involving the free speech rights of public school students tend to accept two general premises. First, the constitutional right of free speech applies to students while they attend public schools. Second, the protection offered by the constitution may apply in a weaker form in schools than in other settings, if a different approach is mandated by educational necessity. This second premise means that the result in a given case will hinge on a Court's view of what a good education requires -- which in turn hinges on a Court's view of what education is for. But unlike the earlier decisions, the majority opinion in [Morse](#) is remarkably uninterested in the purpose of education.

This article reviews the major Supreme Court cases involving the speech rights of public school students, with an eye toward their beliefs about the proper purpose and methods of secondary education in a democracy. It concludes that [Morse](#) differs in disturbing ways from its predecessors.

Student Speech Decisions Before [Morse](#)

The Flag Salute Cases

The Supreme Court first considered the speech rights of public school students in a pair of cases involving Jehovah's Witnesses who had religious objections to the Pledge of Allegiance. In [Minersville School District v. Gobitis](#) (1940),^[3] the Court voted 8-1 to uphold the expulsion of the Gobitis children from their Pennsylvania school for refusing to recite the Pledge. The Court acknowledged that reasonable people might disagree on whether mandatory recitation of the Pledge is a good idea, but asserted that "the court-room is not the arena for debating issues of educational policy." Although it professed not to take sides in curricular matters, the majority opinion in fact

endorsed a very specific educational mission, in which the highest purpose of public education is to instill an ethic of patriotic conformity.

The majority believed that “the ultimate foundation of a free society is the binding tie of cohesive sentiment,” and without such a “unifying sentiment . . . there can ultimately be no liberties.” Because freedom requires conformity, mandatory recitation of the Pledge of Allegiance is one of “those compulsions which necessarily pervade so much of the educational process.” Allowing exceptions for religious or conscientious objectors “might introduce elements of difficulty into the school discipline, [and] might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.” In the majority’s view, instilling unified sentiments was so crucial that anything that might “cast doubts” about them could be punished.

Gobitis was not well received by legal commentators, and several lower courts declined to follow it.^[4] Even if the courtroom is not the place to make decisions about curriculum, they reasoned, it is a place to decide the limits of governmental power over the individual’s freedom of expression. Others applauded the patriotic sentiments of Gobitis, including the West Virginia state legislature. It enacted a law in 1941 mandating a flag salute in all public schools, to be enforced by expelling objecting students from school, declaring them delinquent, and putting their parents in jail. When the law was challenged in federal court, the Supreme Court decided 6-3 to overrule its earlier decision.

Like Gobitis, the majority opinion in West Virginia State Board of Education v. Barnette (1943)^[5] reflected not only legal considerations, but a specific vision for public education. Barnette rejected the notion that school administration was somehow beyond the reach of ordinary First Amendment rules.

The [constitution] protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Barnette rejected the idea that an ethic of unified sentiment was crucial for a good society. Instead, “history indicates a disappointing and disastrous end” for systems of “officially disciplined uniformity.” The Court was aware of the rigid educational system in Nazi Germany, and saw no reason to emulate “the fast failing efforts of our present totalitarian enemies.” The danger to national security lay not in insufficient conformity: it lay in conformity itself. In particular, public education should not become a tool of propaganda for the party currently in power. In its most famous passage, Barnette said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

In light of these values, Barnette concluded that a truly American educational system would cultivate “intellectual individualism” and “rich cultural diversities,” and that these can thrive only where there is “freedom to differ.” Shared patriotism is of course desirable, but “national unity as an end which officials may foster by persuasion and example” and not command by force of law.

The Armband Case

The flag salute cases involved students who did not wish to speak at school. The students in *Tinker v. Des Moines Independent School District* (1969) wished to convey messages school administrators did not want to hear.^[6] Like *Barnette*, the case arose during wartime. When the school board of Des Moines, Iowa, learned that a number of students were planning to wear black armbands to school to protest against the Vietnam War, it hurriedly enacted an official policy forbidding black armbands, on pain of suspension. The 7-2 decision of the Supreme Court ruled that the policy violated the students' right to freedom of speech.

The Court's legal conclusion was consistent with its vision for public education:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

For the *Tinker* majority, it was simply not a legitimate goal of a school district to "foster a homogenous people." Instead, "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."

Although the result in *Tinker* was protection of student speech, the opinion also acknowledged that educational necessity may in some circumstances justify punishing students for their on-campus speech. Student activity that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." Hence, the Court was willing in principle to deviate from accepted First Amendment standards if the speech would actually interfere with a school's educational program, properly understood. *Tinker* did not dwell on the reasons for this exception, which it took as self-evident. The opinion spent more time explaining that only genuine interference would justify punishment, not "undifferentiated fear or apprehension of disturbance." Since the armbands did not rise to that level, there was no need to consider what a genuine disturbance would look like.

The Salacious Nomination Case

The Supreme Court's next foray into high-school student speech was *Bethel School District v. Fraser* (1986)^[7]. Matthew Fraser of Bethel, Washington, gave a speech at a mandatory school assembly to nominate a classmate for student body vice president. The motif of his speech was the male ejaculation. The nominee, said Fraser, "is firm" in his "belief in you, the students" and "firm in his pants." He "takes his point and pounds it in." He "doesn't attack things in spurts" but will "go to the very end--even the climax, for each and every one of you." Some older students in the audience hooted, yelled, and made rude gestures, while some younger students expressed bewilderment or embarrassment. Fraser was punished for violating the school's rule against "obscene, profane language or gestures," and the Supreme Court upheld that decision on a vote of 7-2.

A vision for public education animated the Supreme Court's decision. "The role and purpose of the American public school system," said the majority, includes preparation "for citizenship in the Republic." A school, therefore, "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." Thus, a school has an "interest in teaching students the boundaries of

socially appropriate behavior.” In Fraser’s case, “a high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.

Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”

Justice Brennan’s concurrence expressed doubt that a few double entendres posed such a grave threat to fundamental values. He voted to uphold the discipline, however, “in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities.” Lower courts and commentators have debated whether Bethel was simply an example of Tinker’s disruption standard in action, or was instead the announcement of a separate standard that allows punishment of vulgar or lewd speech at school regardless of its disruptive effects. Most concluded that it was the latter, but with some wondering why this should be. After all, vulgar joking among adolescents is hardly new; it is constitutionally protected outside of school; and in some school settings (like the locker room) it is the norm.^[8]

Bethel’s reasoning would have been strengthened if it had paid more attention to the educational function of the school assembly. Admittedly, the goal of an assembly is not to facilitate unfiltered exchange of views: a free period would have been better for that purpose. Instead, Fraser’s speech at the assembly was akin to an assignment in public speaking. The audience’s assignment was to compare candidates in a democratic exercise that prepared them for real elections in the future. Fraser interfered with the pedagogical purpose of the event, just as if he had responded to an English class assignment to recite a Shakespeare sonnet by reading dirty limericks instead. Not only did Fraser deviate from his own assignment, he interfered with the ability of others to benefit from their assignments.

A related and even better inquiry is whether Fraser was really speaking on his own behalf when he took the microphone at a mandatory assembly. Given the circumstances, he was not. The nomination speeches were better understood as school-sponsored speech, where students have some discretion to select the precise words but only within boundaries set by the school. Although the Bethel opinion did not do so, many post-Bethel decisions have properly focused on the question, “whose speech is this?” Hazelwood School District v. Kuhlmeier (1988)^[9] concluded that a school newspaper was best understood as an outlet for school-sponsored speech and not for the privately held views of the student contributors. In such a setting, school administrators exercise

authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Hazelwood concluded that school-sponsored speech may be controlled by administrators if doing so is “reasonably related to legitimate pedagogical concerns.”

On the other side of the coin, if student speech is truly not attributable to the school, administrators have no authority to control it under a sponsorship theory. For example, the school district in Board of Education of Westside Community Schools v. Mergens (1990)^[10] refused to allow a student-initiated religious club to meet on campus, for fear that this would imperil the school’s constitutional obligation of religious neutrality. The Supreme Court noted that any religious worship at the meeting would be

that of the students, not the school, so there was no cause for concern. The lead opinion stated that “secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.” As if lecturing a slow learner, the opinion reiterated: “the proposition that schools do not endorse everything they fail to censor is not complicated.”

Morse v. Frederick

This was the state of student speech law when Joseph Frederick hoisted his BONG HITS 4 JESUS banner outside Juneau-Douglas High School. In response to Frederick’s lawsuit, the school argued that the BONG HITS banner required swift punishment because it might lead students to doubt the anti-drug messages that were included in portions of the school curriculum. A trial court dismissed Frederick’s lawsuit, but the Court of Appeals for the Ninth Circuit restored it.^[11] As the Court of Appeals saw it:

the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, 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.”

Despite this rebuff, the school insisted that its anti-drug curriculum -- which it was now touting in court as a “fundamental value” -- would be imperiled if educators could not suspend students who appeared to contradict or mock it. The Supreme Court agreed to take the case.

What Might Have Happened

A court could have ruled in favor of Principal Morse without endorsing the school’s extreme legal position that students are not allowed to contradict things taught in class. Indeed, the case could have been decided without charting any new territory. The first step would be to recognize that Frederick raised his banner during a school-sponsored activity that was in the nature of a field trip where school personnel have authority to ensure discipline sufficient to achieve the activity’s educational purpose. All of the courts reviewing the case agreed with this concept. As the Court of Appeals for the Ninth Circuit said, if the case involved school punishment for speech on a public sidewalk, “the law would be easy indeed” because the school has no business controlling non-school speech.

The next step would draw on Bethel’s observation that part of a school’s mission is to impart to students the skills and habits of public decorum. One proper educational reason to allow Juneau-Douglas students to leave classes to observe the Torch Relay was to give students some supervised practice in conducting themselves in public without being a nuisance to their fellow citizens. It could be said that Frederick’s banner violated the standards of decorum that were a purpose of the assignment. His lack of decorum included drawing attention to himself and his message in a way that could be seen as disrespectful to the athletes; upsetting the sensibilities of onlookers by connecting the holy figure of Jesus to illegal recreational drug use; and forcing onlookers to confront taboo topics for pure shock value. In addition, during this almost-field trip the students were expected to behave as ambassadors for the school, so that their decorum might be viewed as school-sponsored in the Hazelwood sense. Under this view, Frederick exceeded the bounds of acceptable discourse for a school-sponsored event so badly as to deserve punishment. A court could conclude that the school’s judgment was within the range of permissible reactions. The end.

A ruling of this sort would have marked no significant change in the law. At most, it would have required deference to some questionable assertions about proper decorum at sporting events. Holding up goofy banners from the bleachers to get on TV is exactly how our culture expects adults to behave. When government-operated sports stadiums have interfered with this popular ritual, they tend to lose in court.^[12] Nonetheless, a court could decide that Principal Morse had latitude to decide what level of decorum is required by community standards. Alternatively, a court could have ruled that Principal Morse's actions were an overreaction not reasonably related to legitimate pedagogical concerns, but nonetheless afford her qualified immunity from suit because her decision did not violate any clearly established prior case law. Either result would have stayed within the legal framework established by earlier cases, and been grounded in a plausible view of the legitimate needs of educators.

Instead of focusing on the educational purpose of the event, a majority of the Supreme Court decided the case solely on the grounds that Frederick's banner advocated an illegal form of drug use (or more precisely, that Principal Morse could reasonably interpret it that way). Conspicuously missing from the majority opinion was any consideration of what public education is for, or what authority educators truly need to effectuate that purpose. The majority said that Frederick's banner could be punished because it seemed to celebrate something that the government condemned -- whether or not the celebration itself was bad for the orderly administration of public education.

Justice Thomas's Opinion

Of the five separate opinions written by the justices in Morse, only the concurrence by Justice Thomas (which no one else joined) conveyed a clear vision of what public education should be. He believed that the constitution should be applied as he imagined it would have been applied at the time of ratification, and back then schools acted *in loco parentis*, a doctrine that limited educator's powers "in almost no way" other than some minor barriers to excessive corporal punishment. Early American schools "were not places for freewheeling debates or exploration of competing ideas." Instead,

in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.

Justice Thomas's schools resemble the Spartan academies that Tinker rejected, where students are "closed-circuit recipients of only that which the State chooses to communicate." Unsurprisingly given this different vision of the ideal school, Justice Thomas argued that Tinker was wrongly decided and should be overruled. Justice Thomas also argued that control over school-sponsored speech should not be judged by the "legitimate pedagogical purpose" test from Hazelwood. Public schools may censor and punish as they please, because "the First Amendment, as originally understood, does not protect student speech in public schools." If parents don't like what the principal is doing and can't change it politically, "they can send their children to private schools or home school them; or they can simply move." Justice Thomas referred to this love-it-or-leave-it framework as the "democratic regime."

The Majority Opinion

Unlike the opinions described above, the majority opinion of Chief Justice Roberts in Morse never proposed what the purpose of a school might be, or what type of citizenship would result from a good public education. It says only that schools should "protect those entrusted to their care from the dangers of drug abuse," and "safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." School staff do not teach or train; they safeguard and provide care. Other than this strong undercurrent of paternalism, the opinion has virtually nothing to say about schooling itself. Why do Americans operate elaborate school systems and require attendance

by law? The Morse majority did not even allude to an answer.

The majority might consider the absence of a stated educational goal to be a virtue, because it allows school boards to decide their own missions free of judicial influence. The problem, however, is that the central question before the Court was whether something about the school setting required this case to be evaluated under different standards than apply to ordinary speech off school grounds.

Constitutional law requires judges to balance competing interests, and there is no discussion in the majority opinion of what the government's true interests in operating a school system actually are. At best, this means the reasoning is incomplete, but at worst it means that the decision was not grounded any agreed-upon standards other than the justice's personal preferences regarding the outcome.

The lack of standards was clearly visible in the majority's discussion of Bethel. According to the majority, that case was not really about decorum, or pedagogy, or school control over the speech it sponsors. The Morse majority said that "the mode of analysis employed in [Bethel] is not entirely clear," so that all one could know for certain is that "[Bethel] established that the mode of analysis set forth in Tinker is not absolute." This disregards all the language from Bethel explaining how the decision responded to identified and legitimate educational needs. If Bethel means nothing more than that schools can punish students for speech without regard to Tinker, then anything goes. Today's rule against speech advocating illegal drug use will be followed by another *ad hoc* rule tomorrow, and a different one the day after that. Although I disagree with Justice Thomas on the solution, there is some truth to his complaint that after Morse, "our jurisprudence now says that students have a right to speak in schools except when they don't."

To their credit, the majority and Justice Alito's concurrence rejected the school's sweeping claims that a school could punish a student for uttering anything that is deemed offensive or that conflicts with the school's chosen messages. But it is difficult to reconcile those statements with the actual result in the case, because the reason for the discipline was that Frederick's banner offended sensibilities and conflicted with the school's chosen anti-drug message. The majority sought to differentiate its decision on the ground that drug abuse is illegal and bad for one's health. But that reasoning is not limited to speech about drugs. A banner saying JAYWALK 4 JESUS or UNBUCKLE YOUR SEAT BELT 4 JESUS would also encourage conduct that is illegal and bad for one's health.

The elephant in the room is the well-established case law about advocacy of illegal action. During the Cold War, the Supreme Court recognized that even though violent overthrow of the government is illegal, the First Amendment protects one's ability to advocate for it as a moral necessity.^[13] The influential decision in Brandenburg v. Ohio (1969)^[14] stated that a person could be convicted of inciting others to illegal conduct only if the exhortation was both intended to cause and likely to cause "imminent" lawbreaking. Encouraging people to break the law at some unspecified future time cannot be a crime.^[15] The majority in Morse made no effort to follow this formula. Frederick's intent was irrelevant, because the only question is whether Frederick's speech could be viewed by a school principal as promotion of drug use. There was no consideration of imminence -- when would readers of Frederick's banner hit the bong? -- or causation -- whether display of the banner was likely to cause more bong hits than would have occurred otherwise.

Morse made clear that the Brandenburg rule does not operate in its usual way when high school students advocate illegal drug use, but the majority did not explain why or how. Justice Stevens' dissenting opinion criticized the majority's failure to consider Brandenburg, but did not reach any firm conclusions of its own. (The dissent surmised that on different facts not involving such an obvious joke, "it is possible that our rigid imminence requirement ought to be relaxed at schools.") Justice Alito's concurring opinion asserted without much explanation that "the special features of the school

environment” require school officials “to intervene before speech leads to violence” -- or to drug abuse, which he considered equally dangerous. The only special feature of a school setting that was relevant to Justice Alito was that “school attendance can expose students to threats to their physical safety that they would not otherwise face.” Of course, the same could be said for attending a soccer game or riding an airplane.

Beyond these brief nods by Stevens and Alito to changing the imminence standard, no justice seriously considered what educational reasons might justify a change in Brandenburg’s requirement of intent and causation. A serious look at the question might ask, for example, whether it matters that the on-campus speech advocates for on-campus misbehavior.^[16] For a school, far different interests are implicated by a student’s banner reading GET STONED B4 CLASS than by a banner reading SUMMER VACATION = TIME 4 BONG HITS.

On this and other points, the majority’s evident distaste for Frederick’s banner overwhelmed any careful consideration of actual educational needs. For example, the majority was curiously inconsistent about how a school-sponsored speech theory might apply. The majority stated that Hazelwood’s “legitimate pedagogical concern” test did not apply “because no one would reasonably believe that Frederick’s banner bore the school’s imprimatur.” The logical next step from this observation should have been to follow Mergens and its uncomplicated notion that a school does not endorse everything it does not censor. Yet the opinion reached the opposite conclusion: “Failing to act would send a powerful message to the students in [Morse’s] charge, including Frederick, about how serious the school was about the dangers of illegal drug use.” At least with regard to speech advocating drug use, a school evidently *does* endorse anything it does not censor.

Which leads us back to orthodoxy. The majority opinion detailed at length the current governmental orthodoxy against recreational drug use. Congress spends millions of dollars every year to convey anti-drug messages through the schools, and for the majority, the wisdom of this message was simply beyond debate. Indeed, the majority viewed debate itself to be an independent evil.

Thousands of school boards throughout the country -- including [Juneau-Douglas] -- have adopted policies aimed at effectuating this [anti-drug] message. Those school boards know that peer pressure is perhaps the single most important factor leading schoolchildren to take drugs, and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The majority identifies peer pressure as the source of drug use, and what is peer pressure but a display of non-conforming beliefs? The problem of drug abuse, therefore, should to be solved through establishing and enforcing “norms” and banishing anything that “appears to tolerate” deviation from them. School should impose punishment as a way of conveying that it is “serious” about imparting an anti-drug message, because the problem is not actual drug use, but beliefs about drug use. In light of this, the majority considered Frederick’s banner to be so alarming that it required the principal to react with the same split-second timing that courts ordinarily expect of police officers trying to arrest armed felons.

Beyond the specifics of the anti-drug orthodoxy, the majority also considered it important that speech advocating use of illegal drugs was “in violation of established school policy.” The majority mentioned on several occasions that the discipline was the result of a policy rather than simply a whim of the principal, although it did not explain why this should make any difference. Following the policy is important, evidently, because it is the policy. Whether this degree of obedience serves any

educational purpose that society should support did not enter into the discussion.

Conclusion

The largely unstated educational philosophy of *Morse* was far removed from the one in *Barnette*, but it mirrored the rejected views found in *Gobitis*. For the *Morse* majority, school is not about inculcating the habits of thought that characterize a free-thinking, self-governing populace. To the extent it is about anything at all, school is about producing persons who know how to conform their conduct and their speech to prevailing norms as dictated by those in authority. Given this vast difference in underlying beliefs, it is perhaps not surprising that neither the majority nor Justice Thomas made any mention of *Barnette*.

However, the Supreme Court did make one truly surprising citation to *Barnette* on the day *Morse* was decided. *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007)^[17] was a campaign finance case where the task was to decide whether a television commercial advocated voting against a candidate, much as the task in *Morse* boiled down to deciding whether Frederick's banner advocated illegal use of marijuana. The same justices who formed the majority against Joseph Frederick said grandly, "When the First Amendment is implicated, the tie goes to the speaker" and "we give the benefit of the doubt to speech, not censorship." Justice Stevens' dissent in *Morse* observed that the majority was unwilling to extend the same benefit of the doubt to Frederick's banner.

He might also have noted an equally chilling irony. Justice Scalia's opinion in *Wisconsin Right to Life* cited approvingly to *Barnette* -- but for the proposition that the Supreme Court should not hesitate to overrule its prior decisions, just as *Barnette* had overruled *Gobitis*. The "fixed star" of *Barnette* -- "that no official, high or petty, can prescribe what shall be orthodox" -- was nowhere to be seen.

References

[1] Staff Attorney, American Civil Liberties Union of Washington. Full disclosure: The author provided advice to Joseph Frederick's attorneys when *Morse v. Frederick* was pending in the Ninth Circuit and US Supreme Court.

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

[3] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[4] See articles cited in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 635 n.13 (1943). State court cases departing from *Gobitis* included *Bolling v. Superior Court for Clallam County*, 133 P.2d 803 (Wash. 1943) and *State v. Smith*, 127 P.2d 518 (Kan. 1942).

[5] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[6] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

[7] *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

[8] See Aaron H. Caplan, "Public School Discipline for Creating Uncensored Anonymous Internet Forums," 39 *Willamette L. Rev.* 93, 131-34 (2003); *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1992) (Goodwin, J., concurring).

[9] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

[10] Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 250-51 (1990).

[11] Frederick v. Morse, 2003 WL 25274689 (D.Alaska), rev'd, 439 F.3d 1114 (9th Cir. 2006), rev'd, 127 S.Ct. 2618 (2007).

[12] Aubrey v. City of Cincinnati, 815 F.Supp. 1100 (S.D. Ohio 1993); Stewart v. District of Columbia Armory Bd., 863 F.2d 1013 (D.C. Cir. 1988), on remand, Stewart v. District of Columbia Armory Bd., 789 F. Supp. 402 (D.D.C. 1992).

[13] Noto v. United States, 367 U.S. 290 (1961).

[14] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[15] Hess v. Indiana, 414 U.S. 105 (1973).

[16] See Boucher v. School Bd. of School Dist. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) (declining to apply Brandenburg to a student discipline case because the speech “advocates on-campus activity”).

[17] Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652 (2007)