# Bong Hits 4 Jesus: An Analytic History of *Morse v. Frederick* (2007).

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Perhaps the most memorable moment of the 2002 Winter Olympics was Steven Bradbury's comical gold-medal finish in the 1,000-meter speed skating competition, where he became an Australian hero by winning their first gold due to an iconic pile-up in the final corner. Despite the notoriety of his victory, it has yet to have any notable effects on the American judicial system. Instead, this paper discusses the Supreme Court's ruling on an event that happened during the Olympic Torch Relay.

In January of 2002, students from Juneau-Douglas High School in Alaska were permitted to leave classes to watch the ceremonial torch relay pass by the surrounding sidewalk. During the event, senior Joseph Frederick held up a banner with the phrase "Bong Hits 4 Jesus", which was then confiscated by school principal Deborah Morse. Afterwards, Frederick was given a 10-day suspension which was further upheld by the Juneau School Board. Driven by his desire to protect his First Amendment free speech rights, he filed suit with the help of Alaskan attorney Douglas Mertz against Morse and the Juneau School District in the United States District Court for the District of Alaska. Given the constitutional question at issue, the case was brought to Judge John W. Sedwick, a private environmental lawyer who was sworn into the Alaska District Court by Republican president George H. W. Bush (Cooke et al., 2011).

For Mertz, what drove him to take on the case on behalf of Frederick was his personal interest in defending the rights granted by the First Amendment, which can be seen in both his life experiences as well as within his legal case. Although his prior legal expertise lay primarily with oil transportation and pollution issues, he was also celebrated for his pro bono services in defense of civil liberties (Johnson, 2019). That aligns closely with his argument citing *Tinker v. Des Moines Independent Community School District* (1969), a case where the Supreme Court ruled that public school students retained their constitutional rights to free speech and expression while in school, which Mertz argued constitutionally protected Frederick's act of waving the banner (Foster, 2010).

This was refuted by David C. Crosby on behalf of principal Morse and the Juneau School Board, who argued that the precedent set in *Bethel School District v. Fraser* (1986) meant that their confiscation of Frederick's banner and following suspension was not a violation of his rights as the banner's language supported illegal drug use and was offensive. In *Fraser*, the Supreme Court tinkered with *Tinker* by ruling that public schools have the right to prohibit the use of vulgar and offensive language, holding that senior Matthew Fraser's suspension for using sexually inappropriate metaphors in his school assembly speech was not a violation of his freedom of speech (Thibodeaux, 1987). Crosby, a former school board member with a reputation of being extremely conservative on drugs (Foster, 2010), had very clearly shared common interests with Morse, who supported drug prevention programs in school

(Azriel, 2007). Throughout the trial, Crosby would double-down on the argument that the banner promoted drug usage, which is unacceptable in a school setting. This stance was shared among the American population at the time, with no more than 25% of the population supporting decriminalizing marijuana in 2002 (Stenglein & Hudak, 2019).

Beyond the public, the case occurred during President George W. Bush's tenure, who had been strongly against illegal drugs and was actively increasing the militarization of domestic drug law enforcement (Hollingshed, 2019). As such, the stars had seemingly aligned for Crosby to represent Morse, as the benefits of stricter regulation of drug-supporting speech encompassed his vested interests not only as a lawyer "playing for rules" but also as a staunch opposer of the lenient drug policies being pushed at the time (Foster, 2010).

In the District Court, each party's case revolved around separate Supreme Court cases, which were notably decided by radically different makeups of the bench. Whereas *Tinker* had been decided by the notably liberal Warren Court (Driver, 2012), the precedent in *Fraser* was set by the strongly conservative Burger Court (Morrison, 2017). Morrison additionally notes that the change in judicial identity between the Warren and Burger Courts was historically unprecedented, and legal scholars have marked it as one of the largest differences in ideology between two Supreme Court benches (Graetz & Greenhouse, 2016; Israel, 1977).

In understanding the different partisan affiliations inherent in comparing *Tinker* to *Fraser*, it becomes possible to predict the outcome of the trial by observing which precedent lies closer to Judge Sedwick's ideal point on an ideological spectrum. Given that he was appointed by President Bush, a general rule of thumb can be used to assume that Judge Sedwick may have been attitudinally aligned with more Republican values (Bonica & Sen, 2017). Beyond that, another metric that estimates the judicial identities of district court judges is an analysis of a judge's law clerk hiring. Working under the assumption that judges tend to hire like-minded law clerks (Peppers & Zorn, 2008; Baum, 2014), the Clerk-Based Ideology (CBI) Scores coined by Bonica et al. (2016) provides further evidence in predicting how district judges will rule in a given case, with a higher CBI score representing right-leaning preferences and vice versa. In that same study, Bonica et al. finds that Judge Sedwick leans slightly towards conservative decisions (CBI = 0.24), supporting the idea that Judge Sedwick would rule in a more conservative manner.

By plotting where the two different benches approximately lie on an ideological scale, we can more greatly advance the argument that Judge Sedwick's judicial identity was a factor in his decision.

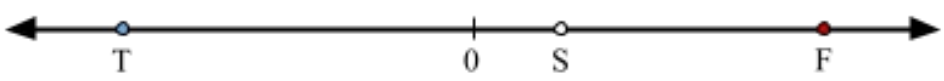


*Figure 1: Spatial Plot of Sedwick's Estimated Ideology*

In observing that Judge Sedwick's (S) conservative-leaning preference is more closely aligned with the precedent set by *Fraser* (F) than it is to

*Tinker* (T), the logical expectation would be for Judge Sedwick to rule in favor of Morse.

Indeed, Judge Sedwick convincingly ruled in favor of Morse, writing in his opinion that:

> "… *Fraser* governed the situation here and not *Tinker* because the expression in *Tinker* did not intrude upon the work of the schools. Here, by contrast, Frederick's expression directly conflicted with the school's deterrence of illegal drug use. None of Frederick's arguments change this result. The cases he cites either pre-date *Fraser* or are distinguishable, or both."

While upholding the validity of Frederick's suspension, Judge Sedwick also emphasized his expectation that this case was unlikely progress any further, stating that "insofar as Frederick seeks summary judgment on this issue, his motion probably should be denied." Additionally, in an interview conducted by Professor James Foster of Oregon State University, Crosby noted that he was surprised to hear that Mertz had appealed the case, as he felt that it would have been a losing battle (Foster, 2010). Despite this, Frederick's disagreement with the decision and his self-described "Texas spirit and stubbornness" would cause him to file a motion to appeal Judge Sedwick's decision (Friedman, 2007), which would proceed to be heard in the Ninth Circuit by honorable judges Kim McLane Wardlaw, Cynthia Holcomb Hall, and Andrew Kleinfeld.

For Frederick, amicus curiae briefs were submitted by two non-profit organizations with very closely aligned policy interests: the Student Press Law Center (SPLC), lawyers offering legal defense in protection of first amendment rights for student journalists (Sullivan,

2017), and the Drug Policy Alliance (DPA), an organization offering support of new, more humanitarian drug policies (Krane, 2019). In their briefs, the SPLC and DPA argued that the fact that Frederick was not physically in school meant Morse had no jurisdiction to punish him. For Morse, the Association of Alaska School Boards filed a brief justifying their low tolerance for speech promoting illegal drug use. Despite the larger role that amicus briefs are known to play in the Supreme Court (Harrington, 2005), little mention of any brief was made in the circuit court's opinion. However, in future interviews with Frederick, he claimed to be more confident in his case after knowing that legal organizations had reached out to support his case (Foster, 2010).

With both cases having been presented, many would expect the decision to remain unchanged. However, this deterministic forecast glosses over the importance of legal indeterminacy in the judicial system. As Professor Linda Meyer of the Quinnipiac University School of Law succinctly wrote:

> "What legal theorists now acknowledge with uneasiness, first-year law students with terror and confusion, and lawyers with prosaic calm is that there may not be a right answer to every legal question. Two reasonable minds, both analyzing the same set of legal materials, may differ as to their proper application."

Thus, understanding the ideological preferences of the panel, as well as of the Ninth Circuit broadly, stops one from buying into such an oversimplistic prediction.

Indeed, this would not be the first time the Ninth Circuit would rule on a case regarding student rights. In a prior case, *Chandler v. McMinnville School District* (1992), the Ninth Circuit would take on a

case regarding the right for students to wear and distribute buttons in support of an ongoing teacher's strike while in school. Mentioned within their opinion was the Supreme Court's holding in *Hazelwood School District et al. v. Kuhlmeier* (1988), where the conservative-leaning Rehnquist Court held that the Hazelwood School Board's limits on free speech in a school-sponsored newspaper was constitutional (LaVigne, 2008; Ringhand, 2007). With that in mind, Judge J. Clifford Wallace held in his opinion on *Chandler* that there are:

> "…three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude... that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*...school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*."

Using this new interpretative rule, the Ninth Circuit was convinced that the buttons in question fell into the third category, wherein the precedent set by *Tinker* established that the school's intervention was unconstitutional.

Both sides doubled down on their respective cases with respect to the Ninth Circuit's *Chandler* rule: Mertz related Frederick's banner to the buttons in *Chandler*, while Crosby was resolute in his belief that the banner's message, "Bong Hits 4 Jesus", was both plainly offensive and fell under school-sponsored speech, arguing that both *Fraser* and *Hazelwood* took precedent over *Tinker*. Once again, both parties were unyielding in their respective partisan ideological stances, warranting a further investigation into the individual beliefs held by the panel.

Unfortunately, a surface-level view of the three judges provides conflicting information on how their ideologies could play a role in their decision. Of the three, only Judge Wardlow had been nominated by a democratic president (Clinton). Thus, a prediction based solely on the party of the nominating president would predict Judges Hall (Reagan) and Klienfeld (Bush) to uphold Judge Sedwick's decision, with Judge Wardlow on the dissent. However, the CBI scores of found by Bonica et al. (2016) would strongly disagree as Judges Wardlow (CBI = –1.20) and Hall (CBI = –1.08) were both found to be among the twenty most liberal circuit judges from 1995 to 2004, with Judge Kleinfeld (CBI = 0.36) being slightly conservative but relatively neutral.

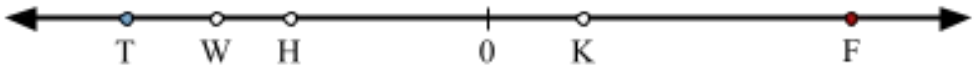


*Figure 2: Spatial Plot of Wardlow, Hall, and Kleinfeld's Clerk-Based Ideology*

With all that being said, it could be seen as a surprise that Judge Kleinfeld, who would be expected to side with the trial court's decision, not only ruled to overturn Judge Sedwick's decision alongside Judges Wardlow and Hall but opted to author the opinion.

In deciding *Frederick*, Kleinfeld referred back to the *Chandler* test and determined that Frederick's banner did not meet the threshold for "vulgar, lewd, obscene, and plainly offensive speech" that Judge Sedwick felt justified the application of *Fraser*, nor did his banner constitute "school-sponsored speech," which meant Crosby's references to *Hazelwood* was distinguishable in this case.

One explanation for his seemingly contradictory decision is that Judge Kleinfeld personifies legal formalism. When asked about his role as a judge, he was quoted as saying:

> "The value of having life tenure is that we can reject the general public's expected reaction when the law requires rejection, instead of following public sentiment as we would usually have to do were we elected legislators rather than judges.... If the law compels a result, that's the way it is[.]"

His devotion towards enforcing what the law "actually says, rather than what it could or should say" is clear (Schwerd et al., 2013). When asked in the same interview for his thoughts on judicial activism and whether a judge's personal preference should ever be factored into a ruling, he replied:

> "[Judges] … determine whether the law compels a result, whether it is consistent with the judges' preferences or not....¶ [T]he people … have their elected legislators and executives, not us, make policy judgments.... To my mind, the judge who simply decides upon the outcome he or she prefers rather than deciding upon an intellectually honest application of the law, is … an outlaw."

In understanding Judge Kleinfeld as an ideologically indifferent, textbook formalist, we can chalk his partisan CBI up to chance. That being said, it may still be incorrect to conclude that ideological identities did not factor into the decision.

As the circuit encompassing states such as California, Hawaii, and Nevada – some of the most consistently democratic states (Gregory, 2016; Bell, 2012) – it comes as no surprise that a majority of judges appointed to the circuit courts have liberal ideological preferences (Hellman, 2022; Roll, 2007). The fact that Republicans in Congress have

tried, and repeatedly failed, to split the Ninth Court is telling of its unusually liberal composition.

Hence, even if Judge Kleinfeld himself did not consciously make a liberal ruling, to say that the “messy system” that is the Ninth Circuit (as former president Trump once tweeted) had no effect on his decision would be an imprecise understanding of the factors that each of the judges had evaluated in making their unanimous decision to reverse Judge Sedwick’s ruling.

Indeed, supporting evidence for Judge Kleinfeld’s discrepancy in voting pattern comes from a part of the collective decision-making process that occurs uniquely on collegiate courts: deliberative enhancement (Edwards, 2003). As is procedure for decisions made on the Ninth Circuit, judges on a panel oftentimes deliberate amongst themselves before making a final conclusion in order to exchange ideas and opinions with one another (Sedwick et al., 2013).

In applying this to Frederick’s case, the lack of clear language regarding what constitutes “vulgar, lewd, obscene, and plainly offensive speech” in the *Chandler* test creates a great deal of judicial indeterminacy which could potentially have been discussed during the panel’s deliberation sessions (Sunstein, 2005). As there are no rules prohibiting the phrase "Bong Hits 4 Jesus", it was entirely up to the judges to decide whether the banner’s message ought to be interpreted as meaningless banter or as an endorsement of marijuana.

In this legal limbo, Judge Kleinfeld's decision to distinguish both *Fraser* and *Hazelwood* from the facts of the case was uncharacteristically subjective, writing plainly in his opinion that "[t]he phrase "Bong Hits 4 Jesus" may be funny, stupid, or insulting, … but it is not "plainly offensive" in the way [a] sexual innuendo is." That being said, insight on the history of decisions made by the Ninth Circuit found them to be considerably more lenient on cases pertaining to marijuana (Davidson, 2016). Therefore, an argument could be reasonably made that the liberal ideology of the Ninth Circuit, as well as that of fellow judges Wardlow and Hall, may have played a role in his final decision during parts of the deliberation process that occurred behind the scenes.

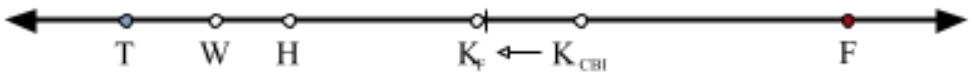


*Figure 3: Spatial Plot of Wardlow, Hall, and Kleinfeld's Estimated Ideologies*

Needless to say, Crosby and Morse were not pleased by this reversal, and neither were several new parties to the case. Three legal powerhouses: the Drug Abuse Resistance Education (D.A.R.E) Program, the National School Boards Association (NSBA), and Solicitor General Paul D. Clement, each submit amicus briefs requesting the Supreme Court grant Morse a writ of certiorari on behalf of their interests (Foster, 2010). Both D.A.R.E and NSBA, arguing that "students should not be able to advocate illegal drug use, and school officials should have the authority to sanction any students who do" (Foster, 2010), were concerned about the negative ramifications that the Ninth Circuit's holding would have on drug prevention programs in schools across their

geographic jurisdiction. In their briefs, they believed that the circuit court erred in concluding that Frederick's banner did not fall under "plainly offensive speech," arguing instead that the harms that their lenient ruling could potentially have on the education system warranted *Fraser's* narrower protection of first amendment freedoms for public school students. Furthermore, in the hopes that the Supreme Court would rule in their favor, they hoped to establish a stricter prevention on drug-related speech in schools on at the highest level of the judicial system (Foster, 2010), thus setting federal precedent applicable throughout the nation.

It should be noted that no event during the judicial process showcased the importance of this case more than the government's decision to intervene, using the solicitor general's opinion to greatly shift the calculations used by the Supreme Court to evaluate whether to grant certiorari to Morse (Picozzi, 2015). The amicus brief submitted by Clement, supported by government attorneys representing the Department of Justice; Department of Education; and Office of National Drug Control Policy, argued that the Ninth had erred in arguing that the protections offered under *Tinker* extended to "student advocacy of illegal drug use at school events," claiming that *Fraser* and *Kuhlmeier* should have been applied instead when the Supreme Court had previously held that a school had jurisdiction to restrict student speech violating school policy. One particular section of their brief, which would later be referred

to in the Supreme Court's majority opinion, illustrated that schools had a duty to uphold their "basic educational mission," defined as:

> "… not only educating students, but doing so in an environment that keeps them free from the scourge of drugs during their K-12 years… [since] drug use impedes students' ability to learn and promotes behavior antithetical to the educational mission."

Externally, Clement et al. felt as though the facts of the case had been misinterpreted by the court of appeals, harshly commenting that they had:

> "… further erred… on the theory that [Frederick] displayed his banner off campus. Education occurs both in and out of the classroom, and the fact that field trips and other school events take place off campus does not deprive… school officials of the authority to apply school policies to their students."

The government found this to be especially true in this context, as Frederick was not only attending a school-sponsored event taking place during school hours, but also held his banner up in a manner that students on school property could see it.

The Supreme Court, who greatly respects the opinions of the Solicitor General (Waxman, 2000; Wilkins, 1988), granted certiorari to Morse's appeal across partisan lines (Foster, 2010). However, this was not necessarily an unexpected outcome for Frederick and Mertz, as the Ninth Circuit had a reputation of frequently reversal – specifically on their more liberal rulings (Scott, 2006). Judge Diarmuid F. O'Scannlain, a fellow judge on the Ninth Circuit, wrote that:

> "The Ninth Circuit… got [cases] wrong in eighty-one percent of … cases that the Supreme Court agreed to hear.¶ By contrast… the other twelve circuits had a combined reversal rate of only seventy-one percent.… even the state courts… appear to be better at interpreting federal law than the Ninth Circuit.¶ … in about one-

> half of all the cases in which our court was reversed, not a single justice agreed with the Ninth Circuit's decision."

One reason for this disproportionately high rate of reversals comes from the inherent structuring of the Circuit Courts. Richard Posner (2000), former Chief Judge of the Seventh Circuit, notes that the Ninth Circuit is "by far the largest federal court of appeals in terms of both population served and number of judgeships". Indeed, the Ninth Circuit's larger judgeship has empirically caused the quality of its rulings to be relatively lower than holdings of other circuit courts, since the "informal norms of judicial propriety and restraint" become less effective as violations are less likely to be detected and accountability becomes less stringent as the size of the court increases (Posner, 2000; Roll, 2007).

The cases presented by both remained relatively untouched, with only slight modifications being made to include new opinions provided by the amicus briefs and court opinions mentioned previously (Foster, 2010). It should be noted, however, that Frederick had seemingly rose to the status of a "martyr" among groups ranging from the most intellectual of civil rights activists to the most disreputable of rebellious teenagers (Foster, 2010). With twelve amicus briefs being filed on his behalf, Frederick had gained support from parties across the entire political spectrum. The Rutherford Institute, fearing potential applicability of an adversarial precedent on religious speech (Waldman, 2008), frequently brands themselves as a conservative Christian public interest law firm (Moore, 2007). On the contrary, the American Civil Liberties Union (ACLU) found rare harmony with the political right in their shared

concern over the potential consequences that Supreme Court precedent would have on future cases surrounding student activism (Theoharis, 2008).

On June 25, 2007, the Supreme Court had made its final decision on the matter: on a 5-4 split, Chief Justice Roberts ruled to overturn the Ninth Circuit's decision with the support of Justices Scalia; Kennedy; Thomas; and Alito. Despite the bipartisan support Frederick received in the amicus briefs filed on his behalf, however, the Supreme Court's decision was still split among partisan lines.

The majority opinion resembled that of Judge Sedwick's in that they felt as though Frederick's was promoting illegal drug use and went against the basic educational mission of the school. Therefore, *Fraser* was applicable and thus upheld the constitutionality of Frederick's punishment. Ultimately, however, the new precedent was a massive blow to student speech, as Business Professor Edward J. Schoen of Rowan University noted that legal commentators:

> "… expressed fear that the decision, which permits school officials to censor… student expression [they feel] undermines the educational mission…, will open the door to restrictions on student speech….¶ While *Morse* may be limited to student speech promoting illegal drug usage in the future, there is little doubt… that *Morse* permits far greater deference to school officials' efforts to curtail student speech"

The conservative connotations embedded into the majority opinion, not only in its restriction on student speech but also in the increased authority it grants to teachers and school officials, is evident (Foster, 2010). Indeed, Bonica et al.'s (2016) CBI scores find that, with the

exception of sixth-place Justice Roberts (CBI = 0.85), Justices Thomas (CBI = 2.43), Alito (CBI = 2.36), Scalia (CBI = 1.67), and Kennedy (CBI = 1.26) sweep the podium with the four highest scoring, and most conservative, justices. In addition to the CBI scores, which provide some insight into the ideological preferences of Supreme Court Justices, looking at the Martin-Quinn (MQ) scores of the Supreme Court – a statistic that spatially estimates where justices would fall on an ideological spectrum over time – produces additional information on the voting patterns of the Justices hearing Frederick's case (Spruk & Kovak, 2019). Indeed, with a lower MQ representing left-leaning political ideologies, all Justices voting in the majority had ideal points in alignment with conservative ideological preferences. In fact, Justices Thomas (MQ = 0.405), Scalia (MQ = 0.372), Alito (MQ = 0.354), Roberts (MQ = 0.251), and Kennedy (MQ = 0.205) all fall within the top ten most conservative justices since 1946. As such, it's only par for the course that the Roberts Court is thought to have been one of the most conservative benches in Supreme Court history (Liptak, 2010; Stearns, 2008).

The dissenting opinion, held by Justices Souter and Ginsburg and authored by Justice Stevens, largely agreed with the Ninth Circuit's judgement that Frederick's case should be viewed through the lens of *Tinker*. Finding that Frederick's act of waving the banner did not constitute school-sponsored speech, they agreed with the Ninth Circuit that *Kuhlmeier* could be distinguished. Furthermore, they strongly felt that *Fraser* wasn't applicable to this case, writing that the majorities'

“feeble effort to divine [the banner’s] hidden meaning is strong evidence [that "Bong Hits 4 Jesus" is a nonsense message, not advocacy]”. As such, they distinguished *Fraser* on the basis that any offensive meaning assigned to the banner was farfetched at best, further writing that “it takes real imagination to read a "cryptic" … drug reference as an incitement to drug use… [students] do not shed their brains at the schoolhouse gate, and … know dumb advocacy when they see it”.

The clear disagreement with the majority held by Justices Souter, Ginsburg, and Stevens neatly coincides with the aforementioned proxies of their judicial ideology, with Bonita et al. (2016) finding all three of them to have among the eight most liberal CBIs in the Supreme Court’s history (Souter = –0.81, Ginsburg = –0.79, Stevens = –0.63). Indeed, Spruk & Kovak’s (2019) calculated MQ scores tell us very little that has not yet been established (Souter = –0.204, Ginsburg = –0.263, Stevens = –0.257).

One exception that warrants discussion is Justice Breyer, disagreeing with parts of both opinions. Writing in concurrence and dissent in part, Justice Breyer was similarly concerned that precedent made by the Supreme Court would have unforeseen consequences on future cases regarding free speech. However, he could not completely agree with the dissenting opinion to the extent that he did not believe Frederick was entitled to relief.

Justice Breyer’s restrained decision was to be expected of a minimalist judge, a title unofficially given to him due to his known

aversion to making unnecessarily deep decisions (Gerwitz, 2005). This is showcased in his written opinion, where he wrote that:

> "… a decision on the underlying First Amendment issue is both difficult and … portentous. And that is a reason for us not to decide the issue unless we must. ¶ …Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges… Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse."

Indeed, Justice Breyer's adherence to judicial minimalism is obvious: given the potential for future cases to "substitute courts for school boards, or … turn the judge's chambers into the principal's office," the pragmatic moderation of his decision seems to fit squarely within his ideologically neutral preferences (Collins & Ward, 2022). His MQ score found by Spruk & Kovak (2019) corroborates this: with a score of −0.165, Justice Breyer's ideal point lies close to the center with only marginal signs of a liberal ideological preference, thoughless than those of the dissenting Justices Souter, Ginsburg, and Stevens.

For an institution as complex as the Supreme Court, the ideological information explained above coincides perfectly with how each of the nine justices voted: all justices to the left dissent (with Breyer, who is close to the center, only dissenting in part), while all justices to the right (with Thomas writing in concurrence his desire for *Tinker* to be overturned) voted in favor of Morse.

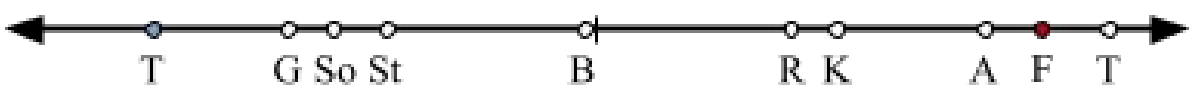


*Figure 4: Spatial Plot of SCOTUS Estimated Ideologies*

The question of whether the decision was "correct" is a separate one entirely. To this day, many still argue that the majority opinion was clouded and filled with inconsistent applications of *Fraser* and *Tinker* (Jergensen, 2013). On the other hand, legal scholars find little issue with the Supreme Court's decision-making process. Given the multimember nature of the Supreme Court, academics find that their holding is valid, regardless of their personal beliefs on the matter. As Professor Evan Caminker, Dean Emeritus of the University of Michigan Law School, concisely puts it:

> "[t]he more judges there are, the more likely the majority-winning position will be correct. An intuitive proof of this axiom is quite simple. If there are three judges choosing between rules A and B, the court will reach the "correct" result (let's say A) even if one judge errs and chooses B."

For the legal school of thought surrounding the Condorcet Jury Theorem (Edelman, 2002), the Supreme Court's nine-member panel had made the correct decision in correcting mistakes made by the three-member panel of the Ninth Circuit (Lebon, 2018). Despite disagreement coming from a third of the panel, the fact that a majority of the bench reached the same conclusion gives credence to their eventual decision.

Yet, to say that the dissenting justices eventually agreed with the majority's opinion would be an extreme exaggeration. Noting Justice Steven's argument in dissenting that the logic used by the majority that the phrase "Bong Hits 4 Jesus" would "… actually persuade … the average student or even the dumbest one to change [their] behavior is most implausible," legal scholars mention that the majorities opinion in this case is part of a larger, concerning trend within the Supreme Court

of deviating away from approaching the law *tabula rasa* (Zhou & Müller, 2022; Waldman, 2013), with students often bearing the brunt of these increasingly conservative rulings and it's progressively narrower protections of the first amendment rights (Lomonte, 2009). Specifically, Justice Thomas's expressed wish to see *Tinker* overturned altogether in his concurring opinion drew (deserved) concern from across the political spectrum (Calvert, 2009). Though only written as dicta, Justice Thomas's disdain of first right amendments struck fear among both the general public and legal scholars, forecasting that *Frederick* was only the tip of the iceberg that may sink the ship of free speech (Jorgensen, 2013).

The ongoing protests across the country and here at Emory are demonstrative of the significance of understanding the scope to which our freedom of speech is protected by the Constitution. However, the scale to which students are granted those protections has become under attack as a result of the Supreme Court's holding in *Morse v. Frederick*. By granting school officials the authority to censor student speech based on whether they deem the content to be "in line" with their educational policy (Banasiak, 2009; Schoen, 2008), student speech took a massive tumble during a crucial corner. The United States placed third overall in the 2002 Winter Olympics and even swept the Men's halfpipe podium. However, that success was short lived as we look at the real losers of the Olympics: the First Amendment rights granted to students.

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