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## CONSTITUTIONAL LAW—The Supreme Court Takes a Fractured Stance on What Students Can Say About Drugs; *Morse v. Fredrick*, 127 S. Ct. 2618 (2007)

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## CASE NOTE

### CONSTITUTIONAL LAW—The Supreme Court Takes a Fractured Stance on What Students Can Say About Drugs; *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

*Kellie Nelson\**

#### INTRODUCTION

One student's publicity stunt led to the Supreme Court restricting what students all over the United States may legally say about drugs.<sup>1</sup> It all began when Juneau-Douglas High School released its students to attend the Olympic torch relay as it passed in front of the school.<sup>2</sup> As the Olympic torch (and television cameras) approached, a group of students, including Joseph Frederick, raised a fourteen-foot banner that read, "BONG HiTs 4 JESUS."<sup>3</sup> When the high school principal, Deborah Morse, saw this banner, she crossed the street and asked the students to lower it.<sup>4</sup> Frederick was the only student who refused.<sup>5</sup> Principal Morse confiscated the banner and later suspended Frederick for ten days.<sup>6</sup> Morse explained to Frederick that she confiscated the banner because it promoted illegal drug use, in violation of school board policy.<sup>7</sup> Frederick administratively appealed to the Juneau School District Superintendent, who upheld Frederick's suspension, but limited his punishment to time served.<sup>8</sup> Like Principal Morse, the Superintendent determined the message promoted the use of illegal substances, and thus violated school board policy.<sup>9</sup> The Juneau School District Board of Education upheld the Superintendent's decision.<sup>10</sup>

Frederick then filed a suit in United States District Court for the District of Alaska, alleging that Morse and the school board violated his First Amendment rights by removing his banner and punishing him for displaying the banner.<sup>11</sup> The

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<sup>1</sup> *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

<sup>2</sup> *Id.* at 2622.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Morse*, 127 S. Ct. at 2622.

<sup>7</sup> *Id.* at 2622-23.

<sup>8</sup> *Id.* at 2623. Frederick had already served eight days of his suspension. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Frederick v. Morse*, No. J 02-0008 CV (D.Alaska May 27, 2003). Frederick filed suit under 42 U.S.C. § 1983. *Morse*, 127 S. Ct. at 2623.

district court granted summary judgment in favor of the principal and the school board, ruling that Morse was entitled to qualified immunity and that neither Morse nor the school board violated Frederick's First Amendment rights.<sup>12</sup> The United States Court of Appeals for the Ninth Circuit reversed the district court's decision, finding that Principal Morse violated Frederick's right to free speech.<sup>13</sup> The Ninth Circuit also held that Morse was not entitled to qualified immunity because the law on student speech was clear and Morse violated it.<sup>14</sup> Because she was not entitled to qualified immunity, the Ninth Circuit held Morse personally liable for monetary damages due to her violation of Frederick's rights.<sup>15</sup>

The United States Supreme Court reversed the Ninth Circuit and held that, "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."<sup>16</sup> Under this ruling, Principal Morse did not violate Frederick's right to free speech.<sup>17</sup> Thus, the Court did not address the qualified immunity issue.<sup>18</sup>

This case note discusses student speech jurisprudence as it stood before the decision in *Morse*.<sup>19</sup> This discussion focuses primarily on three United States Supreme Court cases referred to as the *Tinker* trilogy.<sup>20</sup> The note also provides some background information on speech that advocates illegal conduct and the doctrine of qualified immunity.<sup>21</sup> The note then summarizes the five separate opinions issued in *Morse* and how the Justices reached the conclusion that school administrators can restrict student speech advocating drug use.<sup>22</sup> This note contends that the Court made the area of student speech more confusing by issuing five different opinions.<sup>23</sup> It also argues the Court should not have allowed a viewpoint-based restriction of speech.<sup>24</sup> Finally, this note expresses concern that

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<sup>12</sup> *Frederick*, No. J 02-0008 CV slip op. at 25.

<sup>13</sup> *Frederick v. Morse*, 439 F.3d 1114, 1125 (9th Cir. 2004).

<sup>14</sup> *Id.* In order to be covered by qualified immunity, a public official must show, among other things, that the constitutional right was not clearly established at the time the public official violated it. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); for further explanation of qualified immunity see also *infra* notes 117-23 and accompanying text.

<sup>15</sup> *Frederick*, 439 F.3d at 1123.

<sup>16</sup> *Morse*, 127 S. Ct. at 2622.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2624.

<sup>19</sup> See *infra* notes 29-109 and accompanying text.

<sup>20</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); See *infra* notes 29-109 and accompanying text.

<sup>21</sup> See *infra* notes 110-123 and accompanying text.

<sup>22</sup> See *infra* notes 129-218 and accompanying text.

<sup>23</sup> See *infra* notes 223-241 and accompanying text.

<sup>24</sup> See *infra* notes 242-251 and accompanying text.

this decision could lead to further restrictions on both student speech and speech in other contexts.<sup>25</sup>

### BACKGROUND

Since the Court focused primarily on whether Frederick's banner constituted protected speech under the First Amendment, this Background section focuses primarily on student speech as embodied by Supreme Court cases known as the *Tinker* trilogy.<sup>26</sup> However, since drugs are illegal, the background section also covers how the First Amendment applies to advocacy of illegal activity.<sup>27</sup> Finally, the background section addresses the doctrine of qualified immunity, which Principal Morse raised as a defense in this case.<sup>28</sup>

#### *Student Speech and the First Amendment*

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech or of the press."<sup>29</sup> At first glance, this amendment looks like an absolute shield against government action that would limit freedom of expression.<sup>30</sup> However, the Supreme Court has never interpreted the First Amendment so absolutely.<sup>31</sup> Rather, the Supreme Court has consistently upheld certain limitations on expression based on the potential effects of the speech.<sup>32</sup> In particular, the Supreme Court has afforded student speech less protection than adult speech under the First Amendment.<sup>33</sup> A trilogy of cases, often referred to as the *Tinker* trilogy, formed the basis of student speech law prior to the holding in *Morse*.<sup>34</sup>

#### Tinker v. Des Moines Independent School District

The Supreme Court first recognized students' First Amendment rights to free speech in *Tinker v. Des Moines Independent Community School District*.<sup>35</sup> In

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<sup>25</sup> See *infra* notes 252-255 and accompanying text.

<sup>26</sup> See *infra* notes 29-109 and accompanying text; *Kuhlmeier*, 484 U.S. 260; *Fraser*, 478 U.S. 675; *Tinker*, 393 U.S. at 503.

<sup>27</sup> See *infra* notes 110-116 and accompanying text.

<sup>28</sup> See *infra* notes 117-128 and accompanying text.

<sup>29</sup> U.S. CONST. amend. I.

<sup>30</sup> LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 214 (CQ Press 2004).

<sup>31</sup> *Id.* See also *Dennis v. United States*, 341 U.S. 494, 503 (1951) (holding speech is not an unlimited right); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (establishing words that pose a clear and present danger can be limited).

<sup>32</sup> See *Dennis*, 341 U.S. at 503; *Schenck*, 249 U.S. at 52.

<sup>33</sup> *Fraser*, 478 U.S. at 682; *Tinker*, 393 U.S. at 506.

<sup>34</sup> *Tinker*, 393 U.S. at 503; *Fraser*, 478 U.S. 675; *Kuhlmeier*, 484 U.S. 260.

<sup>35</sup> *Tinker*, 393 U.S. 503, 504 (1969).

December of 1965, a group of students and adults in Des Moines, Iowa decided to wear black armbands to protest the Vietnam War.<sup>36</sup> When the Des Moines public school principals heard about the students' plan to wear black armbands to school, they met and adopted a policy.<sup>37</sup> According to the policy, faculty members would first ask student wearing black armbands to remove them.<sup>38</sup> The schools would then suspend any student who refused to remove the armband until he or she returned without it.<sup>39</sup> John Tinker, Christopher Eckhardt, and Mary Beth Tinker all wore black armbands to school.<sup>40</sup> They refused to remove the armbands when asked, and, in accordance with the school board policy, they were all suspended.<sup>41</sup>

The Supreme Court held the Constitution did not allow school officials to deny students this form of expression.<sup>42</sup> The Court began by explaining that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>43</sup> However, the Court tempered this ruling by noting that the First Amendment in student speech cases must be applied in light of the special circumstances of the school environment.<sup>44</sup>

The Court stated that under the special circumstances of the school environment, if a school cannot find that the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” the prohibition cannot be sustained.<sup>45</sup> This standard requires school officials to show “more than a mere desire to avoid the discomfort and unpleasantness” that comes with an unpopular opinion.<sup>46</sup> *Tinker* also requires more than an undifferentiated fear or apprehension of disturbance.<sup>47</sup>

The Court found school authorities had no reason to believe students wearing black armbands would substantially interfere with the classroom or impinge on

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Tinker*, 393 U.S. at 504. John Tinker was fifteen years old, Christopher Eckhardt was sixteen years old, and Mary Beth Tinker was thirteen years old. *Id.*

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

<sup>42</sup> *Id.* at 514.

<sup>43</sup> *Id.* at 506.

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

<sup>45</sup> *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (1966)).

<sup>46</sup> *Tinker*, 393 U.S. at 509. In *Tinker*, the Court said the school officials' concern that if students wore the armbands, other students might ridicule them or argue with them was no more than a desire to avoid an unpleasant situation. *Id.*

<sup>47</sup> *Id.* at 508. The Court also held that the school officials' fear that the armbands might cause conflict between the students was only an undifferentiated fear of apprehension. *Id.*

the rights of other students.<sup>48</sup> The armbands silently and passively expressed an opinion, and no evidence existed to show the armbands caused any disturbance.<sup>49</sup> Further, the Vietnam War created major political controversy at that time.<sup>50</sup> School officials, motivated by their desire to avoid the controversy surrounding the Vietnam War, tried to avoid conflict at the cost of student expression.<sup>51</sup> The Court found this denial of expression unacceptable.<sup>52</sup>

The Court found particular significance in the school's prohibition of black armbands but not other political or social symbols.<sup>53</sup> It interpreted the schools' prohibition of just one symbol as evidence that the school officials' actions amounted to the prohibition of one particular viewpoint.<sup>54</sup> Absent a substantial interference with school work or discipline, the Court held this prohibition unconstitutional.<sup>55</sup> Thus under *Tinker*, freedom of expression exists within public schools as long as the student does not substantially interfere with the requirements of appropriate discipline or violate the rights of others.<sup>56</sup>

*Bethel School District No. 403 v. Fraser*

The Court heard the second major student speech case, *Bethel School District No. 403 v. Fraser* in 1986.<sup>57</sup> In that case, Matthew Fraser delivered a speech at a high school assembly, nominating another student for student elective office.<sup>58</sup> He delivered his speech in front of approximately six hundred high school students, many as young as fourteen, at a school-sponsored assembly as part of an educational program in self-government.<sup>59</sup> In his speech, Fraser used an elaborate, graphic, and sexually explicit metaphor to describe the candidate he was nominating.<sup>60</sup>

Before Fraser presented his speech, two of his teachers warned him they considered the content of his speech inappropriate and he would likely be

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<sup>48</sup> *Id.* at 509.

<sup>49</sup> *Id.* at 508.

<sup>50</sup> *Tinker*, 393 U.S. at 510.

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

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

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

<sup>54</sup> *Id.*

<sup>55</sup> *Tinker*, 393 U.S. at 511. The Court also held that a student's speech rights apply not only in the classroom, but also in the cafeteria, on the playing field, or anywhere on campus. *Id.* at 512-13.

<sup>56</sup> *Id.* at 512-13.

<sup>57</sup> *Fraser*, 478 U.S. at 677.

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

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

<sup>60</sup> *Id.* at 677-78.

punished.<sup>61</sup> Despite these warnings, Fraser presented his remarks as planned.<sup>62</sup> The day after the speech, the assistant principal called Fraser to her office.<sup>63</sup> The assistant principal informed Fraser of Bethel High School's disciplinary rule, which prohibited conduct that interfered with the educational process, including obscene or profane language or gestures.<sup>64</sup> The assistant principal told Fraser she considered his speech a violation of that rule.<sup>65</sup> The assistant principal suspended Fraser for three days and removed his name from the list of students to be considered for a graduation speaker.<sup>66</sup> The school district upheld Fraser's punishment by finding his speech plainly offensive.<sup>67</sup> After Fraser served two days of his suspension, the school permitted Fraser to return to school.<sup>68</sup>

The United States District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit both found that the assistant principal violated Fraser's free speech rights under the *Tinker* standard.<sup>69</sup> The Supreme Court reversed the Ninth Circuit on several grounds.<sup>70</sup> The Court began by explaining that although students have a constitutional right to free expression while at school, students must also learn the boundaries of socially acceptable behavior in school.<sup>71</sup> As such, schools are not required to grant students the same latitude in expressing their opinions as government officials would have to grant adults for the same expressions.<sup>72</sup> Thus, "the constitutional rights of students in public schools are not automatically co-extensive with the rights of adults in other settings."<sup>73</sup>

The Court went on to hold that school officials could punish lewd and offensive speech.<sup>74</sup> Focusing on the public schools' role in protecting young students from offensive and vulgar language, the Court explained that offensive speech did not warrant the same level of protection as other forms of speech.<sup>75</sup> It

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<sup>61</sup> *Id.* at 678.

<sup>62</sup> *Fraser*, 478 U.S. at 678.

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

<sup>64</sup> *Id.*

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

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

<sup>67</sup> *Fraser*, 478 U.S. at 678-79.

<sup>68</sup> *Id.* at 679. The school allowed Fraser to speak at graduation. *Id.*

<sup>69</sup> *Id.* at 679-80.

<sup>70</sup> *Id.* at 680.

<sup>71</sup> *Id.* at 681. The Court stated "that right must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.*

<sup>72</sup> *Fraser*, 478 U.S. at 682.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 683.

<sup>75</sup> *Id.* at 684.

referenced *Chaplinsky v. New Hampshire* stating that such offensive speech did not contribute to the exchange of ideas and had very little value in finding truth.<sup>76</sup>

The Court distinguished *Fraser* from *Tinker* by explaining the penalty imposed on Fraser was unrelated to any particular viewpoint.<sup>77</sup> *Fraser*, the Court noted, did not follow the rule set out in *Tinker*.<sup>78</sup> As long as the speech is offensive or obscene, under *Fraser*, the school can censor the speech even if the school cannot show any actual or substantial disruption, as required by *Tinker*.<sup>79</sup>

### *Hazelwood School District v. Kuhlmeier*

The third case in the *Tinker* trilogy is *Hazelwood School District v. Kuhlmeier*.<sup>80</sup> In that case, Hazelwood East High School, through its Journalism II class published a school paper entitled *Spectrum* approximately every three weeks.<sup>81</sup> The Board of Education bore the majority of the financial responsibility for *Spectrum*.<sup>82</sup> The normal practice at Hazelwood East High was for the Journalism II teacher to present a copy of the paper to the principal, Robert Reynolds, for review prior to publication.<sup>83</sup>

Three days prior to the scheduled publication, the Journalism II teacher submitted a copy of the May 13th edition of *Spectrum* for Principal Reynolds's review.<sup>84</sup> Reynolds thought the school should not publish two of the stories in that edition of the school paper.<sup>85</sup> One of the stories he objected to discussed three students' experiences with pregnancy.<sup>86</sup> He worried that even though the authors withheld the students' names, the limited number of pregnant students at Hazelwood East would make the identity of the students in the story easy for other students to determine.<sup>87</sup> The other story he found objectionable discussed the impact of divorce on the Hazelwood East students.<sup>88</sup> The article contained

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<sup>76</sup> *Id.* at 684. (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The *Chaplinsky* Court stated, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

<sup>77</sup> *Fraser*, 478 U.S. at 685.

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 685.

<sup>80</sup> *Kuhlmeier*, 484 U.S. at 262.

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 263.

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

<sup>85</sup> *Kuhlmeier*, 484 U.S. at 263.

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

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

some negative remarks about one student's parents.<sup>89</sup> Principal Reynolds expressed concern that the parents did not have a fair opportunity to respond to such remarks.<sup>90</sup>

Due to Principal Reynolds's concerns, the Journalism II class published *Spectrum* without the two pages containing the stories to which the principal objected.<sup>91</sup> The class did not print the other articles that would have been on the pages with the objectionable articles.<sup>92</sup> Principal Reynolds explained there was not enough time to make the necessary changes before the scheduled publication date, and delayed publication would result in publication after the end of the school year.<sup>93</sup>

Three students in Hazelwood East's Journalism II class filed suit in United States District Court for the Eastern District of Missouri, alleging that the school violated their First Amendment rights.<sup>94</sup> The district court found no violation had occurred.<sup>95</sup> The district court held "school officials may impose restraints on students' speech in activities that are 'an integral part of the school's educational function,' . . . so long as their decision has a 'substantial and reasonable basis.'"<sup>96</sup> Relying on *Tinker*, the United States Court of Appeals for the Eighth Circuit reversed and found that *Spectrum* amounted to a public forum, and thus deserved increased protection.<sup>97</sup>

The United States Supreme Court reversed the Eighth Circuit's decision.<sup>98</sup> The Court relied on *Tinker* and *Fraser*, stating that although students do not shed their constitutional rights at the schoolhouse gate, those rights are not necessarily the same rights as those possessed by adults.<sup>99</sup> The Court determined that *Spectrum* did not amount to a public forum because school officials did not show any intention to open its pages to "indiscriminate use" by student reporters and editors.<sup>100</sup> Rather, *Spectrum* was part of the Journalism II curriculum, overseen by teachers and school administrators.<sup>101</sup> Since the Court did not consider *Spectrum*

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<sup>89</sup> *Id.*

<sup>90</sup> *Kuhlmeier*, 484 U.S. at 263.

<sup>91</sup> *Id.* at 264.

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

<sup>93</sup> *Id.* at 263-64.

<sup>94</sup> *Id.* at 264.

<sup>95</sup> *Kuhlmeier*, 484 U.S. at 264.

<sup>96</sup> *Id.* at 264.

<sup>97</sup> *Id.* at 265.

<sup>98</sup> *Id.* at 266.

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

<sup>100</sup> *Kuhlmeier*, 484 U.S. at 270.

<sup>101</sup> *Id.* at 268-70.

a public forum, the Court held “school officials were entitled to regulate the content of *Spectrum* in any reasonable manner.”<sup>102</sup>

In this case, the Court distinguished between tolerating particular student speech and affirmatively promoting that same speech.<sup>103</sup> When students, parents, and members of the community could reasonably perceive that activities such as school-sponsored publications, theatrical productions, and expressive activities are sponsored or promoted by the school, educators have more authority.<sup>104</sup> Even if such activities do not take place in the classroom, they may be considered part of the school’s curriculum.<sup>105</sup> As such, school authorities can exercise control over such activities to ensure students learn the lessons the activity is designed to teach.<sup>106</sup> The school can also “disassociate” itself from speech, even if it is not disruptive or offensive.<sup>107</sup> The Court specifically held, “[a] school must also retain authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”<sup>108</sup> Thus the *Tinker* trilogy established that students possessed First Amendment rights subject to restriction if the expression created a substantial disruption, was lewd or obscene, or bore the school’s imprimatur.<sup>109</sup>

### *Incitement to Lawless Activity*

In addition to student speech, speech that incites lawless action also receives less protection under the First Amendment than other types of speech.<sup>110</sup> The current test for whether state officials can restrict speech that incites lawless action is found in *Brandenburg v. Ohio*.<sup>111</sup> In that case, a leader of the Ku Klux Klan (KKK) was convicted under the Ohio Criminal Syndicalism statute, fined \$1,000 and sentenced to ten years imprisonment for speeches he made at KKK rallies.<sup>112</sup> In the speeches he expressed racist attitudes and threatened “revengeance.”<sup>113</sup> The Supreme Court reversed *Brandenburg*’s conviction, holding the Ohio Criminal Syndicalism statute unconstitutional under the First and Fourteenth

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<sup>102</sup> *Id.* at 270.

<sup>103</sup> *Id.* at 270-71.

<sup>104</sup> *Id.* at 271.

<sup>105</sup> *Kuhlmeier*, 484 U.S. at 271.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

<sup>109</sup> *Tinker*, 393 U.S. at 503; *Fraser*, 478 U.S. 675; *Kuhlmeier*, 484 U.S. 260.

<sup>110</sup> See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>111</sup> *Id.* at 447.

<sup>112</sup> *Id.* at 445.

<sup>113</sup> *Id.* at 446.

Amendments.<sup>114</sup> The Court held a state can only prohibit speech that 1) advocates the use of force or law violation when such advocacy directly incites or produces imminent lawless action, and 2) is likely to actually incite or produce such action.<sup>115</sup> This narrow holding does not allow a state to punish mere advocacy of illegal action.<sup>116</sup>

### *Qualified Immunity*

Another issue in the *Morse* case was qualified immunity, a doctrine in which courts grant public officials performing discretionary functions qualified immunity and “shield them from liability for civil damages [when] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>117</sup> To determine whether a public official is entitled to qualified immunity, courts engage in a two-step inquiry as described in *Saucier v. Katz*.<sup>118</sup> First, the court must determine if the plaintiff has alleged a deprivation of a constitutional right, and if so, whether that constitutional right was clearly established at the time of the alleged violation.<sup>119</sup> A constitutional right is “clearly established,” if it is clear within the specific context of the case, rather than in a general sense.<sup>120</sup> While there does not have to be a case prohibiting the exact conduct in question, the right must be “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>121</sup>

The second step in the qualified immunity analysis requires the court to determine whether the public official was objectively reasonable in taking the particular action in light of the legal rules that were clearly established at the time of the action.<sup>122</sup> The court does not need to address the second step unless it first finds the law clearly established.<sup>123</sup>

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<sup>114</sup> *Id.* at 448.

<sup>115</sup> *Brandenburg*, 395 U.S. at 447.

<sup>116</sup> *Id.*

<sup>117</sup> *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>118</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson*, 526 U.S. at 609.

<sup>119</sup> *Wilson*, 526 U.S. at 609.

<sup>120</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Saucier*, 533 U.S. at 200.

<sup>121</sup> *Anderson*, 483 U.S. at 640; *Wilson*, 526 U.S. at 615. The Court also phrased this standard as “in the light of pre-existing law the unlawfulness must be apparent.” *Anderson*, 483 U.S. at 640; *Wilson*, 526 U.S. at 615.

<sup>122</sup> *Anderson*, 483 U.S. at 641; *Wilson*, 526 U.S. at 614.

<sup>123</sup> *Harlow*, 457 U.S. at 818. This is because “an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be said to ‘know’ that the law forbade conduct not previously identified as unlawful.” *Id.*

The Court justified this order-of-battle in *Saucier*.<sup>124</sup> In that case, a demonstrator sued the military police officer who arrested him after a protest, alleging the police officer violated numerous rights.<sup>125</sup> The police officer raised the defense of qualified immunity.<sup>126</sup> The Supreme Court held that in a qualified immunity analysis the Court must consider the constitutional question before determining whether the official acted reasonably.<sup>127</sup> This order-of-battle is justified, according to the Court, because it allows constitutional law to develop.<sup>128</sup>

#### PRINCIPAL CASE

The decision in *Morse v. Frederick* consists of five separate opinions.<sup>129</sup> Chief Justice Roberts wrote the Court's opinion joined by Justices Scalia, Alito, Thomas, and Kennedy.<sup>130</sup> Justice Thomas wrote a concurring opinion.<sup>131</sup> Justice Alito also wrote a concurring opinion, joined by Justice Kennedy.<sup>132</sup> Justice Breyer concurred in part and dissented in part, and Justice Stevens authored the dissent joined by Justice Souter and Justice Ginsburg.<sup>133</sup>

#### *Chief Justice Roberts, Opinion of the Court*

The Supreme Court granted certiorari to consider two questions: whether Frederick had a First Amendment right to wield his banner, and whether Principal Morse was entitled to qualified immunity.<sup>134</sup> The Court initially determined

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<sup>124</sup> *Saucier*, 533 U.S. at 201.

<sup>125</sup> *Id.* at 198-99.

<sup>126</sup> *Id.* at 199.

<sup>127</sup> *Id.* at 200.

<sup>128</sup> *Id.* at 201.

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

*Saucier*, 533 U.S. at 201.

<sup>129</sup> See generally *Morse*, 127 S. Ct. 2618 (2007).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2629 (Thomas, J., concurring).

<sup>132</sup> *Id.* at 2636 (Alito, J., concurring).

<sup>133</sup> *Id.* at 2637 (Breyer, J., concurring in part and dissenting in part); *Id.* at 2643 (Stevens, J., dissenting).

<sup>134</sup> *Morse*, 127 S. Ct. at 2624.

Frederick did not have a First Amendment right to waive his banner.<sup>135</sup> Therefore, the Court never had to address the qualified immunity issue.<sup>136</sup>

### *School Speech*

The Court quickly rejected Frederick's argument that this case did not amount to a school speech case.<sup>137</sup> Chief Justice Roberts noted every authority that addressed the case considered Frederick's banner student speech.<sup>138</sup> The opinion also explained the facts indicate this amounted to school speech.<sup>139</sup> Namely, the expression occurred during school hours, at an approved school event, supervised by teachers, while the high school band and cheerleaders performed in uniform.<sup>140</sup> The Court also noted that Frederick directed his banner toward the student body, providing further evidence that the banner constituted student speech.<sup>141</sup>

### *Meaning of the Message*

Whether the message "BONG HiTs 4 JESUS" promoted illegal drug use was a hotly contested factual issue.<sup>142</sup> The Court began by describing the message as cryptic.<sup>143</sup> The Court reasoned, to some the message could be offensive, while others may find it amusing.<sup>144</sup> Still others could believe, as Frederick claimed, the words meant nothing and were merely nonsense meant to attract the attention of television cameras.<sup>145</sup> Yet, the opinion took none of these views.<sup>146</sup>

The Court discussed Principal Morse's interpretation of the message.<sup>147</sup> Morse explained when she saw the banner she thought many people would understand the term "bong hit" as a reference to smoking marijuana.<sup>148</sup> In particular, she believed the other high school students would interpret "bong hits" in that way.<sup>149</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The Court's opinion did, however, address Justice Breyer's contention that the court should have decided based on qualified immunity alone in a footnote. *Id.* at n.1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Morse*, 127 S. Ct. at 2624.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Compare *Morse*, 127 S. Ct. at 2624-25 with *Morse*, 127 S. Ct. at 2643-44 (Stevens, J., dissenting).

<sup>143</sup> *Morse*, 127 S. Ct. at 2624.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 2625.

<sup>147</sup> *Id.* at 2624-25.

<sup>148</sup> *Morse*, 127 S. Ct. at 2624-25.

<sup>149</sup> *Id.*

Thus, Morse viewed the banner as promoting illegal drug use, in violation of school board policy.<sup>150</sup>

The Court agreed with Morse's interpretation of the sign.<sup>151</sup> Chief Justice Roberts claimed "BONG HiTS 4 JESUS" could be interpreted two ways.<sup>152</sup> First, the message could be an imperative, as in "[Take] bong hits for Jesus."<sup>153</sup> Second, it could celebrate marijuana use, as in "bong hits [are a good thing]" or "[we take] bong hits."<sup>154</sup> The majority then stated that no practical difference existed between promoting illegal drug use and celebrating it.<sup>155</sup> Further, the "paucity of alternative meanings" made it highly probable the banner promoted marijuana use.<sup>156</sup> The Court rejected Frederick's alternative interpretation of the banner as meaningless.<sup>157</sup> While 'meaningless' was a possible interpretation, dismissing the banner as meaningless would ignore an undeniable reference to illegal drugs, according to the Court.<sup>158</sup> It refused to consider that Frederick just wanted to appear on television.<sup>159</sup> The majority summarily dismissed any argument that Frederick's message constituted political speech.<sup>160</sup>

### *Application of the Tinker Trilogy*

Chief Justice Roberts discussed previous case law, but determined that the Court need not follow that case law in its holding.<sup>161</sup> The Court cited *Tinker v. Des Moines Independent Community School District* for the proposition that students and teachers have First Amendment rights.<sup>162</sup> Nevertheless, the Court went on to distinguish the present case from *Tinker*.<sup>163</sup> The Court determined the black armbands worn by the students in *Tinker* constituted political speech,

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<sup>150</sup> *Id.* at 2625.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Morse*, 127 S. Ct. at 2625.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Morse*, 127 S. Ct. at 2625.

<sup>159</sup> *Id.* The Court reasoned getting on television was Frederick's motive for the creating the banner and not an interpretation of what the banner said. *Id.*

<sup>160</sup> *Id.* All the court said regarding political speech was "not even Frederick argues that the banner conveys any sort of political or religious message," and "this is plainly not a case about political debate over the criminalization of drug use or possession." *Id.*

<sup>161</sup> *Id.* at 2625-29. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to students and teachers." *Id.*

<sup>162</sup> *Id.* at 2625 (citing *Tinker*, 393 U.S. at 506).

<sup>163</sup> *Morse*, 127 S. Ct. at 2625-26.

while Frederick's banner did not.<sup>164</sup> Political speech, as in *Tinker*, deserves more protection than other forms of speech because political speech is "the core of what the First Amendment aims to protect."<sup>165</sup> The Court also distinguished the present case from *Tinker*, because unlike black armbands, Frederick's fourteen-foot banner was not a passive expression.<sup>166</sup>

From the second case in the *Tinker* trilogy, *Bethel School District No. 403 v. Fraser*, the Court cited two principles.<sup>167</sup> First, students do not have the same extent of free expression rights as adults in other settings.<sup>168</sup> The Court stated if Frederick had unfurled his banner in a public forum outside the school his expression would be protected.<sup>169</sup> Second, the Court used *Fraser* to illustrate that the analysis in *Tinker* is not absolute.<sup>170</sup> The Court reasoned whatever analysis the *Fraser* Court used, it did not follow the material disruption standard from *Tinker*.<sup>171</sup>

In its discussion of *Hazelwood School District v. Kuhlmeier*, the Court quoted, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>172</sup> The Court concluded since no reasonable person would reasonably believe Frederick's banner was promoted by the school, *Kuhlmeier* did not control as precedent.<sup>173</sup> Nevertheless, the Court did find *Kuhlmeier* instructive because *Kuhlmeier* acknowledged public schools' ability to regulate some speech "even though the government could not censor similar speech outside the school."<sup>174</sup>

### *Important Interest*

The Court next addressed the importance of deterring drug use by school children.<sup>175</sup> The Court stated that deterring drug use among school children is

<sup>164</sup> *Id.* at 2626.

<sup>165</sup> *Id.* (citing *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

<sup>166</sup> *Morse*, 127 S. Ct. at 2626.

<sup>167</sup> *Id.*

<sup>168</sup> *Morse*, 127 S. Ct. at 2626 (citing *Fraser*, 478 U.S. at 682). "The rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Fraser*, 487 U.S. at 682.

<sup>169</sup> *Morse*, 127 S. Ct. at 2626.

<sup>170</sup> *Id.* at 2627.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (citing *Kuhlmeier*, 484 U.S. at 273).

<sup>173</sup> *Morse*, 127 S. Ct. at 2627.

<sup>174</sup> *Id.* (citing *Kuhlmeier*, 484 U.S. at 266). According to the Court, *Kuhlmeier* also confirms that *Tinker* is not the only analysis the Supreme Court can use in student speech cases. *Id.* (citing *Kuhlmeier*, 484 U.S. at 260).

<sup>175</sup> *Morse*, 127 S. Ct. at 2628.

an important, and possibly even compelling, interest.<sup>176</sup> The Court also found that drug use among young people has become an even larger problem in the past twelve years.<sup>177</sup> The Court cited statistics and referred to Congressional spending to support the contention that drug use among teens in the United States remains a serious problem.<sup>178</sup> In particular, Congress provided billions of dollars for school drug-prevention programs, requiring that schools receiving such funds convey a clear message to students that illegal drugs use is wrong and harmful.<sup>179</sup> According to the Court, this showed Congress deemed teen drug use a serious problem.<sup>180</sup> The Court also relied on the thousands of school board policies across the nation aimed at educating students about the harmful effects of drug use.<sup>181</sup> Based on statistics and congressional and school board policies, the Court determined the goal of preventing drug use among teens sufficiently justified punishing drug advocacy in public schools.<sup>182</sup>

The majority's emphasis on the importance of preventing teen drug use was the final justification for holding that school officials could punish students for messages promoting drug use, thus creating a fourth rule on student speech.

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<sup>176</sup> *Id.* (citing *Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)). To support this conclusion, Chief Justice Roberts explained many of the negative effects drug use can have on teens including harm to the nervous system, losses in learning, increased risk of chemical dependence, and a low recovery rate. *Morse*, 127 S. Ct. at 2628 (citing *Veronia School Dist. 47J*, 515 U.S. at 661-62). The Court then stated that student drug use affects a school's entire student body because even one student taking drugs can harm a learning environment. *Morse*, 127 S. Ct. at 2628 (citing *Veronia School Dist. 47J*, 515 U.S. at 661-62).

<sup>177</sup> *Morse*, 127 S. Ct. at 2628 (citing *Bd. of Edu. of Indep. Sch. Dist. No. 92 of Pattawatomie Cty. v. Earls*, 536 U.S. 822, 834, n.5 (2002)). The Court determined that the drug problem has gotten worse since the Court decided *Earls* in 2002. *Morse*, 127 S. Ct. at 2628. In *Earls*, the Court found that the drug use problem among teens had grown worse since 1995. *Earls*, 536 U.S. at 834, n.5.

<sup>178</sup> *Morse*, 127 S. Ct. at 2628 (citing 1 National Institute on Drug Abuse, National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2005 Secondary School Students*, 99, 101 (2006)). The Court noted that about half of American twelfth graders, one-third of tenth graders, and one-fifth of eighth graders have used an illicit drug. *Morse*, 127 S. Ct. at 2628. It also recognized that nearly one in four twelfth graders has used an illicit drug in the past month. *Id.* The court also noted that 25% of high school students say they have been offered, sold, or given an illegal drug on school property in the last year. *Id.* (citing DEPT. OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *YOUTH RISK BEHAVIOR SURVEILLANCE-UNITES STATES, 2005, 55 MORBIDITY AND MORTALITY WEEKLY REPORT, SURVEILLANCE SUMMARIES*, No. SS-5, p. 19 (June 9, 2006)).

<sup>179</sup> *Morse*, 127 S. Ct. at 2728 (citing *Safe and Drug-Free Schools and Communities Act of 1994*, 20 U.S.C. § 7114(d)(6) (2000 ed., Supp. IV)).

<sup>180</sup> *Morse*, 127 S. Ct. at 2728.

<sup>181</sup> *Morse*, 127 S. Ct. at 2728. The Court suggested that one reason so many school boards have such policies is that they understand the power of peer pressure in influencing teens to consume illegal substances. *Id.* (citing *Bd. of Edu. of Indep. Sch. Dist. No. 92 of Pattawatomie Cty. v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring)).

<sup>182</sup> *Morse*, 127 S. Ct. at 2629.

The Court's determination that Frederick's banner was unfurled at school and that "BONG HiTS 4 JESUS" promotes drug use caused the Court to hold that Frederick's banner was unprotected.

*Justice Thomas, Concurring*

Justice Thomas agreed schools should be allowed to prohibit student speech advocating illegal drug use, however, he also argued the Constitution allows schools to prohibit any and all student speech.<sup>183</sup> Justice Thomas stated that the ruling in *Tinker* had no basis in the Constitution.<sup>184</sup> In reaching this conclusion, Justice Thomas relied on the history of U.S. public education.<sup>185</sup> He also relied on the doctrine of *in loco parentis*, which gave schools power to discipline and teach children similar to parental power.<sup>186</sup> Justice Thomas claimed that by granting students First Amendment rights, *Tinker* ignored the *in loco parentis* doctrine and undermined teachers' authority to maintain order in public schools.<sup>187</sup>

*Justice Alito, With Whom Justice Kennedy Joined, Concurring*

Although Justices Alito and Kennedy concurred in the Court's opinion, they wrote separately to clarify that any further restrictions on student speech based on precedent formed by this decision would be unacceptable.<sup>188</sup> Justice Alito's concurrence even stated it regards this regulation as "standing at the far reaches of what the First Amendment permits."<sup>189</sup> While this concurrence agreed with the Court that student speech rights are limited, it argued there are no further grounds for regulation that this Court has not already recognized in *Tinker*, *Fraser*, *Kuhlmer*, and now *Morse*.<sup>190</sup>

<sup>183</sup> *Morse*, 127 S. Ct. at 2629-30 (Thomas, J., concurring).

<sup>184</sup> *Id.* at 2630-31 (Thomas, J., concurring).

<sup>185</sup> *Id.* at 2631 (Thomas, J., concurring). Justice Thomas explained that early public schools instilled a "core of common values in students and taught them self-control." *Id.* at 2630 (Thomas, J., concurring) (citing A. POTTER & G. EMERSON, *THE SCHOOL AND THE SCHOOLMASTER: A MANUAL* 125 (1843)). Teachers taught, and students listened. *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring). Teachers commanded, and students obeyed. *Id.* (Thomas, J., concurring).

<sup>186</sup> *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring).

<sup>187</sup> *Id.* at 2631-35 (Thomas, J., concurring). Justice Thomas did not accept the argument that today's public schools should not treat children as if they were still in the nineteenth century. *Id.* at 2635 (Thomas, J., concurring). Rather, he suggested that parents who want their children to have freedom of speech can send their children to private school or work through the political process with local school boards. *Id.* (Thomas, J., concurring).

<sup>188</sup> *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

<sup>189</sup> *Id.* at 2638 (Alito, J., concurring).

<sup>190</sup> *Id.* at 2637 (Alito, J., concurring). Justice Alito's concurrence made an effort to combat one argument made by *Morse* that the Court's opinion did not address. *Id.* (Alito, J., concurring). *Morse* argued *Tinker* would allow school officials to prohibit speech that interferes with a school's educational mission. *Id.* (Alito, J., concurring). The concurrence reasoned this would be much too broad, and allow school boards to define the school's 'educational mission' of the school in terms of the political and social views of that group. *Id.* (Alito, J., concurring).

Justice Alito also emphasized that schools are organs of the State, and they do not stand in the shoes of parents.<sup>191</sup> Rather, the special characteristics of the school environment often pose special dangers because parents do not have the ability to protect their children while they attend school.<sup>192</sup> Justice Alito went on to argue that speech advocating the use of illegal drugs is one of the special dangers posed by the school environment.<sup>193</sup> As such, the concurrence agreed schools can prohibit speech advocating illegal drug use.<sup>194</sup>

*Justice Breyer, Concurring in the Judgment in Part and Dissenting in Part*

Justice Breyer argued the Court should have ruled solely on the grounds of qualified immunity, by finding Principal Morse's conduct reasonable.<sup>195</sup> Justice Breyer worried the *Morse* ruling could authorize further viewpoint-based restrictions on speech.<sup>196</sup> He also pointed out the Court produced several differing opinions, only confusing the area of law.<sup>197</sup> Whereas, if the Court decided the case solely on qualified immunity grounds, the decision would have likely been unanimous.<sup>198</sup> He argued that making a constitutional ruling was unnecessary and violated the principle of judicial restraint.<sup>199</sup>

*Justice Stevens, With Whom Justice Souter and Justice Ginsburg Joined, Dissenting*

The dissent agreed that Principal Morse should not be personally liable for restricting Frederick's speech, but the agreement ended there.<sup>200</sup> The interpretation

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<sup>191</sup> *Id.* (Alito, J., concurring). This argument specifically addressed Justice Thomas's contention that schools stand *in loco parentis* and thus have unlimited authority to discipline school children. *See Morse*, 127 S. Ct. at 2629-36 (Thomas, J., concurring).

<sup>192</sup> *Id.* at 2638 (Alito, J., concurring). Justice Alito's concurrence also pointed out that public school is the only option for many parents. *Id.* at 2637 (Alito, J., concurring).

<sup>193</sup> *Morse*, 127 S. Ct. at 2628. (Alito, J., concurring).

<sup>194</sup> *Id.* (Alito, J., concurring).

<sup>195</sup> *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in part and dissenting in part). Justice Breyer also argued that lower courts should be able to determine whether a public official is entitled to qualified immunity before determining whether the actions of the public official violated the constitution. *Id.* at 2642 (Breyer, J., concurring in part and dissenting in part).

<sup>196</sup> *Id.* at 2639 (Breyer, J., concurring in part and dissenting in part).

<sup>197</sup> *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

<sup>198</sup> *Id.* (Breyer, J., concurring in part and dissenting in part).

<sup>199</sup> *Id.* at 2639-42 (Breyer, J., concurring in part and dissenting in part). The doctrine of judicial restraint posits that when possible, the federal courts should avoid ruling on constitutional issues. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936).

<sup>200</sup> *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting.).

of the facts sparked a strong disagreement between the dissent and the majority.<sup>201</sup> Unlike the majority, the dissent found it relevant that Frederick did not have any particular desire to spread the pro-drug message.<sup>202</sup> Rather, he claimed he only wanted to be on television.<sup>203</sup> The dissent also found Frederick's message did not advocate the use of illegal drugs.<sup>204</sup> At best, the banner proclaimed a nonsense message that mentioned drugs.<sup>205</sup> The dissent, therefore, would have decided the case on much narrower grounds, finding Principal Morse justified in removing the fourteen-foot banner based on concern about nationwide evaluation of student conduct at Juneau-Douglas High School.<sup>206</sup>

The dissent also disagreed with the Court's application of the *Tinker* trilogy to this case.<sup>207</sup> Justice Stevens, writing for the dissent, stated that *Tinker* stood for two basic First Amendment principles that the Court ignored in its ruling.<sup>208</sup> First, the Court ordinarily presumes censorship based on the speech's content, and more particularly the speech's viewpoint, is unconstitutional.<sup>209</sup> The dissent declared that the Court sanctioned stark viewpoint discrimination in this decision.<sup>210</sup> The dissent reasoned this was inappropriate because the First Amendment protects against government interference with the expression of unpopular ideas.<sup>211</sup>

Second, the dissent asserted that punishing advocacy of illegal conduct is only constitutional when that advocacy is actually likely to provoke such harm.<sup>212</sup>

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<sup>201</sup> *Compare Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting) (calling the majority's interpretation "feeble" and stating that the majority's interpretation required "real imagination") *with Morse*, 127 S. Ct. at 2624-25 (finding that Frederick's banner can only be interpreted as advocacy or celebration of drug use).

<sup>202</sup> *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting).

<sup>203</sup> *Id.* (Stevens, J., dissenting).

<sup>204</sup> *Id.* at 2643-46 (Stevens, J., dissenting).

<sup>205</sup> *Id.* at 2643 (Stevens, J., dissenting).

<sup>206</sup> *Id.* (Stevens, J., dissenting). The dissent stated that Morse's concern about the evaluation of student conduct would have justified removal even if the banner had said something as benign as "Glaciers Melt." *Id.* (Stevens J., dissenting).

<sup>207</sup> *Morse*, 127 S. Ct. at 2644-45 (Stevens, J., dissenting).

<sup>208</sup> *Id.* at 2645 (Stevens, J., dissenting).

<sup>209</sup> *Id.* at 2644 (Stevens, J., dissenting) (citing *Rosenburger v. Rector & Visitors of Univ. of Va.*, 354 U.S. 819, 828-29 (1957)).

<sup>210</sup> *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

<sup>211</sup> *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (quoting *Texas v. Johnson*, 391 U.S. 397, 414 (1968)) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

<sup>212</sup> *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (citing *Brandenburg*, 395 U.S. at 449 (holding a state can only prohibit speech that advocates the use of force or law violation when such advocacy directly incites or produces imminent lawless action, and is likely to actually incite or produce such action)).

Advocating illegal drug use is far from “incitement to imminent lawless action,” the standard established by *Brandenburg v. Ohio*.<sup>213</sup> Even though the dissent agreed on the importance of preventing teenage drug use, it asserted the high school must show Frederick’s supposed advocacy stood a meaningful chance of making other students try marijuana.<sup>214</sup> The dissent asserted that Morse could not show a meaningful chance of inducing other students to try marijuana existed in this case.<sup>215</sup>

The dissent argued that in the First Amendment context, any tie should be resolved in the speaker’s favor.<sup>216</sup> The policy behind such a standard aims to prevent the fears of a political majority from silencing the view of a political minority.<sup>217</sup> The dissent worried that school administrators would use this decision to silence opposition to the “war on drugs.”<sup>218</sup>

#### ANALYSIS

The Supreme Court’s reasoning in *Morse v. Frederick* is problematic for several reasons.<sup>219</sup> First, rather than clarify student speech law, the multitude of opinions and the creation of a fourth rule make student speech law even more confusing.<sup>220</sup> Second, the Court’s ruling allows viewpoint-based discrimination,

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<sup>213</sup> *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (citing *Brandenburg*, 395 U.S. at 447). Relying on *Tinker*, the dissent asserted prohibiting a certain kind of speech, even in a school setting, requires more than a remote fear of apprehension of a disturbance. *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

<sup>214</sup> *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting).

<sup>215</sup> *Id.* (Stevens, J., dissenting). The dissent stated:

Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would persuade the average student, or even the dumbest one, to change his or her behavior is implausible.

*Id.* at 2649 (Stevens, J., dissenting).

<sup>216</sup> *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting) (citing *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2669 (2007)).

<sup>217</sup> *Morse*, 127 S. Ct. at 2651 (Stevens, J., dissenting).

<sup>218</sup> *Id.* (Stevens, J., dissenting) The dissent analogizes current debate over the wisdom of the so called war on drugs with the debate surrounding prohibition. *Id.* (Stevens, J., dissenting). It argued that this nation’s experience with alcohol should make the Court cautious with restrictions on speech regarding marijuana. *Id.* (Stevens, J., dissenting). The dissent also noted the Court’s ruling did not differentiate between types of drugs, specifically alcohol. *Id.* at 2650 (Stevens J., dissenting). Justice Stevens hypothesized that if Frederick’s banner had instead said “WINE SiPS 4 JESUS,” a message that could easily be construed either as a religious message or as a pro-alcohol message, the Court’s ruling would allow school officials to punish such a message. *Id.* at 2650 (Stevens, J. dissenting).

<sup>219</sup> See *infra* notes 220-65 and accompanying text.

<sup>220</sup> See *infra* notes 223-41 and accompanying text.

which is ordinarily unconstitutional.<sup>221</sup> Third, the court's decision could have a chilling effect on student speech.<sup>222</sup>

### Morse v. Frederick *Further Confuses Student Speech Law*

*Morse v. Frederick* is the first student speech case addressed by the Supreme Court since *Hazelwood v. Kuhlmeier* in 1988.<sup>223</sup> As such, this case was widely anticipated in the hopes that the Court would finally clarify what had become a confusing area of law.<sup>224</sup> The Supreme Court, however, dashed those hopes by making student speech law even more confusing than it was prior to this decision.<sup>225</sup> The Court's opinion made student speech law more confusing by 1) creating a new rule, rather than clarifying precedent, 2) relying on an ambiguous factual situation to create the new rule, and 3) issuing five separate opinions.<sup>226</sup>

Rather than rely on the precedent set by the *Tinker* trilogy, the Court further confused the law by adding a fourth condition under which schools can prohibit student speech.<sup>227</sup> Chief Justice Roberts, in the Court's opinion, stated, "the special characteristics of the school environment, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."<sup>228</sup> This new rule does not clarify when student expression is sufficiently disruptive or whether school officials can curtail expression that conflicts with the school's mission in the absence of

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<sup>221</sup> See *infra* notes 242-55 and accompanying text.

<sup>222</sup> See *infra* notes 256-60 and accompanying text.

<sup>223</sup> See *Kuhlmeier*, 484 U.S. 260; *Morse*, 127 S. Ct. at 2618.

<sup>224</sup> See Martha McCarty, Ph.D., *Student Expression Rights: Is a New Standard on the Horizon?*, 216 ED. LAW REP. 15, 27 (2007). Dr. McCarty argues that student speech rights were not clear. *Id.* (citing *Guiles v. Murrineau*, 461 F.3d 320, 321 (2d Cir. 2006) (recognizing the "unsettled waters of free speech rights in public schools") and *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (acknowledging that much of the law on student expression is "difficult to understand and apply")). Dr. McCarty also claims that, "[c]larification is needed as to when student expression has to be disruptive to be censored and whether expression that conflicts with the school's mission can be curtailed in the absence of a threat of disruption." *Id.* at 30.

<sup>225</sup> See Clay Calvert & Robert D. Richards, *A Narrow Win for Schools*, 29 NAT'L L.J. No. 49 (2007) (stating neither administrators nor student come out of this decision with a greater understanding of the broader issue of how much protection student speech deserves).

<sup>226</sup> See *Morse*, 127 S. Ct. at 2629 (creating a fourth rule about student speech and issuing five separate opinions); Murad Hussain, *The "BONG" Show: Viewing Frederick's Publicity Stunt Through Kuhlmeier's Lens*, 116 YALE L.J. Pocket Part 292, 300 (2007) (arguing that the Court should not shape student speech law based on such an idiosyncratic fact situation).

<sup>227</sup> See Calvert & Richards, *supra* note 225 (arguing the Court's decision does not "advance, overrule, diminish or even substantially tweak" any earlier precedent).

<sup>228</sup> *Morse*, 127 S. Ct. at 2629.

disruption, as many had hoped it would.<sup>229</sup> It merely added a fourth rule for administrators to consider: whether the student's expression could reasonably be interpreted as promoting illegal drug use.<sup>230</sup>

The facts of this case and the ambiguous nature of the message amplify the confusion created by adding a fourth rule.<sup>231</sup> Great debate ensued over whether the phrase "BONG HiTS 4 JESUS" even amounted to drug-use advocacy.<sup>232</sup> Chief Justice Roberts, in the Court's opinion, added his own words to Frederick's banner to come to the conclusion that the message constituted either an incitement to use drugs or a celebration of drug use.<sup>233</sup> Thus, the extent to which school administrators can add their own interpretation to a student's speech to create a pro-drug message remains unclear.<sup>234</sup> The Court also stated no practical difference exists between the celebration of drugs and the promotion of drug-use, leaving which activities are close enough to the advocacy of drug use to warrant suppression also unclear.<sup>235</sup> As such, this opinion may cause teachers, school administrators, and students great confusion as to which messages involving drugs can be proscribed as "advocacy" and which messages cannot.<sup>236</sup>

Finally, the *Morse* decision confuses student speech law by issuing five different opinions and rationales.<sup>237</sup> Although five Justices agreed with the Court's opinion, they clearly had different reasons for doing so, as demonstrated by the abundant concurrences.<sup>238</sup> The existence of five opinions and vastly differing rationales gives very confusing guidance to the teachers and school administrators who have the

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<sup>229</sup> See McCarthy, *supra* note 224, at 30 (expressing hope that the Court would clarify student speech law); Calvert & Richards, *supra* note 225.

<sup>230</sup> *Morse*, 127 S. Ct. 2618.

<sup>231</sup> See Posting of David French (Senior Legal Counsel at the Alliance Defense Fund and the Director of its Center for Academic Freedom) phibetacons.nationalreview.com <click on archives><June 2007><A Bong Hit to Free Speech> (June 25, 2007, 12:19 EST) (arguing that in *Morse*, "bad facts make bad law"); Hussain, *supra* note 226 (stating "it would be unfortunate if the Court broadly reshapes the contours of intra-school discourse with an idiosyncratic case in which the student was not trying to speak to anyone at school").

<sup>232</sup> Compare *Morse*, 127 S. Ct. at 2624-25 with *Morse*, 127 S. Ct. at 2643-44 (Stevens, J., dissenting).

<sup>233</sup> *Morse*, 127 S. Ct. at 2625. See *supra* notes 147-151 and accompanying text.

<sup>234</sup> See *Morse*, 127 S. Ct. at 2649 (Stevens J., dissenting).

<sup>235</sup> *Id.* at 2625.

<sup>236</sup> See Hussain, *supra* note 226; Perry A. Zirkel, *The Supreme Court Speaks on Student Expression: A Revised Map*, 221 ED. LAW REP. 485, 491 (2007). "In the meanwhile, pending further Supreme Court speech on student expression, caution is warranted in these grey, unsettled areas, particularly in, but not limited to, jurisdictions without pertinent lower court decisions. In short, deciphering content of *Morse* code beyond pro-drug messages is subject to (mis)interpretation." *Id.*

<sup>237</sup> See generally *Morse*, 127 S. Ct. 2618.

<sup>238</sup> *Id.*

responsibility of making the day-to-day decisions regarding student speech.<sup>239</sup> A United States District Court opinion issued less than a month after the decision in *Morse* recognized that school administrators are justified in their confusion about the boundaries of student speech.<sup>240</sup> Thus, rather than clarify student speech law, the Court only made it more confusing through the *Morse* decision.<sup>241</sup>

*Morse Allows Viewpoint-Based Discrimination.*

The Supreme Court's decision not only utterly confused student speech law, but more importantly it essentially condoned viewpoint-based discrimination.<sup>242</sup> In First Amendment cases, content-based, and especially viewpoint-based prohibitions, are subject to the most stringent standards.<sup>243</sup> The Court generally presumes viewpoint-based discrimination unconstitutional.<sup>244</sup> The reasoning behind this presumption relates to a major justification of the First Amendment itself: the least popular political views need the most protection for democracy to function.<sup>245</sup>

This reasoning applies equally to the school environment.<sup>246</sup> Since public schools are a primary vehicle of social and civic learning in our society, the infringement of rights in schools while students are at an impressionable age is

<sup>239</sup> See Calvert & Richards, *supra* note 225; Margaret Graham Tebo, *High Court Hits "BONG,"* 6 No. 26 ABA J. E-Report 1 (June, 29 2007) ("Noting the close vote and variety of opinions expressed by the justices . . . the case provides little value as precedent. There was nothing close to consensus here"). Justice Breyer argued that it was "utterly unnecessary" to produce five differing opinions in this case. *Morse*, 127 S. Ct. at 2641 (Breyer J., concurring in part and dissenting in part).

<sup>240</sup> Layshock v. Hermitage School District, 496 F.Supp.2d 587, 604 (2007). "The five separate opinions in *Morse* illustrate the plethora of approaches that may be taken in this murky area of law." *Id.*

<sup>241</sup> See *supra* notes 218-36 and accompanying text.

<sup>242</sup> See Hans Bader, *Campaign Finance Reform and Free Speech: Bong HiTS for Jesus: The First Amendment Takes a Hit*, 2006-07 Cato Sup. Ct. Rev. 133, 142 (2007) (stating that the decision in *Morse* was disappointing because it permitted "viewpoint discrimination and censorship based on speculation about the consequences of speech").

<sup>243</sup> See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); See generally *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

<sup>244</sup> *Rosenberger*, 515 U.S. at 828.

<sup>245</sup> *Id.*

<sup>246</sup> *Tinker*, 393 U.S. at 512.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.

*Id.* (citing *Keyishan v. Board of Regents*, 385 U.S. 589, 603 (1967)(internal citations omitted)).

detrimental.<sup>247</sup> If students do not learn about their constitutional rights early, they will not be as willing to exercise those rights in the future.<sup>248</sup>

In creating a restriction that prohibits students from expressing possible views concerning drugs, the Court has taken the increased First Amendment flexibility granted ‘in light of the special circumstances’ of public schools too far.<sup>249</sup> Although preventing student drug use may be an important objective of public schools, that concern does not raise it above constitutional grounds.<sup>250</sup> In effect, the Supreme Court raised the “war on drugs,” a highly controversial political topic, to a level equal with the First Amendment, and gave the “war on drugs” equal footing with constitutional guarantees.<sup>251</sup>

*Morse* may pave the way for further speech restrictions.<sup>252</sup> Perhaps colleges and universities will adopt the *Morse* rationale and prohibit drug-related messages on campuses.<sup>253</sup> If the Court deems preventing drug use among teens a sufficient justification to pass constitutional scrutiny in schools, it is likely other justifications for censorship will also pass constitutional scrutiny.<sup>254</sup> Student speech regarding alcohol, sex, and violence may be on the path to restriction.<sup>255</sup>

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<sup>247</sup> See *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954) (stating public education “is the very foundation of good citizenship,” and “is a principal instrument in awakening the child to cultural values”).

<sup>248</sup> See Hussain, *supra* note 226.

<sup>249</sup> *Id.* (arguing that permitting broader content regulation is likely to have a chilling effect on student speech).

<sup>250</sup> See Bader, *supra* note 242. “The idea that viewpoints can be restricted when they oppose or undercut important government policies is fundamentally at odds with the purpose of the First Amendment.” *Id.*; see also Posting of French, *supra* note 231 (arguing that virtually all restrictions on speech are justified by preventing harm to young people and by referencing other laws and regulations, and that the same justifications could be used to silence virtually any speech, including speech on political and religious issues).

<sup>251</sup> See Bader, *supra* note 242.

<sup>252</sup> See *ACLU Slams Supreme Court Decision in Student Free Speech Case*, <http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html> (“because the decision is based on the Court’s view about the value of speech concerning drugs, it is difficult to know what its impact will be in other cases involving unpopular speech”).

<sup>253</sup> See Posting of French, *supra* note 231 (asserting, “[w]hen high school rights shrink, universities grow bolder”).

<sup>254</sup> See Zirkel, *supra* note 236 at 488 (arguing that the Supreme Court may also subject expression supportive of alcohol, sex, and violence to censorship in public schools); see also Bader, *supra* note 242, at 142.

<sup>255</sup> Zirkel, *supra* note 236; Bader, *supra* note 242, at 142.

### *Morse May Have a Chilling Effect on Student Speech*

The danger of the confusing *Morse* decision is its potential to lead school officials to prohibit any message in which drugs form the content.<sup>256</sup> Schools may become more apt to censor drug related speech, even if the message contains political or social commentary in ways that Frederick's message did not.<sup>257</sup> Even if school officials do not punish protected speech regarding drugs this decision may create a chilling effect on students.<sup>258</sup> Increasing the possibility of punishment for drug-advocacy may encourage students to steer far clear of any speech about drugs, even constitutionally protected speech, out of fear of punishment.<sup>259</sup> A chilling effect is particularly likely since the Court did not attempt to clarify that political or social speech is protected, despite Justice Alito's attempt to make the limits on this ruling clear.<sup>260</sup>

### *Qualified Immunity*

Although the Supreme Court granted certiorari based partially on qualified immunity, which performed a major role in the lower courts' decisions, the Supreme Court virtually ignored qualified immunity by stating since *Morse* did not violate Frederick's constitutional rights, the Court did not need to consider the second issue of whether *Morse* was entitled to qualified immunity.<sup>261</sup> Justice Breyer argued that the Court erred by ruling on the constitutional issue rather than limiting its review to qualified immunity.<sup>262</sup> Justice Breyer asserted that the principle of judicial restraint prohibited the Court from considering a question of constitutionality when it can decide a non-constitutional question.<sup>263</sup> In this case, Justice Breyer concluded the Court could have unanimously decided that *Morse* was entitled to qualified immunity without addressing the merits of Frederick's claim, and thus should have done so.<sup>264</sup>

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<sup>256</sup> See *Morse*, 127 S. Ct. at 2649-50 (Stevens, J., dissenting).

<sup>257</sup> See *id.* at 2649 (Stevens, J., dissenting) (stating, "that the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principal it articulates has no stopping point").

<sup>258</sup> See *id.* at 2650 (Stevens, J., dissenting); Hussain, *supra* note 226.

<sup>259</sup> *Morse*, 127 S. Ct. at 2650 (Stevens, J., dissenting). "If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some reasonable observer censor and punish them for promoting drugs." *Id.* (Stevens, J., dissenting).

<sup>260</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring).

<sup>261</sup> *Morse*, 127 S. Ct. at 2624.

<sup>262</sup> *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

<sup>263</sup> *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

<sup>264</sup> *Id.* (Breyer, J., concurring in part and dissenting in part).

The Court rightfully rejected Justice Breyer's argument for two reasons.<sup>265</sup> First, the two-step qualified immunity test the Supreme Court announced in *Saucier* requires the Court to determine the constitutional issue before determining whether a public official qualifies for qualified immunity.<sup>266</sup> Second, if the Court found Principal Morse was covered by qualified immunity, it would only eliminate Frederick's claim for damages.<sup>267</sup> Such a ruling would not address Frederick's claim for injunctive relief.<sup>268</sup>

The Court addressed the First Amendment issue first because that is the first step specifically described by the controlling precedent, *Saucier*.<sup>269</sup> Although Justice Breyer has urged the court to overrule the *Saucier* order many times, the Court has never adopted his view.<sup>270</sup> On policy grounds, the *Saucier* order of considering the constitutional question allows constitutional law to develop.<sup>271</sup> Under the test as Justice Breyer urges, courts could consistently hold public officials are entitled to qualified immunity because the law was unclear without addressing the constitutional merits.<sup>272</sup> Since so many constitutional cases involve public officials, important constitutional questions may never be addressed, and

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<sup>265</sup> See *infra* notes 266-80 and accompanying text.

<sup>266</sup> *Saucier*, 533 U.S. at 200-01.

<sup>267</sup> *Morse*, 127 S. Ct. at 2624 n.1.

<sup>268</sup> *Id.*

<sup>269</sup> *Saucier*, 533 U.S. at 201.

<sup>270</sup> See *Scott v. Harris*, 127 S. Ct. 1769, 1780-81 (2007) (Breyer, J., concurring); *Brosseau v. Haugen*, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring). Justice Breyer concurred in these cases to argue that the *Saucier* order-of-battle should be overturned. *Scott*, 127 S. Ct. at 1780-81 (Breyer, J., concurring); *Brosseau*, 543 U.S. at 201-02 (Breyer, J., concurring). He argued that the order-of-battle sometimes requires lower courts to unnecessarily consider constitutional questions, and that such inquiries often lead to a waste in judicial resources. *Scott*, 127 S. Ct. at 1780-81 (Breyer, J., concurring); *Brosseau*, 543 U.S. at 201-02 (Breyer, J., concurring). As such, Justice Breyer contended the Court should not have followed the principal of *stare decisis* in this instance, and the Supreme Court should have overruled *Saucier*, allowing courts to choose the order of review on a case-by-case basis. *Scott*, 127 S. Ct. at 1780-81 (Breyer, J., concurring); *Brosseau*, 543 U.S. at 201-02 (Breyer, J., concurring).

<sup>271</sup> *Saucier*, 533 U.S. at 201.

<sup>272</sup> *Saucier*, 533 U.S. at 201.

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

*Saucier*, 533 U.S. at 201; see also *Scott*, 127 S. Ct. at 1774 n.4.

in many cases government agencies may escape review of their actions.<sup>273</sup> In light of this policy, the Court was reasonable in following precedent rather than addressing qualified immunity before the constitutional question.<sup>274</sup>

The second reason the Court could not dispose of this case by simply claiming Morse was entitled to qualified immunity without addressing the constitutionality of her actions was that Frederick requested injunctive relief regarding his suspension.<sup>275</sup> A holding in favor of Morse on qualified immunity grounds alone would prevent Frederick from recovering damages.<sup>276</sup> However, it would not address his claims for injunctive relief.<sup>277</sup> Although Justice Breyer hypothesizes that Frederick's suspension might be completely justified on non-speech-related grounds, the Court points out that none of the lower courts considered that possibility and none of the parties alleged it.<sup>278</sup> The Court further asserted the record supports the opposite conclusion, that Frederick's suspension was based at least in part on his speech.<sup>279</sup> Based on these two reasons, the Court rightly concluded disregarding the *Saucier* order-of-battle and deciding based on qualified immunity alone was not the quick and easy answer Justice Breyer suggested it was.<sup>280</sup>

#### CONCLUSION

The Supreme Court created a fourth justification for suppressing student speech by ruling that school officials can take steps to safeguard students from speech that can reasonably be interpreted as encouraging illegal drug use.<sup>281</sup> Rather than rely on existing precedent the Court now requires school officials to consider a new rule.<sup>282</sup> This holding, unlike previous student speech law allows for the restriction of a specific viewpoint which may lead to further restrictions of speech in the future and may discourage students from exercising their First Amendment rights.<sup>283</sup>

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<sup>273</sup> *Saucier*, 533 U.S. at 201; *See also Scott*, 127 S. Ct. at 1774 n.4.

<sup>274</sup> *See Saucier*, 533. U.S. at 201.

<sup>275</sup> *Morse*, 127 S. Ct. at 2623, 2624 n.1.

<sup>276</sup> *Id.* at 2624 n.1.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *See supra* notes 261-79 and accompanying text.

<sup>281</sup> *Morse*, 127 S. Ct. at 2622.

<sup>282</sup> *See supra* notes 227-30 and accompanying text.

<sup>283</sup> *See supra* notes 242-60 and accompanying text.