

MORSE V. FREDERICK: THE UNITED STATES SUPREME COURT APPLIED THE STANDARD FOR SCHOOL-SPONSORED SPEECH TO INDEPENDENT STUDENT SPEECH

INTRODUCTION

For over thirty-five years, the United States Supreme Court has recognized students do not relinquish their rights to free speech at the schoolhouse gate.¹ The Supreme Court has additionally acknowledged students' constitutional rights in schools are not coextensive with adults' constitutional rights in other settings.² In the first student speech case balancing these two principles, *Tinker v. Des Moines Independent Community School District*,³ the Court determined schools could only censor student speech if the speech materially and substantially conflicted with the school's work or with other students' rights.⁴

In *Morse v. Frederick*,⁵ the United States Supreme Court held that a school official could suppress a student's speech the school official reasonably regarded as advocating illegal drug use.⁶ In *Morse*, Juneau-Douglas High School ("JDHS") Principal Deborah Morse ("Morse") punished JDHS senior Joseph Frederick ("Frederick") for holding up a banner at the Olympic Torch Relay that read "Bong Hits 4 Jesus."⁷ The Court determined Morse reasonably regarded Frederick's sign as advocating illegal drug use because Frederick's banner was susceptible to at least two pro-drug interpretations.⁸ The Court reasoned that although Frederick's banner could be interpreted as funny, offensive, or meaningless, two interpretations were "bong hits are a good thing" and "we take bong hits," both of which encouraged illegal drug use.⁹ The Court concluded Morse legally confiscated

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (*Tinker III*), 393 U.S. 503, 506 (1969).

2. *Bethel Sch. Dist. No. 403 v. Fraser* (*Fraser II*), 478 U.S. 675, 682 (1986).

3. 393 U.S. 503 (1969); Lynn Mostoller, *Freedom of Speech and Freedom From Student-on-Student Sexual Harassment in Public Schools: the Nexus Between Tinker v. Des Moines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N.M. L. REV. 533, 535 (2003).

4. *Tinker III*, 393 U.S. at 509.

5. 127 S. Ct. 2618 (2007).

6. *Morse v. Frederick* (*Morse III*), 127 S. Ct. 2618, 2622 (2007).

7. *Morse III*, 127 S. Ct. at 2622.

8. *Id.* at 2624, 2625.

9. *Id.*

Frederick's banner and suspended Frederick because Morse reasonably regarded Frederick's banner as advocating illegal drug use.¹⁰

This Note will first examine the facts and holding of *Morse*.¹¹ This Note will then discuss Supreme Court precedent concerning student speech.¹² Further, this Note will demonstrate that the Court in *Morse* deviated from precedent by allowing schools to restrict student speech based on the speech's content, rather than allowing schools to restrict student speech based on the context and manner in which the student delivered the speech.¹³ This Note will additionally illustrate that the Court in *Morse* essentially applied the standard for school-sponsored speech, although the Court stated that Frederick's speech was not school-sponsored.¹⁴

FACTS AND HOLDING

In *Morse v. Frederick*,¹⁵ the Olympic Torch Relay (the "Relay") ran through Juneau, Alaska, on its way to the 2002 Olympic Winter Games in Salt Lake City, Utah.¹⁶ Juneau-Douglas High School ("JDHS") permitted its students and staff to leave class to watch the torchbearers.¹⁷ JDHS senior Joseph Frederick ("Frederick"), who had not attended school that morning, joined students and other non-students beyond school grounds to watch the Relay.¹⁸ When the torchbearers passed by, Frederick and his friends held up a sign that read, "Bong Hits 4 Jesus."¹⁹ Frederick stated he intended to catch the television cameras' attention by conveying a message that he thought was funny and meaningless.²⁰

JDHS Principal Deborah Morse ("Morse") immediately demanded that Frederick take the sign down.²¹ After Frederick refused to comply, Morse confiscated the sign.²² Morse suspended Frederick for ten days, stating she believed Frederick violated JDHS School Policy No. 5520, which proscribed public expression that encouraged minors to

10. *Id.* at 2622.

11. *See infra* notes 15-137 and accompanying text.

12. *See infra* notes 138-262 and accompanying text.

13. *See infra* notes 277-94 and accompanying text.

14. *See infra* notes 295-332 and accompanying text.

15. 127 S. Ct. 2618 (2007).

16. *Frederick v. Morse (Morse I)*, No. J 02-008 CV(JWS), 2003 WL 25274689, at *1 (D. Alaska May 27, 2003), *vacated*, 439 F.3d 1114 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

17. *Morse v. Frederick (Morse III)*, 127 S. Ct. 2618, 2622 (2007).

18. *Frederick v. Morse (Morse II)*, 439 F.3d 1114, 1115, 1116 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

19. *Morse I*, 2003 WL 25274689, at *1.

20. *Morse II*, 439 F.3d at 1116.

21. *Morse III*, 127 S. Ct. at 2622.

22. *Id.*

use illegal substances.²³ Morse stated she believed the policy applied to Frederick's off-campus actions because School Policy No. 5850 stated that students who attended class trips and social events must comply with the same rules that applied on-campus and during regular school hours.²⁴ Frederick appealed his suspension to the Juneau School District Superintendent, who reduced his suspension to eight days.²⁵

As a result of his upheld suspension, Frederick sued Morse and the Juneau School Board in the United States District Court for the District of Alaska seeking injunctive and declaratory relief.²⁶ Frederick alleged that Morse violated his First Amendment right to free speech.²⁷ Morse responded that she was exempt from suit based on a qualified immunity defense.²⁸ District Judge John Sedwick reviewed the summary judgment motions that Frederick and Morse filed.²⁹ The district court determined that Morse did not violate Frederick's First Amendment right because Frederick's speech interfered with the school's educational mission.³⁰ The district court further stated that even if Morse had violated Frederick's rights, Morse would have been entitled to qualified immunity because Frederick's right to free speech was not clearly established.³¹

The district court determined that Morse did not violate Frederick's right to free speech because Frederick chose a school-sponsored event as a forum at which to display his sign and because his message interfered with the school's educational mission.³² The district court relied upon *Bethel School District Number 403 v. Fraser*,³³ which determined that a school legally suspended a student for his lewd and indecent speech, reasoning that the student's speech interfered with the school's educational mission.³⁴ While evaluating Frederick's claim, the district court stated that the student in *Fraser* chose a

23. *Id.* at 2622-23. School Policy No. 5520 provided, "The Board will not permit the conduct on school premises of any willful activity . . . that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits . . . any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . ." *Id.* at 2646-47 (Stevens, J., dissenting).

24. *Id.* at 2622-23 (majority opinion).

25. *Id.* at 2623.

26. *Morse II*, 439 F.3d at 1117; *Morse I*, 2003 WL 25274689, at *1.

27. *Morse II*, 439 F.3d at 1114, 1117. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

28. *Morse I*, 2003 WL 25274689, at *1, *2.

29. *Morse II*, 439 F.3d at 1115; *Morse I*, 2003 WL 25274689, at *1.

30. *Morse II*, 439 F.3d at 1114, 1117; *Morse I*, 2003 WL 25274689, at *5.

31. *Morse I*, 2003 WL 25274689, at *2, *3.

32. *Morse II*, 439 F.3d at 1114, 1117; *Morse I*, 2003 WL 25274689, at *5.

33. 478 U.S. 675 (1986).

34. *Morse I*, 2003 WL 25274689, at *2 (quoting *Bethel Sch. Dist. No. 403 v. Fraser (Fraser II)*, 478 U.S. 675, 685 (1986)).

school assembly to deliver an indecent speech that went against the school's basic educational mission by violating established school policy against lewd and obscene language.³⁵ The district court reasoned that *Fraser* controlled Frederick's speech because Frederick chose a school-sponsored event to display his banner and because Frederick's speech interfered with the school's basic educational mission by violating school policy against advocating illegal drug use.³⁶ The district court noted that the Court's holding in *Fraser* applied beyond lewd and obscene language.³⁷ The district court determined that, under *Fraser*, Morse was entitled to confiscate the banner because Frederick's banner interfered with the school's mission.³⁸

In determining that Morse did not violate Frederick's right to free speech, the district court determined that Frederick's message constituted "speech" under the First Amendment, that the Relay was a school-sponsored event, and that Frederick was a student observer of the Relay.³⁹ The district court determined that Frederick's message constituted "speech" under the First Amendment.⁴⁰ The district court noted that in order to warrant First Amendment protection, the speaker must intend to convey a comprehensible message.⁴¹ The district court reasoned that Frederick intended to communicate a message, even though Frederick stated he believed his banner was meaningless, to determine Frederick's banner constituted "speech" under the First Amendment.⁴² The district court reasoned the Relay constituted a school-sponsored event because the event occurred during school hours, and teachers supervised students while they attended the Relay.⁴³ Additionally, the district court stated Frederick was a part of the school-sponsored event, despite his tardiness, because Frederick was under the school's authority when he joined the Relay.⁴⁴ Thus, the district court determined Frederick's case would be analyzed as a First Amendment student speech case because Frederick's banner constituted "speech" under the First Amendment, the Relay was a school-sponsored event, and Frederick was a student observer of the Relay.⁴⁵

35. *Id.* at *2, *5.

36. *Id.* at *5.

37. *Id.*

38. *Id.* at *1, *5.

39. *Morse II*, 439 F.3d at 1117; *Morse I*, 2003 WL 25274689, at *4, *5.

40. *Morse I*, 2003 WL 25274689, at *4.

41. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

42. *Id.*

43. *Id.*

44. *Id.* at *5.

45. *See id.* at *4, *5 (stating Frederick was a part of the school-sponsored event because he was under the school's authority when he joined the Relay).

The district court further determined that Morse was entitled to qualified immunity because Frederick's First Amendment right was not clearly established at the time of the event.⁴⁶ The district court stated that public school officials are entitled to qualified immunity unless their actions violate clearly established constitutional rights.⁴⁷ Frederick alleged that *Tinker v. Des Moines Independent Community School District*⁴⁸ clearly established his First Amendment right.⁴⁹ The district court noted *Tinker*, which held that a school could not constitutionally censor armbands students wore to protest the Vietnam War without showing that wearing the armbands would substantially disrupt the school's work.⁵⁰ The district court noted the speech in *Tinker* did not disrupt the school's work.⁵¹ The district court stated that Morse could reasonably believe *Fraser* controlled, rather than *Tinker*, because like Fraser's nominating speech, Frederick's banner intruded upon the school's educational mission.⁵² The district court granted Morse qualified immunity because there were no published precedent on point that clearly established Frederick's right to free speech in this instance.⁵³ The district court stated that Morse and the Juneau School Board were additionally immune from damages based on an Alaska statute that immunized school officials from civil liability when they acted within the scope of their employment to enforce a school disciplinary policy.⁵⁴ Thus, the district court stated two grounds for declaring that Morse was not liable to Frederick; first, Morse did not violate Frederick's First Amendment right because Frederick's speech interfered with the school's educational mission,

46. *Morse I*, 2003 WL 25274689, at *2.

47. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (stating that a person's constitutional rights are clearly established when an official's actions are so unbelievable that the illegality is obvious or there is reported case law on point).

48. 393 U.S. 503 (1969).

49. *Morse I*, 2003 WL 25274689, at *2 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist. (Tinker III)*, 393 U.S. 503 (1969)).

50. *Id.* at *2, *5 (citing *Tinker III*, 393 U.S. 503).

51. *Id.* at *2 (citing *Tinker III*, 393 U.S. 503).

52. *Id.* at *2, *5. Fraser's speech went against the school's basic educational mission because his nominating speech was lewd and indecent, which violated school policy. *Fraser*, 478 U.S. at 678, 685. Frederick's speech went against the school's educational mission because it advocated illegal drug use, violating established school policy. *Morse I*, 2003 WL 25274689, at *2 (citing *Fraser II*, 478 U.S. at 685).

53. *Morse I*, 2003 WL 25274689, at *2, *3.

54. *Id.* at *3. The Alaska Statute provided the following:

teacher, teacher's assistant, a principal or another person responsible for students is not liable for civil damages resulting from an act or omission (1) arising out of enforcement of an approved school disciplinary and safety program . . . and (2) arising out of and in the course of employment unless the act or omission constitutes gross negligence or reckless or intentional misconduct.

ALASKA STAT. § 14.33.140 (2006).

and second, Morse was entitled to qualified immunity because Frederick's right to free speech was not clearly established.⁵⁵

Frederick appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in reviewing Morse's actions under *Fraser*, rather than *Tinker*, and in determining that Morse had not violated Frederick's First Amendment right to free speech.⁵⁶ The Ninth Circuit reversed the district court's decision and applied *Tinker* to declare that Morse's actions violated Frederick's right to free speech because Frederick's banner did not substantially disrupt the school's educational mission.⁵⁷ Justice Andrew Kleinfeld, writing for the three-judge panel of the Ninth Circuit, additionally determined that Morse was not entitled to qualified immunity because Frederick's right was clearly established when the event occurred, and a reasonable principal would have known that suspending Frederick on such grounds was unconstitutional.⁵⁸

The Ninth Circuit applied the United States Supreme Court's analysis in *Tinker*, and determined Morse did not violate Frederick's First Amendment right because Frederick's banner did not cause a substantial disruption.⁵⁹ The Ninth Circuit relied on *Tinker*, where the Court held that the First Amendment protected student speech to the extent the speech did not cause a disturbance and did not interfere with the school's work or other students' rights.⁶⁰ The Court in *Tinker* held schools could only suppress student speech if the speech materially impeded schoolwork or school discipline.⁶¹ The Ninth Circuit reasoned Frederick's banner did not cause a disruption to the school's educational mission because the Olympic Torch Relay was not an educational event.⁶² Accordingly, through applying *Tinker*, the Ninth Circuit determined Morse violated Frederick's right to free speech because Frederick's banner did not interfere with the school's educational mission.⁶³

Before applying *Tinker*, the Ninth Circuit evaluated the extent to which *Tinker* protected speech such as Frederick's, and the extent to which *Fraser* allowed a school to restrict student speech that under-

55. *Morse I*, 2003 WL 25274689, at *2, *3, *5.

56. *Morse II*, 439 F. 3d at 1114, 1115, 1117, 1118 (citing *Tinker III*, 393 U.S. at 514; *Fraser II*, 478 U.S. at 685).

57. *Id.* at 1123, 1125.

58. *Id.* at 1115, 1125.

59. *Id.* at 1118, 1123.

60. *Id.* (citing *Tinker III*, 393 U.S. at 508).

61. *Id.* at 1118 (citing *Tinker III*, 393 U.S. at 511).

62. *Id.* at 1120.

63. *Id.* at 1123.

mined the school's educational mission.⁶⁴ The Ninth Circuit noted that in order for a student to retain his or her right to free speech at school, there must be a limit on a school's ability to define its educational mission.⁶⁵ In analyzing *Fraser*, the Ninth Circuit stated that schools could restrict student speech that disturbed the educational process.⁶⁶ The Ninth Circuit distinguished *Fraser* on the grounds that the Relay was not educational in nature, that Frederick's speech was not plainly offensive, and that Frederick's speech did not disturb a school assembly.⁶⁷ By contrast, the student's speech in *Fraser* was plainly offensive and disturbed a high school assembly.⁶⁸ In applying *Tinker*, the Ninth Circuit noted that Frederick's message about marijuana was similar to the political speech at issue in *Tinker* because the legalization of marijuana was a political issue when Frederick displayed his banner.⁶⁹ As opposed to *Fraser*, the Ninth Circuit held that *Tinker* governed because Frederick's banner did not disturb the school's educational mission.⁷⁰

The Ninth Circuit reasoned that another United States Supreme Court case regarding student speech, *Hazelwood School District v. Kuhlmeier*,⁷¹ was distinguishable because Frederick's banner was not school-sponsored.⁷² The Ninth Circuit held that the Court in *Kuhlmeier* determined a school could restrict the content of the school's newspaper, distinguishing between school-sponsored speech that bore the imprimatur of the school and independent student speech.⁷³ In *Kuhlmeier*, the Court held that a school could censor school-sponsored speech so long as the school's actions were reasonably connected to "legitimate pedagogical concerns."⁷⁴ Distinguishing *Kuhlmeier*, the Ninth Circuit in *Morse* noted that the school, JDHS, did not sponsor Frederick's banner.⁷⁵ Thus, under *Kuhlmeier*, Frederick's sign was not school-sponsored.⁷⁶

The Ninth Circuit reasoned that under its student speech precedents, *Tinker* governed Frederick's speech.⁷⁷ The Ninth Circuit noted

64. *Id.* at 1120, 1123 (citing *Fraser II*, 478 U.S. at 685).

65. *Id.* at 1120 (citing *Tinker III*, 393 U.S. at 506).

66. *Id.*

67. *Id.* at 1118-19, 1120.

68. *Id.* at 1119.

69. *Id.* at 1119, 1123.

70. *Id.* at 1123.

71. 484 U.S. 260 (1988).

72. *Morse II*, 439 F.3d at 1118-19 (citing *Hazelwood Sch. Dist. v. Kuhlmeier (Kuhlmeier II)*, 484 U.S. 260 (1988)).

73. *Id.* at 1119 (citing *Kuhlmeier II*, 484 U.S. at 268-73).

74. *Morse III*, 127 S. Ct. at 2627 (quoting *Kuhlmeier II*, 484 U.S. at 273).

75. *Morse II*, 439 F.3d at 1119.

76. *Id.*

77. *Id.* at 1120, 1121.

that under its student speech cases, *Fraser* traditionally governed speech that was plainly offensive, obscene, and lewd in nature; *Kuhlmeier* governed school-sponsored speech; and *Tinker* governed all other types of student speech.⁷⁸ The Ninth Circuit noted that other circuits had recognized similar principles from the Supreme Court precedent about student speech, while noting one exception from the Sixth Circuit.⁷⁹ In *Boroff v. Van Wert City Board of Education*,⁸⁰ the United States Court of Appeals for the Sixth Circuit applied *Fraser* to determine that a school could prohibit Marilyn Manson t-shirts.⁸¹ The Ninth Circuit noted that the Sixth Circuit implied that a school could prohibit plainly offensive student speech that conflicted with the school's educational mission.⁸² The Ninth Circuit distinguished *Boroff* on the grounds that the student's T-shirt was more prone to interfere with the school's educational mission than Frederick's banner because the student displayed his t-shirt in a classroom and Frederick displayed his banner off-campus.⁸³

After applying *Tinker* to determine that Morse violated Frederick's First Amendment right, the Ninth Circuit held Morse was not entitled to qualified immunity.⁸⁴ First, the Ninth Circuit established that Morse violated Frederick's constitutional right to free speech.⁸⁵ Second, the Ninth Circuit reasoned Frederick's right to free speech was clearly established when the event occurred.⁸⁶ Third, the Ninth Circuit determined that a reasonable principal would have known that suspending a student on such grounds was unconstitutional.⁸⁷ The Ninth Circuit determined Frederick's right to free speech was clearly established because existing precedent concerning student speech established that *Tinker* governed unless the student speech at issue was lewd and offensive, as in *Fraser*, or school-sponsored, as in *Kuhlmeier*.⁸⁸ The Ninth Circuit concluded Morse could not have reasonably believed that her actions were constitutional because Morse was aware of relevant case law when the event occurred.⁸⁹ Accord-

78. *Id.* at 1121.

79. *Id.* at 1121, 1122. See *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (applying *Tinker* and distinguishing *Fraser* and *Kuhlmeier* to conclude a school could not constitutionally prohibit a T-shirt depicting guns).

80. 220 F.3d 465 (6th Cir. 2000).

81. *Morse II*, 439 F.3d at 1122 (citing *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000)).

82. *Id.*

83. *Id.* at 1123.

84. *Id.* at 1123, 1125.

85. *Id.* at 1125.

86. *Id.*

87. *Id.*

88. *Id.* at 1124.

89. *Id.*

ingly, the Ninth Circuit held that Morse was not immune from damages pursuant to qualified immunity because the law on Frederick's right to free speech was clearly established at the time of the event, and Morse was not ignorant to case law concerning student speech.⁹⁰ The Ninth Circuit determined Morse violated Frederick's First Amendment right and held Morse was not entitled to qualified immunity.⁹¹

Morse filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to answer whether Morse violated Frederick's First Amendment right to free speech, and, if so, whether Morse was entitled to qualified immunity.⁹² The Supreme Court concluded Morse legally restricted Frederick's speech because Morse reasonably regarded Frederick's banner as advocating illegal drug use.⁹³ The Court held a school could suppress a student's speech that the school reasonably regarded as advocating illegal drug use.⁹⁴ Chief Justice John Roberts, writing for the majority, determined that Morse reasonably regarded Frederick's sign as advocating illegal drug use because Frederick's banner was susceptible to at least two pro-drug interpretations.⁹⁵ The Court reasoned that although Frederick's banner could be interpreted as funny, offensive, or gibberish, that two reasonable interpretations were "bong hits are a good thing" and "we take bong hits," both of which encouraged illegal drug use.⁹⁶ The Court concluded Morse legally confiscated Frederick's banner and suspended Frederick because Morse reasonably believed that Frederick's banner advocated illegal drug use.⁹⁷

In arriving at the rule that a school could restrict student speech that the school reasonably regarded as advocating illegal drug use, the Court distilled two principles from *Fraser* and *Kuhlmeier*.⁹⁸ First, the analysis the Court employed in *Tinker* was not absolute.⁹⁹ Second, students' First Amendment rights in school were not coextensive with adults' rights in other settings.¹⁰⁰ Although the Court distinguished *Kuhlmeier* on the grounds that Frederick's speech was not school-sponsored, the Court noted that *Kuhlmeier* demonstrated that the

90. *Id.* at 1124, 1125.

91. *Id.* at 1123, 1125.

92. *See Morse III*, 127 S. Ct. at 2624 (granting certiorari to determine whether Frederick had a First Amendment right to display the sign and to determine whether that First Amendment right was so clearly established to entitle Frederick to damages).

93. *Id.* at 2622.

94. *Id.*

95. *Id.* at 2622, 2624, 2625.

96. *Id.* at 2624, 2625.

97. *Id.* at 2622.

98. *Id.* at 2622, 2626-27.

99. *Id.* at 2627.

100. *Id.* at 2626, 2627.

analysis employed in *Tinker* was not absolute, and that students' First Amendment rights in school were not coextensive with adults' First Amendment rights in other settings.¹⁰¹ The Court noted students' Fourth Amendment rights to be free from searches and seizures in school are also different than students' Fourth Amendment rights in other settings.¹⁰²

In addition to stating that the analysis the Court employed in *Tinker* was not absolute, the Court distinguished *Tinker* on two grounds.¹⁰³ First, the Court distinguished *Tinker* on the grounds that Frederick's speech was not political.¹⁰⁴ The Court noted that the students in *Tinker* wore armbands to protest the Vietnam War.¹⁰⁵ The Court stated that Frederick did not argue that his speech was political or religious.¹⁰⁶ The Court determined *Tinker* did not govern Frederick's banner because the banner did not involve political speech.¹⁰⁷

Second, the Court distinguished *Tinker* on the grounds that the school's interest in censorship in *Morse* was greater than the school's interest in *Tinker*.¹⁰⁸ The Court determined schools had a strong interest in deterring illegal drug use.¹⁰⁹ The Court stated that *Tinker* determined a school could not justify banning the students' armbands merely because of a fear of disturbance and a desire to avoid the discomfort that came with an unpopular view.¹¹⁰ The Court declared the school's interest in deterring illegal drug use was strong enough to justify censoring Frederick's speech.¹¹¹ The Court determined that *Tinker* did not govern Frederick's banner because the school's interest in censoring Frederick's speech was stronger than the school's interest in *Tinker*.¹¹²

In addition to distinguishing *Tinker*, the Court distinguished both *Fraser* and *Kuhlmeier*.¹¹³ The Court declined to expand the rule from

101. *Id.* at 2627.

102. *Id.* at 2627-28 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995)).

103. *See id.* at 2625, 2626, 2627 (distinguishing *Tinker* on the grounds that one, Frederick's speech was not political, and two, the school's interest in censorship in *Morse* was greater than that in *Tinker*).

104. *Id.* at 2625, 2626.

105. *Id.* at 2626.

106. *Id.* at 2625.

107. *See id.* at 2625, 2626 (stating Frederick did not argue that his banner conveyed a political message).

108. *Id.* at 2626, 2629.

109. *Id.* at 2628.

110. *Id.* at 2626.

111. *Id.* at 2629.

112. *See id.* (stating the school's justification of discouraging illegal drug use in *Morse* was stronger than the school's justification in merely avoiding controversy in *Tinker*).

113. *Id.* at 2627, 2629.

Fraser to allow schools to censor speech that was plainly offensive because the Court was not concerned with the offensive nature of Frederick's banner.¹¹⁴ Rather, the Court was concerned with how Morse reasonably regarded Frederick's banner as encouraging illegal drug use.¹¹⁵ The Court also determined *Kuhlmeier* was not controlling because no one could plausibly believe Frederick's speech was school-sponsored.¹¹⁶

In concluding Morse was justified in censoring Frederick's speech, the Court reasoned the school had a strong interest in deterring illegal drug use.¹¹⁷ The Court mentioned statistics demonstrating approximately fifty percent of high school seniors had used an illegal drug, as well as approximately thirty-three percent of high school sophomores and approximately twenty percent of eighth graders.¹¹⁸ The Court opined a school could censor student speech the school reasonably regarded as advocating illegal drug use because the schools have a strong interest in deterring illegal drug use.¹¹⁹

In applying the rule that a school could suppress a student's speech that the school reasonably regarded as advocating illegal drug use, the Court reasoned Morse reasonably regarded Frederick's banner as promoting illegal drug use.¹²⁰ The Court first stated Morse reasonably believed that Frederick's speech would be viewed as encouraging illegal drug use.¹²¹ The Court opined that two reasonable interpretations of Frederick's sign were "bong hits are a good thing" and "we take bong hits," both of which promoted illegal drug use.¹²²

The Court distinguished between restricting speech based on the manner in which a student expressed the speech and suppressing speech based on the speech's content.¹²³ The Court noted that while the Court in *Fraser* allowed Fraser's speech to be censored based on the speech's lewd and indecent content, the *Fraser* Court alluded to the manner in which Fraser delivered his speech.¹²⁴ The Court in *Fraser* evaluated the content of Fraser's speech while making a distinction between the political speech at issue in *Tinker* and the graphic, explicit, and elaborate sexual metaphor at issue in *Fraser*.¹²⁵

114. *Id.* at 2629.

115. *Id.*

116. *Id.* at 2627.

117. *Id.* at 2622, 2628, 2629.

118. *Id.* at 2628.

119. *Id.* at 2628, 2629.

120. *Id.* at 2622.

121. *Id.* at 2624.

122. *Id.* at 2625.

123. *Id.* at 2626.

124. *Id.*

125. *Id.* (quoting *Fraser II*, 478 U.S. at 678, 680).

However, the *Fraser* Court reasoned schools could declare which manner of speech was inappropriate.¹²⁶ The Court in *Morse* marked a distinction between censoring speech based on its content, and restricting speech based on the manner in which a student expressed the speech.¹²⁷ The Court determined *Morse* legally restricted Frederick's speech because *Morse* reasonably regarded Frederick's banner as advocating illegal drug use.¹²⁸

Justice Samuel Alito, joined by Justice Anthony Kennedy, concurred in the Court's opinion to the extent schools could censor speech that a reasonable observer perceived as promoting illegal drug use, and to the extent the Court's holding did not allow a school to censor speech that could be interpreted as political speech.¹²⁹ In a separate opinion, Justice Stephen Breyer concurred in the judgment in part and dissented in part.¹³⁰ Justice Breyer's concurrence stated that the Court should not have decided the case on First Amendment grounds, but rather should have held that *Morse* was entitled to qualified immunity and determined that Frederick was not entitled to monetary damages.¹³¹

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsberg, and Justice David Souter, submitted a dissenting opinion.¹³² Justice Stevens' dissent reasoned that JDHS's justification for censoring Frederick's banner was not enough to restrict Frederick's right to free speech.¹³³ Justice Stevens' dissent criticized the Court's determination that JDHS legally censored Frederick's speech because the speech advocated illegal drug use on the basis that the majority stated two uncontroversial propositions; first, that students' First Amendment rights in school are different from adults' First Amendment rights, and second, that schools have a valid interest in deterring illegal drug use.¹³⁴ Justice Stevens' dissent noted that in *Brandenburg v. Ohio*,¹³⁵ the United States Supreme Court determined the government could not censor an adult's speech that advocated illegal acts

126. *Id.* (quoting *Fraser II*, 478 U.S. at 683). The Court noted that Justice Brennan's concurrence in *Fraser* stated that "In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express." *Id.* (Brennan, J., concurring) (quoting *Fraser II*, 478 U.S. at 689).

127. *Id.*

128. *Id.* at 2622.

129. *Id.* at 2636 (Alito, J., concurring).

130. *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

131. *Id.* at 2638, 2640 (Breyer, J., concurring in part and dissenting in part).

132. *Id.* at 2643 (Stevens, J., dissenting).

133. *Id.*

134. *Id.* at 2622 (majority opinion); *Id.* at 2643, 2644 (Stevens, J., dissenting).

135. 395 U.S. 444 (1969) (per curiam).

unless the speech incited imminent unlawful action.¹³⁶ Justice Stevens' dissent reasoned that a permissible holding would have allowed schools to censor student speech that actually advocated illegal acts, but would have determined, under the dissent's holding, that JDHS unconstitutionally censored Frederick's speech because Frederick did not advocate anything.¹³⁷

BACKGROUND

A. *TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*. THE UNITED STATES SUPREME COURT STATED THE MATERIAL DISRUPTION STANDARD AS A MANNER RESTRICTION ON STUDENT SPEECH

In *Tinker v. Des Moines Independent Community School District*,¹³⁸ the United States Supreme Court determined a school could not constitutionally proscribe armbands that conveyed a political message without showing that wearing the armbands would cause a substantial disruption to the school's work.¹³⁹ In *Tinker*, the district court stated school officials passed a regulation that banned students from wearing armbands to discourage students from showing their opposition to the Vietnam War.¹⁴⁰ Cognizant of the regulation, John Tinker, Mary Beth Tinker, and Christopher Eckhardt (the "Students") wore black armbands to school, and school officials sent them home because the Students violated the regulation.¹⁴¹

The Students sued Des Moines Independent Community School District in the United States District Court for the Southern District of Iowa to challenge the constitutionality of the school officials' actions.¹⁴² The district court upheld the school officials' actions, noting that the officials reasonably anticipated that the armbands would disturb school discipline.¹⁴³ The district court declined to follow a Fifth Circuit student speech case that held a school could censor a student's speech if the speech substantially and materially impeded school discipline.¹⁴⁴ Rather, the district court stated schools could constitutionally restrict student speech so long as schools reasonably believed the

136. *Morse III*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam)).

137. *Id.* at 2644 (Stevens, J., dissenting).

138. 393 U.S. 503 (1969).

139. *Tinker v. Des Moines Indep. Cmty. Sch. Dist. (Tinker III)*, 393 U.S. 503, 510-11 (1969).

140. *Tinker v. Des Moines Indep. Cmty. Sch. Dist. (Tinker I)*, 258 F. Supp. 971, 972 (S.D. Iowa 1966).

141. *Tinker I*, 258 F. Supp. at 972.

142. *Id.* at 971-72.

143. *Id.* at 973.

144. *Id.* (citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

students' speech would disturb school discipline.¹⁴⁵ The district court reasoned the school officials' actions were constitutional because the officials reasonably believed the armbands would disturb school discipline.¹⁴⁶

The Students appealed to the United States Court of Appeals for the Eighth Circuit, which reviewed the case en banc.¹⁴⁷ Equally divided, the Eighth Circuit affirmed the district court's decision without opinion.¹⁴⁸ The Students appealed to the United States Supreme Court, which granted certiorari to answer whether schools could censor passive student expression that did not substantially or materially impede school discipline.¹⁴⁹ The Supreme Court determined schools could not censor student speech unless the speech materially and substantially conflicted with the school's work or with other students' rights.¹⁵⁰ Justice Abe Fortas, writing for the majority, stated that the Students' speech did not cause a material disturbance, did not impede the school's work, and did not interfere with other students' rights because the Students only sought to influence others with their views and did not interfere with school activities.¹⁵¹ Additionally, the Court noted that the school's justification for restricting the Students' speech, a fear of disturbance, was not strong enough to proscribe student speech.¹⁵² The Court determined school officials violated the Students' rights to free speech because the Students' speech did not materially impede the school's activities nor cause any disruption.¹⁵³

The Court evaluated two competing interests to determine that schools could only suppress student speech if the speech materially and substantially conflicted with the school's work or with other students' rights.¹⁵⁴ First, the Court recognized the Students' interest in maintaining their rights to free speech on school grounds.¹⁵⁵ The Court stated students retain their rights to free speech when they enter the schoolhouse gate.¹⁵⁶ The Court added that because schools educate the nation's youth, there must be strong protection for stu-

145. *Id.*

146. *Id.*

147. *Tinker v. Des Moines Indep. Cmty. Sch. Dist. (Tinker II)*, 383 F.2d 988 (8th Cir. 1967) (en banc), *rev'd*, 393 U.S. 503 (1969).

148. *Tinker III*, 393 U.S. at 505.

149. *See id.* at 505, 509 (stating schools could not censor student speech without demonstrating that the student's conduct would substantially and materially impede the school's discipline).

150. *Id.* at 509.

151. *Id.* at 504, 509, 514 (citing *Burnside*, 363 F.2d at 749).

152. *Id.* at 508.

153. *Id.* at 514.

154. *Id.* at 507, 509.

155. *Id.* at 506.

156. *Id.*

dents' constitutional freedoms.¹⁵⁷ Second, the Court recognized the school's interest in maintaining order in school.¹⁵⁸ The Court recognized the school's need to control student conduct.¹⁵⁹ In balancing these two interests, the Court determined schools could restrict student speech based on the context and manner in which the student expressed the speech.¹⁶⁰

Through stating that a school could proscribe student speech based on the manner and context in which the student stated his or her expression, the Court gave no deference to the political nature of the Students' speech, and thereby discouraged viewpoint discrimination and content regulations on student speech.¹⁶¹ By giving no deference to the political content of the Students' speech, the Court reasoned the school could not constitutionally suppress the Students' speech because the speech did not interfere with the school's work.¹⁶² In discouraging schools from discriminating based on the schools' viewpoints and based on the speech's content, the Court stated that the school did not prohibit all controversial speech, but rather prohibited a political viewpoint that was unpopular.¹⁶³ Further, the Court declared schools could only restrict a student from expressing a particular opinion if the opinion substantially and materially conflicted with school discipline or the school's work.¹⁶⁴ The Court also stated the classroom was a marketplace for ideas, and America's future leaders must be exposed to those ideas.¹⁶⁵ In determining schools could only restrict student expression if the expression substantially and materially interfered with the school's work, the Court discouraged content restrictions on student speech but did not address the political nature of the Students' speech.¹⁶⁶

The Court determined courts should defer to the judgment of a reasonable person, and not to the subjective judgment of school officials, when determining whether schools reasonably interpreted the

157. *Id.* at 507.

158. *Id.*

159. *Id.*

160. *See id.* at 507, 509 (holding that student speech was not subject to censorship unless it materially and substantially conflicted with the school's work or with other students' rights).

161. *See id.* at 509, 511 (failing to defer to the political content of the Students' speech and stating that prohibiting a particular opinion was unconstitutional unless the school could demonstrate that the speech materially and substantially conflicted with the school's work or with other students' rights).

162. *Id.* at 509.

163. *Id.* at 509, 510.

164. *Id.* at 511.

165. *Id.* at 512.

166. *See id.* at 509, 510, 511 (failing to defer to the political context of the Students' speech).

message that a student intended to convey.¹⁶⁷ Although the Court rejected the district court's holding, the Court noted that the district court deferred to the court's own judgment, as opposed to the school officials' subjective judgment, to conclude that the school officials reasonably anticipated the Students' armbands would cause a disturbance.¹⁶⁸ Additionally, the Court determined the Students' armbands were silent and passive, and the Court did not state that the armbands were susceptible to other reasonable interpretations.¹⁶⁹ The Court supported the principle that courts should not defer to a school official's subjective judgment when determining a student's rights under the First Amendment.¹⁷⁰ In conclusion, the Court endorsed manner restrictions on student speech by determining schools could censor student speech if the speech caused a substantial disruption to the school's work or school discipline.¹⁷¹

B. IN *BETHEL SCHOOL DISTRICT NO. 403 v. FRASER*, THE UNITED STATES SUPREME COURT APPLIED *TINKER* TO DETERMINE SCHOOLS COULD CENSOR SPEECH THAT INTERFERED WITH THE SCHOOL'S EDUCATIONAL MISSION

In *Bethel School District No. 403 v. Fraser*,¹⁷² the United States Supreme Court held that a school could censor a student's lewd and indecent speech because the student's speech interfered with the school's educational mission.¹⁷³ In *Fraser*, Bethel High School ("BHS") officials punished Matthew N. Fraser ("Fraser"), a BHS student, for delivering a speech that involved an explicit, graphic, and elaborate sexual metaphor.¹⁷⁴ School officials suspended Fraser and removed Fraser's name from a list of potential graduation speakers, stating they believed Fraser violated a BHS disciplinary rule that proscribed profane and obscene language.¹⁷⁵ Fraser sued BHS in the United States District Court for the Western District of Washing-

167. *Id.* at 508.

168. *Id.* at 508; *Id.* at 518-19 (Black, J., dissenting) (stating the district court held that "the school order was reasonable and hence constitutional").

169. *See id.* at 508 (failing to characterize the Students' armbands as anything other than silent and passive).

170. *Id.* at 508 (stating that the district court "concluded that the action of the school authorities was reasonable").

171. *Id.* at 509, 511.

172. 478 U.S. 675 (1986).

173. *Bethel Sch. Dist. No. 403 v. Fraser (Fraser II)*, 478 U.S. 675, 685 (1986).

174. *Fraser II*, 478 U.S. at 677-78.

175. *Id.* at 678, 679. The disciplinary rule states "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678.

ton.¹⁷⁶ Fraser argued BHS officials violated his First Amendment right to free speech.¹⁷⁷ The district court held BHS's disciplinary rule was unconstitutionally vague and overbroad.¹⁷⁸

BHS appealed to the United States Court of Appeals for the Ninth Circuit.¹⁷⁹ The Ninth Circuit affirmed and applied *Tinker* to determine Fraser's speech did not materially or substantially interfere with the school's work.¹⁸⁰ In *Tinker*, the Court determined a school could not proscribe student speech without showing that such speech would cause a substantial disruption to the school's work.¹⁸¹ The Ninth Circuit reasoned Fraser's speech was indistinguishable from the Students' armband protest in *Tinker* because BHS presented insufficient evidence to prove that Fraser's speech interfered with the school's educational process.¹⁸² The Ninth Circuit rejected BHS's argument that it had a strong interest in shielding a captive audience of students, including fourteen-year-olds, from indecent and lewd language.¹⁸³ The Ninth Circuit determined BHS officials violated Fraser's right to free speech because Fraser's speech did not materially or substantially interfere with the school's educational process.¹⁸⁴

BHS appealed to the United States Supreme Court, which granted certiorari to answer whether, consistent with the First Amendment, a school could punish a student for delivering a lewd and indecent speech at a high school assembly.¹⁸⁵ The Court held BHS's sanctions on Fraser were constitutional because Fraser's lewd and indecent speech interfered with the school's educational mission.¹⁸⁶ In applying the rule from *Tinker*, the Court distinguished *Tinker* on two grounds to determine that BHS could restrict lewd and indecent speech.¹⁸⁷ First, the Court distinguished Fraser's speech on the grounds that the Students' speech in *Tinker* was political.¹⁸⁸ Second, the Court noted that in *Tinker*, the Students' speech did not intrude

176. *Id.* at 679. Fraser spoke at his graduation ceremonies after the district court enjoined the school from preventing Fraser from speaking at his commencement. *Id.* at 678.

177. *Id.* at 679.

178. *Id.*

179. *See id.* (stating the district court awarded damages to Fraser and the Ninth Circuit affirmed).

180. *Fraser v. Bethel Sch. Dist. No. 403 (Fraser I)*, 755 F.2d 1356, 1356, 1359 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

181. *Tinker III*, 393 U.S. at 509.

182. *Fraser II*, 478 U.S. at 679; *Fraser I*, 755 F.2d at 1359.

183. *Fraser II*, 478 U.S. at 677, 680.

184. *Fraser I*, 755 F.2d at 1358, 1359.

185. *Fraser II*, 478 U.S. at 677.

186. *Id.* at 685.

187. *Id.* at 680, 685.

188. *Id.* at 680.

on the school's work or other students' rights.¹⁸⁹ Chief Justice Warren Berger, writing for the majority, determined Fraser's speech interfered with the school's mission because the speech could be severely damaging to an audience that included fourteen-year-old students.¹⁹⁰ While applying the rule from *Tinker*, the Court distinguished *Tinker's* holding on the grounds that the Students' speech in *Tinker* was political and did not interfere with the school's work.¹⁹¹

To determine that BHS officials constitutionally censored Fraser's speech, the Court balanced Fraser's First Amendment right to free speech against the school's interest in teaching acceptable behavior.¹⁹² The Court stated that students had a right to express controversial and unpopular views in school.¹⁹³ The Court further stated that schools had an interest in teaching students manners of civility and socially appropriate behavior.¹⁹⁴ After balancing the two competing interests, the Court reasoned the school had the stronger interest in shielding minors from lewd and indecent speech, and held BHS officials constitutionally censored Fraser's speech.¹⁹⁵

In determining BHS had the stronger interest in shielding Fraser's youthful audience, the Court stated that limitations apply to sexually explicit and indecent speech that could be expressed to children.¹⁹⁶ The Court pointed out that in *Ginsberg v. New York*,¹⁹⁷ the Court upheld a statute that prohibited businesses from selling sexually oriented materials to children, although the First Amendment protected selling the same materials to adults.¹⁹⁸ The *Fraser* Court further stated that in *Board of Education v. Pico*,¹⁹⁹ the Court unanimously agreed that schools could remove vulgar books from their libraries.²⁰⁰ The *Fraser* Court also noted that in *FCC v. Pacifica Foundation*,²⁰¹ the Court concluded that the Federal Communications Commission could censor radio broadcasts that were indecent, ob-

189. *Id.*

190. *Id.* at 677, 683, 685.

191. *Id.* at 680.

192. *Id.* at 681, 685.

193. *Id.* at 681.

194. *Id.*

195. *See id.* at 681, 683, 685 (recognizing the school's interest in protecting its teenage audience from indecent and lewd speech and holding the school constitutionally censored Fraser's speech).

196. *Id.* at 683-84.

197. 390 U.S. 629 (1968).

198. *Fraser II*, 478 U.S. at 684 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).

199. 457 U.S. 853 (1982) (plurality opinion).

200. *Fraser II*, 478 U.S. at 684 (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 871-72 (1982) (plurality opinion); *Pico*, 457 U.S. at 879-81 (Blackmun, J., concurring in part and concurring in the judgment); *Id.* at 918-20 (Rehnquist, J., dissenting)).

201. 438 U.S. 726 (1978).

scene, or profane, in order to protect children from such speech.²⁰² The Court stated the First Amendment fully protected sexually explicit and indecent speech when such speech was expressed to adults, but that limits applied when such speech was expressed to children.²⁰³ The Court reasoned schools had the stronger interest in protecting minors from indecent and sexually explicit speech.²⁰⁴

The Court additionally noted that the government had not tolerated indecent and offensive speech in other settings.²⁰⁵ The Court stated that, for example, members of Congress could not use indecent or offensive speech within the nation's legislative halls during a congressional debate.²⁰⁶ The Court analogized Fraser's speech to Congressional debates and determined that if Congress could prohibit its members from using offensive speech, a school could restrict a student's offensive and lewd speech.²⁰⁷

The Court determined Fraser's offensive speech would not be given the same protection as adults' offensive speech.²⁰⁸ The Court noted that in *Cohen v. California*,²⁰⁹ the Court held the First Amendment protected an adult's offensive jacket that demonstrated the adult's opposition to the draft.²¹⁰ The Court determined Fraser's speech would not be given the same protection as the jacket protected in *Cohen* because students' First Amendment rights in schools were not coextensive with adults' First Amendment rights in other settings.²¹¹

The Court identified Fraser's speech as lewd, offensive, indecent, and sexually explicit, and did not state any other interpretations of Fraser's speech.²¹² The Court did not state that Fraser's speech was susceptible to other interpretations that would have been outside the reach of the BHS disciplinary rule.²¹³

202. *Fraser II*, 478 U.S. at 684-85 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978)).

203. *Id.* at 684.

204. *See id.* at 681, 683, 684-85 (recognizing the school's interest in protecting its teenage audience from indecent and lewd speech and holding the school constitutionally censored Fraser's speech).

205. *Fraser II*, 478 U.S. at 681.

206. *Id.* at 681-82.

207. *Id.* at 681-82, 685.

208. *Id.* at 682.

209. 403 U.S. 15 (1971).

210. *Fraser II*, 478 U.S. at 682 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

211. *Id.*

212. *See id.* at 685 (failing to characterize Fraser's speech as anything other than lewd, offensive, indecent, or sexually explicit).

213. *Id.* at 678, 685. The BHS disciplinary rule provides, "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678. The Court declared that Fraser's speech was offensive, lewd, indecent, and sexually explicit. *Id.* at 685.

The Court determined, like in *Tinker*, that schools could suppress student speech based on the manner in which the student expressed the speech.²¹⁴ The Court stated that schools could determine what manner of expression was appropriate at a school assembly or in the classroom.²¹⁵ Further, the Court noted that a classroom or a high school assembly was no place for lewd or indecent speech because such speech interfered with the school's educational mission.²¹⁶ The Court noted that Fraser's speech could damage an audience including fourteen-year-olds.²¹⁷ The Court supported manner restrictions on student speech by stating that schools could determine what manner of expression was appropriate and by stating that a class or an assembly was no place for a lewd expression.²¹⁸

The Court stated that Fraser's speech would be plainly offensive to any mature person and further could be damaging to Fraser's audience that included fourteen-year-old students.²¹⁹ By stating that Fraser's speech would offend a mature person, the Court relied on an objective interpretation of Fraser's speech to determine the speech was lewd and vulgar.²²⁰ In conclusion, the Court in *Fraser* held the First Amendment did not protect Fraser's indecent and lewd speech because Fraser's speech interfered with the school's educational mission.²²¹

C. IN *HAZELWOOD SCHOOL DISTRICT V. KUHLMIEER*, THE COURT ALLOWED SCHOOLS TO PLACE CONTENT RESTRICTIONS ON SCHOOL-SPONSORED STUDENT SPEECH

In *Hazelwood School District v. Kuhlmeier*,²²² the United States Supreme Court held a school could restrict the content of the school's newspaper because the newspaper constituted school-sponsored speech, and school officials acted reasonably in restricting the speech.²²³ In *Kuhlmeier*, Principal Robert Reynolds ("Reynolds") deleted two pages from an issue of *Spectrum*, the Hazelwood East High

214. *See id.* at 683 (stating schools could determine what manner of expression was appropriate at a school assembly or in the classroom); *see also Tinker II*, 393 U.S. at 509 (holding that student speech was not subject to censorship unless it materially and substantially conflicted with the school's work or with other students' rights).

215. *Fraser II*, 478 U.S. at 683.

216. *Id.* at 685.

217. *See id.* at 683 (stating the speech could be damaging to Fraser's less mature audience that included fourteen-year-olds).

218. *Id.* at 683, 685.

219. *Id.* at 683.

220. *Id.* at 683, 685.

221. *Id.* at 685.

222. 484 U.S. 260 (1988).

223. *Hazelwood Sch. Dist. v. Kuhlmeier (Kuhlmeier II)*, 484 U.S. 260, 271, 273, 274 (1988).

School newspaper, due to objectionable articles on each perspective page.²²⁴ One article concerned students' experiences with pregnancy, and Reynolds deleted the article stating the pregnant students were potentially identifiable, although the article used false names.²²⁵ The other article concentrated on how divorce impacted students and included a derogatory statement about a student's father.²²⁶ Reynolds deleted the article because the father did not have a reasonable opportunity to defend the allegations about him in the article.²²⁷

Three student writers (the "Writers") sued the school district and Reynolds (collectively the "School Officials") in the United States District Court for the Eastern District of Missouri.²²⁸ The district court held that the School Officials did not violate the Writers' rights to free speech.²²⁹ The district court concluded a school could censor student speech that was integral to the school's educational function if the school had a reasonable justification for censoring such speech.²³⁰ The district court reasoned *Spectrum* was a part of Hazelwood East High School's educational function and Reynolds' justification for suppressing the two articles was legitimate and reasonable.²³¹ The district court concluded the School Officials constitutionally controlled the content of *Spectrum* because *Spectrum* contributed to the school's educational function and because Reynolds had a reasonable justification for deleting the two articles.²³²

The Writers appealed to the United States Court of Appeals for the Eighth Circuit.²³³ The Eighth Circuit held the school violated the Writers' First Amendment rights because *Spectrum* was a public forum, and the articles would not have interfered with others' rights or impeded the school's work.²³⁴ The Eighth Circuit held that *Spectrum* was a public forum because *Spectrum* was intended to air the student viewpoint.²³⁵ After concluding *Spectrum* was a public forum, the Eighth Circuit stated that in order for the school to censor speech in that forum, the school must show the articles would cause a substantial disruption to the school's work or to others' rights, as *Tinker* pre-

224. *Kuhlmeier II*, 484 U.S. at 262, 264.

225. *Id.* at 263.

226. *Id.* The student stated that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce. *Id.*

227. *Id.*

228. *Id.* at 262, 264.

229. *Id.* at 264.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 265.

234. *Id.* at 265, 266.

235. *Kuhlmeier v. Hazelwood Sch. Dist. (Kuhlmeier I)*, 795 F.2d 1368, 1372 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

scribed.²³⁶ In *Tinker*, the Court determined student speech was not subject to censorship unless the speech materially and substantially conflicted with the school's work or with other students' rights.²³⁷ The Eighth Circuit declared the school did not present evidence to prove that any disturbance or disorder would have occurred due to the articles.²³⁸ Further, the Eighth Circuit determined a school must be susceptible to tort liability to justify suppressing student speech on the grounds that the speech would interfere with others' rights.²³⁹ The Eighth Circuit reasoned Reynolds could not justify censoring the articles on the grounds that the articles would interfere with others' rights because publishing the articles would not have rendered the school subject to tort liability.²⁴⁰

The School Officials appealed to the United States Supreme Court, which granted certiorari to answer whether, under the First Amendment, a school was required to affirmatively endorse student speech.²⁴¹ The Supreme Court held the School Officials could restrict the content of *Spectrum* because the newspaper constituted school-sponsored speech, and Reynolds acted reasonably in deleting the two articles.²⁴² Justice Byron White, writing for the majority, held that a school could censor school-sponsored speech so long as the school's actions were reasonably connected to "legitimate pedagogical concerns."²⁴³ The Court confirmed two principles enumerated in *Fraser*; one, schools could censor student speech that interfered with the school's educational mission, and two, schools could determine which manner of student speech was appropriate on school grounds.²⁴⁴

The Court distinguished between school-sponsored speech, such as school-sponsored publications, and independent student speech.²⁴⁵ The Court reasoned school officials could exercise more control over school-sponsored speech because the public could perceive such speech as bearing the school's imprimatur.²⁴⁶ The Court defined school-sponsored speech as speech the public could classify as a part of the school's curriculum, including plays and school newspapers.²⁴⁷ The Court concluded the rule from *Tinker* should not apply to school-spon-

236. *Kuhlmeier I*, 795 F.2d at 1374 (citing *Tinker III*, 393 U.S. at 511).

237. *Tinker III*, 393 U.S. at 509.

238. *Kuhlmeier I*, 795 F.2d at 1375.

239. *Kuhlmeier II*, 484 U.S. at 265-66.

240. *Id.*

241. *Id.* at 262, 266, 270-71.

242. *Id.* at 273, 274.

243. *Id.* at 262, 273.

244. *Id.* at 266, 267 (citing *Fraser II*, 478 U.S. at 683, 685).

245. *Id.* at 270-71.

246. *Id.* at 271.

247. *Id.*

sored speech, stating that courts should ask whether school officials' actions were reasonably connected to legitimate pedagogical concerns to determine whether a school constitutionally restricted school-sponsored speech.²⁴⁸

The Court deferred to Reynolds' subjective reasonable judgment to conclude Reynolds acted reasonably in deleting the two articles.²⁴⁹ The Court held a school could suppress school-sponsored speech if the school official's actions were reasonably connected to legitimate pedagogical concerns.²⁵⁰ The Court noted that if a school restricted school-sponsored speech that advocated illegal drug use, the school's actions would be reasonable.²⁵¹ The Court concluded Reynolds acted reasonably in deleting the pregnancy article because Reynolds could have reasonably believed that the pregnant girls' anonymity would not be protected if the school newspaper published the article.²⁵² The Court stated that Reynolds could have deleted the article on the grounds that he reasonably believed that the article was inappropriate for fourteen-year-old students.²⁵³ In concluding Reynolds acted reasonably in deleting the divorce article, the Court stated that Reynolds could have reasonably believed, in the spirit of journalistic fairness, the father deserved an opportunity to respond to the article's allegations.²⁵⁴ The Court deferred to the subjective reasonable judgment of Reynolds to conclude Reynolds could have reasonably believed the pregnancy article did not protect the girls' anonymity, and the divorce article should be deleted in the interest of journalistic fairness.²⁵⁵

The Court disagreed with the Eighth Circuit's reasoning that *Spectrum* was a public forum because the School Officials never intended the newspaper to be a public forum.²⁵⁶ The Court noted that for a school facility to be a public forum, school officials must have, by practice or policy, opened the facility to the general public for indiscriminate use.²⁵⁷ The Court noted that if a school facility operated for its intended purpose, then schools could place reasonable restrictions on student speech that arose from the facility.²⁵⁸ The Court reasoned

248. *Id.* at 272-73.

249. *Id.* at 274.

250. *Id.* at 273.

251. *Id.* at 272.

252. *Id.* at 274.

253. *Id.* at 274-75.

254. *Id.* at 274, 275.

255. *See id.* (stating Reynolds could have reasonably believed the pregnancy article did not protect the girls' anonymity and the divorce article should be deleted in the interest of journalistic fairness).

256. *Id.* at 269, 270.

257. *Id.* at 267 (quoting *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 47 (1983)).

258. *Id.* (citing *Perry*, 460 U.S. at 46).

the school did not open *Spectrum*, by policy or practice, to the public for indiscriminate use.²⁵⁹ Further, the Court noted that *Spectrum* was serving its intended use, as a learning environment for journalism students.²⁶⁰ The Court determined *Spectrum* was not a public forum because the school did not open its pages to the public and the newspaper was serving the school's intended educational purpose.²⁶¹ Accordingly, the Court held the school could restrict the content of *Spectrum* because the newspaper constituted school-sponsored speech, and thus Reynolds acted reasonably in restricting the speech.²⁶²

ANALYSIS

In *Morse v. Frederick*,²⁶³ the United States Supreme Court held Juneau-Douglas High School ("JDHS") Principal Deborah Morse ("Morse") legally restricted Joseph Frederick's ("Frederick") speech because Morse reasonably regarded Frederick's banner as advocating illegal drug use.²⁶⁴ The Court held a school could suppress a student's speech the school reasonably regarded as advocating illegal drug use.²⁶⁵ Chief Justice John J. Roberts, writing for the majority, determined Morse reasonably regarded Frederick's sign as advocating illegal drug use because Frederick's banner was susceptible to at least two pro-drug interpretations.²⁶⁶ The Court reasoned that although Frederick's banner could be interpreted as funny, offensive, or meaningless, two reasonable interpretations were "bong hits are a good thing" and "we take bong hits," both of which encouraged illegal drug use.²⁶⁷

In *Morse*, the Court erred in relying on Morse's reasonable judgment while placing a content-based restriction on Frederick's speech without giving deference to the context and manner of Frederick's speech.²⁶⁸ This Analysis will demonstrate that the Court in *Morse* mistakenly deviated from both *Tinker v. Des Moines Independent Community School District*²⁶⁹ and *Bethel School District No. 403 v. Fraser*²⁷⁰ by placing a restriction on student speech allowing schools

259. *Id.* at 270.

260. *Id.*

261. *Id.*

262. *Id.* at 273.

263. 127 S. Ct. 2618 (2007).

264. *Morse v. Frederick (Morse III)*, 127 S. Ct. 2618, 2622 (2007).

265. *Morse III*, 127 S. Ct. at 2622.

266. *Id.* at 2622, 2625.

267. *Id.* at 2624, 2625.

268. See *infra* notes 277-332 and accompanying text.

269. 393 U.S. 503 (1969).

270. 478 U.S. 675 (1986).

to censor speech based on the speech's content, as opposed to a restriction requiring schools to defer to the context and manner of the student's speech.²⁷¹ This Analysis will additionally explore how the Court in *Morse* essentially applied *Hazelwood School District v. Kuhlmeier*'s²⁷² standard for school-sponsored speech, although the Court stated *Kuhlmeier* was inapplicable because Frederick's speech was not school-sponsored.²⁷³ This Analysis will prove this point in two respects.²⁷⁴ First, by demonstrating that the Court, in relying on Morse's subjective judgment and reasonable interpretation of Frederick's banner, erroneously extended *Kuhlmeier*'s standard for school-sponsored speech to independent student speech.²⁷⁵ Second, by demonstrating that the Court, by allowing schools to censor speech based on its drug-related content, inappropriately extended *Kuhlmeier*'s standard for school-sponsored speech to non-school-sponsored speech.²⁷⁶

A. IN *MORSE*, THE COURT DEVIATED FROM PRECEDENT BY PLACING A CONTENT RESTRICTION ON FREDERICK'S SPEECH WITHOUT RELYING ON THE MANNER IN WHICH FREDERICK REVEALED HIS BANNER

The Court in *Morse* extended student speech precedent to allow schools to restrict student speech based on the speech's content by giving little weight to the context in which Frederick displayed his banner.²⁷⁷ In *Morse*, the issue before the Court was whether school officials could constitutionally censor a student's expression a school official reasonably interpreted as advocating illegal drug use.²⁷⁸ By failing to state that Frederick's audience consisted of both students and adults, the Court in *Morse* failed to defer to the manner or context in which Frederick revealed his banner.²⁷⁹ Further, the *Morse* Court did not state that Morse was entitled to take Frederick's banner down because the banner caused a disruption or because Frederick revealed his banner in an inappropriate place; to the contrary, the Court stated

271. See *infra* notes 277-94 and accompanying text.

272. 484 U.S. 260 (1988).

273. See *infra* notes 295-332 and accompanying text.

274. See *infra* notes 295-332 and accompanying text.

275. See *infra* notes 297-312 and accompanying text.

276. See *infra* notes 313-32 and accompanying text.

277. See *infra* notes 278-94 and accompanying text.

278. *Morse III*, 127 S. Ct. at 2625.

279. See *id.* at 2622, 2629 (failing to state Frederick's audience consisted of both students and adults). The United States Court of Appeals for the Ninth Circuit stated that both students and adults attended the torch relay. *Frederick v. Morse (Morse II)*, 439 F.3d 1114, 1114, 1116 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

that Morse was entitled to take Frederick's banner down because she reasonably regarded the banner as advocating illegal drug use.²⁸⁰

In *Tinker*, the Court determined whether schools could censor passive student expression that did not substantially or materially impede school discipline.²⁸¹ The Court in *Tinker* determined restrictions on student speech should be based on the manner and mode of expression, and to what extent the students' expression disturbed the school's work, rather than based on the expression's content.²⁸² The *Tinker* Court determined a school could not censor student speech unless the speech materially and substantially disrupted the school's work or interfered with other students' rights.²⁸³ In determining the school violated the students' First Amendment rights because the armbands did not cause a substantial disruption, the Court in *Tinker* did not defer to the political content of the students' speech.²⁸⁴

Further, the Court in *Fraser* determined whether, consistent with the First Amendment, a school could punish a student for delivering a lewd and indecent speech.²⁸⁵ In *Fraser*, the Court alluded to the manner and context of Fraser's expression by stating that Fraser delivered his speech at a school assembly to an audience of six hundred students including fourteen-year-olds.²⁸⁶ Specifically, the *Fraser* Court stated that a high school assembly was no place for lewd, sexually explicit, and indecent speech.²⁸⁷ Moreover, the Court in *Fraser* declared school boards could determine what manner of speech was appropriate in school assemblies and in the classroom.²⁸⁸ In addition, other courts

280. *Id.* at 2622, 2629.

281. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist. (Tinker III)*, 393 U.S. 503, 509 (1969) (stating schools could not censor student speech without demonstrating that the student's conduct would substantially and materially impede the school's discipline).

282. *Id.* at 509 (determining that a school could not censor student speech unless the speech materially and substantially disrupted the school's work or other students' rights).

283. *Id.* at 509.

284. *See id.* at 509, 514 (failing to defer to the political content of the Students' speech).

285. *Bethel Sch. Dist. No. 403 v. Fraser (Fraser II)*, 478 U.S. 675, 677 (1986).

286. *See id.* (stating Fraser's audience included fourteen-year-olds); *see also Hazelwood Sch. Dist. v. Kuhlmeier (Kuhlmeier II)*, 484 U.S. 260, 286 n.2 (1988) (Brennan, J., dissenting) (providing *Fraser* holding limited "to the appropriateness of the manner in which the message is conveyed, not of the message's content"); *see also East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) (stating, "*Fraser* speaks to the form and manner of student speech . . . It addresses the mode of expression, not its content or viewpoint").

287. *Fraser II*, 478 U.S. at 685.

288. *Id.* at 683.

have stated that the *Fraser* Court addressed the manner of Fraser's speech and not the speech's content or substance.²⁸⁹

Similar to *Tinker* and *Fraser*, the Court in *Morse* analyzed whether a school constitutionally proscribed a student's speech.²⁹⁰ However, dissimilar to *Tinker* and *Fraser*, the Court in *Morse* did not defer to the context or manner in which Frederick revealed his banner because the Court neither deferred to the audience to which Frederick revealed his banner to nor stated that Frederick's banner caused a disruption.²⁹¹ Furthermore, unlike *Fraser* where the Court noted that Fraser spoke to an audience of six hundred high school students, the *Morse* Court did not state that Frederick's audience consisted of both students and adults.²⁹² Also unlike *Fraser* and *Tinker*, where the Court did not defer to the content of the students' speech, the Court in *Morse* proscribed Frederick's speech based on the speech's drug-related content.²⁹³ Therefore, the Court in *Morse* deviated from *Tinker* and *Fraser* by allowing schools to censor student speech based on the speech's content, rather than the manner in which the student expressed the speech.²⁹⁴

289. See *Kuhlmeier II*, 484 U.S. at 286 n.2 (Brennan, J., dissenting) (providing *Fraser* holding limited "to the appropriateness of the manner in which the message is conveyed, not of the message's content"); see also *East High*, 81 F. Supp. 2d at 1193 (stating, "*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint").

290. Compare *Morse III*, 127 S. Ct. at 2625 (determining whether school officials could constitutionally censor a student's expression that a school official reasonably interpreted as advocating illegal drug use), with *Tinker III*, 393 U.S. at 509 (determining whether schools could censor passive student expression that did not substantially or materially impede school discipline); and *Fraser II*, 478 U.S. at 677 (determining whether, under the First Amendment, a school could punish a student for delivering a lewd speech at a high school assembly).

291. Compare *Morse III*, 127 S. Ct. at 2622, 2629 (failing to defer to the context in which Frederick revealed his banner by not alluding to Frederick's audience and by not stating that Frederick's banner caused a disruption), with *Tinker III*, 393 U.S. at 509 (determining that restrictions on student speech should be based on the manner and mode of expression, rather than based on the expression's content), and *Fraser II*, 478 U.S. at 677 (alluding to the manner and context of Fraser's expression by stating that Fraser delivered his speech at a school assembly to an audience that included fourteen-year-olds).

292. Compare *Morse*, 127 S. Ct. at 2622, 2629 (failing to state that Frederick's audience consisted of both students and adults), with *Fraser*, 478 U.S. at 677 (stating Fraser's audience consisted of 600 high school students).

293. Compare *Morse III*, 127 S. Ct. at 2622, 2629 (stating *Morse* was entitled to take Frederick's banner down because she reasonably regarded the banner as advocating illegal drug use), with *Tinker III*, 393 U.S. at 509, 514 (determining that the students' armbands did not cause a substantial disruption without deferring to the political content of the students' speech), and *Fraser II*, 478 U.S. at 677, 683, 685 (alluding to the manner and context of Fraser's expression without relying on the content of Fraser's speech).

294. See *supra* notes 277-93 and accompanying text.

B. THE COURT APPLIED *KUHLMEIER'S* STANDARD FOR SCHOOL-SPONSORED SPEECH TO INDEPENDENT STUDENT SPEECH

To the extent the Court in *Morse* deferred to Morse's subjective judgment, the Court mistakenly extended *Kuhlmeier* to independent, non-school-sponsored speech.²⁹⁵ The Court in *Morse* also inappropriately extended *Kuhlmeier* to non-school-sponsored speech by allowing schools to restrict student speech based on its content.²⁹⁶

1. *To the Extent the Court Relied on Morse's Subjective Judgment and on Morse's Reasonable Interpretation, the Court Erroneously Extended Kuhlmeier's Standard for School-Sponsored Speech to Independent Student Speech*

To the extent the Court relied on Morse's subjective judgment and on Morse's reasonable interpretation of Frederick's sign, the Court erroneously extended *Kuhlmeier's* "legitimate pedagogical concern" test for school-sponsored speech to independent student speech.²⁹⁷ In *Morse*, the Court granted certiorari to answer whether Morse violated Frederick's First Amendment right to free speech.²⁹⁸ The Court in *Morse* determined Frederick's speech was not school-sponsored, and therefore *Kuhlmeier* was not controlling because no one could plausibly argue Frederick's sign bore the school's imprimatur.²⁹⁹ The *Morse* Court declared a school could constitutionally suppress a student's speech that school officials reasonably regarded as advocating illegal drug use.³⁰⁰ In *Morse*, the Court deferred to Morse's subjective judgment to conclude Morse constitutionally censored Frederick's speech.³⁰¹ The Court in *Morse* stated that Morse reasonably regarded Frederick's sign as advocating illegal drug use.³⁰²

In *Kuhlmeier*, the Court granted certiorari to answer whether, under the First Amendment, a school was required to affirmatively endorse student speech.³⁰³ The Court in *Kuhlmeier* determined the speech at issue was school-sponsored because the school would have

295. See *infra* notes 297-312 and accompanying text.

296. See *infra* notes 313-32 and accompanying text.

297. See *infra* notes 298-312 and accompanying text.

298. *Morse III*, 127 S. Ct. at 2624.

299. *Id.* at 2627.

300. *Id.* at 2622.

301. See *id.* at 2622, 2624, 2625, 2629. The Court stated that Morse reasonably regarded Frederick's sign as advocating illegal drug use. *Id.* at 2629. The Court noted that Morse believed that Frederick's sign would be interpreted by its audience as encouraging illegal drug use, and that Morse's interpretation was plainly reasonable. *Id.* at 2624. The Court asked whether a school official could censor student speech if that official reasonably viewed the speech as encouraging illegal drug use. *Id.* at 2625.

302. *Id.* at 2629.

303. *Kuhlmeier II*, 484 U.S. at 260, 266, 270-71.

published the articles in its newspaper.³⁰⁴ In *Kuhlmeier*, the Court held a school could constitutionally censor school-sponsored speech if the school's actions were connected to legitimate pedagogical concerns.³⁰⁵ In applying the "legitimate pedagogical concern" test, the *Kuhlmeier* Court deferred to Principal Reynolds' ("Reynolds") subjective judgment, and concluded Reynolds acted reasonably in deleting two articles from the school's official newspaper.³⁰⁶ The Court in *Kuhlmeier* concluded that Reynolds acted reasonably in deleting an article about pregnancy because Reynolds could have reasonably believed the pregnant girls' anonymity would not be protected if the school published the article.³⁰⁷ Further, the *Kuhlmeier* Court stated that Reynolds acted reasonably in deleting an article concerning divorce because Reynolds could have reasonably believed the father identified in the article deserved an opportunity to respond to the article's allegations.³⁰⁸

Similar to *Kuhlmeier*, the Court in *Morse* granted certiorari to answer whether a school violated a student's First Amendment right to free speech.³⁰⁹ Also like *Kuhlmeier*, where the Court stated that Reynolds acted reasonably in deleting an article about pregnancy because Reynolds could have reasonably believed that the pregnant girls' anonymity would not be protected if the article was published, the Court in *Morse* deferred to the school official's subjective judgment by stating that Morse reasonably regarded Frederick's banner as advocating illegal drug use.³¹⁰ However, unlike in *Kuhlmeier*, the Court in *Morse* determined that Frederick's speech was not school-sponsored, and was therefore not subject to the "legitimate pedagogical

304. *Id.* at 271, 274.

305. *Id.* at 273.

306. *Id.* at 273, 274 (stating Reynolds acted reasonably in deleting an article about pregnancy because Reynolds could have reasonably believed that the pregnant girls' anonymity would not be protected if the article was published); *Id.* at 275 (stating Reynolds could have reasonably believed, in the spirit of journalistic fairness, that the father identified in an article about divorce deserved an opportunity to respond to the article's allegations).

307. *Id.* at 274.

308. *Id.* at 274, 275.

309. *Compare Morse III*, 127 S. Ct. at 2624 (granting certiorari to answer whether Morse violated Frederick's First Amendment right to free speech), *with Kuhlmeier II*, 484 U.S. at 266, 270-71 (granting certiorari to answer whether, consistent with the First Amendment, a school was required to affirmatively endorse student speech).

310. *Compare Morse III*, 127 S. Ct. at 2629 (stating that Morse reasonably regarded Frederick's banner as advocating illegal drug use), *with Kuhlmeier II*, 484 U.S. at 274 (stating Reynolds acted reasonably in deleting an article about pregnancy because Reynolds could have reasonably believed that the pregnant girls' anonymity would not be protected if the article was published), *and Id.* at 275 (stating Reynolds could have reasonably believed, in the spirit of journalistic fairness, that the father identified in an article about divorce deserved an opportunity to respond to the article's allegations).

concern" test.³¹¹ Thus, to the extent the Court in *Morse* deferred to Morse's subjective judgment, the Court inappropriately extended *Kuhlmeier* to independent, non-school sponsored speech.³¹²

2. *The Court in Morse Inappropriately Extended Kuhlmeier to Non-School-Sponsored Speech by Allowing Schools to Restrict Student Speech Based on the Speech's Content*

The Court in *Morse* mistakenly extended *Kuhlmeier* to independent student speech by announcing a rule that allowed schools to restrict student speech based on the speech's drug-related content.³¹³ In *Morse*, the issue before the Court was whether school officials could constitutionally censor a student's speech.³¹⁴ The Court in *Morse* held a school could suppress a student's speech based on the speech's drug-related content as long as the school reasonably regarded the speech as promoting illegal drug use.³¹⁵ Further, the Court in *Morse* determined Frederick's speech was not school-sponsored because no one could plausibly view Frederick's sign as bearing the school's imprimatur.³¹⁶ In *Morse*, the Court reasoned the government's strong interest in deterring illegal drug use justified a rule that allowed schools to censor speech that school officials reasonably regarded as advocating illegal drug use.³¹⁷

By comparison, in *Kuhlmeier*, the Court answered whether, under the First Amendment, a school was required to affirmatively endorse student speech.³¹⁸ The Court in *Kuhlmeier* held schools could restrict the content of school-sponsored speech as long as the schools' actions were reasonably connected to "legitimate pedagogical concerns."³¹⁹ The *Kuhlmeier* Court determined the speech at issue was school-sponsored because the school would have published the articles in its newspaper.³²⁰ In distinguishing between school-sponsored student speech

311. Compare *Morse III*, 127 S. Ct. at 2627 (declaring Frederick's banner did not bear the imprimatur of the school, and therefore that *Kuhlmeier* was not binding on the Court's decision); with *Kuhlmeier II*, 484 U.S. at 271, 273, 274 (determining that the speech at issue was school-sponsored because the school would have published the articles in its newspaper, and that the schools' actions would be constitutional if their actions were reasonably connected to legitimate pedagogical concerns).

312. See *supra* notes 297-311 and accompanying text.

313. See *infra* notes 314-32 and accompanying text.

314. *Morse III*, 127 S. Ct. at 2625.

315. *Id.* at 2622.

316. *Id.* at 2627.

317. See *id.* at 2622, 2628 (recognizing the school's strong interest in deterring illegal drug use and determining schools could censor student speech which schools reasonably regarded as advocating illegal drug use).

318. *Kuhlmeier II*, 484 U.S. at 266, 270-71.

319. *Id.* at 273.

320. *Id.* at 271.

and independent student speech, the *Kuhlmeier* Court reasoned school officials could exercise greater control over the content of school-sponsored speech because the public could perceive such speech as bearing the school's imprimatur.³²¹

Further, the Court in *Fraser* determined whether, consistent with the First Amendment, a school could punish a student for delivering a lewd and indecent speech.³²² In *Fraser*, the Court held the First Amendment did not protect student speech that was indecent and lewd because such speech interfered with the school's educational mission.³²³ The Court in *Fraser* did not analyze Fraser's speech as school-sponsored speech.³²⁴ The *Fraser* Court reasoned the school constitutionally censored Fraser's speech because the school had a strong interest in censoring speech that interfered with the school's educational mission, which included speech that was lewd and indecent.³²⁵

Similar to *Kuhlmeier* and *Fraser*, the Court in *Morse* analyzed whether a school constitutionally proscribed student speech.³²⁶ Similar to *Kuhlmeier*, but unlike *Fraser* where the Court held a school constitutionally censored indecent student speech because the speech interfered with the school's educational mission, the *Morse* Court relied on a school official's reasonable judgment to determine the school constitutionally proscribed the student's speech.³²⁷ Also similar to *Kuhlmeier* where the Court allowed a school official to make content-based judgments concerning the school newspaper, but unlike *Fraser* where the Court determined schools could censor student speech if the speech interfered with the school's educational mission, the *Morse* Court's decision allowed a school to censor student speech based on

321. *Id.* at 270-71.

322. *Fraser II*, 478 U.S. at 677.

323. *Id.* at 685.

324. *See generally id.* at 685 (failing to analyze Fraser's speech as school-sponsored speech).

325. *Fraser II*, 478 U.S. at 681.

326. *Compare Morse III*, 127 S. Ct. at 2625 (determining whether school officials could constitutionally censor a student's expression that a school official reasonably interpreted as advocating illegal drug use), *with Kuhlmeier II*, 484 U.S. at 266, 270-71 (determining whether, under the First Amendment, a school was required to affirmatively endorse student speech), *and Fraser II*, 478 U.S. at 677 (determining whether, under the First Amendment, a school could punish a student for delivering a lewd speech at a high school assembly).

327. *Compare Morse III*, 127 S. Ct. at 2622 (holding that a school could suppress a student's speech based on its drug-related content as long as the school *reasonably* regarded the speech as promoting illegal drug use), *with Kuhlmeier II*, 484 U.S. at 273 (holding that schools could restrict the content of school-sponsored speech as long as the schools' actions were *reasonably* connected to "legitimate pedagogical concerns"), *and Fraser II*, 478 U.S. at 685 (holding that the First Amendment did not protect student speech that was indecent and lewd because such speech interfered with the school's educational mission).

the speech's drug-related content.³²⁸ However, unlike *Kuhlmeier* where the Court determined the student speech was school-sponsored, but similar to *Fraser* where the Court did not analyze the student's speech as school-sponsored, the *Morse* Court did not analyze Frederick's speech as school-sponsored.³²⁹ Further, unlike *Kuhlmeier* where the Court reasoned school officials had authority to restrict the content of school-sponsored speech if the school official's actions were reasonably related to "legitimate pedagogical concerns," but similar to *Fraser* where the Court recognized the school's interest in shielding a captive audience of fourteen-year-olds from lewd and indecent speech, the *Morse* Court recognized the school's strong interest in deterring illegal drug use.³³⁰ In *Morse*, the Court extended *Kuhlmeier* to allow content-based restrictions on non-school-sponsored speech by deferring to Morse's reasonable judgment and by allowing schools to proscribe student speech based on the speech's drug-related content.³³¹ By determining Frederick's speech was not school-sponsored and by referring to a strong governmental interest as the Court in *Fraser* did, the Court extended *Kuhlmeier* to independent student speech.³³²

CONCLUSION

In *Morse v. Frederick*,³³³ the United States Supreme Court concluded that Juneau-Douglas High School ("JDHS") Principal Deborah Morse ("Morse") legally restricted Joseph Frederick's ("Frederick")

328. Compare *Morse III*, 127 S. Ct. at 2622 (holding that a school could suppress a student's speech based on its drug-related content as long as the school reasonably regarded the speech as promoting illegal drug use), with *Kuhlmeier II*, 484 U.S. at 273 (holding that schools could restrict the content of school-sponsored speech as long as the schools' actions were reasonably connected to "legitimate pedagogical concerns"), and *Fraser II*, 478 U.S. at 685 (holding that the First Amendment did not protect student speech that was indecent and lewd because such speech interfered with the school's educational mission).

329. Compare *Morse III*, 127 S. Ct. at 2627 (determining that Frederick's speech was not school-sponsored because no one could plausibly view Frederick's sign as bearing the school's imprimatur), with *Kuhlmeier II*, 484 U.S. at 271 (determining that the speech at issue was school-sponsored because the school would have published the articles in its school newspaper), and *Fraser II*, 478 U.S. at 685 (failing to analyze Fraser's speech as school-sponsored speech).

330. Compare *Morse III*, 127 S. Ct. at 2622, 2628 (reasoning that the government's strong interest in deterring illegal drug use justified a rule that allowed schools to censor speech that school officials reasonably regarded as advocating illegal drug use), with *Kuhlmeier II*, 484 U.S. at 270-71 (reasoning that school officials could exercise greater control over the content of school-sponsored speech), and *Fraser II*, 478 U.S. at 681 (reasoning that the school constitutionally censored Fraser's speech because the school had a strong interest in censoring speech that interfered with its educational mission, which included lewd and indecent speech).

331. See *supra* notes 313-30 and accompanying text.

332. See *supra* notes 313-31 and accompanying text.

333. 127 S. Ct. 2618 (2007).

speech because Morse reasonably regarded Frederick's banner as advocating illegal drug use.³³⁴ The Court held a school could suppress a student's speech that the school reasonably regarded as advocating illegal drug use.³³⁵ The Court determined Morse reasonably regarded Frederick's sign as advocating illegal drug use because Frederick's banner was susceptible to at least two pro-drug interpretations.³³⁶ The Court reasoned that although Frederick's banner could be interpreted as funny, offensive, or meaningless, two reasonable interpretations were "bong hits are a good thing" and "we take bong hits," both of which encouraged illegal drug use.³³⁷ The Court concluded Morse legally confiscated Frederick's banner and suspended Frederick because Morse reasonably believed Frederick's banner advocated illegal drug use.³³⁸

In *Morse*, the Court erred in relying on Morse's reasonable judgment while placing a content-based restriction on Frederick's speech without giving deference to the context and manner of Frederick's speech.³³⁹ The Court mistakenly deviated from both *Tinker* and *Fraser* by placing a restriction on student speech that allows schools to censor speech based on the speech's content, as opposed to a restriction that requires schools to defer to the context and manner of the student's speech.³⁴⁰ Further, the Court essentially applied *Kuhlmeier*'s standard for school-sponsored speech, although the Court stated that Frederick's speech was not school-sponsored and therefore that *Kuhlmeier* did not apply.³⁴¹ The Analysis illustrated this point in two respects.³⁴² First, by demonstrating that to the extent the Court relied on Morse's subjective judgment and reasonable interpretation of Frederick's banner, the Court erroneously extended *Kuhlmeier*'s standard for school-sponsored speech to independent student speech.³⁴³ Second, by demonstrating that the Court, in allowing schools to censor speech based on the speech's drug-related content, inappropriately extended *Kuhlmeier*'s standard for school-sponsored speech to non-school-sponsored speech.³⁴⁴

The Court's holding in *Morse* did not leave room for political speech about illegal drug use because a school official could interpret a

334. *Morse v. Frederick (Morse III)*, 127 S. Ct. 2618, 2618, 2622 (2007).

335. *Morse III*, 127 S. Ct. at 2622.

336. *Id.* at 2624, 2625.

337. *Id.*

338. *Id.* at 2622, 2624.

339. See *supra* notes 263-332 and accompanying text.

340. See *supra* notes 277-94 and accompanying text.

341. See *supra* notes 295-332 and accompanying text.

342. See *supra* notes 295-332 and accompanying text.

343. See *supra* notes 297-312 and accompanying text.

344. See *supra* notes 313-32 and accompanying text.

student's speech concerning the legalization of marijuana as advocating illegal drug use and therefore, under the Court's holding, constitutionally proscribe the student's speech.³⁴⁵ The Court held schools could proscribe student speech so long as a school official reasonably regarded the speech as advocating illegal drug use without expressly limiting the holding to speech that was not political or religious.³⁴⁶ Through this holding, the Court would make it possible for schools to censor a sign that a student revealed on a field trip to the state capital while the legislature was in session stating, "Legalize Marijuana."

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345. See *Morse III*, 127 S. Ct. at 2622, 2624, 2625 (holding that a school official could constitutionally proscribe a student's speech if that speech was susceptible to a pro-drug meaning).

346. *Id.*