First Amendment Does Not Require Schools to Tolerate Student Expression That Contributes to the Dangers of Illegal Drug Use: Morse v. Frederick

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The First Amendment Does Not Require Schools to Tolerate Student Expression That Contributes to the Dangers of Illegal Drug Use: Morse v. Frederick

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREEDOM OF SPEECH — The United States Supreme Court held that a student’s right to free speech was not violated when a banner which he displayed at a school event was confiscated by his principal because she reasonably believed that it promoted illegal drug use.


The Olympic Torch Relay for the 2002 Winter Olympic Games in Salt Lake City, Utah was anticipated to pass through Juneau, Alaska on January 24, 2002. As part of one of the segments of the procession, the torchbearers planned on running in front of Juneau-Douglas High School (JDHS). The students and staff were permitted to leave the school and observe the relay from both sides of the street by the petitioner, Deborah Morse, the JDHS principal. Morse deemed the torch relay observation an approved social event or class trip during which the students’ behavior was supervised by teachers and administrative officials.

Respondent, Joseph Frederick, a JDHS senior, was absent from school the morning of January 24, 2002, because of a snowstorm. However, he arrived near JDHS shortly before the torch relay passed the school. Upon arriving and before entering JDHS, Frederick joined several of his friends on the sidewalk across the street from the school to wait for the torch relay. There was some mayhem among the students before the torch passed, as evidenced by students throwing plastic cola bottles, tossing snowballs, and

2. Morse, 127 S. Ct. at 2622.
3. Id.
4. Id.
5. Frederick v. Morse, 439 F.3d 1114, 1115 (9th Cir. 2006). The Ninth Circuit characterizes Frederick’s tardiness as “never making it to school that morning.” Frederick, 439 F.3d at 1115. The United States Supreme Court, in its presentation of the facts of the case, simply reported that Frederick was late to school the day of the incident resulting in the claim. Morse, 127 S. Ct. at 2622.
6. Morse, 127 S. Ct. at 2622.
7. Id.
fighting with each other. Frederick and his group did not participate in this disorder. Instead, they waited until the torchbearers and camera crews passed by and then unfurled a fourteen-foot banner which displayed the phrase “BONG HiTS 4 JESUS.” The students on the other side of the street were able to read the banner, and Morse immediately crossed the street and directed Frederick and his group to take down the banner.

Everyone followed the direction except Frederick, who asked Morse about his rights under the United States Constitution. Morse later informed Frederick that the banner violated the JDHS policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. Morse then took the banner and crumpled it up. After Morse confiscated the banner, she instructed Frederick to report to her office. While in Morse’s office, Frederick refused to divulge the names of the other students who were holding up the banner. Frederick also claimed that Morse suspended him for five days, but increased his suspension to ten days after he quoted Thomas Jefferson on the freedom of expression.

Frederick utilized the administrative appeals process available to him through the school district to dispute the suspension. The superintendent upheld the suspension, but limited it to time served, or eight days. Frederick appealed the superintendent’s decision to the Juneau School District Board of Education, which also upheld the suspension.

8. Frederick, 439 F.3d at 1115-16.
9. Id.
10. Morse, 127 S. Ct. at 2622.
11. Id.
12. Frederick, 439 F.3d at 1116.
13. Id.
14. Id.
15. Morse, 127 S. Ct. at 2622.
16. Frederick, 439 F.3d at 1116.
17. Id.
18. Morse, 127 S. Ct. at 2623.
19. Id. In a memorandum explaining his reasons for upholding the suspension, the superintendent noted that Frederick had displayed the banner at a school-sponsored event during school hours and in the presence of other students. Id. He also added that Frederick was not suspended because the principal of the school “disagreed” with his speech, but because the banner appeared to promote illegal drug use. Id. Finally, the superintendent concluded that the principal’s actions were permitted because displaying the banner interfered with the work of the school. Id.
20. Id.
Frederick, claiming that his First Amendment rights were violated by the principal and school board, filed suit under 42 U.S.C. § 1983 and sought declaratory and injunctive relief, compensatory damages, punitive damages, and attorney’s fees. In her answers to interrogatories, Morse never contended that the display of the banner disrupted or could have disrupted classroom work. Rather, Morse argued that the banner interfered with the educational process because it could have been construed as advocating illegal drug use, which was inconsistent with the school district’s mission to promote a healthy, drug-free lifestyle. Morse also indicated that failure to address the display of the banner would have given the impression that the district approved of the message. If this impression were realized, Morse feared it would result in further inconsistencies with the district’s obligation to teach the students socially appropriate behavior.

The United States District Court for the District of Alaska granted summary judgment for Morse and held that she was entitled to qualified immunity. Additionally, the district court found that Morse had not violated Frederick’s First Amendment rights because, in confiscating the banner, Morse reasonably perceived the banner’s message as promoting illegal drug use and in direct contradiction of the JDHS’s policy involving the prevention of drug abuse.

Frederick appealed, and the United States Court of Appeals for the Ninth Circuit reversed, holding that Morse was not entitled to

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22. Frederick, 439 F.3d at 1116.
23. Id.
24. Id.
25. Id.
26. Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *2 (D. Alaska May 29, 2003). Government officials performing discretionary functions are given qualified immunity and are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
27. Petition for Writ of Certiorari at 36a-38a, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278).
28. Frederick, 439 F.3d at 1123.
qualified immunity and that Frederick's First Amendment rights were violated when his banner was confiscated and when he was subsequently punished for displaying it. The court of appeals reasoned that Frederick's punishment for displaying his banner should be reviewed under the standard set forth in *Tinker v. Des Moines Independent Community School District*, which required the speech in question to cause the likelihood of a substantial disruption to a school's educational mission to justify the censorship and punishment of such speech. In reaching its holding, the court noted Morse's admission that the sole reason for banning Frederick's speech was because it conflicted with the school's objective of discouraging drug use. The court, therefore, held that Morse's reason failed to meet the standard outlined in *Tinker*. Additionally, the defense of qualified immunity was rejected because, in the court's opinion, Frederick's constitutional right to display the banner was so obviously established that a reasonable principal in Morse's position would have understood that her actions were unconstitutional.

Frederick appealed to the United States Supreme Court, which granted certiorari on two questions. The first was whether Frederick had a First Amendment right to display his banner. The second was whether this right was so clearly established that Morse could be held liable for damages. Because the majority resolved the first question against Frederick, they found no need to address the second.

Chief Justice Roberts, writing for the majority, began his analysis by addressing Frederick's argument that this was not a school speech case. Frederick argued that since the students were released from school that day to watch a private event, parental permission slips were not required for release from the school for the event (as was the routine for field trips and other supervised

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30. *Frederick*, 439 F.3d at 1123.
31. *Id*.
32. *Id*.
33. *Id.* at 1123-25.
34. *Morse*, 127 S. Ct. at 2624.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
events off the school premises), and the banner display was off of school property, Frederick's speech was not made at school.\textsuperscript{39} As support for Frederick's argument, other students filed affidavits which indicated that they were simply released from school, not required to stay with the school group or with their teachers, and were not stopped from leaving.\textsuperscript{40} However, Chief Justice Roberts rejected Frederick's argument that this was not a school speech case, considering that the event had occurred during normal school hours, was approved by the principal, was supervised by teachers and administrators, and was accompanied by the performance of the high school band and cheerleaders.\textsuperscript{41}

The opinion proceeded to declare that dismissing the banner as meaningless and funny, as contended by Frederick, would ignore its unquestionable reference to the promotion of illegal drugs.\textsuperscript{42} Correspondingly, the Court narrowed the question to whether a principal may restrict speech at a school event when that speech is reasonably viewed as promoting drug use.\textsuperscript{43}

The Court referenced Tinker,\textsuperscript{44} which held that student speech may not be restricted by school officials unless it is reasonably perceived as significantly disrupting the work and discipline of the school.\textsuperscript{45} The majority then examined Bethel School District No. 403 v. Fraser,\textsuperscript{46} a case which involved the suspension of a student for delivering a high school assembly speech which included a sexually graphic metaphor.\textsuperscript{47} Although the method of analysis in Fraser was not entirely clear, two basic principles were extracted from it.\textsuperscript{48} First, the constitutional rights of students in public

\textsuperscript{39} Frederick, 439 F.3d at 1116.
\textsuperscript{40} Id.
\textsuperscript{41} Petition for Writ of Certiorari at 22-23, Morse, 127 S. Ct. 2618 (No. 06-278). Furthermore, the Court agreed with the superintendent's assertion that Frederick could not "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." Id. at 63a.
\textsuperscript{42} Morse, 127 at 2625. The majority suggested that the words on the banner could be interpreted as an imperative ("take bong hits") or as celebrating drug use ("bong hits are a good thing" or "we take bong hits"). Id.
\textsuperscript{43} Id.
\textsuperscript{44} 393 U.S. 503 (1969). The court in Tinker also recognized that if the only interest a school identifies in restricting political speech is to avoid the discomfort associated with an unpopular viewpoint, then that interest is not enough to justify the banning of a silent and passive expression of opinion. Id. at 509 (quoting Tinker, 393 U.S. at 508 ("a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").
\textsuperscript{45} Morse, 127 S. Ct. at 2626 (citing Tinker, 393 U.S. at 514).
\textsuperscript{46} 478 U.S. 675 (1986).
\textsuperscript{47} Morse, 127 S. Ct. at 2626 (citing Fraser, 478 U.S. at 678).
\textsuperscript{48} Id.
schools are not necessarily the same as those of adults in other situations.\textsuperscript{49} Second, \textit{Tinker}'s method of analysis is not absolute in that the \textit{Fraser} court did not conduct the substantial disruption test prescribed by \textit{Tinker}\.\textsuperscript{50}

Morse encouraged the Court to apply the broader rule from \textit{Fraser} and to conclude that Frederick's speech could be banned because it was "offensive," as the term was used in \textit{Fraser}\.\textsuperscript{51} The majority believed that this would extend the \textit{Fraser} standard too far and that \textit{Fraser} should not be interpreted to include all speech that falls under the definition of "offensive."\textsuperscript{52} Additionally, the Court noted that the issue was whether the speech could be reasonably perceived as promoting illegal drug use, not whether it was offensive.\textsuperscript{53}

Chief Justice Robert's analysis also recognized the principle that even though children do not lose their constitutional rights in school, such rights are characterized by what is appropriate for children while in school.\textsuperscript{54} Additionally, Chief Justice Roberts acknowledged the compelling interest that a school has in deterring drug use by schoolchildren.\textsuperscript{55} The majority noted that Congress required that schools that receive funds under the Safe and Drug-Free Schools and Communities Act of 1994 confirm that their drug prevention programs communicate an authoritative message that using illegal drugs is wrong and harmful.\textsuperscript{56} Additionally, Congress instructed that it is a part of a school's job to educate students about the dangers of illegal drugs.\textsuperscript{57}

The Court's conclusion that schools should be allowed to restrict student speech reasonably perceived to be promoting illicit drug use was supported by the interest of government in curbing drug abuse by students in school and the special qualities of the school environment.\textsuperscript{58} Because this distinct concern of preventing drug abuse was included in JDHS's school policy, the majority deter-

\begin{footnotes}
\begin{itemize}
\item[49.] \textit{Fraser}, 478 U.S. at 682.
\item[50.] Morse, 127 S. Ct. at 2627 (citing \textit{Fraser}, 478 U.S. at 676).
\item[51.] Id. at 2629.
\item[52.] Id.
\item[55.] Id.
\item[54.] Id. at 2627 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)).
\item[55.] Morse, 127 S. Ct. at 2628.
\item[56.] Id. (quoting Safe and Drug-Free Schools and Communities Act, 20 U.S.C. § 7114(d)(6) (Supp. IV 2004)).
\item[57.] Id.
\item[58.] Id. at 2629.
\item[59.] Id.
\end{itemize}
\end{footnotes}
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mined that Morse’s restriction of Frederick’s speech extended beyond a simple desire to circumvent controversy.59

Considering the determination that Frederick’s banner constituted the promotion of illegal drug use, the unique characteristics of the school environment, and the distinct interest a school has in discouraging illegal drug abuse, the majority finalized its opinion by proclaiming that the First Amendment did not require schools to tolerate student expression at school events that contributed to the dangers of illegal drug use.60

Justice Thomas wrote a concurring opinion.61 In his opinion, Justice Thomas stated that the rule of law established in Tinker is without Constitutional basis.62 In his opinion, the original understanding of the First Amendment did not protect student speech in public schools.63 Justice Thomas reasoned that if students were originally understood to have First Amendment rights in public schools, these rights would have been respected and enforced in public schools in the nineteenth century.64

However, Justice Thomas noted that these rights were not enforced.65 Therefore, Justice Thomas placed significant emphasis on the doctrine of in loco parentis.66 According to Justice Thomas, the doctrine only prevented schools in the nineteenth century from imposing excessive physical punishment on the student; otherwise, there were no limits on the school’s ability to set rules and control their classrooms.67 Consequently, courts frequently preserved the rights of teachers to restrict speech that they thought was not in accordance with the school’s educational goals.68 Justice Thomas concluded by noting that Tinker utterly ignored this

60. Morse, 127 S. Ct. at 2629.
61. Id. at 2636 (Thomas, J., concurring).
62. Id. at 2630.
63. Id. Justice Thomas noted that the Court has previously observed that “the First Amendment was not originally understood to permit all sorts of speech; instead ‘[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.’” Id. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).
64. Id.
65. Morse, 127 S. Ct. at 2630 (Thomas, J., concurring).
66. Id. at 2631. In loco parentis allowed a parent to delegate part of their authority to the school and give it the same power as the parent with regard to restraint and correction.
67. Morse, 127 S. Ct. at 2633 (Thomas, J., concurring).
68. Id. at 2632.
69. Id. at 2636.
70. Id. at 2638 (Alito, J., concurring).
history of public education; thus he could not accept the law that it established.69

Justice Alito filed a separate concurring opinion, which Justice Kennedy joined.70 He advised that the better approach would be to dispense with Tinker altogether instead of adding another exception to it, as he believed the majority had done.71 Justice Alito rejected Justice Thomas’s contention that public school officials, for First Amendment issues, should be treated as if they were private actors standing in loco parentis.72 He recognized that most parents have no choice but to send their children to public schools and that parents have little influence on what occurs in those schools.73 Because of this, any argument for changing the usual rules of free speech must be rooted in the uniqueness of the school environment and not in a theory of delegation.74 In Justice Alito’s opinion, that special characteristic in this case was the threat to the physical safety of the students.75 Because illegal drug use poses a threat to student safety, schools should be able to restrict speech promoting it.76 However, Justice Alito warned that such regulation stands at the “far reaches of what the First Amendment permits.”77

Justice Breyer issued an opinion which concurred in part and dissented in part, arguing that the Court should effectively end the dispute by deciding that Frederick’s claim for monetary damages was prohibited by qualified immunity.78 He contended that the Court should adhere to the basic constitutional obligation of avoiding unnecessary decisions of constitutional questions.79 He proposed that this could be done through the application of qualified immunity which he believed was appropriate in this case.80 Its appropriateness lies in the fact that Morse’s actions when dealing with Frederick were not in plain violation of the law.81

71. Id.
72. Morse, 127 S. Ct. at 2637-38 (Alito, J., concurring).
73. Id. at 2637.
74. Id. at 2638.
75. Id.
76. Id.
77. Morse, 127 S. Ct. at 2638 (Alito, J., concurring).
78. Id. at 2638-43 (Breyer, J., concurring in part and dissenting in part).
79. Id. at 2639-40.
80. Id. at 2640.
81. Id.
82. Morse, 127 S. Ct. at 2642 (Breyer, J., concurring in part and dissenting in part).
83. Id.
84. Id. at 2642-43.
However, Justice Breyer recognized that Frederick initially sought an injunction in addition to damages and that a qualified immunity defense does not apply to requests for injunctive relief.\(^8\) Thus, the constitutional question would apparently still remain.\(^3\) Justice Breyer, however, seriously doubted whether the constitutional question, in actuality, remained because the superintendent, in reducing the suspension of Frederick, noted that several actions independent of Frederick's speech supported the suspension.\(^4\) The superintendent wrote that even if the school were to concede that Frederick's speech was protected, the remainder of his behavior was inexcusable.\(^5\) In essence, the school board's refusal to erase the suspension from Frederick's record could be justified on grounds not related to speech and would not require the Court to resolve the constitutional question.\(^6\)

Justice Stevens dissented and was joined by Justice Souter and Justice Ginsburg.\(^7\) He agreed with the majority that Morse should not be held liable for pulling down Frederick's banner; however, the school's interest in protecting its students from speech reasonably interpreted as promoting illegal drug use does not justify suspending Frederick for making an ambiguous statement in front of television cameras simply because it made an indirect reference to drugs.\(^8\)

The dissent argued that the First Amendment protects student speech as long as it does not violate a school policy or explicitly advocate conduct which is illegal or harmful to students.\(^9\) Justice Stevens claimed that Frederick's expression, which Stevens characterized as a "nonsense banner," did neither.\(^10\) Consequently, the majority, by upholding a school's decision to punish Frederick for expressing a view with which it disagreed, did damage to the First Amendment.\(^11\)

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85. *Id.*
86. *Id.*
87. *Morse*, 127 S. Ct. at 2651 (Stevens, J., dissenting).
88. *Id.* at 2643. Justice Stevens further added that "the First Amendment demands more, indeed, much more." *Id.*
89. *Id.* at 2644.
90. *Id.*
91. *Id.* Justice Stevens opined: "This nonsense banner [neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students], and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed." *Id.*
The United States Supreme Court has long held that students and teachers do not surrender their constitutional rights to freedom of speech upon entering the schoolhouse. This principle was reflected in *Board of Education v. Barnette*, when the Court concluded that, under the First Amendment, a student in a public school could not be compelled to salute the flag. On the other hand, the Court has recognized the need to support State and school authority to control the conduct of students in school as long as such authority is consistent with constitutional rights.

The problem inherent in the collision between the exercise of a student's First Amendment rights and the policies and rules of a school was comprehensively dealt with in *Tinker*. In *Tinker*, the Court concluded that a school could not prohibit student expression simply because it wanted to avoid the controversy which could result from that expression. Based on this conclusion, the Court held that a school can only prohibit student expression if the particular expression would cause a significant disruption in and interference with the operation of the school.

In *Tinker*, a group of adults and students in Des Moines wanted to express their displeasure with the Vietnam War and their support for a truce by wearing black armbands during the holiday season of 1965. The principals of the Des Moines schools were informed of the plan and created a policy to deal with students wearing armbands to school. The policy instructed that any students wearing an armband to school would be requested to remove it; if they refused, they would be suspended until they returned to school without the armband.

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93. 319 U.S. 624 (1943).
94. *Barnette*, 319 U.S. at 637-38. Justice Jackson, writing for the Court, indicated: [Boards of Education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. *Id.* at 637.
96. 393 U.S. 503, 507.
97. *Id.* at 509.
98. *Id.*
99. *Id.* at 504.
100. *Id.*
Two days after the policy was put in place, John Tinker wore his armband to school. Consequently, he was sent home and suspended from school until he would come back without the armband. Tinker returned to school after New Year’s Day.

Tinker, through his father, filed a complaint with the United States District Court, under Section 1983, seeking nominal damages and an injunction preventing the school officials and board of directors from disciplining him. The district court dismissed the complaint and held that the school's actions were a reasonable attempt to prevent disruption to discipline in the school and were therefore constitutional. Tinker appealed, and the Court of Appeals for the Eight Circuit, without written opinion, affirmed the district court's decision.

Tinker then appealed to the United States Supreme Court, which granted certiorari. Justice Fortas, writing for the majority, began his opinion by noting that First Amendment rights are available to students and teachers while in school. In support of this, Justice Fortas emphasized the longstanding holding of the Court that neither students nor teachers abandon their freedom of speech rights upon entering the schoolhouse. However, these rights are considered with regard to the special characteristics of the school environment.

Justice Fortas proceeded to identify the problem in this case as existing in the area where the policies of school officials conflict with students exercising their First Amendment rights. Additionally, Justice Fortas recognized that this case was not one which concerned expression that interfered with the school’s work or other students’ rights. Referencing the district court’s con-
clusion that the school's actions were reasonable because they were rooted in its anxiety surrounding the potential disruption that the armbands could have created, the Court admitted that any student nonconformity may cause trouble or inspire fear.\textsuperscript{114} However, the Court noted that this apprehension is not enough to sacrifice the guarantees of the First Amendment.\textsuperscript{115} There must be something more than the desire to avoid the discomfort that often accompanies an unpopular opinion to justify a school's restriction on a particular type of expression.\textsuperscript{116} That something must rise to the level of presenting a threat of creating significant interference with the administration of discipline in the school.\textsuperscript{117}

The Court's examination of the record uncovered no evidence which could support the conclusion that there was a substantial threat of interference with the discipline of the school or the rights of the other students.\textsuperscript{118} On the contrary, the Court found that the primary reason for the disputed regulation was to avoid controversy.\textsuperscript{119} Before issuing its decision, the majority emphasized that state-operated schools could not institute or enforce policies and rules that result in a totalitarian environment.\textsuperscript{120} Additionally, students in school, as well as out of school, are persons under the Constitution and have fundamental rights included that there was no intrusion on the work of the school or rights of the other students because Tinker's expression was silent and passive and there were no threats or acts of violence on school premises toward him. \textit{Id.}

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 508. Justice Fortas opined:

\begin{quote}
[\textit{A}ny departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take the risk and our history says that this sort of hazardous freedom-this kind of openness-that is the basis of our national strength and of the independence and vigor of Americans who grow up to live in this relatively permissive, often disputatious, society.]
\end{quote}

\textit{Id.} at 508-09.
\textsuperscript{116} \textit{Tinker}, 393 U.S. at 509.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 509.
\textsuperscript{119} \textit{Id.} at 510. There was evidence in the record that the disputed regulation was the product of the school authorities' recognition of the Vietnam War as a source of heated debate in many areas of the United States, as evidenced by protest marches in Washington, D.C. and several draft card burning cases which were pending in the Court. \textit{Id.} The majority also believed it was relevant that other forms of political expression, including the wearing of buttons supporting national political campaigns and the display of the Nazi Iron Cross, were not banned in some of the schools in the district. \textit{Id.}
\textsuperscript{120} \textit{Id.} at 511.
which schools must respect.\textsuperscript{121} Unless there is a constitutionally permissible reason for restricting those rights, students are allowed to express their views.\textsuperscript{122} In \textit{Tinker}, the constitutionally permissible reason for restricting the rights of freedom of expression was determined to be a threat that the expression would have caused a substantial disruption or material interference with school discipline.\textsuperscript{123} Because the Court could find no evidence in the record to support that this threat existed, it concluded that the regulation prohibiting the wearing of the armbands was an unconstitutional denial of Tinker's right of expression.\textsuperscript{124}

The United States Supreme Court confronted a similar issue related to the First Amendment rights of students while in school in \textit{Fraser v. Bethel School District No. 403}.\textsuperscript{125} In \textit{Fraser}, the Court examined whether a school district was prohibited by the First Amendment from suspending a high school student for giving a lewd speech during a school assembly.\textsuperscript{126} Noting that the viewpoints expressed by the student were not political in nature, the majority held the First Amendment does not prevent a school from suspending a student for vulgar and lewd speech after it was determined by the school officials that such speech would adversely affect its educational mission.\textsuperscript{127}

The events that resulted in the Court's holding began when Matthew Fraser, a student at Bethel High School in the state of Washington, gave a speech nominating a fellow student for representation of the student body.\textsuperscript{128} The speech was given during an assembly which was part of a school-sponsored program in self-governance.\textsuperscript{129} In attendance at the assembly were approximately six hundred high school students, many of whom were age fourteen.\textsuperscript{130}

Before giving his presentation, Fraser discussed the contents of his speech with two of his teachers who subsequently warned him of the possibility of dire consequences for giving such a speech.\textsuperscript{131} Despite this warning, Fraser delivered the speech and throughout

\textsuperscript{121} \textit{Tinker}, 393 U.S. at 511.
\textsuperscript{122} \textit{Id}.
\textsuperscript{123} \textit{Id} at 513.
\textsuperscript{124} \textit{Id} at 514.
\textsuperscript{125} 478 U.S. 675 (1986).
\textsuperscript{126} \textit{Fraser}, 478 U.S. at 676.
\textsuperscript{127} \textit{Id} at 685.
\textsuperscript{128} \textit{Id} at 677-78.
\textsuperscript{129} \textit{Id} at 677.
\textsuperscript{130} \textit{Id}.
\textsuperscript{131} \textit{Fraser}, 478 U.S. at 678.
it, referred to his candidate in terms of an elaborate sexual metaphor.\textsuperscript{132}

The following day, the Assistant Principal called Fraser into his office and informed him that his speech was in violation of the school’s disciplinary rule prohibiting the use of obscene language.\textsuperscript{133} Fraser conceded that he gave the speech as described in five letters submitted to the Assistant Principal by teachers who had witnessed the event.\textsuperscript{134} He also admitted that he had purposely used sexually suggestive language in the speech.\textsuperscript{135} In response to these concessions, the Assistant Principal suspended him for three days and informed him that he was not eligible to be considered as a graduation speaker at the school’s commencement.\textsuperscript{136}

Fraser utilized the school district’s grievance procedures and requested review of the suspension.\textsuperscript{137} The hearing officer affirmed the suspension.\textsuperscript{138} After serving two days of his suspension, Fraser was allowed to return to school.\textsuperscript{139}

Fraser brought an action in the United States District Court for the Western District of Washington alleging a violation of his right to freedom of speech under the First Amendment.\textsuperscript{140} The district court held that the school’s rule prohibiting the use of obscene language was unconstitutionally vague and broad and that the suspension of Fraser violated his freedom of speech rights under the United States Constitution.\textsuperscript{141}

The school appealed, and the Court of Appeals for the Ninth Circuit affirmed the judgment of the district court.\textsuperscript{142} The school

\textsuperscript{132} Id. at 677-78. During Fraser’s delivery of the speech, school personnel observed students in the audience becoming unruly in response to the sexual nature of the speech. Id. at 678. The students “hooted and yelled” and made sexual gestures characterizing the activities alluded to in Fraser’s speech. Id. Other students appeared to become embarrassed and confused in response to the speech. Id.

\textsuperscript{133} Id. at 678. The relevant Bethel High School disciplinary rule warned that: “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” Id.

\textsuperscript{134} Id.

\textsuperscript{135} Id.

\textsuperscript{136} Fraser, 478 U.S. at 678.

\textsuperscript{137} Id. at 678.

\textsuperscript{138} Id. at 679.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Fraser, 478 U.S. at 679.

\textsuperscript{142} Id. The court of appeals held that the expression in this case was indistinguishable from the expression in Tinker v. Des Moines, 393 U.S. 503 (1969), and specifically refused to accept the school’s contention that Fraser’s speech, unlike the armbands worn in protest
then appealed to the United States Supreme Court, which granted certiorari. Justice Blackmun, writing for the majority, began his opinion by noting the lack of significance given by the court of appeals to the substantial distinction between the political message of the protest armbands in *Tinker* and the sexual content of Fraser's speech in this case. He also believed it was appropriate to analyze the amount of First Amendment protection that should be given to Fraser's speech against the background established in *Tinker*. This background was characterized by the Court in *Tinker* taking special care to note that the case did not involve expression that intruded upon the school's work or other student's rights.

Justice Blackmun recognized that schools have an interest in shielding minors from exposure to sexually explicit expression. Additionally, the majority stressed that the role of schools in the United States in shaping the minds of students is not limited to education through textbooks and lecture. That role also includes teaching the values of a civilized social order by example. Consequently, both teachers and older students must accept the responsibility of role models and demonstrate the appropriate form of civil discourse. Based on this reasoning, the Court concluded that it is legitimate for a school to determine that mature civil conduct and political expression are not demonstrated by tolerating the expression of lewd, offensive speech. Accordingly, the Court held that an appropriate function of school policy and regulations is to limit lewd and vulgar expression that is opposed to the "fundamental values" inherent in public school education.

A violation of First Amendment rights was also asserted by student staff members of a high school newspaper in *Hazelwood School District v. Kuhlmeier*. The issue in *Kuhlmeier* was to

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143. *Fraser*, 478 U.S. at 679.
144. *Id.* at 680.
145. *Id.* at 681.
146. *Id.* at 680.
147. *Id.* at 684.
149. *Id.*
150. *Id.*
151. *Id.* at 685.
152. *Id.*
what extent a school could assume editorial control over a school-sponsored newspaper. The Court answered this by holding that a school could exercise editorial control over the content of student speech in school-sponsored activities without violating the First Amendment as long as the school’s actions were reasonably related to its educational mission. Writing for the majority, Justice White, however, recognized the limited applicability of both Tinker and Fraser, since the standards set forth in those cases did not extend to articles included in a school-sponsored newspaper.

The majority in Morse recognized the limited application of Kuhlmeier to the circumstances in Morse. The Court also observed that the precedent established by the Tinker and Fraser decisions did not necessarily cover the particular concern to prevent drug abuse at issue in Morse. As Justice Scalia aptly noted in his concurring opinion, the majority instead added another exception to the Tinker standard.

Regardless of whether the holding in Morse borrowed from earlier precedent or established an additional exception, the Court miscalculated in its interpretation of Frederick’s banner as promoting illegal drug use and consequently appropriately subjected to restriction. The assertion that the phrase “Bong HiTS 4 Jesus” advocates illicit drug use and is thus capable of being restricted without violating the First Amendment is suggestive of a position which leaves limits on further restriction of speech amorphous.

This position is dangerous because it leaves open the possibility for further restrictions as long as a school official reasonably believes that certain student expression advocates the use of illicit substances. School officials as well as instructors are surely devoted to the laudable goal of shaping the moral and cognitive minds of today’s youth. However, it is a mistake to overlook the possibility that the responsibility for the order of a large group of teenagers can inevitably and frequently result in quick and swift decision-making, which occasionally is not grounded in reasonableness for First Amendment purposes.

In Morse, the Court concluded that it was reasonable for a school official to believe that the ambiguous phrase on Frederick’s

155. Id. at 273.
156. Id. at 270.
158. Morse, 127 S. Ct. at 2629.
159. Id. at 2636 (Scalia, J., concurring).
Morse v. Frederick

banner promoted illegal drugs. The Court based this conclusion on its reasoning that the phrase could be interpreted in at least two distinct ways which demonstrated that it advocated the use of illegal drugs. First, the court proposed that the phrase "Bong HiTS 4 Jesus" could be perceived as an instruction to take bong hits, or as Morse suggested, "smoke marijuana." Alternatively, the Court indicated that the banner could be viewed as a celebration of illegal drug use because it could be understood as proclaiming that bong hits are a "good thing." Additional support for the Court's conclusion came from Morse's explanation for confiscating the banner. When Morse saw the sign, she thought that the reference to a bong hit would be widely understood by other students as referring to smoking marijuana.

Morse's belief that Frederick's banner would be widely understood by other students as referring to illegal drug use is anything but a reasonable belief. In fact, it is a cynical and pessimistic perception of her student body and their extracurricular activities. Morse provided no additional support for her belief that the banner was widely understood by the student body to mean what she thought it to mean. The record displayed no evidence that illegal drug abuse was a widespread problem at the school or testimony from other students present at the function indicating that they applied the same meaning to the banner as did Principal Morse.

If anything, Morse's interpretation of the banner was an irrational assumption rooted in an "undifferentiated fear or apprehension of disturbance." This fear was caused by the atmosphere present while the students waited for the torch relay to pass. There was a report in the record that not all of the students were waiting patiently. Some of the students began throwing coke bottles and snowballs at each other while others got into fights. This description suggested that the atmosphere at the time was on the threshold of anarchy and the proverbial "last straw" for Morse was Frederick unfurling his "Bong HiTS 4 Jesus" banner. In an attempt to maintain order based on her fear that the chaos would

160. Id. at 2625 (majority opinion).
161. Id.
162. Id.
163. Morse, 127 S. Ct. at 2625.
164. Id. at 2624-25.
165. Id.
166. Tinker, 393 U.S. at 508.
167. Morse, 127 S. Ct. at 2621.
168. Morse v. Frederick, 439 F.3d 1114, 1115 (9th Cir. 2006).
become utterly unbridled, Morse acted impulsively and directed her energy into subduing an activity for which there was no basis that it was contributing to the disruption. The totality of the circumstances resulted in Morse hastily concluding that a nonsensical banner said much more than it actually did. The Court subscribed to this hasty conclusion and expounded with its own thin interpretation that the banner contained hidden meanings while acknowledging that the message was "cryptic." As Justice Stevens remarked in his dissenting opinion, "it takes real imagination to read a 'cryptic' message (the [majority's] characterization, not [his]) with a slanting drug reference as an incitement to drug use."

As the majority in Tinker noted, the type of fear which motivated Morse’s response is not enough to usurp the right to freedom of expression. The Constitution says that this fear must be suppressed and the risk involved in expression that induces such apprehension taken, because this is the sort of perilous freedom that produces our national fortitude and the vigor of Americans. Additionally, the suggestion that the message was widely understood by the student body as advocating illegal drug use is an unnecessary and unfounded cynical view of those students. Even if some of the students did comprehend the reference, they would recognize absurd advocacy when they see it, and "the notion that the message on [the] banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible." As Justice Stevens noted in his dissenting opinion, the fact that the majority believed that this nonsensical banner advocated illegal drug abuse is indicative of the novelty of its argument and evokes the possibility that "the principle it articulates has no stopping point." In other words, the majority’s decision creates a slippery slope for one of the most fundamental freedoms on which our culture thrives and continuously evolves.

Charles Chulack

169. Morse, 127 S. Ct. at 2649 (Stevens, J., dissenting).
170. Id.
171. Tinker, 393 U.S. at 508.
172. Id. at 508-09.
173. Morse, 127 S. Ct. at 2649 (Stevens, J., dissenting).
174. Id.