

---

---

# From *Fraser* to *Frederick*: *Bong Hits* and the Decline of Civic Culture

Kenneth W. Starr\*

*Student speech in public schools has again been thrust into the limelight with the Supreme Court's recent Morse v. Frederick decision. In this Article, former Solicitor General and Circuit Judge Kenneth W. Starr raises important questions about the broad cultural impact of the student speech cases. First, the Article highlights American educational thought's historically communitarian roots. Next, the Article traces the Court's student-speech jurisprudence through the Tinker, Fraser, and Fredrick decisions. Finally, the Article underscores the conquest of libertarian educational ideals over normative communitarian ones at the Court.*

## TABLE OF CONTENTS

INTRODUCTION .....	661
I. A BRIEF SURVEY OF WESTERN EDUCATION .....	663
II. DEVELOPMENTS IN AMERICAN EDUCATIONAL THOUGHT .....	666
III. THE DEVELOPMENT OF STUDENT-SPEECH JURISPRUDENCE .....	668
IV. A RETREAT FROM COMMUNITARIANISM .....	672
A. A Plethora of Views .....	673
B. A Muddled Result .....	676
CONCLUSION.....	676

## INTRODUCTION

*Morse v. Frederick* is the first student free speech case to reach the Supreme Court in a generation.<sup>1</sup> Even with its whimsical facts, the so-

---

\* Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University. The author wishes to thank David Morrell and J. Matt Williams for their research assistance.

<sup>1</sup> *Morse v. Frederick*, 127 S. Ct. 2618 (2007); see, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school officials have editorial power over school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding

called “Bong Hits” case has provided a serious occasion to consider afresh the frequently recurring, highly practical issue of student speech in public schools. Implicitly, however, *Bong Hits* has posed to the judiciary and the nation much broader, culturally laden questions: What does our society seek to achieve in educating our children? Are public schools to be arenas for (largely untrammelled) free speech on the part of students? Are they schoolhouse versions of the Hyde Park Speaker’s Corner?<sup>2</sup> Or are they institutions in which students’ putative rights are limited by the perceived needs of civility and order within the educational environment?

For nearly four decades, the Supreme Court has attempted to answer these underlying questions.<sup>3</sup> In *Tinker v. Des Moines Independent Community School District*, the Court departed from the traditional, communitarian<sup>4</sup> vision of education, which emphasizes order, civility, and the inculcation of virtue within schools.<sup>5</sup> Instead,

---

that school officials’ interest in excluding vulgar speech merits restricting student’s comments); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students’ free speech rights outweigh school authorities’ interests).

<sup>2</sup> The iconic Hyde Park “Speaker’s Corner” is a traditional area of public speech, debate, protest, and assembly in London. See Bruce Keidan, *Hyde Park Hosts Longest-Running Show in London*, PITTSBURGH POST-GAZETTE, June 27, 1999, at F1.

<sup>3</sup> See cases cited *supra* note 1.

<sup>4</sup> “[M]an is by nature a political animal. . . . [H]e who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god . . . .” ARISTOTLE, *THE POLITICS* 7 (Kessinger Publ’g 2004) (4th century BC). This first principle of Aristotle’s political science constitutes the springboard of the communitarian vision. See Robert N. Bellah, *Community Properly Understood: A Defense of “Democratic Communitarianism,”* in *THE ESSENTIAL COMMUNITARIAN READER* 15, 18-19 (Amitai Etzioni ed., 1998); see also Mary Ann Glendon, *Looking for “Persons” in the Law*, 168 *FIRST THINGS* 19, 19-21 (2006); Daniel Bell, *Communitarianism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2004), <http://plato.stanford.edu/entries/communitarianism/#1>. Although the term communitarian was coined in 1841, communitarian ideas are unique neither to the 19th nor 20th centuries; rather, communitarian notions are present throughout history. In defining “communitarianism,” it may be helpful to begin by defining it negatively. At its core, communitarianism contrasts with the libertarian vision, which defines “human being” in purely individualistic, atomistic terms and “liberty” as “individual freedom from all forms of social and legal constraint.” See, e.g., AMITAI ETZIONI, *THE NEW GOLDEN RULE*, at xv-xvi, 4, 34 (1996) (highlighting contrasts between libertarian and communitarian social ideals); Glendon, *supra* at 24 (expressing concern that libertarian and individualist ideas may undermine communitarian ideas essential to maintenance of free republic). In contrast, communitarian thinkers like Mary Ann Glendon and Amitai Etzioni understand human beings to be inherently relational creatures and liberty as something that must necessarily be understood within the broader context of community. See generally ETZIONI, *supra*; Glendon, *supra* (discussing divergent concepts of rights and comparing their effects on American and foreign legal systems).

<sup>5</sup> See generally *Tinker*, 393 U.S. 503 (applying libertarian approach to education, leading to treatment of schools as platforms for free speech).

the Court embraced a more libertarian vision of education that saw public schools as platforms for student free speech. For the first time, students had First Amendment rights within the schoolhouse gates.<sup>6</sup> Nearly two decades later, however, the Court retreated from the libertarian emphasis articulated in *Tinker*. Without overruling *Tinker*, the Court instead emphasized the communitarian role of education in *Bethel School District No. 403 v. Fraser*.<sup>7</sup> Most recently, the Court in *Bong Hits* abandoned the communitarian vision of *Fraser*, which saw public schools as the inculcators of the “habits and manners of civility,”<sup>8</sup> and returned to *Tinker*’s underlying principles.

Still, no single decision has definitively settled the issue of education’s purpose in America. *Bong Hits*, however, points the way to an unspoken but manifest sea change in the way our nation’s highest court perceives the appropriate, constitutionally permissible role of public education in the United States. This brief essay explores that shift in jurisprudential perspective.

#### I. A BRIEF SURVEY OF WESTERN EDUCATION

The Western canon is replete with rich insights regarding the aims of education.<sup>9</sup> From the genesis of Western civilization in ancient Greece to imperial Rome and from the early church to the American founding, at one time or another towering figures from centuries past, such as Plato, Aristotle, and Aquinas, have considered the purpose and character of education.<sup>10</sup> Differences abound, of course, in this vast body of thoughtful reflection. But most of these intellectual giants would heartily agree on this foundational proposition: Education is not merely concerned with job training, but also with fulfilling the

---

<sup>6</sup> See *id.* at 506 (“[N]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

<sup>7</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986) (discussing vulgar speech and lewd conduct as wholly inconsistent with fundamental values of public school education).

<sup>8</sup> *Id.* at 681.

<sup>9</sup> See, e.g., JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 61-70 (Hackett Publ’g 1996) (1695) (discussing educational methods of children by their parents and self-education of adults); JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* (Yale Univ. Press 1996) (1854) (collecting essays discussing different conceptions of the university).

<sup>10</sup> See, e.g., ARISTOTLE, *THE NICOMACHEAN ETHICS* 114 (Filiquarian Publ’g 2007) (4th century BC) (discussing possible distinction between education as good man and education as good citizen); PLATO, *THE REPUBLIC OF PLATO* (Allan Bloom trans., 2d ed., Basic Books 1991) (4th century BC) (discussing importance of sound rearing and education).

twin, closely related goals of (i) forming moral character and (ii) “enabling [children] to become members of a community.”<sup>11</sup>

This classical vision now stands in stark contrast to modern notions of learning, which tend to view education in more instrumentalist terms.<sup>12</sup> Indeed, a reductionist vision emphasizing utility and efficiency sees education as virtually synonymous with career preparation. In contrast with this modern trend, the classicists did not view education as a means of career preparation. To the contrary, education provided a means of both fulfilling the natural human desire to know and to shape individuals’ character. Effectively, the ancients saw education as moral in nature.<sup>13</sup> For example, Aristotle in his *Nicomachean Ethics* maintained that education’s purpose was “to make [men] good and disposed to do what is noble.”<sup>14</sup> In this classical vision, education is a decidedly normative enterprise.

The United States has tended to follow the rich tradition of the West on educational matters. Consequently, Americans have generally expected their educational system to achieve a wide panoply of ends.<sup>15</sup> As one commentator has suggested:

Americans at various times have expected the schools to inculcate religious orthodoxy, to instill moral virtue, to develop rationality or ‘critical thinking,’ to educate for the productive use of leisure time, and to enrich the affective life.

---

<sup>11</sup> See Lottie H. Kendzierski, *Aristotle and Pagan Education*, in *SOME PHILOSOPHERS ON EDUCATION: PAPERS CONCERNING THE DOCTRINES OF AUGUSTINE, ARISTOTLE, AQUINAS & DEWEY* 26, 27 (Donald A. Gallagher ed., 1956).

<sup>12</sup> See, e.g., School-to-Work Opportunities Act of 1994, Pub. L. No. 103-239, 108 Stat. 568 (1994). This Act reflects the popular understanding of education as simply job training or a means to employment. Specifically, this Act provides states with grants to plan and develop a more robust system of vocational training within their respective public school systems. *Id.* §§ 2, 3, 203, 108 Stat. at 569-72, 579-80. In addition, the U.S. Department of Education’s Office of Vocational and Adult Education devotes a large portion of its \$1.9 billion annual budget on vocational training programs for high school students. Office of Vocational and Adult Education (OVAE), Programs/Initiatives, <http://www.ed.gov/about/offices/list/ovae/programs.html#cte> (last visited Nov. 3, 2008). The founding of the Association for Career and Technical Education (ACTE) in 1926 also reflects the shift from a classical vision of education to a vision of public schools as the providers of technical training. See ACTE, *A New Association Is Born*, [http://www.acteonline.org/uploadedFiles/About\\_ACTE/files/A-New-Association-is-Born.pdf](http://www.acteonline.org/uploadedFiles/About_ACTE/files/A-New-Association-is-Born.pdf) (last visited Nov. 17, 2008).

<sup>13</sup> See Kendzierski, *supra* note 11, at 31.

<sup>14</sup> See CHRISTOPHER J. LUCAS, *OUR WESTERN EDUCATIONAL HERITAGE* 88 (1972).

<sup>15</sup> See LUCAS, *supra* note 14, at 468-526 (tracing development of educational thought in America, beginning with colonial era and continuing up through 1970s); see also JENNIFER L. HOCHSCHILD, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 1-2, 9-16 (2003).

... [American schools] have been called upon to teach order, discipline, and democracy, the virtues of thrift, cleanliness, and honest labor, the evils of alcohol, tobacco, atheism, drugs, war, peace, sex, and communism; and they have been asked to help acculturate immigrants, to foster patriotism, tolerance, and, above all, to produce a universally high standard of literacy. All this the schools sometimes did and still do.<sup>16</sup>

Indeed, Americans have traditionally required much from their educational institutions.

Underlying these diverse demands is a core belief that education provides a foundational cure for many of society's ills.<sup>17</sup> In fact, the Founders' generation, which embraced many of the classical notions of learning, perceived education as a necessary condition for national survival.<sup>18</sup> Consider Thomas Jefferson's statement, "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."<sup>19</sup> Likewise, John Adams warned, "Liberty cannot be preserved without a general knowledge among the people."<sup>20</sup>

While the Founders agreed with the classicists that education was an end in itself, they also saw in education a highly practical, societal benefit: the American experiment could succeed only if the People acquired and maintained the power to govern themselves. This power, the Founders believed, required that individuals be educated in the ways of liberty. The Northwest Ordinance of 1787, one of most important measures of the Continental Congress, mandated that, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."<sup>21</sup> Similarly, Noah Webster,

---

<sup>16</sup> See LUCAS, *supra* note 14, at 468-69.

<sup>17</sup> See RUSH WELTER, *POPULAR EDUCATION AND DEMOCRATIC THOUGHT IN AMERICA* 3-4 (1969). In this work, Welter considers, among other things, the development of republican and democratic notions of education throughout American history. Though Welter notes a tension between two sets of educational ideals — republican and democratic — his work suggests that both camps shared a profound faith in education's ability to achieve each side's respective goals, whether by preserving republican institutions or creating and maintaining a more democratic social order.

<sup>18</sup> *Id.* at 23-29.

<sup>19</sup> Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), as reprinted in LUCAS, *supra* note 14, at 468.

<sup>20</sup> John Adams, *Dissertation on Canon and Feudal Law* (1765), available at <http://teachingamericanhistory.org/library/index.asp?document=43>.

<sup>21</sup> An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (Northwest Ordinance of 1787), <http://www.earlyamerica.com/>

the “Father of American Scholarship and Education,”<sup>22</sup> reflected that “[e]ducation . . . forms the moral characters of men, and morals are the basis of government.”<sup>23</sup>

The Founders believed that the “blessings of liberty” secured by the Constitution might be irretrievably lost without education. That idea endured well beyond the early years of the American experiment. In 1880, for example, James Garfield wrote, “Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained.”<sup>24</sup>

## II. DEVELOPMENTS IN AMERICAN EDUCATIONAL THOUGHT

As education in early America took on this moral and communitarian character, the result was that children began learning the perceived values of civic culture and the requirements of citizenship.<sup>25</sup> In effect, American society saw children as citizens in formation. As such, it was the community’s solemn responsibility to teach children foundational principles of liberty, self-government, and civility.<sup>26</sup> These communities also had an obligation to aid children in understanding the nation’s history and culture. As Webster stated in his essay, *On Education of Youth in America*:

[I]t is an object of vast magnitude that systems of education should be adopted and pursued which may not only diffuse a knowledge of the sciences but may implant in the minds of the American youth the principles of virtue and of liberty and

---

[earlyamerica/milestones/ordinance/text.html](http://earlyamerica/milestones/ordinance/text.html).

<sup>22</sup> This title is derived from Rosalie J. Slater’s 1967 biography of Noah Webster. Rosalie J. Slater, *Noah Webster: Founding Father of American Scholarship and Education*, Preface to NOAH WEBSTER’S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 11, 11 (Found. for Am. Christian Educ. 2006) (Noah Webster ed., 1st ed. 1828).

<sup>23</sup> Noah Webster, *On the Education of Youth in America*, in *READING IN AMERICAN EDUCATIONAL THOUGHT: FROM PURITANISM TO PROGRESSIVISM* 91, 105 (Andrew J. Milson ed., 2005).

<sup>24</sup> *A DICTIONARY OF QUOTATIONS IN PROSE* 125 (Anna L. Ward ed., 1889).

<sup>25</sup> In short, the term “civic culture” describes a society’s shared political and general expectations of its citizens. Historically, America’s civic culture has placed great value on equality, self-restraint, patriotism, volunteerism, civic activism (i.e., voting, jury duty, and campaign involvement), and local community. See generally Ronald P. Formisano, *The Concept of Political Culture*, 31 J. INTERDISC. HIST. 393, 393-426 (Robert Rotberg & Theodore Rabb eds., 2001) (differentiating between civic culture and political culture).

<sup>26</sup> See THOMAS C. HUNT, *MORAL EDUCATION IN AMERICA’S SCHOOLS: THE CONTINUING CHALLENGE* 9-18 (2005).

inspire them with just and liberal ideas of government and with an inviolable attachment to their own country.<sup>27</sup>

Without these “just and liberal ideas of government,” the perpetuity of the American experiment would be threatened.

At the advent of the twentieth century and into its early decades, education was still perceived as serving the related purposes of creating good citizens and developing virtuous people. Along the way, however, a subtle conceptual change occurred. Educational reformers began conceptualizing schools as places where “an enormous and ever[-]growing immigrant community[] could learn about the roots of American democratic and republican ideals.”<sup>28</sup> While these reformers, like the Founders, conceived of education as an integral part of perpetuating the American experiment in self-government, the original emphasis on virtue and knowledge shifted. Education’s goals expanded to the point where education was not only a means of preserving democracy, but also a tool to “Americanize” immigrants.<sup>29</sup> This perspective translated into an education of “shared values, principles, and political commitments to promote stability, coherence, and justice for free and equal citizenship.”<sup>30</sup> Education would make citizens out of all who received it, regardless of their parents’ background or home country.

This “melting pot” vision helps to explain the cultural context for the lofty sentiment articulated in *Brown v. Board of Education*, where the Supreme Court famously intoned, “Today, education is perhaps the most important function of state and local governments.”<sup>31</sup> But precisely what is the “education” of which the Court rhapsodized? The answer is unclear. Indeed, a protracted cultural struggle over the direction of public education was underway. The Supreme Court soon became a central battleground in the conflict.<sup>32</sup> In the last four decades, the Supreme Court has considered the question of

---

<sup>27</sup> *Id.* at 14.

<sup>28</sup> Dan Prinzing, Americanization, Immigration, and Civic Education: The Education of the “Ignorant and Free” 2 (Sept. 2004), <http://www.civiced.org/pdfs/PrinzingDan.pdf> (prepared for German/American Conference, San Diego, Cal., Sept. 2004) (quoting ROSEMARY C. SALOMONE, *THE CIVIC PURPOSES OF PUBLIC SCHOOLS* 6 (2002)).

<sup>29</sup> See Kenneth B. O’Brien Jr., *Education, Americanization and the Supreme Court: The 1920’s*, 13 AM. Q. 161, 162-63 (1961).

<sup>30</sup> Prinzing, *supra* note 28, at 4 (quoting ROSEMARY C. SALOMONE, *THE CIVIC PURPOSES OF PUBLIC SCHOOLS* 7 (2002)).

<sup>31</sup> 347 U.S. 483, 493 (1954).

<sup>32</sup> See generally JONATHAN ZIMMERMAN, *WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS* 5-6 (2002) (discussing influence of Court’s decisions on American culture).

education's purpose in three pivotally important student free speech cases: *Tinker v. Des Moines Independent Community School District*,<sup>33</sup> *Bethel School District No. 403 v. Fraser*,<sup>34</sup> and *Morse v. Frederick*.<sup>35</sup>

### III. THE DEVELOPMENT OF STUDENT-SPEECH JURISPRUDENCE

Traditionally, local authorities in the United States were charged with teaching children good moral character, a strong work ethic, and the values of American culture.<sup>36</sup> In performing this duty, teachers were immeasurably aided by the fact that the First Amendment did not apply in the classroom.<sup>37</sup> In effect, students in public schools did not traditionally enjoy any free speech rights when entering the schoolhouse gates.<sup>38</sup> This anti-liberty perspective shifted abruptly, however, in 1969, with the landmark decision in *Tinker*.<sup>39</sup> It is from the majority opinion in *Tinker* that we draw the oft-repeated statement that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>40</sup> That famous Vietnam War black armband case marked the Court's first substantive foray into the legal arena of free speech rights of public school students.

The facts of *Tinker* are well known. In December 1965, several Iowa schoolchildren donned black armbands in silent protest against the

---

<sup>33</sup> 393 U.S. 503 (1969).

<sup>34</sup> 478 U.S. 675 (1986).

<sup>35</sup> 127 S. Ct. 2618 (2007). Prior to *Morse*, the principal student free speech cases were threefold: *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). We will focus on the first two. The last of the trilogy — the *Hazelwood* case — involved a dispute over whether school officials could exercise editorial control over a student-written, but school-sponsored, newspaper. Student staff members for the paper sued these officials after they deleted two pages of the paper before publication. The Court held that because the school newspaper could not be characterized as a forum for public expression, school officials could exercise editorial control over the style and content of student speech in such school-sponsored expressive activity. The Court found that the school principal acted reasonably in requiring the deletion of articles because of numerous concerns relating to the privacy of students and the sensitive subject matter of the articles. *Hazelwood*, 484 U.S. at 270-76. *Hazelwood*'s significance is quite limited for purposes of this reflection.

<sup>36</sup> WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO “NO CHILD LEFT BEHIND” 3 (2005).

<sup>37</sup> See *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

<sup>38</sup> See *id.*

<sup>39</sup> See generally *Tinker*, 393 U.S. 503 (holding that students' free speech rights outweigh school authorities' interests).

<sup>40</sup> *Id.* at 506.



war in Vietnam.<sup>41</sup> After drawing attention to themselves, the schoolchildren were sent home by school officials on the grounds that the armbands violated school board regulations.<sup>42</sup> The students sued and eventually found themselves before the Supreme Court.<sup>43</sup>

Speaking for a seven-member majority, Justice Fortas articulated two pivotal principles with respect to student speech cases. First, a student's "First Amendment rights[] [must be] applied in light of the special characteristics of the school environment."<sup>44</sup> Second, in order to punish a student speaker, school officials must demonstrate that "the students' activities would materially and substantially disrupt the work and discipline of the school."<sup>45</sup> In applying these principles, the Court held that wearing black armbands was a form of protected (symbolic) speech.<sup>46</sup> Importantly, there was "no indication that the work of the schools or any class was disrupted."<sup>47</sup>

In dissenting, Justice Black articulated a federalism-driven perspective, namely the right of states to control public schools and to discipline students who choose to disobey a school official's order.<sup>48</sup> Justice Black noted: "[T]he record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, [they] took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war."<sup>49</sup> Justice Black's distinctive emphasis on the communitarian purpose of public schools in America is significant. In short, public schools should be institutions for shaping children and molding them for citizenship — future members of a larger society.<sup>50</sup> As Justice Black emphasized, "School discipline . . . is an integral and important part of training our children to be good citizens — to be better citizens."<sup>51</sup> He continued: "The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people."<sup>52</sup> In thus drawing on the history and

---

<sup>41</sup> *Id.* at 504.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 504-05.

<sup>44</sup> *Id.* at 506.

<sup>45</sup> *Id.* at 513.

<sup>46</sup> *Id.* at 505-06.

<sup>47</sup> *Id.* at 508.

<sup>48</sup> *Id.* at 515-26 (Black, J., dissenting).

<sup>49</sup> *Id.* at 518.

<sup>50</sup> *Id.* at 524.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

purpose of American schools, Justice Black stood in the long tradition that conceptualizes schools as places of order and civility, rather than platforms for liberty-enhancing, free-speech events.

To Justice Black, the *Tinker* majority was tearing asunder the ability of local authorities to control their classrooms:

[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools [] can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.<sup>53</sup>

The majority, from Justice Black's perspective, was changing the heart of the American public school system. How could schools inculcate values of civility if teachers were unable to prevent behavior deemed antithetical to order and respect? Though Justice Black found himself alone in the *Tinker* opinion, seventeen years later the Supreme Court embraced his dissent, without overruling *Tinker*. The result beclouded free-speech jurisprudence.

Long after Justice Black's departure from the Court in 1971,<sup>54</sup> Chief Justice Burger in *Fraser* recalled the historic values of civic training in American schools.<sup>55</sup> Inspired by this lofty vision from yesteryear, the *Fraser* Court returned to Justice Black's understanding of what goals American schools should serve.<sup>56</sup>

*Fraser's* colorful facts are uncomplicated. In 1983, Matthew Fraser, a senior at Bethel High School in Washington State, delivered a nomination speech at a school assembly in front of 600 students. Fraser's speech, given to an audience including students as young as fourteen years old, was an "elaborate, graphic, and explicit sexual metaphor."<sup>57</sup> The principal suspended Fraser and removed him as a graduation-speaker candidate as punishment for violating a school rule prohibiting "obscene" and "profane" language.<sup>58</sup> Fraser sued and prevailed in the district court on First Amendment grounds.<sup>59</sup> The Ninth Circuit affirmed. However, the Supreme Court reversed.

---

<sup>53</sup> *Id.* at 518.

<sup>54</sup> Justice Black retired from the Court on September 17, 1971, after 34 years of service on the nation's highest bench. He died soon thereafter on September 25, 1971, at the age of 85. See HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 245 (1996).

<sup>55</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681-83 (1986).

<sup>56</sup> See *id.* at 681-83, 685-86.

<sup>57</sup> *Id.* at 678.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 679.

In the opinion, Chief Justice Burger reflected on the “fundamental values” upon which, in the Court’s view, America’s public schools were founded.<sup>60</sup> He began by quoting the preeminent twentieth-century historian Charles Beard on the communitarian “role and purpose of the American public school system”<sup>61</sup>: “[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must *inculcate the habits and manners of civility* as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”<sup>62</sup> For Chief Justice Burger, these “habits and manners of civility” were “essential to a democratic society.”<sup>63</sup> Indeed, this normative vision constitutes the core purpose of public education.<sup>64</sup> In the Chief Justice’s view:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers — and indeed the older students — demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.<sup>65</sup>

No longer was the voice of Justice Black a solitary, marginal lamentation over the erosion (if not loss) of communitarian concepts of education. To the contrary, a majority of the Justices joined this traditionalist opinion. The Burger Court turned away from *Tinker*’s libertarian norms and ringingly embraced the Blackian notion that public school officials do (and should) have power to decide what speech is appropriate on public school campuses.<sup>66</sup> In the *Fraser* Court’s vision, disciplinary decisions are for local school boards, not federal courts.<sup>67</sup>

---

<sup>60</sup> *Id.* at 681.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 683.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Departing from *Tinker* principles, the Burger Court upheld the Bethel School Board's decision to punish Fraser for a speech that was (at least potentially) offensive to its hearers. Not only did the Justices agree that Fraser's speech was inappropriate in a school setting, the Burger Court lifted up the vision of schools as the inculcators of the "habits and manners of civility."<sup>68</sup> "[I]t was," according to the Court, "perfectly appropriate for the school to disassociate itself [from Fraser's speech] to make the point . . . that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."<sup>69</sup> Under *Fraser's* methodology, schools enjoyed greater leeway to prevent *Fraser*-like speakers from undermining public education's communitarian aims. Traditionalism carried the day.

#### IV. A RETREAT FROM COMMUNITARIANISM

Nearly twenty-one years later, during the second full Term of the Roberts Court, *Morse v. Frederick* again raised the nettlesome question of education and free speech. Here, it fell to the Court to decide whether a high school principal could punish a student for speech conveying a pro-drug message (as interpreted by school officials) contrary to the school's educational mission.<sup>70</sup>

The *Bong Hits* facts are well known. In January 2002, the Olympic Torch visited Juneau, Alaska, on its way to Salt Lake City for the Winter Olympics.<sup>71</sup> Students from the local high school were permitted to leave their classes to go outside and watch as the Torch passed by on snowy Glacier Avenue.<sup>72</sup> Joseph Frederick, an eighteen-year-old senior, joined his classmates.<sup>73</sup> As the Torch approached the high school, Frederick and friends unveiled a fourteen-foot banner that read, "BONG HiTS 4 JESUS." Concluding that the banner could be interpreted as promoting illegal drug use,<sup>74</sup> Principal Deborah

---

<sup>68</sup> *Id.* at 681.

<sup>69</sup> *Id.* at 685-86.

<sup>70</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007).

<sup>71</sup> *Id.* at 2622.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2622; *id.* at 2631 n.3 (Thomas, J., concurring).

<sup>74</sup> *Id.* at 2624-25 (majority opinion); see also Joint Appendix, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 119039, at \*21 (noting that Juneau School Board Policy 5520 "prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors[]" and that Juneau School Board Policy 5850 provides, in pertinent part, that "pupils who participate in approved social events and class trips are subject to District rules for student conduct; infractions of these rules [are] subject to discipline in the same manner as infractions

Morse ordered Frederick to take it down. When Frederick refused, Principal Morse took the banner down herself and later suspended him for ten days.<sup>75</sup> Frederick sued both Morse and the Juneau School Board for violation of his First Amendment rights.

Once again a Chief Justice spoke for the Court. In doing so, Chief Justice Roberts drew from both the *Tinker* and *Fraser* majority opinions. Chief Justice Roberts first explained that the armbands at issue in *Tinker* represented political speech “at the core of what the First Amendment [was] designed to protect.”<sup>76</sup> The school’s interest in avoiding student discomfort or political controversy could not justify banning the armbands. Examining *Fraser*, the Chief Justice discerned two basic principles: first, that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings;” and second, that *Tinker*’s “substantial disruption” analysis is not absolute.<sup>77</sup> From those opinions, Chief Justice Roberts fashioned a very limited, narrow rule permitting school officials to “restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”<sup>78</sup> Ultimately, the Roberts Court held that, because “detering drug use by schoolchildren is an ‘important [and] perhaps compelling’ interest,” Principal Morse was justified in punishing speech that she reasonably believed was promoting illegal drug use.<sup>79</sup>

#### A. A Plethora of Views

The *Bong Hits* Court was deeply divided, with fissures even within the five-member majority. Justices Kennedy and Alito, speaking through the latter, filed a concurring opinion that severely qualified their “join” on the express understanding that the majority opinion “goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use.”<sup>80</sup> Other, less limited restrictions would not be justified. For example, both Justices rejected a rule that would permit public school officials to “censor any student speech that interferes with a school’s

---

of rules during the regular school program”).

<sup>75</sup> *Morse*, 127 S. Ct. at 2622.

<sup>76</sup> *Id.* at 2626 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

<sup>77</sup> *Id.* at 2626-27 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

<sup>78</sup> *Id.* at 2625.

<sup>79</sup> *Id.* at 2625, 2628 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

<sup>80</sup> *Id.* at 2636 (Alito, J., concurring).

‘educational mission.’”<sup>81</sup> In their view, local school officials do not stand *in loco parentis* and possess no general license to ban speech.<sup>82</sup> Even banning speech advocating illegal drug use was, for Justices Kennedy and Alito, “at the far reaches of what the First Amendment permits” local officials to do.<sup>83</sup>

Both Justices repudiated *Fraser*’s vision of public education as entrusted to local school boards for the sake of communitarian values. To the contrary, their opinion reflected a profound suspicion of local power centers. As Justice Alito opined:

This argument [that school officials can censor student speech interfering with a school’s “educational mission”] can easily be manipulated in dangerous ways . . . . The “educational mission” of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.<sup>84</sup>

For this reason, neither Justice Alito nor Justice Kennedy embraced the view that public education’s purpose is to instill in children the habits and manners of civility.

These two pivotal Justices were not alone in rejecting the traditional view of education that emphasized habits and manners of civility in public schools. The dissenters also rejected a communitarian educational objective. Justice Stevens, who had also dissented in *Fraser*, sharply disagreed with the *Bong Hits* majority. Joined by Justices Ginsburg and Souter, Justice Stevens argued that Frederick’s “nonsense” banner constituted protected speech.<sup>85</sup> As such, the Chief Justice-led majority, from Justice Stevens’ perspective, did “serious violence to the First Amendment.”<sup>86</sup> The dissenters gave no credit to the majority’s claim that it was, at bottom, protecting students from messages advocating illegal drug use.

In all, *Bong Hits* generated no fewer than five opinions. Notably, all but one ignored or rejected the historic communitarian role of public schools. Chief Justice Roberts’ majority opinion rested on the narrow

---

<sup>81</sup> *Id.* at 2637.

<sup>82</sup> *Id.* at 2637-38.

<sup>83</sup> *Id.* at 2638.

<sup>84</sup> *Id.* at 2637.

<sup>85</sup> *Id.* at 2644 (Stevens, J., dissenting).

<sup>86</sup> *Id.*

point that the banner encouraged illegal drug use. Apart from acknowledging that “Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use,” the Chief Justice never mentioned the history or purpose of public schools, a topic that was the thematic emphasis of both Justice Black in his *Tinker* dissent and Chief Justice Burger in *Fraser*.<sup>87</sup> Likewise, Justices Alito and Kennedy, in their concurrence, repudiated notions of education infused with communitarian purposes — a notion central to *Fraser*’s holding.<sup>88</sup> Indeed, the two concurring Justices expressed misgivings in granting school officials power to ban any speech, even when the speech promotes illegal drug use.<sup>89</sup>

Only Justice Thomas, who joined the majority but filed a separate concurrence, openly reflected on the original purposes of the public school system. While embracing the majority’s limited holding (that public school officials could prohibit speech that advocated illegal drug use), Justice Thomas made it abundantly clear that he would have gone much further.<sup>90</sup> Indeed, he would have jettisoned *Tinker* entirely.<sup>91</sup> Drawing from historical sources and early case law, Justice Thomas opined that “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”<sup>92</sup> In considering the Colonial and early American eras, Justice Thomas noted that no schools “respected [the free speech] rights [of students] and [no] courts [ever] enforced them.”<sup>93</sup> At that time, according to Justice Thomas, “no one doubted the government’s ability to educate and discipline” the children in their care.<sup>94</sup> Indeed, “teachers instilled ‘a core of common values’ in students and taught them self-control.”<sup>95</sup> Like Chief Justice Burger, who had rhapsodized schools as the means of teaching communitarian values, Justice Thomas emphasized that, historically, “[r]ules of etiquette were enforced [in early public schools], and courteous behavior was demanded.”<sup>96</sup> Specifically, students were punished for

---

<sup>87</sup> *Id.* at 2628 (majority opinion).

<sup>88</sup> *See id.* at 2637 (Alito, J., concurring).

<sup>89</sup> *See id.* at 2638.

<sup>90</sup> *See id.* at 2636 (Thomas, J., concurring).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2630.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (quoting REESE, *supra* note 36, at 23).

<sup>96</sup> *Id.* at 2631.

“behavior the school considered disrespectful or wrong.”<sup>97</sup> Justice Thomas continued, “[T]eachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”<sup>98</sup> In his view, it was (and remains today) the sole authority of local school officials to determine what behavior and what speech is acceptable in the school environment. *Tinker*, as he saw it, had no basis in the Constitution.<sup>99</sup>

### B. A Muddled Result

The *Bong Hits* case has, in effect, discarded *Fraser*’s rationale. As all but Justice Thomas’s opinion in *Bong Hits* suggest, the Supreme Court no longer recognizes public education as a source of inculcating virtue and transmitting communitarian values. The vision of Jefferson, Adams, and Webster, and of Justice Black, Chief Justice Burger, and today, Justice Thomas, is moribund. Through *Bong Hits*, the nation’s highest court has replaced their communitarian vision with a thoroughly libertarian notion.

As I have written elsewhere, this libertarian approach to public education reflects a deep-seated Hamiltonian distrust of local authority.<sup>100</sup> Justices Alito and Kennedy share the suspicion that school officials will employ this authority to further the (perhaps highly politicized) worldviews of those in power rather than using it to inculcate abiding values such as virtue and civility. Chief Justice Roberts may harbor the same concern. This skeptical view of modern public education harbors no misgivings about erring on the side of liberty. It is better for a student disrupt the process of inculcating the habits and manners of civility than to permit a school administrator to censor student speech.

### CONCLUSION

Now a quarter century after Chief Justice Burger’s opinion, Matthew Fraser — the plaintiff in *Fraser* — serves as a debate coach at Stanford University.<sup>101</sup> There seems little reason to doubt that if Fraser were to

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 2630.

<sup>100</sup> See Kenneth W. Starr, *Our Libertarian Court: Bong Hits and the Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 8-10 (2008).

<sup>101</sup> David Hudson, *Matthew Fraser Speaks Out on 15-year-old Supreme Court Free-Speech Decision*, FREEDOMFORUM.ORG, Apr. 17, 2001, <http://www.freedomforum.org/>



mount his federal constitutional claim today, the Roberts Court would be inclined to rule in his favor. Despite the fact that Fraser's speech constituted "an elaborate, graphic, and explicit sexual metaphor," the Roberts Court would likely conclude that the interest of protecting students' on-campus freedom of expression trumps an interest in preserving a traditional atmosphere of civility in schools.

For over two centuries, statesmen, educators, and citizens shared a communitarian vision of public education. Schools were in the business of training the next generation of citizens for participation in American democracy. It seems, with the clarity of hindsight, that *Tinker* changed all that. Although Justice Black's dissent in *Tinker* (lifting up the orthodox, communitarian vision of education) was later embraced in *Fraser*, only one member of the current Roberts Court now adheres to the belief that the historic, "civilizing" purpose of America's school systems is the guiding standard behind student speech rights. Justice Thomas stands alone. *Fraser's* normative vision is dead.<sup>102</sup> Individual liberty reigns supreme. Justice Fortas and the *Tinker* Court would be very pleased indeed.

---

templates/document.asp?documentID=13701.

<sup>102</sup> Supreme Court jurisprudence aside, the communitarian vision of education is not dead. The California legislature, for example, has charged public schools with the task of moral instruction. According to CAL. EDUC. CODE § 233.5(a) (West 2008), "Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, and the meaning of equality and human dignity . . . ." As part of this endeavor, teachers are also encouraged to teach students "to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of a free government." *Id.* California has even recognized the month of October as Character Education Month. California Dep't of Educ., Character Education Month, <http://www.cde.ca.gov/ls/yd/ce/cemonthletter.asp> (last visited Oct. 14, 2008). In light of these legislative pronouncements, remnants of the communitarian vision of education clearly remain, at least on paper. Though the California Department of Education might not always demand strict adherence to the requirements of the California Education Code, the goals have been set and, until this time, have not been modified. Classical notions of education have certainly left their traces to this very day.