The Second Prong of The Tinker Test: A Constitutional Right to Not Be offended?

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ABSTRACT

THE SECOND PRONG OF THE TINKER TEST: A CONSTITUTIONAL RIGHT TO NOT BE OFFENDED?

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Northern Illinois University, 2020
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In the landmark 1969 Tinker v. Des Moines case, the Supreme Court ruled school districts could censor student speech if it caused a material and substantial disruption to the educational process or if the speech infringed upon the rights of others. Since then, the Supreme Court has also allowed schools to abridge students’ speech rights if the speech was obscene, if the speech was part of a school-sponsored activity, or if the speech promoted illegal drug use. Most of the court cases since Tinker have applied the first prong of the Tinker decision, focusing on disruption to education as the test to justify censorship. The constitutionality of foreseeability of disruption has even been debated by the courts. The second prong of the Tinker Test has received far less attention. The Supreme Court has yet to define what it means to “infringe upon the rights of others” leaving lower courts to decide and resulting in conflicting decisions. Ultimately, school administrators must practically decide freedom of speech issues, often with little time to prepare and make a decision.
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THE SECOND PRONG OF THE TINKER TEST: A CONSTITUTIONAL RIGHT
TO NOT BE OFFENDED?

BY

JONATHAN D. PILKINGTON
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Doctoral Director:
Tiffany Puckett
DEDICATION

To my wife, Laurie, for her infinite patience and support
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CHAPTER 1: INTRODUCTION

In the early 1950’s, American society was less litigious than it is today in public education. Judges generally supported the expertise of educational leaders and were less likely to question their authority.\(^1\) It was more common for educational attorneys to only take cases where there was certainty of financial compensation. “It was a comfortable world for those who held power and wanted to preserve the status quo, but it left untouched some of the most pressing questions of social justice in public education.”\(^2\) In 1954, the Supreme Court ruled in *Brown v. Board of Education* that separate but equal educational facilities for minority students were unconstitutional. The ruling in this case encouraged the disenfranchised to use the courts for social change. Minority groups began to see the judicial system as a method for righting these wrongs and judges began to view the professional opinions of educators with skepticism and they began to make decisions affecting the operations of the schools.\(^3\) Clearly, the impact of litigation on public schools has resulted in positive and equitable outcomes for students but it has also increased the number of lawsuits as frequently parents view educators as standing in the way of the resources they feel their children deserve.

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\(^2\) *Id.* at 373-374.

\(^3\) *Id.* at 375.
Two pivotal cases in the early 1970’s had a momentous impact on special education. In 1971, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* along with *Mills v. Board of Education* in 1972 mandated school districts must provide education for children with disabilities and districts were forbidden from claiming the financial burden of providing their education as a rationale for not doing so. By 1973, more than thirty Federal court decisions had upheld the precedents set in these two cases. While these two cases formed the foundation of the Individuals with Disabilities Education Act in 1975 and served to improve education for many students, these improvements have come at a cost to current school districts and communities. An entire industry of private enforcement has developed around the issue of enforcing the law in the absence of adequate federal funding to provide for its own mandates. Parents with the financial means to hire legal experts to work on their behalf have access to services beyond the reach of parents without the financial resources or knowledge to navigate a complex system. Schools dedicate considerable time and expense to document in extreme detail all aspects of a student’s progress through their education and implementation of their Individualized Education Plan. Within this environment, parents and schools have developed adversarial relationships where trust has eroded and schools’ goals become more attuned with avoiding litigation.

Fear of litigation has a detrimental impact on student speech by leading school administrators to act in one of two ways. First, students’ rights to expression may not be protected because fear may lead a school’s principal to censor students’ speech for fear of posing

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5 Id. at 28.
a disruption or because it is deemed offensive to others. Although both provide legitimate rational for censoring speech, fear of litigation can tempt administrators to utilize both legal tests to censor when in actuality the speech passes scrutiny. Second, school leaders may allow fear of litigation to be hesitant in censoring student speech which does infringe on the rights of others and may even be considered harassment. This same logic can be applied to an administrator’s hesitancy to discipline students and to disproportionately apply punitive consequences.

Last, fear of litigation has a negative impact on funding. Public school lawsuits are litigated in the court systems through the use of tax payer dollars. Many districts keep education attorneys on retainer for consulting and for attending board meetings and during contract negotiations. A 2015 article in the Chicago Tribune found Chicago area schools spent on average $31 to $100 per student in legal fees. For some districts, this amounts to hundreds of thousands of dollars. Waukegan Community Unit School District 60’s legal fees amounted to $750,000 that same year. It is common in educational leadership to support a decision with the statement, “it was cleared by our attorneys”.

Imagine you are an administrator of a public high school with thousands of students. The collective responsibilities of your career are daunting. You are tasked with protecting the integrity of the academic setting, supporting students’ social emotional well-being and maintaining a safe learning environment conducive for all students. The Gay/Straight Alliance Student Club at your school annually sponsors a “Day of Silence” to create awareness of

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7 Id.
society’s harassment of gay and lesbian students. Some staff members and students wear t-shirts labeled “Be Who You Are”. On the morning of the “Day of Silence”, a student enters the school building wearing a t-shirt labeled on the front “My Day of Silence, Straight Alliance” and on the back “Be Happy, Not Gay”. When a staff member notifies you of the student’s shirt, you immediately begin to review possible responses and reactions. Unfortunately, time is a luxury you cannot afford, a response to the student must be decided quickly. Perhaps, you recall an educational law course and review the Supreme Court’s precedents for restricting student speech. Perhaps you begin to forecast the level of disruption and discomfort the slogan will create. Perhaps you weigh the risk of elevating the issue in the newspapers and possible litigation. After a review of your school’s handbook and School Board policy, it is time to make a decision; a decision requiring action which will be deemed offensive to some students and their families. What would you do?

In the landmark *Tinker v. Des Moines* Supreme Court case, the Court famously declared students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” In the current public school setting, students express their freedom of speech in myriad ways, many of which could be deemed controversial to school staff members as well as other students. Students express their identity through their dress, make up, hairstyles and clothing. Students express political views, social values and their feelings regarding laws and policies. School Boards create policies to preserve the rights of protected classes and comply with federal and state law. Schools create handbooks to protect the educational setting and

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minimize disruptions. However, it is not possible to anticipate every possible scenario; certain student speech is a blatant disregard for anti-discrimination policy while other speech is subtle and difficult to characterize. One student’s speech is another student’s offense. School administrators are frequently left to define on their own and decide a course of action.

In *Tinker*, the Supreme Court outlined a two pronged test to censor student speech. Schools could restrict a student’s speech if it “caused a substantial disruption” or if it “infringed upon the rights of others.” The impact of the *Tinker* Test and how the lower courts have interpreted them will be discussed in detail in Chapter 2. Although each prong of the test is separate, since 1969 the courts have rarely applied the second prong in student’s First Amendment rights cases and instead have relied mostly on disrupting education. The Supreme Court has declined to elaborate on its meaning, and “multiple courts have noted its opacity”. The lack of clarity from the Supreme Court has left the lower courts to interpret the second prong on their own resulting in differing opinions in the district courts. The outcomes of these decisions will be discussed in detail in Chapter 4.

This above mentioned scenario highlights the necessity for school leaders to have a basic framework for understanding the rights of students’ freedom of expression. Frequently, there is little time to prepare or adequate time given to consult and formulate a response to students when censoring speech is being considered. If a student is walking into the building wearing a

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questionable t-shirt, there are only minutes to decide if the student needs to be directed to the school office. School leaders must think and react quickly to forecast disruption and if the student expression crosses the line into harassment. School administrators are not trained legal professionals and freedom of speech concerns in the public schools are inherently challenging and emotionally charged. Students feel strongly and are protective of their First Amendment rights; as they should be. School leaders are in the difficult role of arbiter in these cases and decisions once made are difficult to recast.

The changing landscape of public schools is reflective of the changing demographics and shifting social norms in American society. As with the rest of the United States, schools have become more ethnically diverse and the least restrictive environment principle has placed more special education students in general education classes. The definition of students’ families along with demographics in society continue to change. American political beliefs are shifting as well. Religious beliefs and affiliations are changing. School administrators lead a widely diverse student body and families with widely diverse beliefs on political views, family structures, gender and sexuality as well as increasingly diverse family backgrounds on religious beliefs and nationality.

The legal profession has grown rapidly since the end of the 19th century. Over a one hundred year period, the number of lawyers in the United States grew from 60,000 to 650,000. During this same time period, “personal injury cases, family law cases, and public law cases have increased in number and percentage”.¹¹ Courts have spent more time on “disputes that have

an expressive, personal element.”\textsuperscript{12} Since \textit{Brown v. Board of Education}, along with the decentralization of American school districts, minority groups and protected classes have found their voice and through the court system, a means of challenging once accepted norms in their school districts. The disenfranchised have come to realize their schools “could be held responsible for upholding national standards of justice.”\textsuperscript{13} For the modern educational leader, these educational legal reforms are applauded but also cause concern when current stakeholders are quick to threaten legal action when they feel their needs are not met, when offense is taken or a decision is made not in their favor. It is within this complex mosaic where the prospect of legal action, whether the threat is real or threatened, becomes challenging. The following quotes from school principals will resonate with school leaders and this concern. Michael McNeese, at the time principal of Itawamba High School in Fulton, Mississippi stated, “For all administrators, the question is not 'Will I stand before a judge?' Rather, the thought is 'When I stand before the judge, will I be on the winning side?'”\textsuperscript{14} Mary Smith, Principal and Superintendent in Whitebead School District in Oklahoma shared, “I look at everything from a legal perspective. When I come

\textsuperscript{12} \textit{Id.}


across new territory in decision-making, I imagine myself on the witness stand being cross-
examined. I mentally review my answers.”\textsuperscript{15}

An anonymous administrator stated, “The real challenge is for administrators to remain
focused on moving forward while the major drain on energy would have us looking over our
shoulders.”\textsuperscript{16} Other school administrators shared they have curtailed extra-curricular activities
such as student overnight trips and holiday parties due to the threat of litigation or creating
conflict. Last, multiple administrators lamented the amount of time spent documenting
conversations, events and meetings in the event they would need to be recalled in the future to
settle a legal inquiry or lawsuit.\textsuperscript{17}

The First Amendment of the Constitution guarantees that Congress cannot make a law
which abridges freedom of speech. The second prong of the \textit{Tinker} Test declared schools may
abridge a student’s freedom of speech, within the context of the school, if said speech infringes
upon the rights of others. This study will focus on the second prong of the \textit{Tinker} Test in lieu of
the first because of the rise of incidents in schools and federal cases where students claim their
right to speak was censored because it was deemed offensive to others and not a cause of
substantial disruption. The relevance of this topic to school leaders is timely as students and staff
in public schools are increasingly calling for speech to be censored because it is offensive to
them. School leaders are left to decide where the boundary between protecting speech rights and

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}
protecting students from harassment may be drawn. The Supreme Court’s lack of clarification has left the lower courts hesitant to apply the second prong as a separate test from the first.

Written to advocate for protecting privacy rights of citizens in 1890, Warren and Brandeis’ made famous the phrase “the right to be let alone”. This right was protected by the Fifth Amendment and could further be defined as “a right to enjoy life”. Later, writing a dissenting opinion as a Supreme Court Justice, Brandeis would write “the makers of the Constitution...sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.” Today, students’ right to freedom of speech and their right to be let alone must be considered “in light of the special characteristics of the school environment.” Federal law protects students from being discriminated against based on their sex, national origin and disability. School boards create statutes and policies to protect students from being bullied and harassed. School principals are tasked with enforcing these standards for the safety and well-being of all students.

Merriam-Webster defines the verb to offend as “to cause difficulty, discomfort, or injury, also to cause dislike, anger, or vexation.” School leaders feel their own discomfort when they

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19 Olmstead v. United States, 277 U.S. 438, 479 (1928).


view a student wearing a shirt with a contentious political message or attempt to forecast the level of dislike and vexation from the community when they review the song selections in the program of the annual Winter Concert. School administrators are tasked with protecting the first amendment rights of their students and also to challenge students to think critically; to explore a world of diverse thought which will challenge their preconceptions. Without further guidance, principals will continue to struggle to define the line where an acceptable level of discomfort for students caused by opposing viewpoints collides with their right to be left alone. What lessons can school leaders learn from the Federal court’s application of the second prong of the *Tinker Test*?
CHAPTER 2: LITERATURE REVIEW

Prior to 1969, concerns with students’ freedom of speech issues were generally left to the discretion of school districts. It was not until the Supreme Court famously declared in *Tinker v. Des Moines* that the constitutional right to freedom of speech applied to students in the context of the school. Three subsequent Supreme Court cases restricted the freedom of speech rights of students. In *Bethel v. Fraser*, the Court ruled a school district could restrict student speech that was vulgar and plainly offensive. In *Hazelwood v. Kuhlmeier*, the Court allowed the restriction of student speech if it was school-sponsored. Last in *Frederick v. Morse*, school districts were authorized to restrict student speech that promoted illegal drug usage. This chapter will review these four landmark Supreme Court cases as well as review Federal court cases which have applied the second prong of the *Tinker* Test (speech which infringes upon the rights of others) and Federal court cases which address a student’s right to not be offended.

**Supreme Court**

*Tinker v. Des Moines Independent Community School Dist.*

In 1965, John *Tinker*, his sister Mary Beth *Tinker* and Christopher Eckhardt wore black armbands to their respective Des Moines public schools. In December of that year, a group of adults and students met in the Eckhardt home and determined they would wear the armbands during the holiday season as a symbol of protest of the Vietnam conflict and to show their
support for a truce. Each of the students testified they wore the armbands to “mourn those who had died in the Vietnam War and to support Senator Robert F. Kennedy’s proposal that the truce proposed for Christmas Day, 1965, be extended indefinitely.” On December 14, 1965, principals of Des Moines School District, aware of the students’ plan, met to adopt a preemptive policy calling for all students wearing armbands to be asked to remove them. Any student refusing to remove their armband would be suspended until they returned without them. On December 16, aware of the school district’s new policy, Mary Beth Tinker and Christopher Eckhardt arrived at school wearing black armbands. John Tinker arrived the next day wearing his. Per the new policy, all three students were suspended from school until they returned without wearing the armbands. All three students returned to school following the Christmas holidays; after their planned period for wearing the black armbands had expired. Upon review, the Des Moines School District school board members reviewed and upheld the students’ suspensions.

In 1966, the students’ fathers filed a complaint in the U.S. District Court for the Southern District of Iowa. The district court upheld the school district’s decision claiming they had “a reasonable basis for adopting the arm band regulation” because “it is the disciplined


26 Id. at 973.
atmosphere of the classroom, not the plaintiffs’ right to wear arm bands on school premises, which is entitled to the protection of the law.” The district court determined if a school district can reasonably anticipate a disturbance in school discipline, a reasonable action to prevent a disruption should be upheld by the court. The action by the school district was determined to be reasonable and therefore the students’ constitutional right to freedom of speech was not violated. In 1967, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court’s decision without opinion.

The U.S. Supreme Court granted certiorari and reversed the lower court’s decision. Writing the majority opinion, Justice Fortas stated,

The wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to “pure speech” which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

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27 Id.


While the Court affirmed the authority of school officials to “prescribe and control conduct in schools,” in order for the State to prohibit student expression it must show its action was instigated by more than a desire to avoid conflict resulting from an unpopular viewpoint.

In *Tinker*, the Court developed a two-prong test. The first prong determines whether the expression materially and substantially interferes with the discipline and operation of the school. The second prong determines if the expression interferes with the rights of others. When applying the first prong, the Court determined the wearing of armbands did not materially and substantially disrupt the operation of the school. Only a few of the 18,000 students in the school district wore the black armbands. Only five students were suspended and there were no acts of violence on school grounds. The Supreme Court disagreed with the district court’s acceptance of the reasonableness of the school district’s actions due to a fear of a disturbance. The Court held “any variation of the majority’s opinion may inspire fear.” However, the Court ruled this risk to be “the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” The actions of the school authorities to ban the armbands appears to have been based on their desire to avoid the

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32 Id. at 509.


34 Id.

controversy which might have resulted from the students’ expression of wearing black armbands to school.\textsuperscript{36} When applying the second prong, the Court determined the students’ actions did not interfere with the rights of others. The students merely went about the schedule of their regular school day, their “deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide.”\textsuperscript{37} Their prohibition consisted of the “silent, passive, witness of the armbands” as proscribed by another student.\textsuperscript{38} The Court found the students “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.”\textsuperscript{39}

Writing the dissent, Justice Harlan declared the Court held unconstitutional the judgment of the school district and the two lower courts based on the following: first, the Court concluded the symbolic speech of wearing armbands is “akin to pure speech” and therefore protected speech.\textsuperscript{40} Justice Harlan stated,

While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases when he pleases.\textsuperscript{41}

\textsuperscript{36} \textit{Id.} at 511.

\textsuperscript{37} \textit{Id.} at 515.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}


\textsuperscript{41} \textit{Id.} at 517.
He believed the Court had settled the matter in *Cox v. Louisiana* in declaring the rights of free speech and assembly “do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.”  

Second, the Court decided students may exercise symbolic speech in public schools as long as the normal school functions are not disrupted. At the time, the Vietnam war was a nationally divisive issue and the “public protests in the school classes against the Vietnam war distracted from that singleness of purpose which the State desired to exist in its public educational institutions.”

Reviewing the first prong of the *Tinker* test, he claimed “even a casual reading of the record shows that this armband did divert students’ minds from their regular lessons.” This included disruptive conversations in the classrooms and conflicts with other students. The purpose for wearing the symbolic armbands was to distract the attention of other students.

Third, the courts should decide, rather than school officials, if school disciplinary regulations are unreasonable. In *Waugh v. Mississippi University*, the Court claimed “It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity.” The Court should allow school districts the right to determine for themselves to what extent freedom of expression

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42 *Id.* (citing *Cox v. Louisiana*, 379 U.S. 536 (1965)).

43 *Id.* at 524.

44 *Id.* at 518.


46 *Id.* at 523 (citing *Waugh v. Mississippi University*, 237 U.S. 589, 596-597 (1915)).
should be allowed in their schools. He viewed the ruling as “the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.”

*Bethel v. Fraser*

In 1983, during a school assembly at Bethel High School, student Matthew Fraser delivered a speech to his classmates filled with explicit sexual innuendo. The voluntary assembly was part of a school-sponsored program during the regular school day; students had the option to attend a study hall in lieu of the assembly. Prior to the speech, Fraser had discussed its content with several teachers. Two gave feedback stating the speech was “inappropriate and that he probably should not deliver it.” He was also cautioned delivering the speech as presented might necessitate disciplinary action. During the assembly, a school counselor reported the reaction of the students, stating some appeared “bewildered and embarrassed” while other students simulated the sexual acts mentioned in the speech. Other students “hooted and yelled” and a teacher reported the following day it was necessary to dedicate a portion of instructional time discussing the events of the assembly.

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49 *Id.* at 678.

50 *Id.*

51 *Id.*
The Bethel High School student handbook prohibited the usage of obscene language in the school, stating “conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” The next morning, Fraser was summoned to speak with school administrators and was given the opportunity to explain his conduct. He admitted to delivering the speech and deliberately including sexual innuendo. School administrators suspended Fraser for three days and his name was removed from a list of potential candidates to address the student body at the upcoming commencement ceremony. Fraser requested a review of the consequences through the school district’s formal grievance protocol. Upon review, the hearing officer upheld the consequences, stating the speech was “indecent, lewd and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly.”

The student, through his father, filed suit against the school district in the District Court for the Western District of Washington. He claimed his First Amendment right to freedom of speech had been violated due to the school district’s disruption-obscenity rule being vague. He also claimed his Fourteenth Amendment right to due process had been violated because the removal of his name from the list of potential graduation speakers was not listed as a consequence in the school handbook. The district court upheld the student’s claim and Fraser was allowed to address his classmates at the graduation ceremony. In 1985, the Court of Appeals

52 Id.

53 Id. at 679.

54 Id.
for the Ninth Circuit upheld the judgment of the district court stating Fraser “had free speech rights to express his opinions at the assembly where attendance was optional that appellant school district lacked authority to abridge.” In 1985, the Supreme Court of the United States granted certiorari and reversed the lower court’s decision.

The 9th Circuit, when applying the first prong of the *Tinker* Test, found there was no evidence Fraser’s speech provided a substantial disruption. This reasoning by the lower courts to connect this case to *Tinker* was rejected by the Supreme Court noting the case “did not concern speech or action that intrudes upon the work of the school or the rights of other students.” The second major argument by the School District why their disciplinary actions did not deprive Fraser of his First Amendment rights was due to the District’s interest in maintaining civility and that the language used in Fraser’s speech was indecent. This reasoning was rejected by the 9th Circuit Court of Appeals stating “We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as "indecency" in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools. Language that may be considered "indecent" in one segment of our heterogeneous society may be common, household usage in another.”

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55 *Fraser v. Bethel School District No. 403*, 755 F.2d 1356, 1358 (9th Cir. 1985).


57 *Fraser v. Bethel School District No. 403*, 755 F.2d 1356, 1363 (9th Cir. 1985).
Again, the Supreme Court rejected this rationale by first separating this case from *Tinker* by claiming Fraser’s speech was not expressing a political viewpoint. The Supreme Court also reasoned that school districts have the right to “make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the “fundamental values” of public school education.” Supporting the School District, the Supreme Court determined “the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct…” In addition to the two prongs of the *Tinker* Test, this decision also gave the School District the right to censor student speech if it was determined to be lewd and vulgar speech.

*Hazelwood v. Kuhlmeier*

In 1988, another landmark First Amendment case was decided by the Supreme Court. Ruling again in favor of a school district, the Court declared school districts may restrict student speech in school newspapers where the newspaper has not been specifically designated as a public forum. In 1983, three students at Hazelwood East High School submitted articles for publication in the school’s student newspaper. The submitted articles covered topics such as personal accounts of pregnant students at the school, divorce, teenage marriage, running away from home and regulations requiring the notification of parents if their children receive birth

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59 *Id.* at 686.

60 *Id.* at 683.
control. Upon review, the Principal of the high school rejected the articles pertaining to teenage pregnancies and divorce. Believing there was not enough time to submit revised articles, the Principal directed the teacher of the journalism class to print the newspaper with two pages of the six-page publication removed.

The students filed suit against the school district in the District Court for the Eastern District of Missouri. The district court specifically addressed the students’ complaints that the school newspaper was a free speech forum and therefore protected by the First Amendment. Citing Tinker, the court stated “The conduct of the students in Tinker was symbolic speech that was privately initiated and carried out independent of any school-sponsored program or activity.” Applying this rationale to this case, the court found the journalism class was not an extracurricular activity but rather part of the school district’s curriculum and therefore, unlike Fraser, “did involve the compulsory environment of the classroom” Clearly the District did not create the Journalism class and its newspaper as an open forum of free expression for students. When addressing the complaint that removing the newspaper articles was a violation of the students’ First Amendment rights, the district court agreed with school officials that the content of the articles was inappropriate for some of the readers of the school newspaper. The district court also agreed with the school administrator’s position that the stories on teen pregnancies and divorce at Hazelwood East High School could be considered an invasion of privacy to students.


62 Id. at 1465.

63 Id. at 1466 (citing Fraser v. Bethel School Dist., 755 F.2d 1356, 1364 (9th Cir. 1985)).
and their families because several identifying facts were included therefore not guaranteeing anonymity. The court ruled in favor of the School District.

In 1985, the Eighth Circuit Court of Appeals reversed the lower court’s decision. They disagreed with the lower court, finding the school newspaper was a public forum and afforded First Amendment protection. Applying the Tinker Test, the court placed the burden on the school district to prove the printing of the students’ articles would cause a substantial educational disruption or that it would infringe upon the rights of others. The court stated “there is no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school.”

Responding to the School District’s reasoning that the articles were an invasion of the privacy of the families of the students, the court defined censoring student speech under the second prong of the Tinker Test only when “that speech could result in tort liability for the school. Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.” They concluded that no tort against the district because of the articles could be maintained. The court reversed the lower court’s decision because the demands of both prongs of the Tinker test could not be satisfied.

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65 Kuhlmeier v. Hazelwood Sch. Dist. 795 F.2d 1368, 1376 (8th Cir. 1986).

66 Id. at 1377.

67 Id.
In 1988, the Supreme Court granted certiorari and reversed the decision of the 8th Circuit Court of Appeals. The Supreme Court did not view the school newspaper as a public forum finding “the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming,” therefore, the Tinker Test could not be applied. The Supreme Court explained the difference between their decisions in Tinker and Hazelwood with the following rationale:

The question whether the First Amendment requires a school to tolerate particular student speech -- the question that we addressed in Tinker -- is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."

The Court held firmly that the responsibility for educating students should lie fully upon educators and not Federal judges. They held the principal acted responsibly by considering the First Amendment rights of the families in the articles and his quick decision to remove the two pages was made “was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.”

69 Id. at 271-272.
70 Id. at 277.
Frederick v. Morse

In 2007, the Supreme Court ruled school districts had the right to safeguard students from speech which encouraged illegal drug use. On January 24, 2003, students at Juneau-Douglas High School (JDHS) in Juneau, Alaska were allowed to leave the school building to observe the Olympic torch as it passed in front of their high school. During school hours, Principal Deborah Morse permitted students to line either side of the street to observe the event and school staff were present with the students. JDHS senior Joseph Frederick, together with some of his friends, were standing on the opposite side of the street of the school building. As the runner with the Olympic torch passed, Frederick unfurled a fourteen foot banner which stated “BONG HiTS FOR JESUS”. The banner could be clearly seen by those on the other side of the street. Principal Morse confronted the students and demanded the banner be removed. All the students complied except for Frederick. Morse confiscated the banner and suspended Frederick for ten days. She explained the discipline resulted from the banner’s promotion of illegal drug use; a violation of Juneau School Board policy. Frederick appealed his suspension but it was upheld by the Juneau School District Superintendent. The Superintendent, quoting Tinker in the district’s rationale for upholding the suspension, believed the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools.”

Frederick had displayed the banner "in the midst of his fellow students, during school hours, at a


72 *Id.* at 400 (see also *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508 1969) where the Supreme Court ruled in favor of the students stating “this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.”
school-sanctioned activity." The Superintendent also stated Frederick “was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs.”

In 2003, Frederick filed suit in the District Court of Alaska claiming his First Amendment Rights to freedom of speech had been violated. The district court ruled in favor of the Principal and the School District claiming “Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity so as not to place the imprimatur of school approval on the message.” In 2004, Frederick appealed to the Ninth Circuit Court of Appeals which reversed the lower court’s decision and found the Principal and School District had violated Frederick’s First Amendment rights to freedom of speech. Finally, in 2007, the Supreme Court reversed the Ninth Circuit’s decision in favor of the Principal and School District. Chief Justice John Roberts, delivering the majority opinion of the Court, stated “that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”

A key factor for the District Court of Alaska was deciding if the students’ viewing of the Olympic torch event was a school sponsored event. If it was school sponsored, then the School

73 Id.

74 Id.


76 Morse v. Frederick, 551 U.S. 393, 398 (2007).
District clearly had more latitude to control Frederick’s speech. The court held that the event was specifically approved by the Principal, had educational value, attended by teachers and students and was held during school hours “at a time when parents expected their children to be under school supervision.” They believed the fact it was school sponsored was a matter of common sense. The district court also had to determine whether to apply the Tinker Test in this case or to apply Fraser. Frederick argued that Fraser only applied to lewd speech and the Tinker standard of disruption to the educational process should be applied. The court disagreed, finding the reach of Fraser goes beyond obscene speech and leaving the determination to the School Board to "determine what manner of speech . . . is inappropriate." Last, the court held that intentionality of Frederick’s promotion of illegal drug use to be irrelevant. The banner’s designation of promoting drug use by the Principal was reasonable and therefore the Tinker Test should not be applied because unlike the wearing of armbands which were unrelated to the school’s mission, Frederick’s speech directly contradicted Juneau School Board policy.

The Ninth Circuit Court of Appeals disagreed with the lower court, holding the Tinker Test should be applied instead of Fraser. The court held Frederick’s speech was not “plainly offensive” in the manner of Fraser’s speech. Writing the opinion of the court, Judge Kleinfeld

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78 Id. at 18.
79 Id.
80 Id. at 21.
stated, “The word "offensive" is not a catch-all to embrace any speech that might offend some hearers. Nor was Fraser an invitation to censor and punish any speech that offends school authorities.” In the court’s opinion, “vulgar, lewd, and obscene speech is governed by Fraser, school-sponsored speech is governed by Kuhlmeier, and all other student speech is governed by Tinker.” The court found the speech was not school sponsored. Frederick was not in the classroom, the event was not part of the school’s curriculum and the district admitted they did not expect the banner to disrupt the educational process.

In reversing the judgment of the Ninth Circuit Court of Appeals, the Supreme Court agreed with the lower court, rejecting Frederick’s argument his actions should not be considered school speech. The Court agreed with the Superintendent stating Frederick cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” Again, this fact is foundational to this case as the connection was made to Fraser; had he delivered his speech outside of the school context then his speech would have been protected. Referring to Kuhlmeier, the Court found that Tinker is not the only basis for censoring a student’s speech. In this case, another basis was established: speech which promotes

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81 Id. at 26.

82 Id. at 30.

83 Id. at 8.

84 Morse v. Frederick, 551 U.S. 393, 403 (2007).

85 Id. at 406.
illegal drug usage. The main concern of the Supreme Court was not that Frederick’s banner was offensive but that it promoted illegal drugs. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”

First Circuit

*Pyle by & Through Pyle v. South Hadley Sch. Comm.*

In 1994, a student wore a series of t-shirts to high school with the slogan “Coed Naked Band: Do It To the Rhythm.” After being challenged by staff members, the student wore a series of t-shirts with similar references to the same sexual innuendo. Later, in two separate incidences, the student was given the option to change the shirt or to go home. The student chose the latter in both cases. The student filed suit in the District Court of Massachusetts claiming the school’s dress code policy was a violation of his First Amendment rights to freedom of speech.

The court did not apply the second prong of the *Tinker* test separately from the first prong. If student speech does not cause a substantial disruption, then the speech cannot be censored based on the merits of the collides with the rights of others test alone. Does a student...

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86 *Id* at 409.

have the right to determine what is considered “vulgar” when a school policy forbids students to display slogans that “are obscene, profane, lewd or vulgar?”

According to the district court, the answer to this question is simple. “Assuming general reasonableness, the citizens of the community, through their elected representatives on the school board and the school administrators appointed by them, make the decision. On questions of coarseness or ribaldry in school, federal courts do not decide how far is too far.”

When examining the first prong of the Tinker Test, the lewdness of a student’s shirt and its impact on the educational process is a decision best left to school leaders. Upon examination of the second prong of Tinker, the court agreed that a school may not censor student speech for the mere reason of silencing an unpopular viewpoint. When applying this test to the school’s dress code, the court declared:

“The First Amendment does not permit official repression or homogenization of ideas, even odious ideas, and even when the expression of these ideas may result in hurt feelings or a sense of being harassed. A school committee may not ban speech other than that reflecting the dominant or most comforting ethos. The "harassment" provision at issue here, while it obviously has laudable goals, gives school personnel precisely that excessive authority.”

The court ruled in favor of the school district regarding the designation of obscenity, that decision must be left to school leaders to decide. Regarding the anti-harassment provision in the

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88 Id. at 163.

89 Id. at 159.

90 Id. at 159.
The court ruled in favor of the student saying it abridged First Amendment rights by granting too much authority to schools to censor speech they found uncomfortable.  

Second Circuit

*Trachtman v. Anker*

In 1976, a high school student in New York City requested permission from school administrators to distribute a questionnaire to solicit responses regarding sexual attitudes and preferences from other high school students. The survey was part of a project for the school newspaper and the results were intended to be published and analyzed. The survey contained questions regarding students’ sexual preferences and topics such as masturbation and abortion. The student claimed to keep all respondent information anonymous. School administrators denied the student’s request to conduct the survey and the student filed suit in the District Court for the Southern District of New York claiming his First Amendment right to freedom of speech had been violated.  

Does a student have the right to distribute a sexually explicit questionnaire to students as part of a project for the school newspaper?  

Applying the *Tinker* standard, the court held the burden was on the school to “demonstrate that there was reasonable cause to believe that distribution of the questionnaire would have caused significant psychological harm to some of the Stuyvesant students.”  

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91 *Id.* at 172.


school’s position was that the student would be using the school’s facilities to conduct an activity which would invade the rights of other students by “subjecting them to psychological pressures which may engender significant emotional harm.”

The court held the First Amendment does not guarantee a student the right to express their views if the result is harmful to other students. In this case, the Second Circuit Court of Appeals concurred with the lower court decision. The student would be allowed to share the survey with eleventh and twelfth grade students in the school, but not with ninth and tenth graders due to the possibility of psychological harm at their age and level of development.

Giles v. Marineau

In 2004, a student regularly wore a t-shirt to his middle school denigrating President George W. Bush. The shirt also depicted the president as abusing alcohol and cocaine. After a parent complained to the school, the student was told he would only be allowed to wear the shirt if the images of drugs and alcohol were covered. The student refused and was suspended. The student filed suit in the District Court of Vermont claiming his First Amendment right to engage in political speech had been abridged. Can a student wear a shirt to school which denigrates the President of the United States and also depicts illegal drugs?

94 Id. at 516.

95 Id. at 519-520.

The Second Circuit Court of Appeals applied the legal rules previously set forth in *Tinker*, *Hazelwood* and *Fraser*. When examining *Hazelwood*, the court held the message of the shirt was not school sponsored and therefore *Hazelwood* could not apply. When examining *Fraser*, the Second Circuit Court of Appeals disagreed with the trial court and did not hold that the precedent of *Fraser* could apply. Their definition of offensive, although admittedly “not susceptible to precise definition,”97 must be defined as clearly vulgar, obscene and profane. They held the images on the shirt could not be classified as such. Applying the substantial disruption test of *Tinker*, the court held the message of the shirt did not disrupt the educational process in the school during the months the student wore it nor could the district nor could the school forecast that it would in the future.98

The Second Circuit Court of Appeals found that the student’s First Amendment rights to freedom of speech had been abridged and that the student’s disciplinary record related to the case should be expunged.99 The student did have a right to wear the shirt in school as political speech as long as it did not disrupt the educational process and the images were not plainly offensive.

97 *Id.* at 327.

98 *Id.* at 330.

99 *Id.* at 331.
Third Circuit

*Saxe v. State College Area School District*

In 1999, State College Area School District adopted a harassment policy in order to provide all students with safe and secure learning environment. The policy listed specific protected classes, including sexual orientation, and also gave extensive examples of prohibited actions which would be considered harassing other students.\(^{100}\) The policy also stated violating the harassment policy could result in disciplinary action. The father of two students in the district filed suit in the Middle District of Pennsylvania claiming the First Amendment rights to freedom of speech of his children would be abridged if they spoke publicly about their Christian beliefs that homosexuality was sinful. Can a school censor student speech if said speech is considered to be harassing of another student or students?

The Third Circuit declared there was no question that non-expressive and physical harassment was not protected under the free speech clause.\(^{101}\) However, they also stated, “there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.”\(^{102}\) The court did acknowledge some harassing speech such as “sexually derogatory fighting words”\(^{103}\) would not be protected. Applying *Tinker’s second*


\(^{102}\) *Id.*

\(^{103}\) *Id.*
prong, the court said the infringe on the rights of others language is unclear and only protects ‘tortious speech like libel, slander or intentional infliction of emotional distress.’”  

Speech that is offensive to a person without a satisfying a “threshold showing of severity or pervasiveness,” as long as it does not cause a substantial disruption, should not be punished. The Third Circuit Court of Appeals reversed the lower court’s decision.

_B.H. v. Easton Area School District_

In 2010, five middle school girls wore bracelets to school with the slogan “I ♥ Boobies! (KEEP A BREAST)”. School administrators, concerned the bracelets would cause a disruption, banned students from wearing them. When the group of girls were asked to remove their bracelets, two of them refused and were given an in-school suspension for disrespect and defiance. The school’s dress code policy bans obscenity and double entendre slogans. The two students filed suit in the Eastern District of Pennsylvania claiming the district’s ban on wearing the bracelets violated their First Amendment right to freedom of speech. Can a district restrict speech which may be considered lewd if the speech functions to create awareness of social or political activism?

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104 _Id._ at 218 (citing _Slotterback v. Interboro_ Sch. Dist., 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991)).

105 _Id._ at 218.

106 _Id._ at 300.

107 _Id._
Applying the first prong of the *Tinker* Test, the court held there was no evidence of a substantial disruption and the court turned to *Fraser*. The court expounded extensively on the protections afforded by *Fraser* in cases of obscene speech. Ambiguously lewd speech should not be punished if used to comment on a social or political issues. Plainly obscene speech should not be protected, regardless of its underlying purpose.\textsuperscript{108} The court worried that school districts might censor student speech “merely having the potential to offend.”\textsuperscript{109} The Third Circuit affirmed the lower court’s judgment.


In 2001, the Sypniewski brothers wore comedian Jeff Foxworthy t-shirts to their respective high school and middle school. They had periodically worn the t-shirts during the past two school years and continued wearing the shirts after the Board of Education adopted a Racial Harassment or Intimidation Policy on March 13, 2001. There had been documented racial incidents at the high school including a group of white students wearing t-shirts to school on Wednesdays portraying the Confederate flag and labeling the day “White Power Wednesdays”.\textsuperscript{110} Other incidents included students sharing racist jokes and students also displaying gang like behavior labeling themselves as “the Hicks” and “Rednecks”. The Sypniewski brothers purchased their t-shirts at Walmart and claimed the shirts did not violate the

\textsuperscript{108} *Id.* at 317.

\textsuperscript{109} *Id.* at 319.

district’s policy on Racial Harassment nor did they believe the shirt’s message to be derogatory or harassing. The t-shirt stated:

Top 10 reasons you might be a Redneck Sports Fan if
10. You've ever been shirtless at a freezing football game.
9. Your carpet used to be part of a football field.
8. Your basketball hoop used to be a fishing net.
7. There's a roll of duct tape in your golf bag.
6. You know the Hooter's [sic] menu by heart.
5. Your mama is banned from the front row at wrestling matches.
4. Your bowling team has it's [sic] own fight song.
3. You think the "Bud Bowl" is real.
2. You wear a baseball cap to bed.
1. You've ever told your bookie "I was just kidding."

One of the Sypniewski brothers was suspended for violating the dress code policy and insubordination due to the shirt containing the words “redneck”, “Hooters” and “Bud Bowl”. The student filed suit in the District Court of New Jersey claiming his First Amendment right to freedom of speech had been violated. Was the school district’s Intimidation and Harassment Policy consistent with Sypniewski’s constitutional rights?

The court discussion focused on whether the Hazelwood or Fraser’s exceptions to Tinker’s substantial disruption rule applied in this case. The court held the language on the t-shirt was not “entitled to special regulation as expression in a lewd, vulgar, profane, or highly offensive manner closely akin to obscenity” and therefore Fraser would not apply. Important to the lower court’s decision was their opinion that “not so much the content or viewpoint of the

111 Id. at 27.
112 Id. at 72-73.
speech, but the inappropriate language or manner used to express this content or viewpoint”¹¹³ should determine whether Sypniewski’s rights were abridged.

**Sixth Circuit**

*Nixon v. Northern Local School District*

In 2004, a middle school student wore a t-shirt to school with the slogans, “INTOLERANT, Jesus said . . . I am the way, the truth and the life, John 14:6, Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!”¹¹⁴ When school leaders asked the student to remove the shirt, the student refused and was picked up to go home with his father. During subsequent meetings between the father, the Superintendent and the Principal, the slogans on the shirt were declared to be offensive and disrespectful. The school districts dress code policy prohibits dress which is obscene or that disrupts the educational process.¹¹⁵ A few months later, the student filed suit in the Southern District of Ohio claiming his First Amendment rights to freedom of speech had been violated. By suspending the student for wearing a shirt with a slogan denigrating homosexuality, did the school district violate his right to freedom of speech?

¹¹³ *Id.* at 70.


¹¹⁵ *Id.*
The school district held they were right to prohibit the student from wearing the shirt because under Fraser, the slogan was “plainly offensive”. The court held the ruling in Fraser was more concerned with the manner in which the speech was conveyed over the actual content of the speech. The court disagreed the message on the student’s shirt was classified in the same manner as Fraser’s obscene speech. When applying the first prong of the Tinker Test, the court held there was not a substantial disruption in education due to the wearing of the shirt and the district’s claim there was a possibility of disruption did not meet this standard. The school district claimed they also had a right to censor the shirt under Tinker’s second prong because its message was offensive and invaded the rights of others. At the time of this case, the court held it was “not aware of a single decision that has focused on that language in Tinker as the sole basis for upholding a school's regulation of student speech.” There was no evidence that the student’s “silent, passive expression of opinion” would collide the right of other students to be left alone.

116 Id. at 972.

117 Id.

118 Id. at 974.

119 Id.
The Gay, Lesbian, and Straight Education Network hosts an annual Day of Silence to draw attention to harassment of gay and lesbian students. Students and faculty at the school participating in the event wear shirts with positive messages such as “Be Who You Are”. Another group of like-minded students participated the next school day in a Day of Truth to promote the heterosexual lifestyle. A student wore a t-shirt with the slogan “My Day of Silence, Straight Alliance” and “Be Happy, Not Gay”. School officials only objected to the “Not Gay” portion of the slogan and covered the words on the shirt. The school has a written policy banning spoken or written comments that refer to “race, ethnicity, religion, gender sexual orientation, or disability.” The students filed suit in the Northern District of Illinois claiming they had a constitutional right to express their beliefs regarding homosexuality. Do students have a constitutional right to express negative statements about other students as long as the statements are not “fighting words”?

When applying the *Tinker* Test, the court held the school must prove the slogan would cause harassment at a substantial level of disruption. *Tinker* does not afford a “hurt feelings” defense. The district court had argued the students were able to express their views towards gays as long as their speech did not include negative comments. However, the Seventh Circuit

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120 *Zamecnik v. Indian Prairie Sch. Dist. # 204 Bd. of Educ.*, 636 F.3d 874, 876 (7th Cir. 2011).

121 *Id.* at 877.

122 *Zamecnik v. Indian Prairie Sch. Dist. # 204 Bd. of Educ.*, 710 F. Supp. 2d 711 (N.D. Ill. 2010).
Court of Appeals held that although a school must protect students from the invasion of their legal rights by other students, “people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life.”¹²³ The Seventh Circuit upheld the lower court’s decision in favor of the students.

**Ninth Circuit**


On April 21, 2004, Poway High School planned to observe a “Day of Silence” to support gay and lesbian students. On the same day as the observance, Poway High School student Tyler Harper wore a t-shirt to school with the words “I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED” on the front and “HOMOSEXUALITY IS SHAMEFUL Romans 1:27” on the back.¹²⁴ During the day, the student was told by a teacher and school administrators he was in violation of the school’s dress code. Informally, the student was also told the shirt was “inflammatory” and would need to be removed before returning to class. The student refused to remove the shirt and was given an in-school suspension for the day. The student filed suit in the Southern District of California claiming his constitutional rights had been abridged beginning with his First Amendment right to freedom of speech. “May a public high school prohibit

¹²³ Zamecnik v. Indian Prairie Sch. Dist. # 204 Bd. of Educ., 636 F.3d 874, 876 (7th Cir. 2011).

students from wearing T-shirts with messages that condemn and denigrate other students on the basis of their sexual orientation?"\textsuperscript{125}

The lower court first reviewed the student’s speech through the “plainly offensive” test in \textit{Fraser}. While the court found the speech to be derogatory, the question of whether the speech was “unmistakably offensive” could not be conclusively determined.\textsuperscript{126} When applying the \textit{Tinker} standard to the case, the lower court held the school district could reasonably forecast a substantial disruption due to past altercations on the Day of Silence as well as difficult conversations that had already occurred surrounding the message on the t-shirt. In 2006, the 9th Circuit Court of Appeals upheld the lower court’s decision. The impact of Judge Reinhardt’s majority opinion cannot be overstated as the court specifically addressed the second prong of the \textit{Tinker} Test, denying Harper’s First Amendment rights were abridged based solely on the rationale his speech intrudes upon the rights of other students. “We conclude that Harper's wearing of his T-shirt "collides with the rights of other students" in the most fundamental way."\textsuperscript{127} The court held it is impossible to condemn homosexuality without condemning homosexuals. The comparison was made to the historic civil rights struggles by blacks and Jews to gain equality in American society to attend schools, obtain employment and to vacation where they wish. There are other forums for personal opinions to be expressed, however, “It is not

\textsuperscript{125} \textit{Harper v. Poway Unified Sch. Dist.}, 445 F.3d 1166, 1170 (9th Cir. 2006).


\textsuperscript{127} \textit{Harper v. Poway Unified Sch. Dist.}, 445 F.3d 1166, 1178 (9th Cir. 2006).
necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.”

Tenth Circuit

*West v. Derby Unified Sch. Dist. No. 260*

A seventh grade student at Derby Middle School was suspended from school because he drew a picture of a Confederate flag on a piece of paper during the school day. The student was found to be in violation of the district’s Racial Harassment or Intimidation policy which specifically prohibits “any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred.” The district had a history of racial tension at the high school between black and white students including the distribution of racist propaganda from the Klu Klux Klan and incidents of racist graffiti written in the school against black students. The student filed suit in the District of Kansas claiming his First Amendment right to freedom of speech had been violated. Does a school district have the right to curtail student speech in the form of symbols deemed by the district to be inflammatory and racist?

The lower court, applying the *Tinker* standard, found the school district had acted appropriately by reasonably forecasting a substantial disruption, especially in light of recent racial conflict within district schools. Furthermore, the court held the school district has a

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128 *Id.* at 1181.


130 *Id.* at 1232.
responsibility to prepare students for citizenship in a democracy which includes teaching “habits and manners of civility.”

“Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.”

On appeal, the 10th Circuit Court of Appeals upheld the district court’s ruling, stating “School District officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone.”

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131 Id. at 1233.

132 Id. citing (Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

133 West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) at 1366.
CHAPTER 3: METHODOLOGY

The *Tinker* Test is the foundational legal test for cases involving alleged violations of students’ First Amendment freedom of speech rights. However, since the 1969 *Tinker* decision, the two prongs have not been distributed equally by the lower courts in their usage. The material and substantial disruption test has been utilized more extensively and has stood alone as a legal test. The infringe upon the rights of others clause has been more commonly utilized by the lower courts in conjunction with the first prong and has not stood alone until 2006 when the Ninth Circuit Appellate Court ruled in *Harper v. Poway*.

Chapter Two is a summary of Federal cases which have utilized the second prong of the *Tinker* Test as part of the discussion and decision making process for the majority or minority opinions. This study analyzes a specific type of student speech; speech by a student(s) which is deemed offensive to other students. Terms such as “infringe”, “offend” and “offensive” were targeted because they are typically associated with students’ freedom of speech rights and were analyzed to view how different circuit courts have interpreted them. Interpretations were analyzed for patterns and changes in interpretation over time.

Not all student cases focusing on offensive speech were selected. The Supreme Court held “the pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students.”\(^{134}\) Chief Justice Burger’s majority opinion in the case partners the word “offensive” with “lewd” and “vulgar” when describing Fraser’s speech. The school district did not violate

Fraser’s rights by censoring his speech because it was infringing on the rights of others, it was censored on its own merit of being overtly sexual and vulgar and school leaders must enforce the "fundamental values necessary to the maintenance of a democratic political system". In the same manner, the student newspaper articles in Hazelwood v. Kuhlmeier were labeled “offending” in Justice White’s majority opinion. However, the legal test in the case for censoring was speech which bears the imprimatur of the school and the Court holding “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Although Tinker and its progeny focus on speech deemed offensive to other students, adults or community members, for the purposes of this study, review of select cases showed a discussion of the second prong of Tinker, even if it did not stand alone as the sole legal test in the court’s decision. It is clear by the number of Federal cases selected in this study the deference given by the courts to the first prong.

The following research questions guided this study:

I. What is the current status of the application of the second prong of the Tinker Test?

II. What are the future implications of the application of the second prong of the Tinker Test? How might school administrators utilize these implications to protect students’ rights to freedom of speech, protect students from harassment, avoid litigation and therefore minimize disruptions to the educational process?

135 Id.

Interpretivism was applied as a theoretical framework in this study. There are some who view Legal Interpretivism as another option between Natural Law Theory and Legal Positivism. The theory is commonly tied to the seminal work of Jim Dworkin. Interpretive Theory mandates judges review the legal history of a statute or law as well as consider the values of society and the moral facts of the case. It holds there is no separation between law and morality. “Morality and institutional practice both figure in the constitutive explanation of the law in the sense that the practice determines the content of the law as certain moral facts dictate and in virtue of those facts.” It is the merging of these concepts where judges make decisions that have value for society. The interpreter works therefore with two sets of norms, one composed of norms conveyed by institutions, the other composed of uncreated, genuine moral norms—general moral principles.

The law must be applied to protect students from harassment and provide a safe learning environment for all. The law must also be applied to protect the First Amendment rights of student to their freedom of speech. Applying Interpretive Theory to cases of censorship in public schools highlights the moral obligation judges have in maintaining the balance between the two concepts. It is through this interpretive lens courts debate and define terminology such as “infringe” and “offend”. As the Supreme Court has yet to give further guidance as to the


139 *Id.*


141 *Id.*
meaning of infringe upon the rights of others test, lower courts are left to interpret what it means for a student to have their rights infringed upon. Evidence of the legal doctrine of *stare decisis* will be given in the next chapter as the second prong of the *Tinker* Test has been interpreted differently between the Third and Ninth Appellate Courts.
CHAPTER 4: WHOSE RIGHTS MAY BE IMPINGED?

The lack of clarification from the Supreme Court to clearly define the second prong of the *Tinker* test and lack of unity in the lower courts’ interpretation has a chilling effect on student expression. Uncertainty from school leaders creates a system where student expression concerns might be managed differently from school building to school building and district to district. This creates a system where student speech in school may indeed infringe upon the rights of others and go unchecked. Students, not having clear guidance nor expectations, may be hesitant to speak out and participate in the democratic process because of fear of punishment and uncertainty if their speech is protected under the First Amendment. A fundamental question with free speech is the fact that a student may not like, nor agree with the speech. The difficult question is designating between speech which treads beyond hurt feelings to actually infringing upon another student’s rights and violating their First Amendment protections. How does a school administrator differentiate between protected speech which some may find to be offensive and harassing speech which the First Amendment does not protect?

An example of this question is currently seen in culture in the “safe spaces” debate on college campuses across the United States. Although, at the time of writing, this issue has been mostly relegated to higher education and has yet to infiltrate high schools and middle schools, it

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serves as an example school leaders and educators face when confronting the issue. A safe space on a college campus can be defined as a place intended to be free of bias, conflict, criticism, or potentially threatening actions, ideas, or conversations. Safe spaces in elementary and secondary education have focused more on teachers understanding the background of their students, creating a classroom culture where thoughts and opinions are welcomed and not denigrated and creating a classroom dynamic where bullying is not permitted. Van Jones, speaking to students at the University of Chicago, summarized safe spaces on college campuses into two categories. The first safe space definition is a place for students where they are “physically safe on campus, not being subjected to sexual harassment and physical abuse.” He goes on to provide a second definition for safe space where a college student feels “I need to be safe ideologically, I need to be safe emotionally, I just need to feel good all the time. And if someone else says something that I don’t like, that is a problem for everyone else, including the administration.” The Supreme Court opined “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.”


145 Id.

The outcome of the debate will most certainly have an impact on secondary educators in the future.

This section will examine the courts’ and schools’ critical dilemma of protecting freedom of expression and curbing bullying and harassment by reviewing appellate court decisions in similar cases with very different outcomes. This debate is framed in the detailed review of the following three cases as representative of the dialogue surrounding this complex issue. The opinions of the majority and dissent will be reviewed with attention given to the arguments surrounding infringing on the rights of others and how the courts have interpreted when offensive speech becomes harassing speech. Each of the cases involved a high school student(s) expressing (or wishing the freedom to express) their opposition to homosexuality. The actual speech in two of the cases involved students wearing t-shirts to school with anti-gay slogans including “Be Happy, Not Gay”\(^{147}\) and “HOMOSEXUALITY IS SHAMEFUL Romans 1:27”\(^{148}\).

In all three cases, the students filed suit claiming their First Amendment rights to freedom of expression had been abridged because they were denied their right to express their beliefs, all three on grounds of their religious beliefs, within the public school setting. The opinions highlight the difficult nature of determining whose rights may be impinged in student speech cases and defining the protections afforded by the second prong of the Tinker Test.

\(^{147}\) Zamecnik v. Indian Prairie Sch. Dist. # 204 Bd. of Educ., 636 F.3d 874 (7th Cir. 2011).

\(^{148}\) Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).
In 2001, in *Saxe v. State College*, the Third Circuit deliberated whether the school district’s anti-harassment policy overstepped its constitutional bounds. The language of the district’s policy defined harassment as “any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above.” It further defined as harassing behavior speech which denigrates on the “basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc." Applying specifically to sexual orientation, "negative name calling and degrading behavior" was prohibited. Here, the Third Circuit referred to *Harris v. Forklift Systems, Inc.* to define harassment, noting that for conduct to create a hostile environment, it must "be viewed subjectively as harassment by the victim and be objectively severe or pervasive enough that a reasonable person would agree that it is harassment." The Third Circuit continued to define harassment as evaluating the “totality of circumstances”, this would include the frequency of the conduct, the severity and whether it is

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150 *Id.* at 203.

151 *Id.* at 203.


physically threatening and humiliating or just merely an offensive utterance.\textsuperscript{154} Because the two Supreme Court cases referred to in Saxe were sexual harassment lawsuits, the court summarized that unless the conduct is "objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview."\textsuperscript{155} The distinction is made between harassment and words that are only considered offensive and rude which do not afford the protections of Title VII.\textsuperscript{156} The court set the identifying mark of rudeness transgressing to harassment when the speech is so "pervasive as to constitute an objective change in the conditions of employment."\textsuperscript{157} The court held that simply because speech is offensive does not justify its censorship. On the contrary, it stated "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."\textsuperscript{158} Repeatedly, the Third Circuit reiterates \textit{Tinker}'s statement, and its usage in other court cases, that schools cannot prohibit student speech based solely on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} Civil Right Act of 1964, 42 U.S.C. § 2000e (1964) (which prohibits employment discrimination based on race, color, religion, sex and national origin).

\textsuperscript{157} \textit{Id.} (citing \textit{Faragher v. City of Boca Raton}, 524 U.S. 775, 787 (1998).

It found the district’s harassment policy to be overbroad in its protections and found concern with words in the policy such as “hobbies and values” and “personal characteristics”. Without a severity test, the policy could be used to censor any speech bringing offense and therefore is unconstitutional.

In its application of the *Tinker* standard, the court relied on the first prong, holding “the policy's restrictions were not necessary to prevent substantial disruption or interference with the work of the school or the rights of other students.” The court’s application of the second prong held the language is unclear and cannot be utilized to imply it signifies banning speech merely because it offends. They agreed with previous Third Circuit jurisprudence, defining the second prong of *Tinker* as only applying to “tortious speech like libel, slander or intentional infliction of emotional distress.” The court did find there is a place for harassment policies in schools for preventing harassment and discrimination is a legitimate and compelling interest for all school leaders but, according to the court, the distinction must be made that not all speech defined as offensive violates First Amendment protection. Judge Rendel in his concurrence, accurately summarized “while reliance on provisions of harassment laws or policies might be an easy way

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to resolve difficult cases such as this one, therein lies the rub--there are no easy ways in the complex area of First Amendment jurisprudence.”

Harper v. Poway

In referencing the second prong of *Tinker*, the Sixth Circuit wrote, the “Court is not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school's regulation of student speech.” In 2007, the Ninth Circuit negated this statement by reaching a momentous decision in the legal history of students’ First Amendment right to freedom of expression. Here again, a student wore a t-shirt with an anti-gay message following a Day of Silence event at the school. The court became the first to decide a school speech case on the basis of the second prong alone, deciding the message on the t-shirt was sufficiently offensive to meet the requirements of the second prong and intrude on the constitutional rights of gay students. Although the Supreme Court vacated the Ninth Circuit decision as moot due to the fact the student had graduated, the majority and dissenting opinion provide valuable input to the ongoing discussion between defining speech as expression or harassment. The contrast to the Third Circuit decision in *Saxe* is apparent. Much of the Ninth Circuit Court of Appeals’ defense of its position is supported by the importance given to the right students have in school to be secure and to be let alone and also in defending its rational from Judge Kosinski’s dissenting opinion, which will be reviewed below.

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The Ninth Circuit began its analysis with a review of the applicability of the \textit{Tinker} standard. Although the District relied on the first prong of \textit{Tinker}, claiming the school had the right to censor the message of the t-shirt due to evidence of substantial disruption, the appellate court dismissed the first prong as “not relevant to our holding”\textsuperscript{164} and immediately focused on the rights of other students. The student argued that “rights of other students” should be defined as being free from direct physical confrontation.\textsuperscript{165} The court disagreed, arguing that “plainly offensive speech "by definition, may well 'impinge upon the rights of other students," even if the speaker does not directly accost individual students with his remarks."\textsuperscript{166} Although agreeing with the Third Circuit in \textit{Saxe}, that the “precise scope of Tinker's 'interference with the rights of others' language is unclear,"\textsuperscript{167} the court connected the right to be let alone with the possibility of psychological injury a student may incur when the recipient of plainly offensive speech.\textsuperscript{168} Here

\textsuperscript{164} \textit{Harper v. Poway Unified Sch. Dist.}, 445 F.3d 1166, 1177 n.17 (9th Cir. 2006).

\textsuperscript{165} \textit{Id.} at 1177 (citing \textit{Blackwell v. Issaquena County Bd. of Ed.}, 363 F.2d 749, 751 (5th Cir. 1966) (where the students “accosted other students by pinning the buttons on them even though they did not ask for one").

\textsuperscript{166} \textit{Id.} at 1178.

\textsuperscript{167} \textit{Saxe v. State College Area Sch. Dist.}, 240 F.3d 200, 217 (3d. Cir. 2001).

\textsuperscript{168} \textit{West v. Derby Unified Sch. Dist.}, 206 F.3d 1358, 1366 (10th Cir. 2000) (where a Middle School student drew a picture of a Confederate flag and the court upheld the school district’s decision to suspend the student stating “School District officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone”).
the well-known statement was delivered “we conclude that Harper's wearing of his T-shirt "collides with the rights of other students" in the most fundamental way.”169

The court differentiated between minority groups such as gay and lesbian students and members of the cultural majority who have enjoyed privilege and status unattainable by the former. Minority groups have been historically oppressed and victims of discrimination. There are challenges and difficulties that students as members of the majority group have never faced.

Demeaning speech against them not only is harmful psychologically but also to their educational development, further explaining “our holding is limited to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group.”170 The inequality gay and lesbian students face today is the same principal for which black students fought during the Civil Rights Movement of the 1960’s. A message of “Homosexuality is Shameful” is equated to expressing a message proclaiming the inferiority of Black students or proclaiming that Jewish students will go to hell.171 If schools would not all allow speech demeaning a student for the color of their skin or their race, then neither should speech be allowed to demean their sexual orientation. The court shared the example “if a school permitted its students to wear shirts reading, "Negroes: Go Back To Africa," no one would doubt that the message would be harmful to young black students. So, too, in the case of gay students, with regard to messages such as those written on Harper's T-shirt.”172 The court rejected the

169 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

170 Id. at 1182, n.27.

171 Id. at 1181.

172 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1180 (9th Cir. 2006).
argument that this debate is a political issue because in America of the 1950’s there was a political debate over racial equality such as the political debate over segregated public schools which was settled by Brown v. Board of Education. The point the court makes is nearly sixty years later, it seems incredulous to imagine a credible modern political debate on the merits of separating students based on the color of their skin.

The Ninth Circuit addressed the issue of viewpoint discrimination in the case. Can a school host a Day of Silence to support gay and lesbian students but deny student expression in opposition? The court claimed Tinker’s two prong test allowed for viewpoint discrimination if either of the standards of the two prongs were met. There is a difference between “difference between suppressing religious speech "solely because it is religious" and suppressing speech that is "religious and disruptive or hurtful." According to the court, students do not have the right to express their religious beliefs at any time or place. In the context of the public school, the second prong of Tinker trumps religious expression if it interferes with the rights of others. One cannot “condemn homosexuality without condemning homosexuals”

Judge Kosinski, in his dissent, holds a more traditional interpretation in the case with some fundamental disagreements with the majority opinion. He argued that students holding the conviction of homosexuality being sinful have the right to express their opinion, especially in the context of an event sponsored by the school which supports homosexuality. Kosinski even hints


174 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1185 (9th Cir. 2006) (citing Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996)).

175 Id. at 1181.
the school may have caused some of the conflict by thrusting the issue into the spotlight in
hosting the Day of Silence and forcing those in disagreement with homosexuality to express their
opposition so as not to appear in agreement. He goes on to suggest the district may have even
been best served by banning the event altogether.

Both sides of the debate are placed by Kosinski on more equal ground, framing the issue
in the context of a political debate and giving both sides the right to express their views.
Regarding bullying, “harassment law might be reconcilable with the First Amendment, if it is
limited to situations where the speech is so severe and pervasive as to be tantamount to
conduct.” 176 He questioned the validity of the sources given by the majority and again, framing
the argument as political, stated “none provides support for the notion that disparaging
statements by other students…materially interfere with the ability of homosexual students to
profit from the school environment.” 177 The focus of his concern with the majority definition was
that it was so overbroad to include any and all statements casting aspersions on students’ sexual
orientation would cause severe harm. 178 A host of hypothetical problems arise from this lack
clarity such as would a student wear a t-shirt stating “I love Jesus” be offensive to Muslim
students and therefore banned?

He disagreed vehemently with the majority’s definition of interfering with the rights of
others as only pertaining to minority students, without defining who is classified as a minority
student. Again, a list of hypothetical issues pertaining to the majority opinion on this topic were

176 Id. at 1198.
177 Id. at 1199.
178 Id.
listed. For example, are Catholics part of a majority of Christians or a protected minority having endured persecution in America? The question is also raised, could students from a majority group have their education disrupted by offensive statements as well? The dissent maintained the only rationale for censoring offensive student speech must be based on the substantial disruption standard to withstand First Amendment scrutiny. The difference between the student’s “Homosexuality is Shameful” message and a student wearing a t-shirt bearing a swastika was the issue of severity and the latter leading to disruption and violence. Such is not the case for the former. The “Defendants can say with apparent sincerity that they were advancing the goal of promoting 'acceptance and tolerance for minority points of view' by their demonstrated intolerance for a viewpoint that was not consistent with their own is hardly worthy of serious comment.”

*Nuxoll v. Indian Prairie Sch. Dist. #204*

The Seventh Circuit provided a different focus in the student plaintiff’s argument that only “fighting words” should be censored. The student argued he should be able to share opinions against any group as long as the words utilized were not inflammatory nor using language the Supreme Court had previously denounced as unconstitutional. The fighting words the court denounced in *Chaplinsky v. New Hampshire*, by modern standards, may seem

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180 *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 671 (7th Cir. 2008) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-573 (1942)).
trivial where a man was arrested for calling a Marshall a “damned racketeer” and a “damn fascist”. A distinction is made between “Be Happy, Not Gay” which the court deemed as “only tepidly negative; "derogatory" or "demeaning" seems too strong a characterization.” Applying a fighting words rationale, the court would ban a statement such as “Gays are going to hell” for its direct confrontational message against students’ sexual orientation; protected characteristics in the district’s anti-harassment policy. The court also rejected the school’s argument based on the second prong of *Tinker* that they needed to ban the speech to protect the rights of other students. Here the court opined, “people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life.”

The dictionary definition of the word “offensive” contains descriptors of human emotion such as displeasure, irritation, anger and annoyance. These are unpleasant emotions which most rational persons would seek to avoid when possible. Many of the freedom of speech cases since *Tinker* have dealt with topics such as sexual orientation, religion, abortion and symbolism; all topics which for many carry strong emotional bonds and define our culture and our very identities as human beings. Being offended is an uncomfortable experience that can evoke strong emotions as a topic we hold dear is the subject of mockery and demeaned. It is impossible to ignore since the personal connections with our core beliefs are strong; in summary, if a student is a devout Catholic, or a lesbian student or a female student who just had an abortion, a verbal attack is more than a clash of ideals, it is internalized as a personal attack against who I am as a person.

181 Id. at 675.

182 Id. at 671.
In *Fraser*, the Supreme Court ruled “plainly offensive” speech could be censored but only in the context of speech that is vulgar and obscene. In *Morse*, the Court supports this separation between *Fraser’s* “plainly offensive” speech and “offensive” speech by stating in its rational why the *Fraser* test was not utilized in the *Morse* decision, “that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some.” Here, the distinction is made between speech that offends in that it is upsetting or that it hurts feelings and speech that is offensive to the degree it is not covered by First Amendment protections. The issue in *Morse* was not that the speech was offensive but it promoted illegal drug use, “It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all.”\(^{183}\)

In contrast to this definition of offensive, the lower courts have defined harassment. In *Saxe*, “[V]erbal or physical conduct based on one's actual perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.”\(^{184}\)

Harassment has also been defined by the Supreme Court. In *Denno v. Monroe*, the Court defined harassing speech conduct that is "so severe, pervasive, and objectively objective, and that so undermines and detracts from the victims' educational experience, that the victim students are effectively denied equal access to an institution's resources and opportunities,"\(^{185}\)

\(^{183}\) *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

\(^{184}\) *Saxe v. State College Area School Dist.*, 240 F.3d 200, 202 (3d Cir. 2001).

context of public schools, the harmful effects of bullying and harassment on a student’s emotional well-being and sense of self-worth are well documented. Statistics highlight the elevated risks of depression and suicide in students experiencing bullying and harassment. The effects do not end in high school but continue into college. Many victims of high school bullying reported as college students the difficulties they have in making friends, feeling isolated and difficulties defending themselves when someone says hurtful things to them. In schools, it is without question that school leaders must mitigate harassment of students whether verbal or physical. All students have the right to be free from behavior that undermines their educational experience.

“Offensive speech might constitute harm, but not all offensive speech is harmful, and we need to compare and contrast both forms to be thorough.” Although the comment may cause hurt feelings and be deemed offensive, does this qualify as harassment? In Judge Kosinski’s dissent in Harper, he briefly addresses the issue by stating “Tolerance is a civic virtue, but not one practiced by all members of our society toward all others. This may be unfortunate, but it is a reality we must accept in a pluralistic society.” This is the issue facing all school leaders, how much intolerance is acceptable in a pluralistic society if intolerance is defined as offensive but not harassing? “Among the central values that public schools transmit are the promotion of tolerance” and decency, and it has long been recognized that an essential part of the public

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186 Frank D. Adams and Gloria J. Lawrence, Bullying Victims: The Effects Last Into College, 40 American Secondary Education 4, 8 (2011).

school's mission is to teach students "of differing races, creeds and colors to engage each other in
civil terms rather than in 'terms of debate highly offensive or highly threatening to others."188

There is no question that harassment and bullying is hurtful and harmful to students. School leaders must work to keep all students safe. The question is defining when speech is
classified as harassment and when is it just offensive as in causing hurt feelings? School leaders
must uphold two foundational truths of American education; protecting First Amendment speech
rights and providing a safe educational climate for all students. The problem is where these two
ideologies meet in the middle as they stand at opposite ends of an ideological spectrum. The
Judge Reinhardt in the Harper decision did not view the two ideologies as equals. All speech
against homosexuality is harassment to the homosexual student and should be censored. Rights
to freedom of speech should be sacrificed to protect the rights of other students. However, there
is also truth that the rights of some students are sacrificed to protect freedom of expression, as
was expressed in Judge Kosinski’s dissent. Again, the debate lies in where to draw this line
between the two. Since the courts affirm both, for school leaders the question becomes should
one err on the side of protecting student rights or err on the side of protecting free speech?

Viewpoint discrimination in schools was defined in Tinker as avoiding an unpopular
viewpoint without “a specific showing of constitutionally valid reasons to regulate their
speech.”189 When a school favors one viewpoint on a controversial topic over another, they are
guilty of discrimination. Judge Reinhardt ruled schools were allowed to commit viewpoint

Fraser, 478, U.S. 675, 683 (1986)).

discrimination when done in the interest of protecting the rights of other students. In schools, promotion of racial equality has become a social given and it is difficult to regard this as a viewpoint at all.\(^{190}\) In many schools, the promotion of tolerance for sexual orientation has become a social given as well. However, in the examples outlined in the court cases above, could zeal to support students run afoul of first amendment law? Once the government is left to define the line between free speech and student rights, there is no guarantee “this balancing will not cut the other direction.”\(^{191}\) The American Civil Liberties Union gives an ominous warning of allowing the government too much latitude in restricting speech:

> “Censoring so-called hate speech also runs counter to the long-term interests of the most frequent victims of hate: racial, ethnic, religious and sexual minorities. We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them. As one federal judge has put it, tolerating hateful speech is “the best protection we have against any Nazi-type regime in this country.”\(^{192}\)

The second prong of the *Tinker* test should not stand alone because not all offensive language offends equally. When *Fraser’s* “plainly offensive” test defined the term as obscene and vulgar speech, it provided the test needed by school leaders to implement. If a student’s speech at school is obscene and sexual, it will not be allowed. The Supreme Court has yet to give this level of specificity for the second prong of *Tinker*. It is nebulous and difficult to define to be able to stand on its own merits. There is a reason courts before and after *Harper v. Poway* have


\(^{191}\) Id. at 637.

avoided using the second prong of *Tinker* as the sole rationale for censoring student speech. Without a “plainly offensive” test for the second prong, the delineation may become a subjective experience and Judge Kosinski’s warnings of examples that may occur if the rationale in *Harper* stands, may become reality.

Guidance from the Supreme Court is sorely needed to resolve this issue. At this time, the response to the question of students’ rights versus freedom of expression may be answered by a student’s zip code as evidenced by the conflicting Third, Seventh and Ninth Circuit decisions. Until then, the question of applying the second prong of *Tinker* while upholding students’ rights to expression remain in question. Kosinski’s statement that tolerance is not practiced by all members of society which “may be unfortunate, but it is a reality we must accept in a pluralistic society” will not sit well with many school administrators because intolerance has become commonly synonymous with harassment. Harassment and bullying are not a rite of passage to endure for children as they progress through the school system. A second prong test is needed that targets specific harassing speech to keep students safe while allowing the freedom of expression to flourish.

A suggested second prong test would include a connection to the first prong of *Tinker*, show intent to harm and/or also severity. For example, (1) The speech must be the proximate cause of a serious student disturbance; and/or (2) The student must have intended the speech to be disturbing and/or (3) the speech must be offensive enough in its severity to disrupt a

193 *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1196 (9th Cir. 2006).

student’s access to a free and safe education. The first prong of *Tinker* is well established in the court system and would provide clarity as a starting point in a censorship issue. In the interest of balancing protecting students and free speech, intent and severity would provide balance, reminiscent of *Chaplinsky’s* “fighting words” and *Nuxoll’s* designation that the “Be Happy, Not Gay” shirt was “tepidly negative.” Here, a message such as “God hates gays” or “gays will go to hell” would be labeled as “fighting words”, intense in their severity of negativity and intolerance towards gay and lesbian students and would not be protected under the second prong. Intent to harm may be more difficult to identify but would align closely with the Third Circuit in *Saxe* where the second prong was applied, holding the language to be unclear and that could only be interpreted as referring to tortious speech such as defamation.

Was *Harper v. Poway* good jurisprudence? The court seems to have overstepped its bounds by applying the second prong of *Tinker* and separating it completely from the substantial disruption clause. The first prong is well documented in its usage and although there is differing judicial opinion on what constitutes “disruption” from “substantial disruption”, the Supreme Court in *Tinker* focused its rationale for ruling in favor of the students heavily on the first prong while leaving the lesser known second prong undefined. The *Harper* court was well intentioned in its desire to protect gay and lesbian students from harassment, as all students should be, but overreaching in the definition of offend. Considering the amount of writing the majority and

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195 *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 675 (7th Cir. 2008).

dissenting opinions dedicated to defending their positions against each other, one might conclude Judge Reinhardt and Judge Kosinski were offended by their opposing judicial opinions.

The American Civil Liberties Union filed an amicus curiae brief in *Harper v. Poway*, urging the court to rule in favor of the student’s expression arguing that “the schools may not prohibit the expression of an idea merely because it is offensive or repugnant to some or even many. An idea, by itself, is not harassment. Though a school may advocate its own position, it may not ban student speech merely because it disapproves of the student’s viewpoint. To ban ideas from public schools simply because they are controversial strikes at the heart of the First Amendment and the spirit of open debate that a healthy democracy and public education require.”  

While the ACLU vigorously defends the rights of LGBT students and recognizes the historical harassment they have faced in schools, they believe “an idea, by itself, is not harassment”. Without meeting the substantial disruption of education standard for the school or for LGBT students, the student has the right to express their beliefs on homosexuality. The ACLU believes schools have the responsibility to protect LGBT students from harassment but would be more effective by improving in educating all students to respect others rather than “resorting to the blunt instrument of censorship.” The material effect of which only serves to further promote the speech the district attempted to silence in the first place. An example of this

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198 *Id.*

199 *Id.*
phenomenon is observed in *Pyle v. Hadley* where the efforts of the school’s principal to censor the students’ “Coed Naked” tagline on a t-shirt resulted in the students purposefully wearing custom designed t-shirts specifically to test the boundaries of the district’s dress code policy.²⁰⁰

Perhaps someday in the future, a case similar to the cases reviewed above will rise to the level of the Supreme Court and clearly define the meaning of impinge upon the rights of others and offer guidance to school leaders in deciding when offensive speech comes harassing speech. “Prohibiting students from mocking and attacking each other personally, while leaving space for them to express their general political viewpoints”²⁰¹ is the goal of school leaders. Within the void created by lack of clarity in defining the second prong of *Tinker*, the following are practical alternatives to deescalate freedom of speech issues in the school, remove some of the emotion from the situation for adults as well as students and balance protecting students from harassment and their right to freedom of speech.

When emotions rise, so do lawsuits. In 1989, when a high school student was disciplined for including in his campaign speech to the student body, a reference to the Assistant Principal having a speech impediment. The Sixth Circuit Court of Appeals shared “It may well be that a more relaxed or more self-assured administration would have let the incident pass without declaring Dean ineligible, and perhaps that is what this administration ought to have done; it is not for us to say.”²⁰² Personal bias must not be a factor in a school leader’s decision making with free speech issues in the school. Freedom of expression can be challenging for adults as well. For


example, a veteran staff member may take umbrage at a student’s refusal to stand for the pledge of allegiance, although they have a free speech right to stay seated. Instead, seeking an opportunity to discuss the Constitution and the foundational American values in the Bill of Rights is a much better alternative than an escalating conflict in the classroom over student rights.

School leaders should exercise caution in immediately defaulting to censorship. There are other options to consider that might turn a potential conflict into a teachable moment for a student. Some school districts have had success with “opt out options”, in effect, creating alternatives for students who feel uncomfortable with a class assignment or discussion and would choose to recuse themselves. The spaces have been utilized by others as designated “safe havens” in the school for a myriad of reasons. These staff supervised spaces are well publicized havens for students needing quiet time or a place to deescalate. Providing alternatives can also be utilized as a proactive strategy to reduce freedom of speech issues by providing multiple curricular options to students while focusing on a unifying theme.

As previously stated, school leaders may find themselves in situations where making a decision to censor student speech may require a quick response. Removing a student and questionable speech from the rest of the student body may be wise but keeping a student from class may also be viewed simultaneously as disciplinary. Removing the student to the school office can buy time to utilize other resources at an administrator’s disposal. Many districts have an administrator with oversight of their district’s legal matters. Certainly, it may be wise to

contact a district’s senior management team if necessary. It may be helpful to use the time to contact a network of other school leaders or even other members of a school’s leadership teams to seek counsel and feedback before proceeding. Many districts have access to a legal team which may be contacted to give advice. Using these moments wisely may help ease some of the emotion from the situation and give a school leader precious moments to decide the best course of action.

The influence of the principal over the entire culture of the school cannot be overstated. In John Hattie’s research, of 252 influences related to student achievement in the school, the influence with the greatest effect on achievement is collective teacher efficacy. CTE is the collective belief of school staff that they are able to positively affect students. School administrators are the unifying factor that influences teachers to develop a collective sense of efficacy as a staff, and according to Hattie’s research, there is no greater influence on student achievement. With this in mind, principals must self-reflect and ask themselves if they are leading well in creating this culture and dynamic for their school. Are teachers empowered to value alternative beliefs in the school? Do teachers and staff members share a collective desire to protect students from harassment and feel equipped to guide difficult discussions in their classrooms so all voices are heard? Do teachers have confidence needed to not power struggle with students leading to irrational responses? These are questions a savvy school leader should begin to contemplate as they lead their staff in creating a school culture which values both protecting students and also values diverse opinions.

CHAPTER 5: PRACTICAL GUIDANCE FOR SCHOOL LEADERS

There is a growing need for practical guidance for school administrators as they navigate whether or not to censor student speech in public schools. I created this next section to contribute a practical application of the findings from my study. It is a training to be taught in the format of a six-hour Illinois Administrator Academy. Illinois administrators are required to complete one administrator academy annually through their Regional Office of Education to maintain their state licensure. The course is designed to allow participants to collaborate and learn from each other’s experiences. It is important and relevant because it is specifically designed to give school leaders an increased level of confidence in their decision making regarding censoring student speech and an awareness of proactive strategies to decrease the probability of facing legal action. A corresponding PowerPoint was created to coincide with each of the sections and sub-sections. As a practicing school administrator, I personally would have appreciated the opportunity to participate in a course such as this early in my career.

The course is divided into six sections; the outline is as follows:

1. Introduction
2. A History of the Law
3. Other Freedom of Speech Considerations
4. Review of School Policy and Handbooks
5. Case Studies
6. Future Considerations and Application
**Section 1: Introduction**

This course was designed to inform practicing school leaders in the basics of school law as it pertains to students’ rights to freedom of expression in the schoolhouse. Legal precedent from the Federal courts has added to the confusion as the lack of guidance from the Supreme Court has left district courts to interpret legal tests resulting in different outcomes. School leaders will discover practical guidance to create an environment where student expression is encouraged while simultaneously protecting all students from harassment and their right “to be left alone”. In this section, participants will review the background of the two prongs of the *Tinker* Test and participate in a discussion on First Amendment issues in their districts and schools. Participants will also independently complete an introductory quiz to gauge their knowledge of students’ First Amendment rights and then compare and discuss their responses with their group. Last, participants will identify major challenges facing administrators in their decisions to censor student speech.

**Background**

In the landmark 1969 *Tinker v. Des Moines* case, the Supreme Court ruled school districts could censor student speech only if it caused a material and substantial disruption to the educational process or if the speech infringed upon the rights of others. Since then, the Supreme Court has also allowed schools to abridge student’s speech rights if the speech was obscene, if the speech was part of a school sponsored activity and if the speech promoted drug use. Most of the court cases since *Tinker* have applied the first prong of the *Tinker* decision; focusing on the student speech’s disruption to education as the test to justify censorship. The constitutionality of foreseeability of disruption has even been debated by the courts. The *Tinker* Test’s second prong
has received far less attention. The Supreme Court has yet to define what it means to “infringe upon the rights of others” leaving lower courts to decide resulting in conflicting decisions. Ultimately, school administrators must practically decide freedom of speech issues, often with little time to prepare and decide who will be offended.

The First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Discussion: The State of Freedom of Expression in your schools.

- As a school leader, what are some of the student expression issues your school or district has recently resolved?
- Describe the experience, its impact on students and/or faculty, as well as the impact on you.

Knowledge of First Amendment Speech Protections

This activity is designed to test a school leader’s knowledge of free speech law using true to life scenarios they might encounter in their school buildings. The responses can be reviewed with the entire class using the compiled results shared in Google Forms and will serve as a discussion to highlight the difficulty school leaders face when students test the boundaries of protected speech in public schools.

1. Students in public schools have the same constitutional Freedom of Speech rights as adults.
2. During the school day, a group of students stage a “walk-out” of their classes to protest a political issue. Do their First Amendment rights protect them from being disciplined?

3. Is a student’s hair style/color protected by their First Amendment rights?

4. A male student wears a dress to school with the name of a transgender student displayed on the back with the purpose to mock the transitioning student. Do the student’s First Amendment rights protect them from discipline?

5. Does the school valedictorian have the constitutional right to begin their speech with prayer?

6. Each day, during morning announcements, a school begins with a recitation of the Pledge of Allegiance. A student in a classroom refuses to stand or participate and instead decides to kneel quietly by their desk. When asked by the teacher to participate, they quietly refuse. Do the student’s First Amendment rights protect them from discipline for insubordination?

7. Does wearing a hijab violate a school’s “no hats” dress code policy?

8. A student upset with the school’s student parking policy, states they are going to “blow up the principal’s car”. When confronted by an administrator, the student states they were
“clearly only joking” and shares there was never real intent to cause harm. Would upholding the student’s suspension be a violation of their First Amendment rights?

9. A student is passing out religious literature during the school day during passing periods. Do they have a constitutional right to do so?

10. A group of students approaches a school administrator requesting to form a student club titled Free Thinkers Club, which upholds and espouses the tenets of Atheism. Do the students have a Constitutional right to form the club?

The Challenge for School Leaders

“Censoring so-called hate speech also runs counter to the long-term interests of the most frequent victims of hate: racial, ethnic, religious and sexual minorities. We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them. As one Federal judge has stated, tolerating hateful speech is "the best protection we have against any Nazi-type regime in this country."^{205}

Table Discussion: What are your thoughts on this statement? Does this apply to students in the public school?

Frequently, there is little time to prepare or adequate time given to consult and formulate a response to students when censoring speech is being considered. If a student is walking into the

building wearing a questionable t-shirt, there are only minutes to decide if the student needs to be
directed to the school office. School leaders must think and react quickly to forecast disruption
and if the student expression crosses the line into harassment. School administrators are not
trained legal professionals and freedom of speech concerns in the public schools are inherently
challenging and emotionally charged. Students feel strongly and are protective of their First
Amendment rights; as they should be. School leaders are in the difficult role of arbiter in these
cases and decisions once made are difficult to recast. How does an administrator discern between
protecting a student’s right to freedom of expression and protecting a student’s right to be left
alone?

Although there is a need for clarification from the Supreme Court, knowledge of their
decisions regarding public school students and their right to freedom of speech can assist school
leaders in overcoming:

Lack of knowledge – Uncertainty of what is protected speech and what is unprotected
creates a lack of confidence in action. Frequently, a school leader’s decision must be made
quickly to alleviate a perceived and/or real disruption.

Fear of litigation - For all administrators, the question is not 'Will I stand before a judge?'
Rather, the thought is ‘When I stand before the judge, will I be on the winning side?’ 206

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206 Gary Hopkins, Has the Threat of Lawsuits Changed our Public Schools? EDUCATION WORLD
(2004), https://www.educationworld.com/a_admin/admin/admin371.shtml (last visited Apr 7,
2020).
Section 2: A History of the Law

In this section, participants will be presented the structure of United States Federal Court system. Next, participants will be presented in detail the landmark Tinker case and also two important concepts: viewpoint discrimination and forecasting disruption. The presentation of the next three Supreme Court cases to follow Tinker will be presented in detail along with a discussion regarding their exceptions to the Tinker standard. The section culminates with a discussion of key questions for school leaders to consider when deciding to censor student speech along with a reference guide to assist in decision making.

The Structure of the United States Federal Court System:

- Districts courts – 94, trial courts
- Appellate, 12 Regional Circuits
- Supreme Court – 9 Justices
- Federal judges – Nominated by the President, confirmed by the Senate, appointed for life.
- Limited Jurisdiction: Violations of the Constitution, such as violating a protection guaranteed by the Bill of Rights. State courts govern most aspects of Americans’ lives.

Tinker v. Des Moines 1969

Siblings Mary Beth and John Tinker wore black armbands to school to silently protest American involvement in the Vietnam War. When asked by administrators to remove the armbands, the students refused and were suspended. Although both the district and appellate courts sided with the school district, the Supreme Court ruled in favor of the students and
developed the *Tinker* Standard as a legal test for determining what student speech may be censored in public schools famously declaring students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court developed a two prong test for schools to be able to censor student speech:

- **First Prong** – If the speech causes a material and substantial disruption to the operations of the school.
- **Second Prong** – If the speech infringes upon the rights of others.

The Supreme Court addressed two key topics relevant to student’s freedom of speech rights:

**Forecasting Disruption** – Schools do not only have to demonstrate a student’s speech caused a substantial disruption but may censor student speech if they can “forecast substantial disruption of or material interference with school activities” This is pertinent information for school leaders as they decide if speech will disrupt the educational process of the school or not. Forecasting disruption may be difficult but it is necessary to protect students from harassment and their educational day. School administrators would have to prove the student speech would cause substantial disruption, for example, showing how similar events in the past caused disruption.

**Viewpoint Discrimination** – “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness

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208 *Id.* at 514.
that always accompany an unpopular viewpoint.” Viewpoint discrimination is defined as the government taking sides on an issue. For example, in the *Tinker* case, the school was not accused of banning speech on the topic of the Vietnam War, it was accused of banning student speech protesting American involvement in the Vietnam War.

**Bethel v. Fraser 1986**

High School student Matthew Fraser gave a speech to students during an assembly. The speech was full of sexual innuendo and double entendre. Fraser sued the school district when he was suspended claiming his First Amendment rights had been violated. The Supreme Court did not agree with Fraser’s argument his speech was political and protected under *Tinker*. Although the district and appellate courts both sided with Fraser, the Supreme Court ruled in favor of the school district, stating “the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct…”

Fraser’s speech: “I know a man who is rock hard – he's firm in his pants, he's firm in his shirt, his character is firm – but most of all, his belief in you the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the very end – even the climax, for each and

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every one of you. So please vote for Jeff Kuhlman, as he'll never come between us and the best our school can be.”

The Exception: Student speech may be censored if it is lewd and/or vulgar.

_Hazelwood v. Kuhlmeier 1988_

Students in a Journalism class in Hazelwood East High School in St. Louis, Missouri decided to write articles about the impact of divorce and teen pregnancy on the students in the school. The articles were prepared to be published in the school’s newspaper but right before the newspaper was printed, the principal removed the articles without notifying the students. The students filed suit claiming their First Amendment rights had been violated. The district court ruled in favor of the school however, on appeal to the Eighth Circuit, the court ruled in favor of the students finding the school newspaper was a “public forum”. The Supreme Court disagreed, finding a school newspaper to be a “limited forum” and because the paper bore the imprimatur of the school, the school had a legitimate interest in censoring speech it deemed inappropriate.

The Exception: Student speech may be censored if it is school sponsored speech.

_Frederick v. Morse 2007_

In 2002, during the Olympic Torch Relay through Juneau, Alaska, high school student Joseph Frederick and friends displayed a large banner which stated “Bong Hits 4 Jesus”. Students had been released from the school to view the event. The principal suspended Frederick and he filed suit claiming a First Amendment violation. The district court ruled in favor of the

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211 Id. at 687.
school, however the Ninth Circuit Court of Appeals reversed the decision in favor of the student. The Supreme Court differentiated Frederick’s speech from the political speech in Tinker finding school’s had a compelling interest in prohibiting and punishing speech which promoted illegal drug usage.

The Exception: Student speech may be censored if it promotes illegal drug use.

Student Freedom of Speech Questions to Consider

- Does the speech violate a known law or statute or district policy?
- Will the speech cause or has it already caused a substantial disruption in the operations of the school?
- Is the speech vulgar or plainly offensive? Proof of disruption not required.
- Does the speech promote illegal drug use?
- Is the speech political?
- Is censoring the speech an example of view point discrimination?
- Is personal bias a factor in the decision to censor?
- Is the speech offensive or is it harassment?

A reference guide is provided for principals to assist in decision making when considering whether to censor student speech (see Table 1).
Table 1

<table>
<thead>
<tr>
<th>A Principal’s Quick Reference Guide to Censoring Student Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Supreme Court</strong></td>
</tr>
<tr>
<td>Censor if speech:</td>
</tr>
<tr>
<td>Causes substantial disruption (past or forecasted)</td>
</tr>
<tr>
<td>Infringes on the rights of others (use caution here)</td>
</tr>
<tr>
<td>Is vulgar, lewd or profane</td>
</tr>
<tr>
<td>Is school-sponsored (school newspaper)</td>
</tr>
<tr>
<td>Promotes illegal drug use</td>
</tr>
</tbody>
</table>

Always be mindful of viewpoint discrimination (permitting one view of an issue but not the other) as well as personal bias.

Section 3: Other Freedom of Speech Considerations:

Although the topics in this section stray from the second prong of the Tinker Test, the implications of each have a profound impact on student expression and free speech rights and therefore warrant consideration. Participants will examine the impact of off-campus student expression and the implications of the Illinois School Code’s bullying prevention policies. Participants will also examine issues pertaining to extra-curricular activities and their specific school’s forum. The final activity in this section is related closely to the prior; participants will
examine religious extra-curricular activities and the guidance given in the three prong *Lemon* Test.

**Off-Campus Student Expression in Illinois**

Student speech which occurs outside of the school day, can be a difficult challenge for school leaders. The Illinois School Code was specifically amended to address off-campus speech:

Bullying defined as: through the transmission of information from a computer that is accessed at a nonschool-related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school. This item (4) applies only in cases in which a school administrator or teacher receives a report that bullying through this means has occurred and does not require a district or school to staff or monitor any nonschool-related activity, function, or program.\(^{212}\)

The policy or implementing procedure shall include a process to investigate whether a reported act of bullying is within the permissible scope of the district's or school's jurisdiction and shall require that the district or school provide the victim with information regarding services that are available within the district and community, such as counseling, support services, and other programs.\(^{213}\)

If the bullying occurs outside of the school day and it causes a substantial disruption in the school, school leaders have a responsibility to investigate and provide assistance to the victim. Online speech and student use of social media present a significant challenge to school leaders. Illinois School Code mandates student speech issues occurring over the weekend may

\(^{212}\) 105 ILL. COMP. STAT. § 5/27-23.7(a) (2016).

\(^{213}\) *Id.* § 5/27-23.7(c) (2016).
involve an investigation by the school on Monday morning. This blurred line between home and school can cause confusion as students and parents may claim immunity from school discipline because the speech was off-campus and not during school hours.

Check Your Forum

The Equal Access Act applies to: (1) any public secondary school (2) that receives federal funds (3) and creates a limited open forum by allowing one or more nongcurricular student groups to meet on its premises (4) during noninstructional time. Schools meeting these criteria are forbidden to prevent access or deny fair opportunity to students who wish to hold meetings on school grounds. The Equal Access Act was originally proposed to protect a place for religion in public schools as a response to recent court decisions denying the reading of the Bible and school-sponsored prayers. More recently, gay and lesbian student groups have utilized the Act to secure their own student clubs in schools.

Schools are defined as having one of the following forums:

- Open – Not applicable to public schools, all groups allowed access
- Limited – Some student groups are allowed, based on the criteria of the Equal Access Act
- Closed – Only curricular clubs/activities allowed

Some schools have chosen to not engage in the debate over which clubs may be allowed in the schools by selecting a Closed Forum and only allowing activities which have a direct correlation to the district’s curriculum. School’s with Limited Forums may offer a much wider

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variety of activities for their students but are also risking becoming enjoined in issue over whether to allow a club or activity to be offered to students.

The Lemon Test

Background: In the late 1960’s, the state legislatures of both Pennsylvania and Rhode Island adopted statues to allow state funding to support a portion of teacher salaries in private schools. A parent of a student in a Pennsylvania school filed suit against the State Superintendent claiming the statue was a violation of the Establishment Clause of the First Amendment. The Supreme Court agreed and adopted the Lemon Test\textsuperscript{215} to determine whether a school has violated the Establishment clause of the First Amendment. The law:

- Must have a secular purpose
- Cannot inhibit nor promote religion
- Cannot foster an excessive government entanglement with religion.\textsuperscript{216}

Guidelines to consider:

- The Equal Access Act applies specifically to secondary schools that receive federal funds.
- The activity can be expected to follow school regulations and guidelines.
- The club must be initiated by a student.

\textsuperscript{215} Lemon v. Kurtzman, 403 U.S. 602 (1971).

\textsuperscript{216} Id. at 620.
• Non-staff members should not have direct influence on the activity and non-staff members may be prohibited from attending the activity.

• The group cannot cause a substantial disruption to the educational process of the school.

• The group must be allowed the same rights as other groups in the school. This would include advertising efforts such as newsletters, posters and announcements.

• Attendance must be voluntary for all students.

• School staff members have the right to supervise the activity.

Section 4: Review of School Policy and Handbooks

In this section, participants will review Board of Education policy regarding bullying and harassment from three school districts and then examine their own district’s policy. Participants will work in groups to compare and contrast the Board policies with the bullying and harassment policies from their own districts. The *Saxe* case will be used as a background for the presentation of this section and the Third Circuit’s rationale for ruling the school district’s harassment unconstitutional will be carefully reviewed. Last, participants will review their own school’s Student Handbooks in a similar fashion, reviewing for consistency with Board policies as well as reviewing for areas for concern.

*Saxe v State College*

In 2001, in *Saxe v. State College*, the Third Circuit deliberated whether the school district’s anti-harassment policy overstepped its constitutional bounds. The language of the district’s policy defined harassment as “any unwelcome verbal, written or physical conduct
which offends, denigrates or belittles an individual because of any of the characteristics described above." It further defined as harassing behavior speech which denigrates on the "basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc." Applying specifically to sexual orientation, "negative name calling and degrading behavior" was prohibited. Here, the Third Circuit referred to *Harris v. Forklift Systems, Inc.* to define harassment, noting that for conduct to create a hostile environment, it must "be viewed subjectively as harassment by the victim and be objectively severe or pervasive enough that a reasonable person would agree that it is harassment." The Third Circuit continued to define harassment as evaluating the "totality of circumstances," this would include the frequency of the conduct, the severity and whether it is physically threatening and humiliating or just merely an offensive utterance. Because the two Supreme Court cases referred to in *Saxe* were sexual harassment lawsuits, the court summarized that unless the conduct is "objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." The

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218 *Id.* at 203.

219 *Id.*


221 *Id* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

222 *Id.*

223 *Id.*
distinction is made between harassment and words that are only considered offensive and rude which do not the protections of Title VII. The court set the identifying mark of rudeness transgressing to harassment when the speech is so “pervasive as to constitute an objective change in the conditions of employment.”

The court held that simply because speech is offensive does not justify its censorship. On the contrary, it stated “a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

Repeatedly, the Third Circuit reiterates Tinker’s statement, and its usage in other court cases, that schools cannot prohibit student speech based solely on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

It found the district’s harassment policy to be overbroad in its protections and found concern with words in the policy such as “hobbies and values” and “personal characteristics”. Without a severity test, the policy could be used to censor any speech bringing offense and therefore is unconstitutional.

In its application of the Tinker standard, the court relied on the first prong, holding “the policy's restrictions were not necessary to prevent substantial disruption or interference with the work of the school or the rights of other students.”

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224 Id. (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)).

225 Id. at 209 (citing Texas v. Johnson, 491 U.S. 397, 408-409 (1989)).


held the language is unclear and cannot be utilized to imply it signifies banning speech merely
because it offends. They agreed with previous Third Circuit jurisprudence, defining the second
prong of *Tinker* as only applying to “tortious speech like libel, slander or intentional infliction of
emotional distress.” The court did find there is a place for harassment policies in schools for
preventing harassment and discrimination is a legitimate and compelling interest for all school
leaders but, according to the court, the distinction must be made that not all speech defined as
offensive violates First Amendment protection. Judge Rendel in his concurrence, accurately
summarized “while reliance on provisions of harassment laws or policies might be an easy way
to resolve difficult cases such as this one, therein lies the rub--there are no easy ways in the
complex area of First Amendment jurisprudence.”

**Board Policy Review**

Board Policies from the following school districts will be utilized as examples:

- Community Unit School District 200 in suburban Chicago primarily serves the
  communities of Wheaton and Warrienville in Northern Illinois. The district serves
  approximately 14,000 students in 21 school buildings. Links to the district’s Board
  policies include:
    - 7:20 Harassment of Students Prohibited
      - [https://www.boardpolicyonline.com/?b=wheaton-warrenville_cusd_200](https://www.boardpolicyonline.com/?b=wheaton-warrenville_cusd_200)

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Student Handbook Review

In this activity, participants will examine their school’s student handbook along with the following example. Participants will also examine their own school’s handbook for congruity with their school board’s policy on bullying and harassment. Participants will review language to check for difficulties in implementing the language in the handbook in protecting students from
harassment and protecting free speech. The activity will culminate with participants comparing their handbook’s language with other participants’ districts. Participants will review bullying and harassment provisions in the following student handbooks:

- Wheaton Warrenville South High School in Community Unit School District 200 in Wheaton, Illinois
  - https://en.calameo.com/read/0056243625de73252dfe4?page=1
- Peoria High School in Peoria Public School District 150 in Peoria, Illinois
- Naperville North High School in Naperville Community Unit School District 203 in Naperville, Illinois.
  - https://www.naperville203.org/NNSHandbook

Section 5: Case Studies

Using the quick reference chart in Section 2, participants will be presented the following case studies involving censoring student speech in public schools. Cases will be presented to table groups to discuss and groups will work together to recommend a course of action. Groups will present their case and recommendation to the entire group.

Case studies

- I ♥ Boobies! Bracelets: Two Middle School girls are wearing bracelets which proclaim “I ♥ Boobies!” to support breast cancer awareness.
Earlier in the school day, there were reported incidents in the hallways of male students making inappropriate comments to the girls such as “We love your boobies!” and making comments about their breasts.

- Pray the Rosary: During passing periods between classes, a student is passing out literature explaining the blessings of praying the Rosary.

- Build the Wall, Trump 2020: It is twenty minutes before the school day begins and you are hailed on your radio to come outside to the front of the school. You see a staff member talking with a student; your staff member tells you they thought you would want to see this. The student is wearing a t-shirt which states “Build the Wall – Trump 2020”
  - During the previous school day’s lunch period, this same student and a group of peers were overheard chanting “build the wall” at their table. The student was confronted in the hallway after lunch ended by a group of Hispanic students offended by the chant.

- You Might Be a Redneck: A student is wearing a Jeff Foxworthy t-shirt with a top ten list of reasons “you might be a redneck”. On each side of the caption is a small picture of a confederate flag. The student handbook clearly states students shall not harass or intimidate others by “wearing or possession of items depicting or implying racial hatred or prejudice.” The student argues the message of the t-shirt is to poke fun at “rednecks” and never intended to convey a racist message.
• Chicken Hawk in Chief: A student is wearing a t-shirt of George W. Bush with a picture of the former President’s face; underneath are printed the words “Commander in Chief”. The student has placed tape over the word Commander and instead has written the word “Chicken Hawk”.

Section 6: Future Considerations and Application

This last section will focus on pro-active strategies for administrators. In 1989, the Sixth Circuit Court of Appeals ruled on another student speech case where a student’s campaign speech for senior class president included derogatory remarks directly referring to one of the school’s administrators. While the court ruled in favor of the school in giving consequences to the student for the speech, Judge Nelson’s quote is noteworthy: “It may well be that a more relaxed or more self-assured administration would have let the incident pass without declaring Dean ineligible, and perhaps that is what this administration ought to have done; it is not for us to say. Such a question, we believe, represents a judgment call best left to the locally elected school board, not to a distant, life-tenured judiciary.”

School leaders are human beings with their own preconceptions, beliefs and viewpoints. In education, teachers and administrators are not presenting the curriculum to students in a vacuum. Human emotion is part of the school experience and works for good in establishing relationships and supporting students and their families. Within this environment, the 6th Circuit poignantly cautions school leaders to think rationally before acting. Relaxed and self-assured leadership is required in our public schools to

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230 Poling v. Murphy, 872 F.2d 757, 761 (6th Cir. 1989).
focus on de-escalation of a free speech conflict. School leaders would be wise to remember as emotions rise, so do lawsuits.

Until the Supreme Court gives clearer guidance, decisions involving student speech cases will continue to be difficult to decide. However, there are recommendations that will assist school leaders in their decision making processes to help avoid substantial disruption, protect students from harassment and lessen the likelihood of litigation. In this final activity, table groups will brainstorm and present ideas regarding student free speech issues. Participants will focus on pro-active strategies to avoid escalating a free speech conflict and not just developing reactive strategies. Some examples include:

- Let common sense prevail.
- Leave personal bias and opinion at the door.
- Document everything; and then document it again.
- Try a creative pro-active strategy such as an “opt out option”.
- Consider curricular activities regarding the First Amendment.
- Work with a student to find an acceptable alternative that allows them to share their speech while not causing a substantial disruption.
- Look for a teaching moment in a potential disciplinary free speech situation.