CONCEPT AND TRIVIA

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INTRODUCTION

context, noun
1. The parts of a discourse that surround a word or passage and can throw light on its meaning;
2. The interrelated conditions in which something exists or occurs: environment, setting (the historical context of the war).

trivia, noun
1. Unimportant matters: trivial facts or details; also singular in construction: a quizzing game involving obscure facts.

“My academic mantra,” writes Professor James C. Foster⁴ in the Introduction to BONG HITS 4 JESUS: A Perfect Constitutional Storm in Alaska’s Capital, which examines the history and development of the Supreme Court’s decision in Morse v. Frederick,⁴ “[is] context, context, context” (p. 2). Foster, a political scientist at Oregon State University, argues that it is necessary to approach constitutional law “by situating the U.S. Supreme Court’s ... doctrinal work within surrounding historical context, shorn of which doctrine is reduced to arid legal rules lacking meaning and significance” (p. 1). He seeks to do so in BONG HITS 4 JESUS by incorporating interviews with and discussion about the parties, some bystanders, and various judges and

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lawyers who worked on the case throughout its multiyear history. Among his subjects are Douglas Mertz, who represented Juneau high school senior Joseph Frederick from the federal district court in Alaska all the way to the Supreme Court; David Crosby, Principal Deborah Morse’s initial attorney; former Solicitor General Kenneth Starr, who, as a partner at Kirkland & Ellis, took up Morse’s case after the Court of Appeals for the Ninth Circuit ruled against her; Mary Becker, the former president of the Juneau-Douglas school board; and retired teacher Clay Good, the former president of the Juneau Education Association (the teachers’ union) who took the famous picture showing Frederick and other students hoisting the “BONG HiTS 4 JESUS” banner. Foster also traces the litigation from the moment in January of 2002 when the students in Juneau held up their cryptic sign through the district court proceedings, the decision by the Ninth Circuit, the reversal by the Supreme Court, and ultimately the settlement in November of 2008 after a second round of oral arguments at the Ninth Circuit. Explicitly striving to emulate a veritable pantheon of academic role models, including, among others, the sociologist Alan F. Westin, legal scholars Michael Dorf and Peter Irons, historian Richard Polenberg, and, “[his] muse” (p. 3), the famed anthropologist Clifford Geertz, Foster consciously draws upon what he refers to as “a rich variety of legal, political science, anthropological, and literary materials” (p. 3). His goal, he explains, is “to make sense of the origins and consequences of the perfect constitutional storm that engulfed Joseph Frederick, Deborah Morse, and the other ‘natives’ whose stories shape this book” (p. 3).

In exploring the context, both doctrinal and sociological or anthropological, in which the Morse litigation was decided, Foster has written a book that is often fascinating, entertaining, erudite, and useful, and that touches on important and continuing questions of law, freedom of speech, student rights, and state power. Particularly interesting is the way in which Foster tracks the litigation, through both briefs and oral argument, through all the levels of judicial analysis. That said, however, in seeking to employ his “rich variety” of materials in telling the Morse story, Foster, who is clearly extremely well versed in both high and popular culture, has written a book that is also often—sometimes maddeningly—frustrating, obscure, or irrelevant. More problematically, while he devotes space to comparing Frederick to Till Eulenspiegel, the fourteenth-century German “merry prankster” who “became legendary in sixteenth-century German Schwankliteratur, or ‘fool’s literature’” (p. 18), and invoking the film Heathers, in which characters played by Winona Ryder and Christian Slater systematically murder popular students, to describe “vexatious high school social relations” (p. 232 n.42), Foster occasionally omits more useful context or includes legal or historical analysis that is mistaken or even misleading. Unfortunately, Chapter One, in which he sets the scene by recounting Frederick’s and Morse’s different views of the events of January 24, 2002, but also spends many pages quoting at length the views of film critics about

Akira Kurosawa’s film masterpiece *Rashomon* to explain why it is so difficult to say what actually happened, is historically and stylistically problematic. That said, a substantial core of the book, which includes Foster’s second, third, and fourth chapters on the Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District*, the Court’s gradual move away from recognizing the full constitutional rights of students in public schools and conflation of Fourth Amendment and First Amendment analyses in the school context, and the recent history of the Supreme Court justices, is excellent. Foster’s central analysis of the *Morse* litigation itself, which occupies Chapters Six, Seven, and Eight, is thorough and interesting—though, as in the rest of his work, Foster is continually drawn away from his central points about this case by what he sees as interesting asides into, for example, how amicus briefs have changed since the late 1700s (pp. 113–19) and whether the Supreme Court in the eighteenth and nineteenth centuries issued unanimous rulings (p. 173). Ultimately, this is a useful and interesting book, albeit one that raises the question of when one crosses the line between addressing historical context on the one hand and recounting historical trivia on the other.

Part I of this Review summarizes the factual and procedural background that led to the Supreme Court’s opinion and to the parties ultimately settling the Alaska state law claims. Part II examines Foster’s book in order and in depth, addressing the progression of the work and presenting Foster’s argument as a whole. Part III takes a slightly more critical view and touches on more thematic questions, including the effectiveness of Foster’s treatment of *Morse* and use of *Morse* to examine more broadly constitutional doctrine in the public school context, as well as the fine line that must be drawn between examining context on the one hand and obscuring the relevant facts with trivia on the other.

I.

As Washington Post columnist Dana Milbank observed in a tongue-in-cheek column entitled *Up in Smoke at the High Court*, published the day after oral argument in *Morse v. Frederick*, in this instance a high school prank had literally become a federal case. On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska. The relay was officially sponsored by Coca-Cola and other private entities. To celebrate the event, which occurred during school hours, the Juneau school district arranged for

6. 393 U.S. 503 (1969). *Tinker*, of course, is the seminal school speech case, in which the Court held that students retain First Amendment rights inside the “schoolhouse gate,” and that their speech may be suppressed only if authorities reasonably “forecast substantial disruption of or material interference with school activities.”


9. Frederick v. Morse, 439 F.3d 1114, 1115 (9th Cir. 2006), rev’d sub nom. *Morse*, 551 U.S. 393; see also p. 231 n.33.
district schools to send their students to the streets to see the torch go by, and even bussed students from distant schools to closer points (pp. 16–17, 231 n.33). The relay route passed in front of Juneau-Douglas High School, where Deborah Morse was the principal and Joseph Frederick was a senior.\(^\text{10}\) Frederick was late to school that day, but after he arrived, he joined a group of friends across the street from the school.\(^\text{11}\) When the cameras following the torchbearers came near, “Frederick and his friends unfurled a 14-foot banner bearing the phrase: ‘BONG HiTS 4 JESUS.’”\(^\text{12}\) Morse, who was watching, and who later explained that she thought the banner was encouraging illegal drug use, immediately crossed the street, and demanded that the students take the banner down.\(^\text{13}\) Frederick refused, and Morse grabbed the banner, crumpled it up, and (after bringing Frederick to her office) suspended Frederick for ten days.\(^\text{14}\) Frederick appealed his suspension to the school board, but lost on March 19, 2002.\(^\text{15}\) On April 25, 2002, Frederick filed suit under 42 U.S.C. § 1983 in federal district court in Alaska, alleging that the Juneau school board and Morse personally had violated his rights under the First Amendment and Alaska law, and seeking declaratory and injunctive relief along with compensatory and punitive damages.\(^\text{16}\) Morse and the school board responded by filing motions for summary judgment on the basis that they were protected from Frederick’s claims by qualified immunity.\(^\text{17}\)

On May 27, 2003, District Judge John W. Sedwick granted the defendants’ motions, concluding that both Morse and the Board were entitled to qualified immunity.\(^\text{18}\) The doctrine of qualified immunity for government officials recognizes that, “where an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken ‘with independence and without fear of consequences.’”\(^\text{19}\) Accordingly, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^\text{20}\) Under the two-part qualified immunity test laid out by the Supreme Court in

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10. Morse, 551 U.S. at 397–98.
11. Id.
12. Id.
13. Id.
14. Id.; Frederick, 439 F.3d at 1115.
15. Morse, 551 U.S. at 397–98.
16. Id.
18. Id. at *6.
20. Id. at 818.
April 2012]  Context and Trivia  1157

Saucier v. Katz,21 a court asks first whether, under the facts viewed in the light most favorable to the nonmoving party, there is any violation of a constitutional right. If there is, the court then asks whether the right was "clearly established" at the time of the violation.22 In this case, Judge Sedwick found that Frederick could not demonstrate that his right to disseminate a message that Morse reasonably believed pertained to drugs was "clearly established" at the time of the incident.23 Frederick appealed.

On March 10, 2006, the Ninth Circuit, in an opinion written by Judge Andrew Kleinfeld (an Alaskan who was appointed in 1991 by George H.W. Bush) and joined by Judges Cynthia Holcomb Hall (a Reagan appointee) and Kim McLane Wardlaw (a Clinton appointee), vacated Judge Sedwick’s order, and remanded the case to the district court.24 Contrasting their view to Judge Sedwick’s, the Ninth Circuit panel observed that the district court “reasoned that Bethel School District No. 403 v. Fraser,25 as opposed to Tinker v. Des Moines Independent Community School District,26 governed Frederick’s speech. We disagree."27 Concluding that there was no genuine issue of material fact, the court reviewed the appeal “on the basis that the banner expressed a positive sentiment about marijuana use, however vague and nonsensical."28 The question, the court concluded,

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

23. Saucier, 533 U.S. at 200. While Judge Sedwick appears to have jumped to the second Saucier prong without addressing the first, before the Supreme Court’s decision in Pearson, 555 U.S. at 224–25, he should have been required by “Saucier’s ‘rigid order of battle,’” id. at 234, to first address whether there had been a constitutional violation. His conclusion that the defendants were entitled to qualified immunity because “Frederick does not argue that the defendants’ actions were so far-fetched as to make the illegality apparent,” Frederick, 2003 WL 25274689, at *3, should perhaps be read instead as a finding that the defendants did not violate Frederick’s constitutional rights. In addressing the defendants’ immunity under Alaska law at a later point in the order, Judge Sedwick did conclude that under Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969), and Bethel School District No. 403 v. Fraser, 478 U.S. 675, 677, 685 (1986), Morse’s actions were appropriate. Frederick, 2003 WL 25274689 at *3, *5.
25. 478 U.S. at 685 (holding that the school district permissibly sanctioned a student for his “lewd,” sexually explicit speech at a school assembly in support of a candidate for student government).
26. 393 U.S. 503.
27. Frederick, 439 F.3d at 1117.
28. Id. at 1117–18.
school. The answer under controlling, long-existing precedent is plainly "No." 

In short, the court explained, Morse and the school board had violated Frederick’s First Amendment rights, because, regardless of whether Frederick’s speech “conflicted with the school’s ‘mission’ of discouraging drug use,” the school could not “show a reasonable concern about the likelihood of substantial disruption to its educational mission.” Now it was Morse’s turn to appeal; to do so, she enlisted the aid of Kenneth Starr and Kirkland & Ellis (pp. 119–20).

The Supreme Court granted certiorari on two questions, of which it ultimately addressed only the first: “whether Frederick had a First Amendment right to wield his banner.” After an entertaining set of oral arguments on Monday, March 19, 2007, the Supreme Court on June 25, 2007, ruled in favor of Morse, by a vote of 5 to 4, with Chief Justice John Roberts delivering the opinion of the Court.

In summarizing the decision, Roberts wrote:

Our cases make clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969). At the same time, we have held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986), and that the rights of students “must be ‘applied in light of the special characteristics of the school environment.’” Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Tinker, supra, at 506). Consistent with these principles, 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. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

While the outcome was clear, however, as Foster observes (p. 181), the meaning of the Supreme Court’s decision was less so: though Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito, three members of this majority were concerned about the scope of that outcome. Justice Thomas, for example, concurred “because [the decision] erodes Tinker’s hold in the realm of student speech,” but would have gone much further than did Roberts, because, in his opinion, “[a]s originally under-

29. Id. at 1118.
30. Id. at 1123.
31. Morse v. Frederick, 551 U.S. 393, 400 (2007). The second question, which the Court did not need to reach, was whether the law regarding Frederick’s rights was clearly established at the time of the incident. Id.
33. Morse, 551 U.S. at 396.
34. Id. at 396–97.
35. Id. at 422 (Thomas, J., concurring).
stood, the Constitution does not afford students a right to free speech in
public schools.” Where Thomas would have gone further, Justice Alito,
who was joined by Justice Kennedy, carefully limited the majority’s hold-
ing, noting that he was joining the majority opinion

on the understanding that (a) it 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 (b) it provides no support for any restriction
of speech that can plausibly be interpreted as commenting on any political
or social issue . . . .

Justice Breyer, who concurred in the judgment in part and dissented in part,
thought that it was “unwise and unnecessary” to address the First Amend-
ment question at all, because such a decision in this case would be “both
difficult and unusually portentous.” Instead, he suggested, the Court
should simply find that the defendants were entitled to qualified immunity.
Justice Stevens, joined by Justices Souter and Ginsberg, dissented, conclud-
ing that “the First Amendment protects student speech if the message itself
neither violates a permissible rule nor expressly advocates conduct that is
illegal and harmful to students,” and that the Court was doing “serious vio-
lation to the First Amendment” by suggesting otherwise.

As Foster ruefully
observes, “In fine, Morse v. Frederick, 551 U.S. 393 (2007), is no less am-
biguous than Frederick’s banner at the bar of judgment” (p. 187).

Following remand, the Ninth Circuit returned the case to Judge Sedwick
for further proceedings on the Alaska state actions. On October 10, 2007,
Judge Sedwick found that Frederick’s claims for declaratory and injunctive
relief under the Alaska Constitution were moot because Frederick had grad-
uated from his school and his disciplinary record had been expunged (p. 199).
Frederick again appealed to the Ninth Circuit, and the same panel heard oral arguments on September 9, 2008—“maul[ing]” David Crosby,
the defendants’ attorney, in the process (p. 206). While the parties ultimately
settled on November 3, 2008, before the panel issued a decision, it seems
clear that, given the panel’s concerns about whether the school district had
or could really eliminate all record of Frederick’s punishment, the defend-
ants were faced once again with the prospect of losing before the Ninth
Circuit.

36. Id. at 418–19.
37. Id. at 422 (Alito, J., concurring).
38. Id. at 425–28 (Breyer, J., concurring in the judgment in part and dissenting in
part).
39. Id. at 425. In making this suggestion, Breyer reiterated his belief, pre-Pearson, that
the Court “should abandon Saucier’s order-of-battle rule.” Id. at 430.
40. Id. at 435 (Stevens, J., dissenting).
41. See Frederick v. Morse, 499 F.3d 926 (9th Cir. 2007); pp. 198–99.
42. Foster suggests, incorrectly, that it was “somewhat unusual” for the same panel to
hear the case, p. 205. In fact, after the Supreme Court remands to the Ninth Circuit, provided
the Ninth Circuit did not rehear the case en banc, it is standard for the original three-judge
panel to retain jurisdiction.
II.

A. Three Beginnings

This is a book that begins several times. In the first beginning, a short introduction, Foster lays out his belief in the necessity of context (pp. 1–2), explains how he became interested in Morse, invokes his academic role models (pp. 2–3), and describes how, for him, “had begun as an account of a weighty novelty . . . became a study in how human relationships can go off the rails,” such that, “[p]laying the role of jurisprudential meteorologist, metaphorically speaking, [he] set about endeavoring to understand and explain the atmospheric genesis of that perfect constitutional storm in Alaska’s capital” (p. 3). In a welcome move, Foster also provides a timeline of events, starting with the banner incident in January of 2002 and running through the settlement agreement that Frederick and the Juneau School District reached on November 3, 2008 (pp. 4–6).

In Foster’s second beginning, a “Prologue” entitled “A Tale of Three Wars and Zero Tolerance,” Foster invokes the dismay the Queen of England expressed when she declared 1992, a year in which British royalty had been plagued by scandal and misfortune, an “annus horribilis,” or “terrible year” (pp. 7–8). “As a preamble to my concerns in the book you are holding,” Foster writes, “I want to reflect on the salient aspect of the first decade of the twenty-first century, our own anni horribili eschewing ‘instant opinions’ in lieu of bringing to bear judgment leavened by moderation” (p. 8). Concluding that “[s]ince World War II, Americans have lived in a garrison state, based on a permanent war economy, suffused with martial imagery” (p. 8), Foster observes that “[w]ar figures appreciably in this book,” in that the events behind Morse v. Frederick were heavily influenced by the Vietnam War, the War on Drugs, and the war of litigation between Morse and Frederick themselves, a natural consequence of the “tendency to resort to combat, in the form of litigation” (pp. 8–9). Noting that the period between January 24, 2002, and November 3, 2008, was Frederick’s and Morse’s “very own anni horribili [sic]” (p. 9), Foster suggests, not for the last time, that this book would never have been necessary if the two had simply expressed a little tolerance, rather than allowing “their interpersonal excesses” to blow up their “squall into the perfect constitutional storm” (p. 9).

Unfortunately, Foster’s third beginning, an important first chapter entitled “Harmonic Convergence in Juneau: (In)famous for Fifteen Minutes,” in which he attempts to set the scene for understanding the dispute between Morse and Frederick, is far weaker than the rest of the book. Arguing that Frederick’s and Morse’s “stories are a lot messier than ‘just the facts,’ ” Foster assures his readers that he is not concerned with “the raw fact” that Frederick unfurled the critical banner on January 24, 2002 (p. 11). Instead, in an attempt to come to grips with what might be thought of as the theoretical, rather than the historical, nature of what happened, Foster spends a good part of the next thirty pages comparing versions of Frederick’s and Morse’s recounting of events to the perspectives of the characters in
Rashomon, the famous film that stands for the simple principle that different people perceive the same events differently. Foster here is clearly troubled by existential and theoretical questions about how to represent the Truth of Morse’s and Frederick’s “perfect constitutional storm” (p. 11). Even describing Morse as “wounded/wary” and Frederick as “brazen/brash” (p. 26), for example, causes Foster near-existential pain. “Yet,” he laments, “in the very act of writing those descriptors—as I engrave black letters on a white page—I realize that I am engaging in precisely the sort of reductionism and, worse, reification that I seek to combat with this project” (p. 26).

Existential angst aside, there is a far more troubling problem with Foster’s approach: in his desire to tell the “stories” rather than the “raw fact[s],” (p. 11), and to present Morse’s and Frederick’s individual Rashomon-like perspectives, Foster engages in some creative—and less-than-obviously acknowledged—cutting and pasting to make sure those stories sound coherent and comprehensive. In a subsection entitled “Rashomon in Juneau” (pp. 27–39), further divided with sub-subheadings such as “Joe Begins His Story” (p. 27) and “Deb Continues Her Story” (p. 32), Foster presents what he represents as “Joe and Deb recounting their stories in their own words” (p. 27). Quoting primary sources is, of course, a laudable and useful historical tool. Here, however, Foster presents Morse’s and Frederick’s “own words” in long blocks of connected, offset text, clearly leading readers to assume that he is quoting from a single contemporary or historical source. A careful reader, however, will, upon reading the endnotes, discover that Foster has constructed these long block quotations from at least two entirely separate sets of documents. Foster is fairly open—albeit in the endnotes, rather than in the body of the text—about his constructive use of sources. He explains that “Joe’s stories” and “Deb’s stories” are “composite[s] derived primarily” from his interviews of the two in 2009 and from the depositions that Frederick gave in 2002 and Morse gave in 2003 (pp. 236 n.74, 237 n.87). Quite apart from the fact that this sort of construction, without notice in the body of the text, is clearly misleading, it is also historically absurd. Foster’s purportedly comprehensive “stories” are actually constructed from statements made seven years apart, with the first made as part of a deposition, during ongoing litigation, and the second coming long after the Supreme Court had issued its opinion and after the parties had actually reached a monetary settlement. The problems with such an approach are readily apparent; in a book designed to present the “context, context, context” (p. 2) of a particular constitutional conflict, Foster’s choice is baffling.

Foster’s final purpose in the first chapter is to describe Judge Sedwick’s initial order granting summary judgment to the defendants (pp. 37–38). In doing so, Foster is somewhat dismissive of Sedwick’s decision—although such dismissiveness does not seem to be warranted by a historically rigorous approach to what the “raw fact[s]” (p. 11) actually were. “The supreme irony of Judge Sedwick’s rulings is that he granted summary judgment[,]”
Foster notes (p. 38). Foster clearly suggests that Sedwick based his ruling on an inappropriate reading of the facts. Characterizing the order as “judicial discounting trumping judicial fact finding” (p. 38), Foster concludes, incorrectly, that “Judge Sedwick found no authentic factual disagreement between the plaintiff and the defendant because he regarded the latter’s account as more valid than the former’s” (p. 38). To the contrary, there is no indication that Sedwick found the defendants’ account “more valid” than Frederick’s—only that Sedwick found that there was no genuine dispute of material fact, because the facts that Frederick alleged, even if true, would have made no difference to the legal analysis.\(^4\) (Interestingly, Foster does not criticize the Ninth Circuit, which in overturning Sedwick’s order similarly found that “[t]here is no genuine issue of fact material to the decision.”\(^5\)) While concluding that Sedwick’s “answers rang untrue to some,” however, Foster is forgiving: “Legal truth,” he concludes, “may have the assuring ring of authority about it. Legal truth also has the aura of contrivance about it” (p. 39). Before describing how “three judges on the Ninth Circuit [had] their chance at truth telling,” however, Foster turns to establishing the doctrinal context (p. 39).

**B. Doctrinal and Historical Framework**

In contrast to the overly theoretical and even angst-ridden first chapter, the next section of Foster’s book, comprising Chapters Two (“The Tentative Tinker Rule”), Three (“From Black Armbands to Colliding Tubas”), and Four (“A New Century, A Different Court”), is generally an excellent, clear, and coherent examination of the legal, historical, and even personal context that influenced the development and outcome of Morse v. Frederick.

In Chapter Two, Foster seeks to “demystify Tinker,” the seminal case in which the Supreme Court held that a school had violated the First Amendment rights of three students by suspending them in December of 1965 for wearing black armbands to protest the war in Vietnam.\(^6\) Reducing Tinker to Justice Abe Fortas’s “resonant sound bite” (p. 41) that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”\(^7\) Foster argues, “obscures several circumstances that render Tinker as much an instructive historical artifact as a resounding protection of student speech” (p. 41). Tracing the effect in Tinker of two critical school speech cases decided by the Court of Appeals for the Fifth Circuit,\(^8\) Foster argues persuasively that

\(^{44}\) See Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *5 (D. Alaska May 29, 2003), rev’d, 439 F.3d 1114 (9th Cir. 2006), rev’d sub nom. Morse, 551 U.S. 393.

\(^{45}\) Frederick v. Morse, 439 F.3d 1114, 1117 (9th Cir. 2006), rev’d sub nom. Morse, 551 U.S. 393.


\(^{47}\) Tinker, 393 U.S. at 506.

\(^{48}\) See Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
Tinker really represented a tentative embrace of free speech rights for students (pp. 45–46), and was very much “a product of its time” (p. 56), and especially of the “unique political climate” (p. 47) fostered by the Vietnam conflict. This argument is not novel, but Foster makes it particularly well. In one admirable turn of phrase that neatly sums up his argument, Foster observes that “[a]s constitutional poetry, there is more to Tinker than meets the eye. As constitutional law, there is less” (p. 45).

Foster’s third chapter, one of the most ambitious and strongest in the book, focuses on explaining the context and the controversy over constitutional rights in public schools that informed the Morse decision. Foster traces how, in five of the critical cases addressing the constitutional rights of secondary school students between 1985 and 2002, the Supreme Court essentially limited Tinker through “a line of analysis that resolves the tentative Tinker rule into a picture of deference to authority” (p. 60). In New Jersey v. T.L.O., the Court, finding that the Fourth Amendment in public schools “does not require strict adherence to the requirement that searches be based on probable cause,” upheld as “reasonable” the search of a student’s purse for contraband after the student was caught smoking. In Fraser, Chief Justice Burger, writing for the seven-justice majority, upheld the suspension of a student who delivered a nominating speech for student government that was in fact “an extended double-entendre” (p. 63), concluding that school officials may still determine what “would undermine the school’s educational missions.” In Hazelwood, Justice White concluded that a school had not violated the First Amendment rights of students who wrote for the school paper when the principal censored articles he deemed inappropriate because “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” In Vernonia School District 47J v. Acton, Justice Scalia writing for the majority held that a school district’s policy of requiring random drug testing of student athletes did not violate the Fourth Amendment, because the school officials are the “guardian[s] and tutor[s]” of the children entrusted to their care. Seven years later, in Board of Education of Independent School District No. 92 v.

50. 469 U.S. 325.
51. Id. at 341–42, 346.
52. Fraser, 478 U.S. 675.
53. Id. at 685.
55. Id. at 270–71, 273; see pp. 65–68.
57. Vernonia, 515 U.S. at 665; see pp. 68–70.
Earls, as Foster observes, “the other Fourth Amendment shoe dropped” (p. 70), and the Court sanctioned expanding drug testing to any student who wanted to participate in an extracurricular activity.

It is clear that, in Foster’s view, these cases represent a severe curtailing of the judicial aspirations of the Warren Court; as he observes, “[o]ne might say that this chapter traces the constitutional consequences of the exhaustion of the liberal spirit” (p. 57). That said, however, Foster is not sure what these cases really mean for student rights. “Whither goest Tinker?” he asks (p. 73). “The first thing to say is that little definitive can be said” (p. 73). Ultimately, he concludes, the only thing that is clear is that “Tinker is in limbo” (p. 73) and “has gone into eclipse” (p. 74). “Nevertheless,” he adds, “Tinker remains only a few votes away from being applied in practice. The Court that abandoned Tinker can always potentially embrace it” (p. 74; footnotes omitted).

In his fourth chapter (“A New Century, A Different Court”), which is focused on changes in the Supreme Court, Foster “explores the thirty-four-year skirmish (some would say total war)” over political attempts to remake the Supreme Court (p. 75), and in particular “the story of how Justice O’Connor’s resignation and Chief Justice Rehnquist’s death . . . gave President George W. Bush the opportunity to build on previous Republican appointments to create ‘critical mass’ around a policy regime opposed to the Roosevelt Court’s economic liberalism and the Warren Court’s civil liberties jurisprudence” (pp. 75–76). This story is one that has been told before, but Foster tells it powerfully and effectively as he tries to further explain the context behind the Supreme Court’s decisions in cases such as Vernonia and Earls. Ultimately, for Foster, O’Connor’s replacement on the Court by Justice Alito seems regrettable. “What Justice O’Connor’s departure signifies, then,” he writes,

is that a receptive voice has been silenced. We will never know how she would have responded to the specific issues raised in Morse v. Frederick. . . . What we do know is that the Supreme Court to which Deborah Morse brought her appeal was not the same body that saw Justice O’Connor dissent in Vernonia and Earls. (p. 90)

Foster’s reliance on this statement to end this chapter, and this doctrinal and historical section, sounds a sour note; of course the Court in 2007 was not the same Court as in 2002. Given the quality of Foster’s analysis in the chapter to this point, and that he is concerned with how the Court decided Morse, rather than Vernonia, it seems surprising that in this chapter he does not engage in any real analysis of how Chief Justice Roberts and Justice

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59. Earls, 536 U.S. at 528.
60. See, e.g., Linda Greenhouse, In Steps Big and Small, Supreme Court Moved Right, N.Y. TIMES, July 1, 2007, at A1. Of course, there is disagreement with Foster’s thesis that the Roberts and Alito appointments radically changed the Court’s direction. See, e.g., Lee Epstein et al., The Bush Imprint on the Supreme Court: Why Conservatives Should Continue To Yearn and Liberals Should Not Fear, 43 TULSA L. REV. 651 (2008).
Alito—who respectively authored the majority opinion and critical concurrence in *Morse*—have changed the Court’s nature.61

### C. Briefing, Argument, and Decision

In the third major section of Foster’s book, comprising Chapters Five (“The Ninth Circuit Weighs In”), Six (“Not-So-Brief Battles, Not Such Odd Bedfellows”), Seven (“Up in Smoke at the High Court”), and Eight (“Five Takes on a Single Event”), Foster examines the arguments made, briefs filed, and decisions published in *Morse* itself and looks at some of the attorneys and judges who made those arguments, filed those briefs, and authored those opinions. While Foster examines and describes a great deal of material that is useful for those seeking to understand the context in which *Morse* was decided, he is continually sidetracked in these chapters—more so than in the previous section—by a desire to discuss “context” that is largely irrelevant.

In Chapter Five, for example, in which Foster examines *Morse*’s reception at the Ninth Circuit, Foster begins with a long description of the history and nature of the Ninth Circuit, beginning with the 1891 bill that created the federal circuit courts of appeals (p. 92). He then describes the chapters of David C. Frederick’s book about the history of the Ninth Circuit (p. 93), and examines several of the Ninth Circuit’s most famous historical cases (p. 93–94). After ten pages of this sort of analysis (pp. 91–101), interspersed with an extensive discussion (pp. 95–96) of the Ninth Circuit’s en banc procedure—which was not used in *Morse*—Foster seems for the first time to realize that his discussion of “context” might be going too far. “The reader may well be asking at this point, why this lengthy discussion about the court that decided *Frederick v. Morse*?” (p. 101). In response to the reader’s imagined question—“What does this analysis of the Ninth Circuit have to do with understanding that case?” (p. 101)—Foster offers three answers: first, this discussion “situates *Frederick v. Morse* historically”; second, it “provides a flavor—a feel, if you will—for the [court] . . . as well as how that court is perceived”; third, it “locat[es] the case within ongoing judicial process” (p. 101).

Foster’s explanation here seems strained. Certainly, the Ninth Circuit has a culture, and the Circuit together with certain of its judges has a reputation—probably undeserved62—as a “bastion of liberalism run

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Understanding that culture and those reputations might reveal a good deal about the context of Morse, especially if it is true, as Akhil Amar suggested, that “some of the Supreme Court’s attitude toward the Ninth Circuit is personal,” how the court decided a notable immigration case in 1905, however, seems to have very little to do with anything about the case. More useful than this lengthy discussion about the Ninth Circuit’s roots is Foster’s description of Judges Hall, Kleinfeld, and Wardlaw (p. 102). That said, however, it is surprising that each of these judges merits only a paragraph, when the Ninth Circuit’s 1974 decision in a fishing rights case is given a page of its own (pp. 99–100). In appreciating the court’s decision in Morse, knowing the judicial philosophies and temperaments of these individuals—as well as knowing, for example, which of them had school-age children—seems far more important. Also more useful than the discussion of the Circuit’s history is Foster’s close analysis of the briefs both parties filed before the court (pp. 102–10). Given the often-overlooked importance of the actual arguments that attorneys make and the highly variable quality of the attorneys who appear before the federal courts of appeals, it is hard to exaggerate the importance of this analysis to Foster’s project.

In his sixth chapter, Foster takes this sort of close analysis to the next level by examining the arguments made in the briefs at both the certiorari and merits stages before the Supreme Court. Beginning, predictably, with a long digression into the history and nature of amicus briefs (pp. 113–19), Foster “speculate[s]” that the five justices who ultimately voted in favor of Morse also voted to grant certiorari (pp. 120–21), and further speculates—with some support in the extant academic literature (p. 114–15)—that amicus briefs therefore had an impact. Ultimately, Foster concludes carefully,
“[w]e have seen that the not-so-brief battles in which amici on both sides engaged plausibly influenced the Court’s decision to grant cert” (p. 144).

In Chapter Seven, Foster dissects Starr’s and Mertz’s oral arguments before the Supreme Court, and considers more generally the nature of Supreme Court oral advocacy (pp. 150–53). Ultimately, Foster argues, the primary goal of the attorneys in this case was to convince Justice Kennedy, “el jefe,” who was presumably in control of the Court’s swing (p. 169). It is clear that Foster believes that Starr was by far the most successful in doing so. Starr, Foster concludes, “remained focused on his task” and performed in an “impressive” fashion (p. 157). In Foster’s view, the same could apparently be said of Deputy Solicitor General Edwin S. Kneedler (pp. 157–58). In contrast, Foster suggests that “[f]rom the outset, it was clear that Doug Mertz was going to experience rougher sailing” (p. 159). Mertz, Foster concludes, was “thrown off balance” by the first few questions, and so “found it difficult to accomplish his primary task” of “conveying to the justices Frederick’s injury narrative” (p. 160). In comparison, Foster observes, “Starr sounded all the right notes,” even in rebuttal (p. 165).

In his eighth chapter, Foster examines the Supreme Court’s five-faceted decision, and concludes that Morse was “incoherent” (p. 192). Foster begins the chapter by observing that, even before the decision was released, three veteran Supreme Court reporters—Linda Greenhouse, Lyle Denniston, and Tony Mauro—expected the Court to come down somewhere between the extremes of Frederick’s and Morse’s positions, and perhaps craft a drug exception to Tinker (pp. 171–72). Continuing with a long discourse on the history of unanimous Supreme Court opinions (pp. 173–79), Foster observes that the Morse Court was a “doubly fragmented tribunal. First, the justices are deeply split ... Second, the justices also are fractious, inclined to write separate opinions staking out their own positions” (p. 179). Given this fractiousness, Foster observes, it is less accurate to describe the result in Morse as “5–4” (Roberts, Scalia–Thomas–Alito, and Kennedy–Breyer–Stevens, Ginsburg, and Souter) than as “2–1–2/1–3” (Roberts and Scalia–Thomas–Alito and Kennedy/Breyer–Stevens, Ginsburg, and Souter) (p. 181). That said, he adds in a “coda,” “[r]ead judicial results ... solely in zero-sum terms is highly misleading” (p. 188). Instead, he suggests, it is useful to read each individual opinion as a “judicial performance” that might “enlarge our understanding of drug use in public schools, stimulating imaginative approaches to adolescents and drugs while respecting student expression” (p. 193). Pursuing this reading of judicial opinions not as opinions, but rather as cultural and political performances, Foster ends this chapter, and this section, by posing an open-ended question: Does this decision, he asks, “help us burrow into details of our shared lives, conjuring images and forging connections, thereby enabling us to grapple with an intractable social problem in ways that honor us and burnish our cherished values?” (p. 193).

support of Frederick came from twelve fairly disparate organizations, including Students for a Sensible Drug Policy and Christian religious organizations such as Liberty Counsel, p. 135.
D. Can’t We All Just Get Along?

Foster’s ninth and final chapter (“Lost Opportunities and Failure of Imagination”) reads simultaneously as a history of the events that followed the Supreme Court’s remand, a lament about the unclear nature of the \textit{Morse} decision, and a call for more tolerance and understanding between potential litigants. “[T]wo matters remain,” Foster writes: “First, for the foreseeable future, we are stuck with the drug speech exception to protected student speech . . . \textit{Morse} is a messy precedent providing little useful guidance . . . as we go about trying to harmonize the tension between First Amendment rights and school authority” (p. 224). Second, he adds, we are left with the “more fundamental” challenge of how to convince potential litigants to “imagine breaking free from their self-defined rigid roles and seize the surprising opportunities that might result” (p. 224). What, he asks, if Morse and Frederick “had managed to empathize with, instead of rubricizing [sic], each other?” (p. 225). Had the two managed to converse, he concludes almost sadly, “my efforts in this book to kindle conversation would have been unnecessary” (p. 225).

III.

\textit{BONG HiTS 4 JESUS} is clearly worthy of praise. At the same time, especially in considering the more thematic questions of how effective the book is at explaining the context behind \textit{Morse} and to what extent “context” is necessary or helpful in understanding judicial decisions, it is useful to highlight two significant shortcomings: first, the inclusion of too many irrelevant references and allusions to popular culture and obscure trivia; and second, the lack of some critical and relevant material or analysis actually about or touching on the case, including interviews with Frederick’s fellow students and an engagement with the legal academic literature on \textit{Morse}.

A. Allusion, Citation, and Trivia

As previously suggested, this book is both fascinating and—primarily because of Foster’s long and random expositions on largely irrelevant historical events or works of high or popular culture—occasionally maddeningly frustrating for the reader interested in what happened in \textit{Morse}. The first chapter more than any other is afflicted by Foster’s love of popular trivia and abstruse literary allusion. Here we see the reference to \textit{Heathers}\textsuperscript{68} and Foster’s strained analogy between Frederick and Till Eulenspiegel (p. 18). Here too we find, for no reason other than to highlight the notion that high school principals are “targets,” a description of a well-known Gary Larson \textit{Far Side} cartoon showing a deer with a bull’s-eye birthmark on its chest (p. 24). Foster in an endnote even compares Morse and Frederick to “[t]he two central characters in Ludwig Bemelman’s classic Caldecott Honor

\textsuperscript{68} P. 232 n.42; see \textit{Heathers}, supra note 5.
Book *Madeline,* with Frederick as a metaphorical Madeline, "wander[ing] off on his own, to 'pooh-pooh' tigers at the zoo" (p. 236 n.72).

Foster’s detours into tangent are not restricted to the first chapter: in his second chapter, Foster expounds on Janus, the Roman god of thresholds, to explain that *Tinker* "is Janus-like," in that the majority and the dissent have different views of the First Amendment (p. 43). In his third chapter, Foster compares different views of *Tinker* to “Prokofiev moments” (p. 73)—which, he explains, is his term for a dramatic pause just as, “[a]t a dramatic moment in his splendid *Peter and the Wolf*—just after the wolf has swallowed the duck—Sergei Prokofiev’s narrator pauses to take stock” (p. 252 n.121). Many of Foster’s allusions are only very loosely connected to his subject. In his chapter examining amicus briefs, for example, perhaps to demonstrate that amici can act as lobbyists, Foster includes a long quotation from a column Will Rogers wrote on October 20, 1929 (days before the Wall Street Crash of 1929), describing the lobbying activities of Joseph R. Grundy, a Republican who served as president of the Pennsylvania Manufacturers’ Association (p. 116). In another note, to little purpose, Foster observes that as a child he used to collect bubblegum cards with sayings that were funny to an eight-year-old—and he proceeds to recount one that he clearly found particularly amusing (p. 249 n.55).

The problem with the repeated allusions is not only that they obscure Foster’s central point, or only that they might well be unknown to Foster’s readers, but also that they can be misleading. While Foster may have included the reference to *Heathers* as a joke, for example, the movie in fact is not a good source to describe “vexatious high school social relations” (p. 232 n.42). Regardless of whether most readers can be expected to know about Till Eulenspiegel, it seems unlikely that the youthful Joseph Frederick, while resentful of authority, was particularly interested (as was Eulenspiegel) in exposing the vices and hypocrisies of those on whom he pulled pranks, rather than (as he later explained) on getting himself on television or “piss[ing] people off” (p. 27). These allusions make Foster’s work less accessible, and detract from what is an impressive analysis of the doctrinal and historical framework that resulted in the *Morse* opinions.

B. Missing Context

In light of the material that is only tangentially related to *Morse,* it is somewhat surprising that there are also some significant gaps in Foster’s evidence and analysis. Some of these gaps result from missing sources. One early surprise—especially given the ongoing debates about what the banner was supposed to mean—is that, while Foster interviews both the head of the teachers’ union and the head of the school board, he does not appear to have interviewed any of the students who were standing with Frederick and who helped unfurl the banner.

Another surprising absence is that of any interviews with the judges who were involved with the case. Foster explains that he was advised by a colleague that judicial ethics would have prevented judges from speaking
with him (p. viii)—but, while there are obviously things judges must keep confidential, there is nothing necessarily inappropriate about speaking with a judge about a completed case with which he or she was involved. Indeed, judges—including judges on the Ninth Circuit\(^6\) and justices on the Supreme Court\(^7\)—routinely discuss important cases that they helped decide. If nothing else, the judges might well have been pleased to discuss their own backgrounds and judicial philosophies.

Of course, as a quick survey of the three judges on the Ninth Circuit who twice heard the appeal demonstrates, investigation into the various judicial philosophies of all the judges involved might have rendered the history of the case more, rather than less, confusing. Judge Hall, for example, who in the 1950s became the Ninth Circuit’s first full-time female law clerk, was a tax expert with a reputation as a conservative who “surprise[d] court-watchers” with her vote in \textit{Morse}.\(^7\) Judge Wardlaw, the first Latina ever appointed to a federal appeals court, is a graduate of University of California, Los Angeles who worked for years as a partner at a major Los Angeles law firm and as a federal district judge. Although she is often viewed as a liberal, Judge Wardlaw describes herself as part of a group of moderates who “try to follow the law to the best of [their] abilit[ies]” and whom “you can’t predict.”\(^7\) Judge Kleinfeld, the “strongly conservative jurist[\textquotesingle] with a “libertarian judicial philosophy”\(^7\) who authored the Ninth


\(^7\) Amelia Hansen, \textit{Profile: Judge Kim Wardlaw}, Ms. JD (Mar. 7, 2007, 5:03 PM), http://ms-jd.org/profile-judge-kim-wardlaw; see also Kim McLane Wardlaw, \textit{First Women Series: Judge Kim McLane Wardlaw}, Ms. JD (Mar. 11, 2009, 2:37 AM), http://ms-jd.org/first-woman-judge-kim-mclane-wardlaw ("How my personal experiences have influenced my philosophy can be found in my opinions. I can only assure young lawyers that developing and maintaining a diverse bench is essential if we are to give real meaning to the words ‘equal justice.’").


Circuit’s opinion, grew up in the Bronx and attended Harvard Law School, but chose to accept a clerkship and then remain in what, in his own words, was the “small frontier town” of Fairbanks, Alaska.\(^7\) (As the disparate backgrounds of this unanimous panel suggest, while it is always tempting to view judicial decisions as reflecting the personalities of the judges involved, it might in some cases be reasonable instead to view the decision in a case such as \textit{Morse} as instead simply reflecting the panel’s best reading of \textit{Tinker}.)

Equally surprising, given the extensive analysis Foster offers of oral argument before the Supreme Court, and even before the Ninth Circuit after remand, Foster does not describe the first oral argument before the Ninth Circuit.\(^6\) The lack of any description of that argument is particularly notable in light of the rough reception that David Crosby, the defendants’ attorney, received, especially from Judges Kleinfeld and Wardlaw. It is also notable in light of the hypothetical that Judge Kleinfeld suggested—and that Crosby stumbled in addressing—regarding whether Morse could have punished a student who passed out copies of \textit{Ravin v. State}, the opinion in which the Alaska Supreme Court held that the state could not justify a statute prohibiting “possession of marijuana by an adult for personal consumption in the home.”\(^7\)

Two other holes in Foster’s book seem to result more from conscious choice than from a lack of access to sources. The first is the lack of extensive discussion of much of the legal academic literature on \textit{Morse},\(^7\) an omission that stands in sharp contrast to Foster’s exhaustive engagement with the literature on other issues and questions, including the influence of amicus briefs (pp. 113–19), and the rise of the Supreme Court bar (pp. 145–49). The second, which is surprising given Foster’s in-depth analysis of \textit{Tinker} and five of its pre-\textit{Morse} progeny, and his suggestion that the Court has been generally moving away from \textit{Tinker}’s protections for the rights of schoolchildren, is Foster’s failure to address \textit{Safford Unified School District No. 1 v. Redding},\(^9\) a post-\textit{Morse} case in which the Supreme Court explicitly recognized a student’s constitutional rights in a drug context. In \textit{Safford}, then thirteen-year-old Savana Redding sued Kerry Wilson, a male

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\(^7\) Bashman, \textit{supra} note 66.

\(^6\) The recording of the oral argument is available through the Court of Appeals for the Ninth Circuit.


\(^7\) For example, even where Foster cites numerous other articles by Erwin Chemerinsky, p. 330, he does not list the latter’s readily available article on \textit{Morse}. See, e.g., Erwin Chemerinsky, \textit{How Will Morse v. Frederick Be Applied?}, 12 \textit{LEWIS \\& CLARK L. REV.} 17 (2008). This is not to say that he does not cite any articles about the decision. E.g., p. 298 n.68 (citing Joshua Azriel, \textit{The Supreme Court’s 2007 Decision in Morse v. Frederick: The Majority Opinion Revealed Sharp Ideological Differences on Student Speech Rights Among the Court’s Five Justice Majority}, 12 \textit{U.C. DAVIS J. JUV. L. \\& POL’Y} 427 (2008)).

\(^9\) 129 S. Ct. 2633 (2009).
assistant principal who, suspecting that Redding was providing prescription-strength ibuprofen (a forbidden drug under school policy) to other students, had her bra and underpants searched. Sitting en banc, the Ninth Circuit—in an opinion written by Judge Wardlaw—found that the principal had violated Redding’s constitutional rights, and that the principal was not entitled to qualified immunity. The Supreme Court affirmed in part and reversed in part, agreeing that the search violated Redding’s Fourth Amendment rights, but concluding that Wilson was entitled to qualified immunity because the extent of Redding’s rights were not “clearly established” at the time of the search. In doing so, the Court clarified that searches in the school context under T.L.O. must be supported by “reasonable suspicion of danger.” The meaning of such a search, and the degradation its subject may reasonably feel, Justice Souter explained, “place a search that intrusive in a category of its own demanding its own specific suspicions.”

CONCLUSION

In spite of its shortcomings, BONG HiTS 4 JESUS is a valuable and entertaining addition to the literature on Morse, the Supreme Court, and the constitutional rights of students in the public schools. That said, however, as Foster recognizes (p. 224), even with a greater understanding of the context behind the constitutional controversy and the decision, it is hard to say exactly how important Morse as a decision itself really was, or is. On the one hand, Morse is one of relatively few school speech cases ever taken up by the Supreme Court, and so intrinsically has value to understanding the Court’s constitutional jurisprudence in the public school context; on the other hand, Morse is “incoherent” (p. 192), and should perhaps best be viewed as “a messy precedent providing little useful guidance to students, teachers, and administrators as we go about trying to harmonize the tension between First Amendment rights and school authority” (p. 224).

Despite the difficulty of evaluating Morse’s importance, I ultimately think that the decision is not quite as incoherent as Foster suggests and instead accurately reflects that a majority of the Court believes that there should be a drug exception to Tinker. This majority clearly has serious concerns about tying the hands of school officials, but a subset of this majority (particularly Justice Alito) is also apparently worried about creating precedent that might enable public schools to limit protected expression, and particularly religious speech. Put another way, as Safford demonstrates, the Supreme Court is still attempting to balance the rights of school children

82. Safford, 129 S. Ct. at 2637–38.
83. Id. at 2643.
84. Id.
with the power of school authorities. This does not mean that *Morse* is incoherent, but only that the subject remains contentious and complex.

Given the nature of the facts and the Supreme Court’s decision, *BONG HIts 4 JESUS* does not—and probably cannot—do much to clarify *Morse*’s lasting importance. What it can and does do is provide welcome background on the case and those affected by the ongoing *Morse* constitutional controversy, and, especially, emphasize the importance of studying historical context in understanding doctrinal development. Ultimately, of course, it also demonstrates that it is possible to take this principle too far, such that legal historians are focusing not as much on historical context as on historical trivia.