

In *Morse v. Frederick*,<sup>841</sup> the Court held that a school could punish a pupil for displaying a banner that said, “BONG HITS 4 JESUS,” because these words could reasonably be interpreted as “promoting illegal drug use.”<sup>842</sup> The Court indicated that it might have reached a different result if the banner had addressed the issue of “the criminalization of drug use or possession.”<sup>843</sup> Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined 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 on 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.’”<sup>844</sup> As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito and Kennedy’s votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

Governmental regulation of school and college administration can also implicate the First Amendment. But the Court dismissed as too attenuated a claim to a First Amendment-based academic freedom privilege to withhold peer review materials from EEOC subpoena in an investigation of a charge of sex discrimination in a faculty tenure decision.<sup>845</sup>

***Government as Regulator of the Electoral Process: Elections and Referendums.***—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and certain expenditures, limiting contributions and expenditures, and imposing other regulations.<sup>846</sup> These regulations can restrict freedom of expression and association, which include the rights to join together for politi-

---

perceived school sponsorship of religion arising from application of the Act’s requirement that high schools provide meeting space for student religious groups on the same basis that they provide such space for student clubs. *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

<sup>841</sup> 127 S. Ct. 2618 (2007).

<sup>842</sup> 127 S. Ct. at 2624.

<sup>843</sup> 127 S. Ct. at 2625.

<sup>844</sup> 127 S. Ct. at 2636.

<sup>845</sup> *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

<sup>846</sup> The basic federal legislation regulating campaign finances is spread over several titles of the United States Code. The relevant, principal modern laws are the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, the Federal Election Campaign Act Amendments of 1979, 93 Stat. 1339, and the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, found at 2 U.S.C. 431 et seq., and sections of Titles 18 and 26. The Federal Corrupt Practices Act of 1925, 43 Stat. 1074, was upheld in *Burroughs v. United States*, 290 U.S. 534 (1934), but there was no First Amendment challenge. All states, of course, extensively regulate elections.