

Morse v. Frederick (2007)

Case No. 06–278; Argued March 19, 2007

FACTS

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. The principal, Deborah Morse, decided that staff and students could participate in the Torch Relay as an approved class trip. School officials dismissed students from classes that morning; teachers and administrators monitored the students' actions. Approximately 1,000 students stood in the vicinity of the high school, on both sides of the street. The school band played to mark the occasion and the school cheerleading squad welcomed the torchbearers.

Joseph Frederick, an 18-year-old senior, was late to school that day. When he arrived, he joined his fellow classmates on a public sidewalk across the street from the school. Some students became rambunctious, throwing plastic cola bottles, snowballs and scuffled with other classmates. Just as the torch and media entourage were passing the high school and as the television cameras began to roll, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The banner was easily readable by the students on the other side of the street.

Morse saw the banner from across the street. She immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and directed Frederick to report to her office. After a conference with him, she suspended him for ten days in light of school board policy that states in part, "The Board specifically prohibits any assembly or public expression that ...advocates the use of substances that are illegal to minors..." and subjects "pupils who participate in approved social events or class trip to the same student conduct rules that apply during the regular school program." Both the superintendent and school board upheld the suspension, explaining that Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy.

Frederick claimed his First Amendment right to free speech was violated and repeatedly affirmed that his banner was a nonsensical manifestation of free speech. He also claimed that Morse doubled his suspension from five to ten days when he quoted Thomas Jefferson in her office. Morse claimed the additional days were added because Frederick was uncooperative.

After losing his appeal to the school board, Frederick sued under the federal civil rights statute, alleging a violation of his First Amendment right to freedom of speech. The U.S. District Court found no constitutional violation and ruled in favor of Morse. Frederick appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed citing *Tinker v. Des Moines Independent Community School District*, which extended First Amendment protection to student speech except where the speech would cause a disturbance. Because Frederick was punished for his message rather than for any disturbance, the punishment was unconstitutional. The school district appealed to the U.S. Supreme Court which granted the petition of Morse and the Juneau School Board for a writ of certiorari.

ISSUE

Does the First Amendment allow public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events?



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CONSTITUTIONAL AMENDMENT AND PRECEDENTS

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Tinker v. Des Moines School District (1969). During the initial buildup for the Vietnam War, two high school students—John Tinker and Christopher Eckhardt—and a junior high school student—John’s sister Mary Beth Tinker—decided with their parents to protest the war between December 16 and December 31, 1965. The protest included wearing black armbands. The principals at their schools learned about the plan and adopted a policy that any student wearing an armband to school would be asked to remove it; if a student refused, the student would be suspended until that student returned without the armband. The students knew of this policy by the schools but wore their armbands to school anyway. They were sent home and suspended until they no longer wore the armbands. The students filed suit in federal court, claiming the schools had violated their First Amendment rights to free expression.

In an 7-2 decision, the Supreme Court agreed with the students. Writing for the Court, Justice Fortas said that wearing an armband was “the type of symbolic act that is within the Free Speech Clause of the First Amendment” and that this act “was entirely divorced from actually or potentially disruptive conduct” by the students who wore it. This kind of act was very much like “pure speech” that the Court had protected in other cases. The Court held that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” The Court also held that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” In other words, the First Amendment did protect student expression in public schools. But how much?

Bethel School District v. Fraser (1986). In 1983, Mathew Fraser, a senior at Bethel High School in Bethel, Washington and ranked second in his class, delivered a speech nominating a fellow student for student government office. Approximately 600 high school students, many of whom were freshmen, attended the assembly. Students were required either to attend the assembly or to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor; however, he did not use obscenities. Fraser gave the speech even though two of his teachers, with whom he discussed it in advance, told him that the speech was inappropriate, that he probably should not deliver it, and that it might result in severe consequences. They were right. Fraser's speech caused many reactions among the students. Some hooted and yelled; some mimicked the sexual activities suggested in the speech; others were just embarrassed. Fraser’s candidate was elected, but Fraser was suspended and ruled ineligible to speak at graduation. He filed suit in federal court, claiming the schools had violated his First Amendment rights.



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CONSTITUTIONAL AMENDMENT AND PRECEDENTS, continued

The Supreme Court decided 7-2 in favor of the school. Writing for the Court, Chief Justice Burger made a distinction between the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student and wearing an armband as in *Tinker* as a form of protest or the expression of a political position. In *Tinker*, “this Court was careful to note that the case did ‘not concern speech or action that intrudes upon the work of the schools or the rights of other students.’” “Surely,” the Court held, “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.... Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’” The decision about “what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”

Hazelwood School District v. Kuhlmeier (1988). In May 1983, students at Hazelwood East High School in St. Louis County, Missouri were readying the latest issue of their school newspaper, the *Spectrum*, for press. The issue included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. The school's practice was for the teacher in charge of the paper to submit the final proofs to the principal. The principal objected to a story about student pregnancy because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal also objected to an article about divorce because the page proofs he saw identified by name a student who complained of her father's conduct; the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication (the name was deleted by the teacher from the final version). The principal believed that there was no time to make necessary changes in the articles if the paper was to be issued before the end of school, and he therefore ordered that the pages on which they appeared not be printed as part of the paper—even though they included other articles. Four students who worked on the newspaper filed suit in federal court, claiming the schools had violated their First Amendment rights.

In this case, the Supreme Court decided 5-3 in favor of the school. Writing for the Court, Justice White said “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.... [T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” In the Court's view, only when the decision to censor a school-sponsored activity has no “valid educational purpose” does a student's constitutional rights require protection.



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STUDENT SPEECH SINCE *Hazelwood*

In the absence of clear rules, schools have adopted several working strategies for dealing with student expression. David Hudson, First Amendment Center, articulates those strategies in this way*:

- Is the student expression a **true threat**? If the answer is “yes,” then such expression—on-line or in print—is unprotected.
- Is the student speech **school-sponsored**? If yes, then *Hazelwood* applies and great deference is given by the courts to school officials.
- Is the student speech **vulgar, lewd or plainly offensive**? If so, then *Fraser* might well be applied by a court reviewing the case.
- If the speech is not a true threat, is not school-sponsored and is not lewd then the court will apply *Tinker* and ask whether school officials can **reasonably forecast** that the student expression will create a **substantial disruption** of school activities or invade the rights of others.

* Excerpted from David L. Hudson Jr. “Chapter II: U.S. Supreme Court framework for student expression’ Student Online Expression: What Do the Internet and MySpace Mean for Students’ First Amendment Rights?” First Amendment Center (2007) pgs. 6-11.
<http://www.fac.org/about.aspx?id=17913>

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ARGUMENTS FOR MORSE

- This case involves student speech because Frederick was at a school-sponsored event. The students were released to watch the relay around school, and the students were under the supervision of school faculty and staff. It was during the school day, and students attending class trips are subject to school rules.
- This case is like *Bethel v. Fraser*. Principal Morse and the school disciplined Frederick for displaying a message that advocated illegal drug use. Discouraging the use of illegal substances is part of the school’s “basic educational mission.”
- Like in *Hazelwood v. Kuhlmeier*, the school can limit Frederick’s message during a school-sponsored event because it looks like the school is endorsing the message.
- Frederick disrupted a school activity by displaying the banner and could have interfered with the work of the school by increasing drug use and promoting other pro-drug messages.



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ARGUMENTS FOR FREDERICK

- This case does not involve student speech in a public school, so Frederick should have the same rights adults have. Frederick claims he did not attend or step foot onto school property that day. Only some of the students were supervised by faculty and staff.
- Even if considered student speech, Frederick’s banner was like the armbands in *Tinker v. Des Moines*. It was displayed peacefully and did not “substantially interfere” with school work. The only disruption was the principal’s action of crumpling up the banner.
- Unlike in *Bethel v. Fraser*, the message was not plainly offensive, lewd, or vulgar. Instead it was political speech about drug use, which did not involve sexual innuendos or cause a reaction from other students.
- This case is not like *Hazelwood v. Kuhlmeier* because the pro-drug banner was not part of the curriculum or an official school activity. The speech took place off campus at an Olympics activity. No reasonable person would think the pro-drug message was endorsed by the school.

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OPINIONS OF THE COURT

Chief Justice Roberts delivered the opinion of the Court, in which Justices Alito, Kennedy, Scalia, and Thomas joined. Justice Thomas filed a concurring opinion. Justice Alito also filed a concurring opinion and was joined by Justice Kennedy. Justice Breyer filed an opinion concurring in the judgment but dissenting in part. Justice Stevens filed a dissenting opinion, in which Justices Ginsburg and Souter joined.

Majority

The Court ruled 6-3 [or 5-4 depending on one's interpretation of Justice Breyer's opinion] for Principal Morse. The Court said it was reasonable for the principal "to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use." Chief Justice Roberts wrote that Frederick's message, though "cryptic," was reasonably interpreted as promoting marijuana use – equivalent to "[Take] bong hits" or "bong hits [are a good thing.]" He continued, "Our cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the school house gate.'" *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). And," 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*." The Court dismissed Frederick's argument that this case did not involve school speech because Frederick was not at a school event. It emphasized that participation in the Torch Relay was approved by the school, monitored by teachers, occurred during school hours, and included performances by the school band and cheerleaders.

Separate Concurrence (Alito)

In a brief concurrence, Justice Alito emphasized that the Court's opinion only applies to speech advocating illegal drug use and that the opinion "does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'"

Separate Concurrence (Thomas)

Justice Thomas wrote that while joined the Opinion in full, he wrote separately about his views of the standards set forth in *Tinker*. He said, "my view [is] that . . . *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), is without basis in the Constitution. . . I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech. . . I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so."

Dissent (Stevens)

Justice Stevens stated that the Court's ruling "does serious violence" to the First Amendment. Based in part on *Tinker*, he argued "The First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal an harmful to students. This nonsense banner does neither." Because most students "do not shed their brains at the schoolhouse gate," the banner would not actually persuade students to use illegal drugs..

