SANCTIONABLE CONDUCT: HOW THE SUPREME COURT STEALTHILY OPENED THE SCHOOLHOUSE GATE

by
Sonja R. West[*]

The Supreme Court's decision in Morse v. Frederick *signaled that public school authority over student expression extends beyond the schoolhouse gate. This authority may extend to any activity in which a student participates that the school has officially sanctioned. The author argues that this decision is unsupported by precedent, and could encourage schools to sanction more events in the future. Because the Court failed to limit or define the power of a school to sanction an activity, the decision could have a chilling effect on even protected student expression. The author commends the Court for taking up this issue after a long silence, but concludes that the messy facts in the case chosen made the case a poor vehicle for the Court to address the underlying school-speech issues.*

I. INTRODUCTION

One January day a young man chose to peacefully display a banner with a message of his choice. He did so while standing on public property and at a public event. A government official on the scene, however, disapproved of the banner's message. So the official tore down the sign and punished the young man for displaying it. If any other resident standing on that crowded public sidewalk—the epitome of a

[*] Assistant Professor of Law, the University of Georgia School of Law. I would like to thank Dan Coenen, Anne Dupre and Mike Wells for their helpful comments. While I was involved in the *Morse v. Frederick* case on behalf of amici curiae, the thoughts expressed in this Article are solely my own and do not represent the views of any other person or organization.

quintessential public forum[1]—had engaged in this simple act of self-expression, the First Amendment would have protected him from such blatant viewpoint-based censorship.[2]

Yet the young man in this case was not so fortunate. The Supreme Court concluded that the government's censorship of him was constitutional for two primary reasons. First, he was at the time a public high school student. And, second, he chose to express himself during a public event that his school, he later learned, had decided to "sanction."

The ability of teachers and school administrators to punish students for their speech while at school is an area laden with legal uncertainty. The Supreme Court's few cases addressing student speech have answered only a handful of questions regarding school officials' ability to censor their students while in the classroom, during a school assembly or when participating in a school sponsored, non-public forum. These cases, however, have left open a number of scenarios where it remains unclear how courts should balance students' free speech rights against school officials' authority. Thus it was of heightened importance when the Court broke its almost twenty-year silence on the topic of the free speech rights of public school students in the case of *Morse v. Frederick*.[3]

In deciding the case of Joseph Frederick and his "BONG HiTS 4 JESUS" banner, a majority of the Court concluded that Frederick's principal, Deborah Morse, could lawfully restrict his expression under the Court's school speech precedents. In a concurring opinion, two key

[1] Public sidewalks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Carey v. Brown, 447 U.S. 455, 460 (1980) (holding that access to sidewalks "for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely" (quoting Hudgens v. NLRB, 424 U.S. 507, 515 (1976)); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion . . . .").

[2] Viewpoint-based discrimination by the government "is ordinarily subject to the most exacting First Amendment scrutiny." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 207 (3d Cir. 2001). The Supreme Court has explained that "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). With content-based regulation of speech, moreover, the Court has held that "time, place, or manner" analysis is inapposite. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 20 (1986) (holding that "[f]or a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech"); Reno v. ACLU, 521 U.S. 844, 879 (1997) (holding that "time, place, and manner" analysis is not applicable when statute "regulates speech on the basis of its content"); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 US. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.").

[3] Morse v. Frederick, 127 S. Ct. 2618 (2007).

justices attempted to clarify and narrow the Court's ruling regarding the types of speech schools may restrict. And the dissenting justices disputed the majority's interpretation of the student's message. None of the justices, however, devoted much thought in their opinions to the most perplexing part of this ruling—that perhaps Frederick wasn't at school at all.

On the day of the incident, Frederick had not stepped foot on school property; rather, he was standing among the public on a public sidewalk. He was present at a commercially sponsored, non-school event—the running of the Olympic Torch Relay through his town. The planning, creation and display of Frederick's speech occurred completely off school grounds and without school resources. Thus it was the school principal, not Frederick, who may have crossed the line (both physically and legally) between the school and non-school environment when she left school property, marched across the street, and grabbed Frederick's banner.

The justices were unfazed by this state of affairs. Instead, they dismissed the argument that the principal lacked jurisdiction over Frederick by declaring that he was participating in a school "sanctioned" event. By making this move, the Court—for the first time and with virtually no discussion of the topic—signaled that public school authority over student expression extends beyond the schoolhouse gate. The reach of school officials, it seems, may now extend off campus and beyond traditional school-sponsored events to include any activity the school has sanctioned. Yet what exactly this important new sanctioning power requires or entails is left undefined.

The position that schools may sanction a public event held on public property is unsupported by the Court's precedents. What is more concerning, the Court's ruling could encourage school authorities in the future to sanction all sorts of off-campus community events, thereby aggrandizing government power at the expense of expressive liberty. The failure of the Court to define or limit this sanctioning power raises disturbing questions and potentially could chill a large amount of protected student expression. This Article addresses these questions by both examining the logic of the Court's opinion and by plumbing the troubling possible implications of the Court's new and mysterious sanctioned events rule.

II. "BUT NOT ON THESE FACTS"

Chief Justice Roberts began his majority opinion in *Morse* by stating that "[a]t a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use."[4] He

[4] *Id.* at 2622.

then went on to conclude that the principal did not violate Frederick's free speech rights by confiscating the banner and punishing him for displaying it. According to Chief Justice Roberts, school district authority over student speech might engender "some uncertainty at the outer boundaries . . . *but not on these facts.*"[5]

The parties did not dispute most of the key facts in the *Morse* case. It was agreed, for example, that Frederick was an eighteen-year-old public high school senior when the Olympic Torch Relay came through his hometown of Juneau, Alaska in January, 2002.[6] The relay was sponsored by Coca-Cola and other private local businesses as part of the build up to the 2002 Winter Olympic Games in Salt Lake City.[7] In Juneau, the event caused much excitement. Citizens lined the streets to watch, and national television cameras were on hand to record the festivities.[8] The route for the relay passed along Glacier Avenue in front of Juneau-Douglas High School. The school thus decided to release its students from class to watch the torch pass by.

Frederick, however, did not attend his first-period class that morning. Instead he drove himself to the event. He parked his car several blocks from the school and walked to the public sidewalk on the side of Glacier Avenue across from the school. Once there, Frederick joined friends and other members of the public who had gathered to view the event. He and his friends waited peacefully for the torch to arrive.[9] As the torch passed, they unfurled a banner that read "BONG HiTS 4 JESUS."[10] The display of the banner, according to Frederick, was an attempt to assert his First Amendment rights and to get on television.[11]

Upon spotting the banner, school principal Deborah Morse crossed the street and demanded that Frederick put the banner down.[12] Frederick asked Morse about his First Amendment rights, and she replied that the banner was not appropriate for display.[13] When Frederick refused to take his banner down, Morse grabbed it and crumpled it up.[14] Morse later suspended Frederick for ten days.[15]

There is some factual dispute about the terms of the students' release from class that day. According to Frederick, the students were released from class but not required to attend the relay. Rather, they

[5] *Id.* at 2624 (emphasis added).

[6] Joint Appendix to Petition for Certiorari at 9, 15, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), *available at* 2007 WL 119039.

[7] Frederick v. Morse, 439 F.3d 1114, 1115 (9th Cir. 2006).

[8] *Id.* at 1116.

[9] *Id.* at 1115–16.

[10] *Id.* at 1115.

[11] Joint Appendix, *supra* note 6, at 28.

[12] *Id.* at 24.

[13] *Id.* at 25.

[14] *Id.* at 25, 30.

[15] *Id.* at 26.

were simply dismissed from school and told to return in time for their next class.[16] He submitted evidence that students were largely, if not completely, unsupervised and that many students left the event and school administrators did not attempt to stop them.[17] Student affidavits described a scene of "chaos" including fights and students throwing snowballs and plastic Coke bottles.[18] The Ninth Circuit Court of Appeals agreed, finding that supervision of students by the school was "minimal or nonexistent."[19] In contrast, school officials testified that students were required to watch the relay and teachers and administrators were interspersed among the students in order to supervise them.[20]

Following the censorship of Frederick, the principal stated that she had sanctioned the relay "as an approved social event or class trip," thus giving her the same control over Frederick that she possessed in the classroom.[21] During Frederick's appeal of his suspension, the superintendent of schools agreed that the torch relay was a "school-sanctioned activity."[22] There was, however, no evidence that either students or parents had been informed of the official sanctioning of the event, and it is clear that attendance was not taken and that parental permission was not sought.[23]

Faced with this record, the district court held that there was no factual issue whether this was a "school-sponsored" event.[24] The court noted that cheerleaders and the band were on hand to support the runner and that "common sense" supported viewing the torch relay as a school event because it occurred during school hours.[25] The Ninth Circuit, while ruling in favor of Frederick, also agreed that the torch relay was a school event because "Frederick was a student, and school was in session."[26] The Supreme Court followed suit by concluding that because the expressive activity occurred during school hours and at a school-sanctioned event Frederick "cannot . . . claim he [was] not at school."[27]

III. CLASS DISMISSED: THE JURISDICTIONAL QUESTION

By concluding that the school had somehow sanctioned the Olympic Torch Relay, the Supreme Court recognized—for the first time in its

[16] *Id.* at 36.
[17] *Id.* at 32, 38.
[18] *Id.* at 29, 32, 38.
[19] Frederick v. Morse, 439 F.3d 1114, 1117 (9th Cir. 2006).
[20] Joint Appendix, *supra* note 6, at 56.
[21] *Id.* at 22–23.
[22] Morse v. Frederick, 127 S. Ct. 2618, 2623 (2007).
[23] *Frederick*, 439 F.3d at 1116.
[24] Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *4 (D. Alaska May 29, 2003).
[25] *Id.*
[26] *Frederick*, 439 F.3d at 1117.
[27] *Morse*, 127 S. Ct. at 2624 (quotation omitted).

history—a new and expanded jurisdiction of school administrators to control their students' speech. In earlier decisions, the Court had addressed only the special ability of school officials to restrict student speech that takes place in the classroom, during a school assembly, or as part of a school sponsored, non-public forum.

The question of whether the student is truly "at school" is an important one, because the Court has emphasized that the rights of students at school are not "coextensive with the rights of adults in other settings."[28] In this case there was great debate about whether the principal in *Morse* lawfully censored Frederick under the Court's school speech precedents even if he were at school. There is no doubt, however, that First Amendment protections reach further for students outside of the school setting than for students within it.

Prior to *Morse*, the Court had decided three key cases regarding student speech at public secondary schools: *Tinker v. Des Moines Independent Community School District*,[29] (finding school censorship of non-disruptive student expression while at school to be unconstitutional); *Bethel School District No. 403 v. Fraser*[30] (upholding a school's punishment of a student who used lewd and vulgar language during a school assembly); and *Hazelwood School District v. Kuhlmeier* [31] (holding that schools may regulate "school-sponsored" speech in the non-public forum embodied in a school newspaper).

In each of these cases, the jurisdictional issue was not in dispute—it was clear that all of the student speakers were, indeed, "at school." In *Tinker*, several students wore black armbands to class in protest of United States involvement in Vietnam, and they were punished for their expression. The Supreme Court came down on the side of the students and famously declared that students do not "shed their constitutional rights . . . at the schoolhouse gate."[32] The Court held in *Tinker* that "[s]tudents in school as well as out of school are 'persons' under our Constitution."[33] And this constitutional personhood entitles them to "fundamental rights which the State must respect."[34] Students, therefore, "cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours.'"[35] In accommodating student speech rights in the "special characteristics" of the learning environment, the Court declared that public authorities may censor student speech

[28] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
[29] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
[30] *Fraser*, 478 U.S. at 685.
[31] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
[32] *Tinker*, 393 U.S. at 506.
[33] *Id.* at 511.
[34] *Id.*
[35] *Hazelwood,* 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 512–13).

only if it "materially and substantially disrupt[s] the work and discipline of the school."[36]

Almost twenty years later, the Court again looked at the issue of school speech in *Bethel School District No. 403 v. Fraser*.[37] In *Fraser*, the Court upheld the school's suppression of an "offensively lewd and indecent" speech[38] that a high school student gave during a school assembly that "was part of a school-sponsored educational program."[39] Because the student in *Fraser* was plainly "at school" at the time of his speech, the majority did not have to dwell on the rule's application to off-premise student speakers. In a concurring opinion, however, Justice Brennan noted that "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest otherwise."[40]

Two terms later, the Court again took up the topic of school speech in *Hazelwood School District v. Kuhlmeier*.[41] In *Hazelwood*, the Court addressed the ability of high school officials to remove articles from the school sponsored student newspaper regarding teen pregnancy and parental divorce. While reaffirming *Tinker*,[42] the Court declared that "a school may refuse to lend its name and resources to the dissemination of student expression" in a non-public forum.[43] The Court emphasized that the school newspaper was produced with school resources through a journalism class taught as part of the regular curriculum during school hours for which students received academic credit and a grade.[44] Citing these specialized facts, the Court found no First Amendment violation while noting that "the government could not censor similar speech outside the school."[45]

---

[36] *Tinker*, 393 U.S. at 513.

[37] 478 U.S. 675 (1986).

[38] *Id.* at 685.

[39] *Id.* at 677.

[40] *Id.* at 688 (citations omitted).

[41] 484 U.S. 260 (1988).

[42] *Id.* at 266.

[43] *Id.* at 272–73.

[44] *Id.* at 268.

[45] *Id.* at 266. *See also* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 & n.22 (5th Cir. 2004) (holding that a student drawing was not "student speech on the school premises" because it "was composed off-campus and remained off-campus for two years"); Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050–52 (2d Cir. 1979) (refusing to apply *Tinker* to student newspaper published and distributed off-campus); Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987) (stating that burden of high school officials to justify censorship or punitive authority over off-campus student speech would be "much greater, perhaps even insurmountable" than over on-campus speech); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 269–71 (2001) (noting that *Tinker* is ill-suited to deal with off-campus student expression).

In short, prior to *Morse*, each of the Court's school speech cases concerned only student expression that occurred on school grounds during class or as part of a formal institutional program. Even more important, the Court had taken care to reserve its most restrictive rules to non-public forums found to be school sponsored. None of the Court's prior cases involved off-campus speech by students at a large scale public event not organized by the school, conducted in a traditional public forum, and overseen (if at all) in such a way that students could move about the vicinity freely intermingling with members of the general public.

IV. YOU SAY "SPONSORED" AND I SAY "SANCTIONED." LET'S CALL THE WHOLE THING OFF

It was clear from the beginning of the *Morse* case that a key question concerned the applicability of the Court's trilogy of school speech precedents. In ruling against the student speaker, District Court Judge John Sedwick noted that "[b]oth parties agree that a central issue is whether the parade-viewing constituted a school-sponsored activity. For if it did, there is little doubt that the school has wider discretion to control Frederick's actions."[46]

It was also evident from the beginning that the appropriate terminology for framing the jurisdictional question was subject to dispute. Judge Sedwick repeatedly referred to the issue in terms of whether student viewing of the torch relay was school "sponsored," and ultimately concluded that there was "no issue of fact as to whether or not this was a school-sponsored activity."[47] He relied on the evidence presented from the school that the students were released to view the relay and that the band and cheerleaders were on hand, he further pointed to "common sense" to support his conclusion. Judge Sedwick eventually declared that Frederick was "participating in a school-approved event."[48]

Similar analytical confusion lurked in the opinion of the Ninth Circuit Court of Appeals. Writing for the three-judge panel, Judge Kleinfeld never described the relevant activity as "school sponsored,"—instead he seemed to deem it decisive that the school had "authorized" the activity.[49] In support of this characterization, Judge Kleinfeld relied on the evidence that students had been released from class and "even though supervision of most students was minimal or nonexistent, the school could have supervised them more if it chose to."[50] Ultimately,

[46] Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *4 (D. Alaska May 29, 2003).

[47] *Id.*

[48] *Id.* at *5.

[49] Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006).

[50] *Id.* at 1117.

Judge Kleinfeld determined that Frederick was under the school's control because "Frederick was a student, and school was in session."[51]

As the case made its way to the United States Supreme Court, the parties continued to float various terms to denote the relationship (if any) between the Olympic Torch Relay and Juneau-Douglas High School. In their brief to the Court, the principal and the school district referred repeatedly to the torch relay as a school "sponsored" activity[52] or a school "sanctioned" event.[53] Amici supporting the school in the case also described the event as school "sponsored,"[54] and school "authorized"[55] as well as adding school "supervised"[56] to the growing list of terms.

The Supreme Court joined in this dialogue.[57] Chief Justice Roberts began his opinion by declaring that Frederick was at "a school-sanctioned and school-supervised event."[58] He later noted that the principal had "sanctioned" the event and referred to it as a school "authorized" activity.[59] In a concurring opinion, Justice Alito described Frederick's expression as "in-school" speech.[60] And in his decision concurring in the judgment in part and dissenting in part, Justice Breyer decided that the relay was a school "related" event.[61]

---

[51] *Id.*

[52] *See* Brief for Petitioner at 33, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278) (stating that "Frederick's banner was unfurled in the midst of a highly important 'school-sponsored' activity").

[53] *See id.* at 31 (contending that Frederick's banner interfered "with a school-sanctioned activity").

[54] *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Petitioners at 22, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278); Brief for D.A.R.E. America, et al., as Amici Curiae in Support of Petitioners at 16, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278); Brief of Amici Curiae National School Boards Association and American Association of School Administrators in Support of Petition for Writ of Certiorari at 1, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).

[55] *See, e.g.,* Brief of Amici Curiae National School Boards Association and American Association of School Administrators in Support of Petition for Writ of Certiorari, *supra* note 54, at 21.

[56] *See, e.g.,* Brief for D.A.R.E. America, et al., as Amici Curiae Supporting Petitioners, *supra* note 54, at 16.

[57] At oral argument, Chief Justice Roberts referred to the relay as a "school *sponsored* activity." Transcript of Oral Argument at 54, Morse v. Frederick, 127 S. Ct. 2618 (2007) (emphasis added). Justice Kennedy argued that Frederick's banner was "[c]ompletely disruptive of the school's image that they wanted to portray in *sponsoring* the Olympics." *Id.* at 50 (emphasis added). Justice Scalia stated that it was "a public event that was sponsored, not sponsored, but to which the school had directed the students to go." *Id.* at 53–54.

[58] Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

[59] *Id.* at 2623–24.

[60] *Id.* at 2637 (Alito, J., concurring).

[61] *Id.* at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part).

Only Justice Stevens, speaking for three dissenting justices, suggested that it might not be clear whether the relay was a school event of some form. He devoted a short footnote to this subject and gave principal attention to governing school rules. He observed that it is "relevant that the display did not take place 'on school premises,'" as the school district's rule against advocating illegal drug use requires.[62] He added that a separate, district-wide rule extended the school's anti-drug policy to "social events and class trips," but commented that "Frederick might well have thought that the Olympic Torch Relay was neither a 'social event' (for example, prom) nor a 'class trip'" for purposes of this prohibition.[63]

V. THE COURT'S PRIOR RECOGNITION OF SCHOOL-SPONSORED SPEECH

The varying use of labels in this case is important. The justices' semantic moves—particularly in shifting attention from school-sponsored to school-authorized and school-sanctioned activities—signals that the Court is stepping outside of its prior decisions and adopting a new view of school control over student speech. The Court fails to elaborate, however, on what this new view entails. Prior to *Morse,* the only term the Supreme Court had embraced regarding the schools' ability to restrict student speech was that of school "sponsored" speech. This analysis comes solely from the 1988 *Hazelwood* decision regarding the ability of public high school officials to regulate the content of the student newspaper.

In *Hazelwood* the Court began by reaffirming the important constitutional protections of *Tinker,*[64] but then went on to explain that "the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[65] The Supreme Court in *Hazelwood* thus created two distinct categories of student speech. The first includes "a student's personal expression that happens to occur on the school premises" while the second covered "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[66] This latter category, the Court explained, included activities that "may fairly be characterized as part of the school curriculum . . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to

[62] *Id.* at 2647 n.2 (Stevens, J., dissenting).
[63] *Id.* Justice Thomas in concurrence did not address the jurisdictional question.
[64] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).
[65] *Id.* at 272–73.
[66] *Id.* at 271.

student participants and audiences."[67] The Court in *Hazelwood* held that speech in the first category—speech that was not part of a school-sponsored activity and not "disseminated under [the] auspices" of the school—was entitled to a high level of First Amendment protection.[68]

The use of the term school "sponsored" to describe the Olympic Torch Relay itself is clearly inaccurate.[69] The facts are undisputed that the relay was commercially and privately sponsored and received no financial support or other resources from the school. It was not organized, planned, or otherwise backed by the school in any way, and it did not carry the school's name or insignia.[70] The relay took place on public, not school, property.[71] And plainly it did not fall in the category of "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[72]

There is a deeper problem with describing the relevant activity as "school sponsored" as used in the Court's prior student speech cases. After all, the Court in *Hazelwood* did not consider whether any generalized event or activity was school-sponsored, but whether the *speech* at issue was school-sponsored. Students, for example, "cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours'"[73] even though those arenas are clearly financed and supported by the school. It follows that even if Frederick had displayed his banner at a school football game or other event that was unquestionably "sponsored" by the school, the question under *Hazelwood* would be whether the school was lending its name and resources to Frederick's message in particular.

Did Juneau-Douglas High School sponsor Frederick's speech? Plainly it did not. The school did not supply any of the resources involved in the making or display of his banner. Frederick's speech was not reviewed by a faculty member who exercised "a great deal of control" and was the "final

---

[67] *Id.*

[68] *Id.* at 271–72; *see also id.* at 271 n.3 (explaining that "an off-campus 'underground' newspaper that school officials merely had allowed to be sold on a state university campus" could not be suppressed (citing *Papish v. Univ. of Mo. Bd. of Curators*, 410 U.S. 667)).

[69] It is not entirely clear whether the "event" being discussed is the Olympic Torch Relay itself or the students' viewing of the relay. At various points in the litigation, some parties distinguished the two. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 54, at 22. Yet more often, the relay itself was simply referred to as a school-sanctioned "event." *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

[70] Joint Appendix, *supra* note 6, at 9, 22–23.

[71] Joint Appendix, *supra* note 6, at 9, 15.

[72] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[73] *Id.* at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969) (citations omitted)).

authority" over the speech.[74] The banner was not produced in connection with a class or school project, and Frederick did not receive a grade or credit for the speech. And particularly because the message was conveyed during an off-campus, public event, the school did not "lend its name and resources to the dissemination of [the] student expression,"[75] and the speech was not "disseminated under [the] auspices" of the school.[76] No reasonable observer could conclude that the school had somehow endorsed Frederick's message, and indeed the school presented no evidence suggesting as much. For these reasons, Judge Kleinfeld, writing for the Ninth Circuit panel, concluded that *Hazelwood*'s analysis did not apply in this case because Frederick's speech "was not sponsored or endorsed by the school."[77]

In their argument to the Court, the school officials contended that *Hazelwood* meant that the school could silence Frederick in order to avoid having his message attributed to them.[78] They argued that Principal Morse had a "responsibility to 'disassociate' the school from the banner[]" because if she "had been insouciantly indifferent to Frederick's drug-related banner, many in the community might well have wondered what they are teaching at taxpayer-supported Juneau-Douglas High School."[79] This argument—that by failing to censor it, school administrators were putting their seal of approval on student speech—has never before been accepted by the Court; indeed the Court has repeatedly rejected it. Prior to *Morse*, a plurality of the Court explained that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."[80] Indeed, the Court held that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[81] Lower courts have taken the same view. The Seventh Circuit, for example, has explained, "The school's proper

[74] *Id.* at 268.

[75] *Id.* at 272–73.

[76] *Id.* at 272.

[77] Frederick v. Morse, 439 F.3d 1114, 1119 (9th Cir. 2006).

[78] Brief for Petitioner, *supra* note 52, at 15.

[79] *Id.* at 33–34.

[80] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (plurality).

[81] *Id; accord* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 64–65 (2006) (holding that by accommodating military recruiters on campus, law schools would not be "viewed as sending the message that they see nothing wrong with the military's policies, when they do"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995) (holding that concern that student message would be attributed to the school was "not a plausible fear"); *see also* Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993) (In an effort to avoid the appearance of school-sponsorship of a student's speech, the school district may not "throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship.").

response is to educate the audience rather than squelch the speaker" when students express view of which school authorities disapprove.[82]

In *Morse*, the school appeared primarily concerned that members of the general public—as opposed to their students—would believe the school was endorsing Frederick's message by failing to censor it.[83] This approach, however, strengthened Frederick's position. Courts already accept the notion that secondary school students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so."[84] A fortiori, there is no basis for finding faulty attribution to school authorities when full-grown adults encounter an offbeat declaration by a young man.[85]

The question raised by *Hazelwood*'s "school-sponsored speech" analysis is not whether the school allowed student attendance at a public event, but rather whether there was school sponsorship of the student's speech. Lower courts, moreover, have concluded that "school 'sponsorship' of student speech is not lightly to be presumed."[86] This approach makes sense because under the logic of *Hazelwood*, censorship authority is granted only when a student speaker occupies a platform that has been provided and sponsored by the school. The *Morse* case falls outside that principle for a simple reason: No reasonable person could have concluded that school authorities had published, endorsed or promoted the message that appeared on Frederick's banner.

VI. I HEREBY SANCTION THEE: SCHOOLS' MYSTERIOUS NEW POWER

The Olympic Torch Relay and Frederick's banner clearly do not meet the Court's definition of school sponsored speech. Unable to properly invoke the term "sponsored," the school district and their amici appear to cast about for the best way to describe the students' attendance at the Olympic Torch Relay. Many other terms are bandied about—authorized, approved, related, supervised—but it is "sanctioned" that found particular favor with the Supreme Court majority. Chief Justice Roberts stated that the students' viewing of the relay "was *sanctioned* by Principal Morse 'as an approved social event or class trip,'"[87] and he

[82] *Hedges*, 9 F.3d at 1299; *see also* Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988) (finding "under-ground newspaper" distributed on school grounds at a school picnic could not reasonably be viewed as school sponsored).

[83] *See* Brief for Petitioner, *supra* note 52, at 33 (referring to what "many in the community" might be thinking and complaining that Frederick's banner was on television "for the community (and the world) to see").

[84] *Rumsfeld*, 547 U.S. at 65.

[85] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (finding that the public would not attribute to a shopping center owner the expressive views of others who are allowed to speak on the property).

[86] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3rd Cir. 2001) (finding that school's anti-harassment policy was facially unconstitutional).

[87] Morse v. Frederick, 127 S. Ct. 2618, 2624 (2007) (emphasis added).

refers to it as a "school-*sanctioned*" event and a "school-*sanctioned* activity."[88]

While it receives only brief discussion by the Court, the adoption of the school sanctioned event phrasing is groundbreaking. The Supreme Court had never before recognized or alluded to the power of a school to take title to an otherwise public event to which it has contributed neither its name nor its resources. That it does so in this case opens up many questions about the scope of the school's new-founded sanctioning powers. Difficulties are heightened because the Court introduced this new concept without defining it, citing any legal support for it, or explaining its limits.

Following the Court's logic, public schools now potentially have the power to sanction any event they choose, whether public or private and whether commercial or non-commercial in nature. By pronouncing an event to be school sanctioned, the school apparently can enhance its own authority to suppress or censor speech by its students that occurs at that event.

The Court offers no guidance as to what, if any, procedures the schools must follow in order to exercise their sanctioning power. In *Morse*, there is no evidence as to what, if anything, the principal did to sanction the torch relay. It is apparent from the record that she did not formally inform the students or their parents that this public event had been sanctioned. And there is nothing to suggest she made any sort of announcement of the sanctioning or any kind of record as to when and how this decision was made. The principal apparently was allowed to make the sanctioning decision unilaterally, because there is no evidence that she conferred with or informed any other school official about the sanctioning decision. And, even if others were made aware of the sanctioning, there does not seem to be any procedural due process right for the students or their parents to appeal the principal's decision to sanction a public event. In light of these facts, *Morse* seems to stand for a sweeping principle: Any school principal, by herself and without guidelines, has the power to sanction a public event and thereby lessen every student's free speech rights at the event with no obligation to give the students, their parents, or anyone else, prior notice and opportunity for appeal.

The Court's endorsement of this new power also raises difficult questions about the sort of events the school can sanction so as to diminish student free speech rights. It can be surmised from the *Morse* case that it does not matter if the event is commercially sponsored, open to the public, and occurs on public property. It makes no difference if, as in *Morse*, the event does not bear the school's name or insignia. Judging from *Morse*, the school need not require attendance by the students or permission from the students' parents. And it is at least questionable

[88] *Id.* at 2623–24 (emphasis added).

whether the school has an obligation to effectively supervise the students during the event it has sanctioned.

In *Morse*, it was noted that the principal had sanctioned the viewing of the torch relay "as an approved social event or class trip."[89] This is suggestive of a student field trip. The Supreme Court has never addressed the issue of student speech rights while on a field trip or defined what constitutes a "field trip." A traditional school field trip, however, typically involves a plan that has been preapproved in writing by a school administrator to take students, as a well-supervised group, to an off-campus location for an educational purpose. A number of forms are generally required including parental permission slips and emergency contact information. Without such formalities, the students may not participate. The students then meet on school grounds where they are transported, as a group, to the outside location.

Was attending the torch relay a school field trip in this vein? The Supreme Court does not explain it as such. Certainly a number of elements are missing: There was no formal preapproval or permission slips, and yet students were allowed to leave school property with minimal to no supervision. Frederick never gathered initially on school grounds with his classmates, but traveled to the public event entirely by himself. It is not even clear that the event needs to take place during traditional school hours, as was the case in *Morse*. At oral argument, Justice Ginsburg asked the school's attorney, Kenneth Starr, if the school's power would lessen had the Olympic Torch Relay occurred on a Saturday. She asked:

> Suppose it were Saturday, not a school day. And the school children were not required to show up at the Olympic event but were encouraged to and the same thing happened. Would it make a difference that it wasn't in the course of a regular school day?[90]

Starr responded that it would make no difference, because the event on any day of the week "would be school sponsored."[91] Thus, if particular factors common to a field trip are required for sanctioning an event, the Court fails to outline them or set any limits.

Even under the field trip analogy, there remain unanswered questions about the reach of the school's sanctioning power. Suppose the school had organized a field trip one Saturday to view a political rally in town square. The school group arrives to find Frederick and his banner already in place—on public property at a public event. Does the fact that a school designated for a field trip the same site where Frederick independently chose to appear give the school power to censor his expression? Does the fact that the school might have sanctioned the rally do so? Does the mere fact that a field trip occurred automatically mean the event has been sanctioned? Again, the Court provides no answers.

---

[89] *Id.* at 2624.

[90] Transcript of Oral Argument, *supra* note 57, at 15.

[91] *Id.*

From all appearances, school authorities need do nothing more than declare, after the fact, that they had sanctioned student attendance at an event. This simple act thus converts a constitutionally protected, public free speech act into an unprotected school-speech situation that exposes the speaker to government censorship and punishment. By seeming to recognize this new, ill-defined power of school officials to sanction public, off-campus events, the Supreme Court potentially has opened the door to unexplored areas of school restrictions on student speech. The problems with these implied new powers are many. And because the sanctioning authority is currently so vague and unclear, it is difficult to determine how it might be interpreted in future cases.

Under its broadest interpretation, this wide-sweeping view of school power over independent, off-campus student speech has the potential to chill all types of student expression. The school could sanction attendance at a planned rally on a matter of public debate, such as illegal immigration or gay rights, as an educational activity. It would certainly be reasonable for a school to decide that there are learning opportunities in having students write letters to the editors of local newspapers, produce off-campus publications or create and maintain weblogs thus leading them to sanction these activities. Trips to museums, zoos, aquariums and historical landmarks could certainly qualify as sanctionable educational outings. And a Fourth of July parade or other expression of community pride would seem to be as educational, and therefore sanctionable, as the Olympic Torch Relay. The school might wish to encourage students to engage in artistic or literary endeavors during their off-hours as a school-sanctioned activity.[92]

Nothing in the Supreme Court's *Morse* decision, moreover, indicates that the school's sanctioning power must be limited to events and activities with an educational element. Indeed, the torch relay itself was not particularly educational in nature; it was instead an occasion of community celebration and pride. Does the Court mean to suggest that there is no boundary to what a school can sanction, including with regard to social, religious, or work-related events? Might a student be open to punishment for what he says at the grocery store or local shopping mall?[93] Such a result would contradict the Court's holdings in *Tinker* that "[u]nder our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact."[94]

[92] LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001) (Court upholds punishment of student for poem he wrote at home and not for a school assignment. The student brought the poem to campus to show his teacher for feedback).

[93] *See, e.g.,* Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976) (On a Sunday afternoon at a shopping center, a student sees a teacher and calls him a "prick." The court upheld the ability of the school to discipline him, stating that "[t]o countenance such student conduct even in a public place without imposing sanctions could lead to devastating consequences in the school." *Id.* at 772).

[94] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

In developing First Amendment rules, the Court has looked askance at vagueness because of fears it will lead speakers to engage in self-censorship even with regard to protected expression. This "chilling effect," according to the Court, is "a harm that can be realized even without an actual prosecution."[95] In the *Morse* case, Frederick claimed he had tried to stay outside of the school's jurisdiction when displaying his banner. In his deposition testimony, he said that he and his friends "purposely avoided the high school grounds itself" because they "wanted to be on a public sidewalk but not on school grounds so there would be no reason for the school to bother us and so it would be clear that we had free speech rights."[96] It turns out that Frederick had misjudged the reach of his school's control over him. Yet no evidence indicates that he had been informed by his principal, or by anyone, that his school had sanctioned this event. The principle articulated in *Morse* raises similar risks for countless students. Does the member of a high school Gay-Straight Alliance, who attends a Gay Pride march with other club members, run the risk that school authorities might later sanction this gathering? If the faculty club advisor or the faculty mentor joins the parade or even watches from the sidewalk? What if the principal chooses to monitor the event with a view to controlling student misconduct?

An inability of speakers to predict whether their speech will or will not subject them to punishment is a constitutional concern of the highest importance. That the speakers happen to be public school students, or that their messages might seem to many to be cryptic or of questionable value does not quiet the First Amendment alarm bells. These questions illustrate both the potential breadth of the Court's new-fangled "school-sanctioned event"—and the risk of chilling effects it creates.

VII. CONCLUSION

After almost twenty years of silence on school speech, the Supreme Court's decision to hear a case addressing students' First Amendment rights while at school was commendable. Unfortunately, the Court selected a case with a messy factual problem—it was not at all clear that the student speaker was actually "at school." At best, this factual question made the case a poor vehicle for the Court to address the underlying school-speech issue. At worst, however, it caused the Court to quietly, and with little discussion or guidance, expand the power of school administrators to restrict the free speech rights of their students.

By failing to properly recognize the jurisdictional issue in this case, the Supreme Court left open a variety of questions regarding the reach of public schools over off-campus student speech. In the coming years lower courts, and perhaps the Supreme Court itself, will need to answer these questions as they arise in actual cases or controversies. Until then,

[95] Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 393 (1988).

[96] Joint Appendix, *supra* note 6, at 28.

student speakers will face much uncertainty as to when, where, and how they might have unknowingly shed their constitutional rights—even beyond the schoolhouse gate.