Student Expression: The Uncertain Future

by Justin M. Bathon and Martha M. McCarthy

Introduction

On June 25, 2007, the United States Supreme Court rendered its decision in *Morse v. Frederick,* a long-awaited ruling regarding student speech in public schools.[1] For nearly twenty years, the Supreme Court had been silent on the issue while lower courts attempted to apply the rules announced in previous Supreme Court decisions. It is unclear what impact the *Morse* decision will have on the lower courts and the daily administration of schools. This paper provides a brief overview of Supreme Court precedent pertaining to student speech, the specifics of the *Morse v. Frederick* decision, and finally an analysis of what this decision means for future student-speech decisions as well as for public school educators.

Supreme Court Precedent Prior to Morse

In 1969, the Supreme Court rendered its first student-speech decision, *Tinker v. Des Moines Independent School District.*[2] Seventeen years later, the Court again ruled on student speech in *Bethel School District No. 403 v. Fraser.*[3] Only two years after that, the Supreme Court addressed school-sponsored student expression in *Hazelwood School District v. Kuhlmeier.*[4] Collectively, these three cases came to be known as "the trilogy" of Supreme Court precedents regarding student speech. To know how *Morse* may affect the traditional student-speech analysis, it is necessary to take a closer look at these three cases as well as the lower-court interpretations of Supreme Court precedents.

First, *Tinker* is the bedrock of student speech. The facts of the *Tinker* case have become familiar over the years. Mary Beth Tinker and friends, in protest over the Vietnam War, wore black armbands to school. Upon hearing of the planned protest, school authorities had enacted a policy against such practices and then disciplined the students for wearing the

armbands. Upon review, the Supreme Court explained that students do have free speech rights in schools, although not equal to the expression rights of adults in other settings.[5] The Court created a rule to distinguish student speech that is constitutionally protected against administrative regulation from speech that is not. The Court said that speech threatening a substantial disruption of the educational process or interfering with the rights of others may be censored by the school. Absent such disruption or interference with rights, a student's ideological views cannot be regulated by the school, even with a school policy in place, because rights granted under the Constitution supersede other governmental regulations.

The Supreme Court supplemented the "disruption" standard under *Tinker* in 1986, when it rendered its decision in *Fraser.* The school in question had disciplined Fraser for using sexual innuendos in a nominating speech during a student assembly. The Court found that "vulgar and offensive terms" could be prohibited in schools because an essential part of the school's mission is to instruct children in proper values in society.[6] Finally, in *Hazelwood,* the Supreme Court carved out a distinct rule for student speech sponsored by the school. At issue was a principal's deletion of articles on teenage pregnancy and divorce from a student-run school newspaper. The Court ruled that when student speech bears the school's imprimatur, it can be regulated based on "legitimate pedagogical concerns."[7] In both *Fraser* and *Hazelwood* school authorities were provided wide latitude to determine what student speech can be considered vulgar and offensive and what is a legitimate pedagogical concern when regulating school-sponsored speech.

Application of the Trilogy by Lower Courts

During the two decades that the Supreme Court was silent on student-speech issues, lower courts were left to use the precedents from the trilogy of cases to deal with new and ever-changing issues within schools. Lower-court interpretations have changed over time, although without fail the lower courts refer to the three categories of allowable regulation under the trilogy: 1) speech that causes a substantial disruption; 2) speech that is lewd, vulgar, or offensive; and 3) speech that is school-sponsored. While a full articulation of lower-court rulings on student expression in the years before *Frederick* is beyond the scope of this investigation, a few developments in the lower courts bear mentioning.

A notable development since the last of the trilogy decisions has been the lower-court preference to rely on the *Fraser* and *Hazelwood* decisions, even though the *Tinker* disruption standard has enjoyed a substantial renaissance in recent years, in part due to issues surrounding off-campus electronic expression. *Fraser* never clearly articulated an identifiable standard like *Tinker*'s, which established that expression can be curtailed if linked to a substantial disruption or if it intrudes on the rights of others. Thus, questions regarding the full meaning of the *Fraser* decision have led to different interpretations of the reach of this decision.

While the original *Fraser* rule can best be interpreted as allowing censorship of "vulgar and offensive" student speech, the rule used by almost all courts is that "lewd, vulgar, or plainly offensive" expression can be regulated.[8] The subsequent application of *Fraser* in *Boroff v. Van Wert City Board of Education*[9] is frequently cited as the most expansive interpretation of the *Fraser* standard.[10] In *Boroff,* the Sixth Circuit ruled that a student's Marilyn Manson T-shirt was offensive and that it conflicted with the school's educational mission. This case has since been interpreted as prohibiting all expression that conflicts with messages the school is trying to promote, which could encompass a very broad range of student speech.[11] Not all courts have expanded the reach of *Fraser* to the same extent. In fact, some courts have even limited the application of *Fraser* to sexual speech.[12] These varied interpretations of *Fraser,* combined with reduced use of the *Tinker* standard, left courts, legal scholars, and school personnel uncertain regarding regulation of student speech.

Morse v. Frederick

The case of *Morse v. Frederick* is unique for its memorable fact pattern, if for no other reason. The incident arose in Juneau, Alaska, as the Olympic Torch relay was passing by on its way to the Olympic Games in Salt Lake City. Because the relay was to pass near a local high school, the students were released to see the torch relay. Joseph Frederick had been detained that morning because his car was stuck in the snow, so he

arrived at school late and went directly across the street to join his classmates.[13] Just as the torch was passing, Frederick and some friends held up a fourteen-foot banner with the words "BONG HITS 4 JESUS" inscribed on the banner using duct tape.[14] The principal crossed the street and confiscated the banner after Frederick refused to lower it. The principal suspended Frederick for ten days, and upon review the superintendent concluded that Frederick "was not disciplined because the principal of the school disagreed with his message, but because his speech appeared to advocate the use of illegal drugs."[15]

Frederick filed suit, and the District Court of Alaska granted summary judgment for the school. The Court found that the school officials did not violate the student's First Amendment rights. On appeal, the Ninth Circuit reversed, finding that the school could not demonstrate that the banner created a substantial disruption. The appellate court ruled that *Tinker* was the proper standard to apply in this case because *Fraser* and its progeny *Boroff* were not applicable. Specifically, the court found that *Boroff* extended *Fraser*'s "plainly offensive" standard too far by allowing school authorities to censor expression conflicting with the school's educational mission. The Ninth Circuit held that the principal violated Frederick's clearly established free-expression rights.[16] The school then appealed the case to the Supreme Court.

Supreme Court Decision

The Supreme Court majority initially addressed some preliminary issues. It found that Frederick was subject to the policies of the school because the event was equivalent to a school "social event or class trip."[17] Thus, the Court rejected the claim that Frederick's speech was off-campus and therefore not subject to typical school policies. Secondly, the Court addressed the message itself. Although Frederick claimed that the message was mere nonsense, the Court focused on the interpretation of the school principal, Morse. Both Morse and the Supreme Court interpreted the message as promoting drug use because the reference to a bong hit "would be widely understood by high school students and others as referring to smoking marijuana."[18]

Concluding that this message was both on-campus and promoting illegal drug use, the Court then turned to First Amendment precedent. The Court reiterated the famous trilogy of cases, pausing to note the confusion surrounding the interpretation of *Fraser.* Specifically, the Court stated that "the mode of analysis employed in *Fraser* is not entirely clear,"[19] but "whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed under *Tinker.*"[20] The Court also reaffirmed the notion that although students do not shed their constitutional rights at the schoolhouse gate, they most assuredly

do not have the same constitutional rights in schools as adults have in other settings.

The Court next turned to the regulation of speech that promotes drug use. The Court declared that the use of drugs remains a significant problem among America's youth and noted some of the harmful side effects. In doing so, the majority cited congressional intent to have schools prohibit speech relating to drugs in the Safe and Gun Free School and Communities Act of 1994.[21] Finally, the Court refused to extend its decision under the *Fraser* "plainly offensive" principle, declaring: "[W]e think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"[22]

The Alito Concurrence

Justice Alito, joined by Justice Kennedy, agreed with the majority's holding but differed on its rationale. The Alito concurrence, the crucial swing opinion, will likely carry great weight not only in scholarly analysis but also in future judicial decisions. The Alito opinion complicates the analysis adopted by the majority on several fronts.

First, Justice Alito specifically stated that he understands the majority opinion as not prescribing a new rule beyond the rules previously established by the Court in *Tinker, Fraser,* and *Hazelwood.*[23] In addition, the Alito concurrence blunted the possible implication that *Morse* could be read as supporting the educational mission standard set forth in *Boroff.* Although not mentioning the case by name, Alito rejected any standard that attempted to regulate all student speech that interfered with a school's mission. Moreover, when referring to school violence, Alito declared that "in most cases, *Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts."[24]

Probably the most important part of the concurrence, however, is its opening lines, which may create the standard that will emerge from *Morse*:

> I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medical use.[25]

Justices Alito and Kennedy's interpretation of the rule announced by the majority may over time become the rule itself.

The Thomas Concurrence and the Dissents

The concurrence of Justice Thomas is relevant not so much for the effect it may have on lower courts but for the extremely conservative principles it espouses. Thomas began, "I write separately to state my view that the standard set forth in *Tinker* . . . is without basis in the Constitution."[26] He continued: "In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[27] Justice Thomas followed this sweeping and startling pronouncement by citing a litany of historical sources for the proposition, including the statement that "[t]o meet their educational objectives, schools required absolute obedience."[28] Further, through the doctrine of *in loco parentis,* Justice Thomas concluded that the administrative powers of public schools should be exactly the same as the administrative powers of parents over their children. The Thomas concurrence is significant as an indication of the conservatism of some members of the current Supreme Court.

There were two written dissents, one by Justice Breyer, concurring in part and dissenting in part, and one by Justice Stevens, joined by Justices Souter and Ginsburg.[29] Justice Stevens apparently would have decided this case solely under the *Tinker* standard. Stevens thought the majority's rule prohibiting speech that advocates drug use "invites stark viewpoint discrimination."[30] The dissenters felt that Frederick's message was only a nonsense statement intended to attract the attention of television cameras and not to promote drug use.[31]

Implications and Uncertainties for Educators

Although it is too early to completely understand how *Morse* will affect students' free speech rights, a few conclusions can be drawn. First, the decision reaffirmed that school administrators can curtail student expression promoting unlawful drug use. Such expression, unlike adult speech in other settings, need not incite others to lawless action.[32] Moreover, *Morse* seems to give school authorities considerable discretion to determine whether specific expression should be viewed as promoting or celebrating such unlawful behavior. In addition, this fairly narrow ruling did not tamper with the established framework of *Tinker, Fraser,* and *Hazelwood.* As a result, school personnel can continue to apply these precedents in censoring student expression that represents the school; is lewd, vulgar, or offensive; or can be linked to a disruption.

Perhaps *Morse* is more noteworthy for the issues the Supreme Court did not address. It did not offer enlightenment regarding the circumstances under which conduct is considered expression *at all*. To constitute speech, conduct must communicate an idea that is likely to be understood by a third party.[33] While the dissenting justices asserted

that Frederick's banner contained a nonsensical message, an argument Frederick himself had made, a full analysis of whether the banner actually involved expression was not conducted.

Also, *Morse* did not illuminate the circumstances under which student expression would be considered off-campus. Speech that occurs off-campus can be regulated only if it would disrupt the school.[34] Even though Frederick's speech technically occurred off-campus (across the street), the Court unanimously agreed that *Morse* involved school-related speech. The Court certainly could have provided more clarity in reaching this understanding, but Frederick's participation in a school event may have been enough for the justices to establish the required connection between his expression and the school. Nevertheless, both cases that have cited *Frederick* since its publication have continued to recognize a separate standard for off-campus speech.[35]

Although the Court in *Morse* was clear in allowing censorship of student expression viewed as promoting drug use, it did not clarify what constitutes a "drug" for purposes of this standard. The Court also left ambiguity regarding what entails *promotion* of an illegal substance, in contrast to *discussion* or *advocacy* of a social or political issue. The question also remains whether the student expression must be illegal under a state law or could simply violate a school policy. For example, if a student mentions alcohol, cigarettes, or other substances that are illegal for minors, could such expression be curtailed? If a student expresses views about using guns, knowing that weapons are barred from the school under its zero tolerance policy, would that expression constitute promoting illegal conduct?

There is some sentiment that the Supreme Court in *Morse* created a new rule regarding "special dangers." Such dangers, if deemed special enough to meet the Court's threshold, receive less protection under the First Amendment because of the strong public policy against permitting such speech. According to Justice Alito, this special danger arose because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students."[36] What other aspects of the school culture rise to this level of "special danger" has been left unaddressed. Lower courts will not likely expand the class of activities under this "special danger" test, but the Supreme Court has created a legal avenue to reduce constitutional protection afforded to other types of student speech.

Many other issues remain unresolved in the wake of *Morse.* For example, although the Supreme Court noted that the *Fraser* standard is not clear, the Court specifically left clarification for another day. This is unfortunate, because lower courts have differed greatly in their interpretations of the reach of *Fraser.* At one end of the continuum, a few courts have ruled that *Fraser* authorizes school authorities to curtail any student expression that contradicts the school's educational mission.[37]

Other courts, however, have been far more restrictive, limiting the reach of *Fraser* to the lewd manner of expression or to its sexual content.[38] The only hint provided by the Court in this regard was its caution that *Fraser* should not be interpreted to allow school authorities to curtail any student expression considered plainly offensive.

Another issue left unresolved by *Morse* is the reach of the second prong of the *Tinker* standard. Under *Tinker,* school authorities can curtail student expression that either threatens a substantial disruption of the educational process or collides with the rights of others. The second prong has received little attention until recently. In 2006, the Ninth Circuit in *Harper v. Poway Unified School District* upheld school authorities in banning a student's T-shirt stating "Homosexuality is Shameful 'Romans 1:27'" and "Be Ashamed, Our School Embraced What God Has Condemned." Instead of relying on *Tinker*'s disruption standard, the court ruled that the expression intruded on the rights of others, violating the less-used *Tinker* principle.[39] The Ninth Circuit stated: "The First Amendment does not require that young students be subjected to such a destructive and humiliating experience."[40] Although this decision was vacated by the Supreme Court with instructions to dismiss the case as moot, the principle articulated in *Harper* may signal a new line of First Amendment analysis under *Tinker*. These cases are particularly sensitive because they pit students' free speech rights against school authorities' obligations to instill basic values of civility and respect for others. Indeed, the growing body of litigation pertaining to restrictions on displays of the Confederate flag and expression demeaning homosexuality has generated a range of lower-court interpretations.[41] Supreme Court guidance in this arena is sorely needed.

The final legacy of the *Morse* decision may be in how school personnel and lower courts interpret the Supreme Court's decision. Whether one applauds or condemns the majority opinion in *Morse*, all agree that this decision does *not* expand students' expression rights. School authorities across the nation expressed relief when the Supreme Court overturned the Ninth Circuit's conclusion that the principal was liable for violating Frederick's clearly established rights. If the majority had ruled otherwise in *Morse,* the implications for students and public schools would have been significant in terms of expanding student-expression rights. Perhaps public educators will see *Morse* as a signal that the Supreme Court may support other restrictions they impose on students. And as school personnel place additional constraints on expression, students will counter with the constitutional challenges on issues that remain unresolved after *Morse*. Indeed, the only certainty right now is that student-expression rights in public schools will continue to generate a steady stream of litigation.

Notes

1. 127 S.Ct. 2618 (2007).
2. 393 U.S. 503 (1969).
3. 478 U.S. 675 (1986).
4. 484 U.S. 260 (1988).
5. *Tinker,* 393 U.S. at 506.
6. *Fraser,* 478 U.S. at 676.
7. *Hazelwood,* 484 U.S. at 273.
8. David Hudson, Jr., and John Ferguson, Jr., "A First Amendment Focus: The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights," 36 *J. Marshall L. Rev.* 181 (2002).
9. 229 F.3d 465 (6th Cir. 2000).
10. See Martha McCarthy, "Student Expression Rights: Is a New Standard on the Horizon?" 216 *Educ. Law Rep.* 15, 20 (2007).
11. Hudson and Ferguson, supra note 8 at 200.
12. *Barber v. Dearborn Pub. Sch.,* 286 F.Supp.2d 847, 856 (E.D. Mich. 2003).
13. *Frederick v. Morse,* 439 F.3d 1114, 1115 (9th Cir. 2006).
14. *Morse,* 127 S.Ct. 2622.
15. *Id.* at 2623. (The superintendent did reduce the suspension to eight days.)
16. *Frederick v. Morse,* 439 F.3d at 1123–25.
17. *Morse,* 127 S.Ct. 2624.
18. *Id.* at 2624–65.
19. *Id.* at 2626.
20. *Id.* at 2627.
21. *Id.* at 2628, citing 20 U.S.C. § 7114(d)(6) (2000).
22. *Morse,* 127 S.Ct. at 2629.
23. *Id.* at 2637 (Alito, J., joined by Kennedy, J., concurring).
24. *Id.* at 2638.
25. *Id.* at 2636.
26. *Id.* at 2630 (Thomas, J., concurring).
27. *Id.*
28. *Id.* Justice Thomas faulted the disciplinary system presently in place in schools, finding it much too lax.
29. A full inquiry into Justice Breyer's dissent is not a necessary component of this paper. In essence, Justice Breyer would not have reached the substantive issues in this case because he would have granted qualified immunity to the principal because her actions did not violate clearly established law and thus fell outside of qualified immunity statutes. One sentence, however, from his dissent is worth noting: "Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence." While the law perhaps "should not" demand full knowledge of the First Amendment on the part of teachers, it certainly appears that it does. *Frederick,* 127 S.Ct. at 2639, Breyer concurring in part and dissenting in part.
30. *Morse,* 127 S.Ct. at 2645 (Stevens, J., dissenting, joined by Souter and Ginsberg, J.J.).
31. *Id.* at 2649. ("Admittedly, some high school students [including those who use drugs] are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average students or even the dumbest one to change his or her behavior is most implausible.")

32. *Brandenburg v. Ohio,* 395 U.S. 444, 449 (1969) (distinguishing protected advocacy from unprotected incitement to lawless behavior).

33. *Texas v. Johnson,* 491 U.S. 397, 404 (1989); *United States v. O'Brien,* 391 U.S. 367, 376 (1968); Nelda H. Cambron-McCabe, Martha M. McCarthy, and Stephen B. Thomas, *Public School Law: Teacher's and Student's Rights,* 5th ed. (2003), 98.

34. *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 615 (5th Cir. 2004).

35. *Layshock v. Hermitage Sch. Dist.,* 2007 WL 2022096, 5 (W.D. Pa. 2007) (reversing punishment of a student for creating a MySpace parody of a principal); *Wisniewski v. Bd. of Educ. of Weedsport Central Sch. Dist.,* 2007 WL 1932264 (2nd Cir. 2007) (upholding punishment of student for instant messaging a graphic of a named teacher being shot).

36. *Morse,* 127 S.Ct. 2638 (Alito, J., concurring).

37. See, e.g., *Boroff,* 229 F.3d at 469.

38. See, e.g., *Guiles,* 461 F.3d 320, 327–29 (2d Cir. 2006) (limiting the "plainly offensive" language in *Fraser* to sexual innuendos or profanity); *Nixon v. Northern Local Sch. Dist. Bd. of Educ.,* 383 F. Supp. 2d 965, 971 (S.D. Ohio 2001) (reasoning *Fraser* governs only the manner and not the content of speech).

39. 445 F.3d 1166, 1183 (9th Cir. 2006), vacated and remanded, 127 S.Ct. 1484 (2007).

40. *Id.*, 445 F.3d at 1182.

41. See *West v. Derby Unified Sch. Dist.,* 206 F.3d 1358 (10th Cir. 2000) (upholding an anti-harassment policy that contained a ban on the Confederate flag); *Castornia v. Madison County Sch. Bd.,* 246 F.3d 536 (6th Cir. 2001) (allowing a student to wear a Confederate flag symbol on a shirt without the threat of a disruption); *Saxe v. State College Area Sch. Dist.,* 240 F.3d 200 (3d. Cir. 2001) (striking down an anti-harassment policy as unconstitutionally overbroad); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243 (3d. Cir. 2002) (upholding a school policy barring racial harassment).

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