POINT OF VIEW

The Roberts Court and Academic Freedom

By MARK C. RAHDERT

Since President Bush named Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. to the Supreme Court, speculation has run high as to where the new court may be headed. The Roberts court's second term, which came to an end last month, sent signals that are loud, clear, and unabashedly conservative — as it moved the law sharply to the right on a number of constitutional fronts. One of the most important decisions for higher education was Morse v. Frederick, a case regarding the scope of First Amendment protection for student speech.

In Morse, an 18-year-old high-school student was disciplined for displaying a banner that read "Bong Hits 4 Jesus" at a school-supported event taking place near the campus. The court ruled in a 5-to-4 decision that the school could punish the student solely because the banner conflicted with a school policy opposing illegal drug use. While the justices debated what the banner actually meant, Chief Justice Roberts held that it was reasonable for the school administration to conclude that it advocated illegal drug use, contrary to the school's stated drug policy, and to punish the student because of that message's potential to undermine that policy. By so ruling, the court limited Tinker v. Des Moines Independent Community School District, a Vietnam-era precedent that upheld the rights of students to wear black armbands protesting the war.

Although Morse involved public schools, Supreme Court decisions have recently blurred the distinction between schools and higher education, particularly when, as in this case, high-school students only slightly less mature than their college counterparts are involved. The court's argument that school officials had a responsibility "to protect those entrusted to their care from the dangers of drug abuse," which justified suppression of a student message "celebrating illegal drug use," could just as plausibly apply to colleges. So could the court's deference to the interpretation by school authorities of the student speech's impact on school policy. What the court has said about the authority of high schools to restrain student speech may encourage college administrators to do the same.

If Morse stood alone, it might not be particularly worrisome, but it comes on top of several previous Roberts court decisions that also limited free speech in ways that could adversely affect higher education. One that directly involved colleges was Rumsfeld v. Forum for Academic and Institutional Rights, Inc., which upheld the power of Congress
to require colleges to give what is effectively "most favored recruiter" status to the U.S. military — thus overriding university policies that otherwise prohibit campus recruiters from employment discrimination based on sexual orientation.

The lower court had determined that the federal requirement violated university rights of free speech and association by forcing colleges to disavow their own policies opposing a form of discrimination they believed to be both irrational and unjust. Reversing, the Supreme Court disputed the notion that the rights of speech and association of the affected institutions were even implicated.

Instead, the court concluded that recruiting is conduct, not speech, and that any lingering speech interest in the underlying institutional policies could be adequately protected by the ineffectual, in my view, means of lodging protests when military recruiters came to interview. The decision appears to narrow the "speech" components of higher education, divorcing formal instruction and research from other "auxiliary" aspects, like job placement. The decision thus invites lower courts and legislatures to disregard the less formal aspects of college expression, relabeling them as "conduct" and subjecting them to intensive outside control.

Even more disturbing is the court's decision in Garcetti v. Ceballos, another 5-4 decision in which (as in Morse) the two Bush appointees voted with the majority. Garcetti concluded that speech by government employees that occurs pursuant to their employment duties simply is not protected by the First Amendment. The case involved alleged employer retaliation against a government lawyer working as a prosecutor who objected to his superiors about what he believed to be misrepresentations in an affidavit used to obtain a search warrant. The court held that even though the matter in question was one of public concern, the employee was entitled to no constitutional protection because his speech had occurred in the course of his assigned duties rather than as "citizen" speech outside them.

The court issued a deliberately broad ruling that would apply to government employees in general. Although the court did not determine how the rule applies to higher education, the decision nonetheless raises the prospect that faculty and staff members at public universities will witness a sharp retraction in the scope of academic freedom protected by the First Amendment. Most faculty academic expression occurs within, not outside, the course of employment.

Already, lower courts have applied the Garcetti rationale to rule that college staff members without faculty appointments enjoy no First Amendment protection for employment-related speech. Other lower courts have asserted that academic-freedom rights, to the extent they are protected at all, belong to the institution and not to individual faculty members or students. How the courts might rule in the case of a faculty member facing job discrimination based on the content of her teaching or research is still uncertain, but there is substantial tension between Garcetti and previous decisions treating faculty academic freedom as a First Amendment value.
Taken together, the three decisions suggest a potentially sharp retraction of constitutional protection for academic debate and inquiry. Their logic would support punishing student speech that conflicts with important institutional values, punishing faculty speech that occurs in the course of employment, and punishing the university itself if it fails to comply with external commands regarding the conduct of its auxiliary activities. In the background lie further questions about the powers of external government agencies to exert even greater control.

Such developments occur when the very concept of academic freedom is under fire. In the aftermath of the September 11 attacks, public reaction to the dangers of international terrorism generated an atmosphere of intolerance for political dissent. Higher education, with its concentrations of foreign students and scholars, became a visible and vulnerable target. Although the fever pitch of public reaction has moderated over time, the negative effects have persisted, including investigations of faculty members and students thought to have questionable beliefs, associations, or sympathies. The notorious case involving Ward Churchill and the University of Colorado is perhaps the best-known example.

This period of mini-neo-McCarthyism has also produced attempts like the proposals for so-called academic bills of rights to limit university autonomy in setting policies toward academic freedom. Under the guise of ensuring diversity of opinion, such measures would open the door to legislative and judicial oversight of campus hiring, teaching, and scholarship replacing the natural process of the university's marketplace of ideas with an artificial predetermined notion of intellectual "balance." Although those proposals have had limited success, a new effort of the same ilk dubbed "intellectual diversity" — essentially a repackaging of the bill-of-rights concept that would presumably lead to some form of "affirmative action" for "underrepresented" viewpoints or ideas — is now under way in several states.

Sixty years ago, the United States faced what then loomed as the grave threat of international Communism. The result was McCarthyism, an obsessive quest led in the Senate by Joseph R. McCarthy but actually conducted by governments at all levels to root out subversive Communist elements that our leaders saw infiltrating hallowed American institutions. Professors, lecturers, researchers, artists, and students who advocated what political leaders regarded as radical views, or who were thought to have questionable political ties (along with the few college administrators brave enough to defend them) suffered at the hands of authorities investigating the "red menace." Many were blacklisted or lost their jobs. Some saw their academic careers destroyed. While the furor eventually died down, the effects on colleges persisted for a generation.

The Supreme Court played an important role in finally bringing the McCarthy period to an end. Although initially reluctant to confront McCarthyism, the court eventually recognized the threat that such demagoguery and tactics posed to civil liberties. A series of decisions extended the protections of the First Amendment to activities of central importance to academe. The court overturned prosecutions for subversive activity based on flimsy evidence, guaranteed constitutional protection for unpopular political ideas, struck down loyalty oaths, prohibited compelled disclosures of political association, and
took other measures that limited government power to prescribe political orthodoxy in academic discourse. In cases involving both faculty members and students, a solid majority of justices, all whom had witnessed McCarthy's demagoguery first hand, recognized that academic freedom itself is entitled to some First Amendment protection.

Will higher education receive similar backing from the Roberts court? Will the Supreme Court reinforce the principles of academic freedom and protect against the dangers of a potentially new form of McCarthyism? Such questions remain open, but the Rumsfeld, Garcetti, and Morse decisions are not encouraging.

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