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The school official's ability to limit student first amendment freedom: exploring the boundaries of student speech and expression in school as defined by the United States federal courts

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THE SCHOOL OFFICIAL'S ABILITY TO LIMIT STUDENT FIRST AMENDMENT FREEDOM: EXPLORING THE BOUNDARIES OF STUDENT SPEECH AND EXPRESSION IN SCHOOL AS DEFINED BY THE UNITED STATES FEDERAL COURTS

by

R. Chace Ramey

An Abstract

Of a thesis submitted in partial fulfillment of the requirements for the
Doctor of Philosophy degree in Educational Policy and Leadership Studies
in the Graduate College of
The University of Iowa

May 2009

Thesis Supervisors: Professor Larry D. Bartlett.
Assistant Professor Liz Hollingworth.

ABSTRACT

The purpose of this study was to identify and review the current legal boundaries of student speech and expression rights in public school, as developed and defined by the U.S. federal courts, to better enable educators to make informed decisions regarding student speech and expression when confronted with such situations. The study examined federal court student speech and expression decisions published between January 1, 1983 and December 31, 2008. Four Supreme Court decisions and numerous lower federal court decisions were reviewed and analyzed to identify the current legal boundaries of student speech and expression in school.

The Supreme Court decisions in *Tinker* v. *Des Moines Indep. Sch. Dist*. (1969), *Bethel Sch. Dist.* v. *Fraser* (1986), *Hazelwood Sch. Dist.* v. *Kuhlmeier* (1988), and *Morse* v. *Frederick* (2007) were reviewed to identify the principles that express the Supreme Court's perspective of student speech and expression in school. The study then focused on the lower federal courts' interpretation and application of the Supreme Court's student speech and expression decisions to specific circumstances, and school leaders' utilization of these principles in making informed decisions regarding student speech and expression rights under the First Amendment. The study concluded that the current constitutional boundaries of student speech and expression rights in school were identified by applying the Supreme Court's student speech and expression principles to specific factual situations encountered by school leaders and addressed by the federal courts. The results of the study were condensed into a reference table that displays a spectrum of possible student speech and expression factual situations, identifies how the Supreme Court's student speech and expression principles may be applied to specific sets of facts, and

provides educators with an instrument that may be used to assist in making informed decisions regarding student speech and expression in school.

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Graduate College
The University of Iowa
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CERTIFICATE OF APPROVAL

PH.D. THESIS

This is to certify that the Ph.D. thesis of

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has been approved by the Examining Committee
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For Granddad,
who taught me more than any book
or class ever could

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ABSTRACT

The purpose of this study was to identify and review the current legal boundaries of student speech and expression rights in public school, as developed and defined by the U.S. federal courts, to better enable educators to make informed decisions regarding student speech and expression when confronted with such situations. The study examined federal court student speech and expression decisions published between January 1, 1983 and December 31, 2008. Four Supreme Court decisions and numerous lower federal court decisions were reviewed and analyzed to identify the current legal boundaries of student speech and expression in school.

The Supreme Court decisions in *Tinker* v. *Des Moines Indep. Sch. Dist*. (1969), *Bethel Sch. Dist.* v. *Fraser* (1986), *Hazelwood Sch. Dist.* v. *Kuhlmeier* (1988), and *Morse* v. *Frederick* (2007) were reviewed to identify the principles that express the Supreme Court's perspective of student speech and expression in school. The study then focused on the lower federal courts' interpretation and application of the Supreme Court's student speech and expression decisions to specific circumstances, and school leaders' utilization of these principles in making informed decisions regarding student speech and expression rights under the First Amendment. The study concluded that the current constitutional boundaries of student speech and expression rights in school were identified by applying the Supreme Court's student speech and expression principles to specific factual situations encountered by school leaders and addressed by the federal courts. The results of the study were condensed into a reference table that displays a spectrum of possible student speech and expression factual situations, identifies how the Supreme Court's student speech and expression principles may be applied to specific sets of facts, and

provides educators with an instrument that may be used to assist in making informed decisions regarding student speech and expression in school.

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CHAPTER I

INTRODUCTION

In Des Moines, Iowa, a group of students wore black arm bands to school to protest the United States involvement in the Vietnam War. Across the country, in Juneau, Alaska, students displayed a banner stating "BONG HiTS 4 JESUS" for television cameras as the Olympic torched passed in front of their school. Although separated by nearly 3,000 miles and taking place 40 years apart, the students in each circumstance claimed that their actions were forms of constitutionally protected student expression. In each instance, school leaders suppressed the expression and disciplined the students for exhibiting the behavior. Unlike countless other clashes between students and public school leaders over student expression, the results of these situations were not determined by the school administration or even the local school board. The United States Supreme Court passed final judgment on the constitutionality of both forms of students' expression.

In *Tinker v. Des Moines Indep. Sch. Dist.* (1969), the United States Supreme Court reached resolution regarding the constitutionality of the students' black armband protest. The Court's decision constituted its first substantial impact on student expression in school, and radically changed students' abilities to exercise their speech or expression rights under the First Amendment to the U.S. Constitution.[1] In writing his majority opinion in *Tinker*, Justice Fortas penned, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the

[1] Student speech and/or expression encompasses student speech; student press; student verbal and non-verbal expressive actions; distribution of petitions; literature and flyers; cyber communication including internet blogs, social networking profiles, email, instant messenger and texting; participation in saluting the flag; and expression through student attire.

schoolhouse gate" (*Tinker*, p. 506). The decision, and this specific statement, established that students do not automatically forfeit all freedoms simply because they enter public school. The statement also supported the *Tinker* Court's ultimate finding that the students' black armband protest was protected expression under the First Amendment to the U.S. Constitution.

Thirty-eight years after the Court handed down the *Tinker* decision, Chief Justice Roberts quoted Justice Fortas' often cited statement in the Court's most recent student expression decision. The Chief Justice made the statement the starting point of his majority opinion in *Morse v. Frederick* (2007). Unlike Justice Fortas' majority in *Tinker*, Chief Justice Robert's *Morse* majority found that the student expression at issue was not constitutionally protected. The Supreme Court concluded that the students' "BONG HiTS 4 JESUS" banner was not protected student expression and that school officials could limit such student expression at school activities (p. 2629).

The transition to limiting students' speech and expression rights in schools began almost immediately following the creation of the student rights. After elegantly stating that students do not shed their rights when they enter school, Justice Fortas concluded that student speech and expression:

> … in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (*Tinker*, p. 513)

The statement complicated the student speech and expression analysis because it established that students' freedoms are not unlimited and that certain circumstances exist that allow school leaders to suppress student speech and expression. Furthermore, the

finding did not specifically outline the student speech and expression that was unconstitutional; rather, the Court offered that it was the effect of the speech – materially disrupts class work – that dictated the constitutionality of the expression. However, the Court left it to school leaders to try and decipher, in specific circumstances what expression creates a substantial material disruption.

Morse was not the first time that the Supreme Court parted ways with the logic put forth in *Tinker.* In the 40 years since *Tinker*, the Supreme Court has decided two additional cases concerning student expression in public schools: *Bethel Sch. Dist.* v. *Fraser* (1986), and *Hazelwood Sch. Dist.* v. *Kuhlmeier* (1988). In *Fraser*, the Supreme Court provided that students' rights in school are not the same as adults in other facets of society (*Fraser,* p. 682; *Morse,* p. 2622). The deconstruction of *Tinker* continued in *Kuhlmeier* when the Court stated that students' rights must be evaluated in light of the special characteristics of the school environment (*Kuhlmeier*, p. 266; *Morse* p. 2622). *Morse* reiterated these additional considerations for analyzing student speech and expression rights in school, expressed that there was more than one approach to analyzing the constitutionality of student expression in school, and added that schools could suppress certain types of speech, specifically student speech that encouraged illegal drug use (*see Morse*, p. 2627) in school or at school related events.

The effect of the four decisions has been a fragmented approach to defining the legal boundaries of student speech and expression in school. The Supreme Court's guidance has left school leaders struggling to understand and apply the Court's decisions in a consistent manner when confronted with student speech and expression dilemmas. This is demonstrated by the stream of student speech and expression disputes that

continue to find their way into courtrooms because of disagreement over the constitutionality of the student speech and expression. *Tinker* provided a starting point for student speech and expression rights in school, but 40 years after that decision the Supreme Court's approach and the exact extent of students' constitutional speech and expression rights in school remains unclear.

The federal courts have developed an extensive record of involvement in determining the proper scope of student speech and expression in schools. Protest armbands and pro-drug banners have been joined by school campaign condoms, religious candy canes, parody principal MySpace pages, school election speeches filled with sexual innuendo, ill-advised student newspaper articles, and drug-charged band music as student speech and expression issues that have been decided in the courtroom rather than the principal's office. Although the federal courts have undoubtedly stated that it is primarily the role of the school to educate students, the federal courts have played a major part in determining the extent to which students may exercise the constitutional rights they learn about in class while still in school or participating in school-sponsored events.

Need for the Study

America's schools are becoming forums where students unabashedly attempt to exercise what they believe are their constitutional rights, leaving teachers and administrators to determine whether the student conduct is constitutionally protected or exceeds these protections and falls within the purview of school control. However, drawing a clear distinction between constitutional student speech and expression and student speech and expression that falls outside the protection of the First Amendment to

the U.S. Constitution has become more complex. Student expression has expanded from verbal speech in the classroom, hallways, lunchroom, and written expression in school newspapers, underground newspapers, and written flyers to include in-school video communication, web postings, online blogs and chats, social networking profiles, and cell phone text communications. At the same time that the forms of student expression are expanding, an increased concern over school violence and school safety, and a renewed focus on student academic success under the federal No Child Left Behind Act, has spread across the nation. The combination of these competing interests places school leaders in the difficult position of maintaining safe and secure schools focused on academic success while respecting the constitutional speech and expression rights student retain even after they enter through the "schoolhouse gates".

The student speech and expression rights landscape has been broadly defined by the Supreme Court in its four student expression decisions. However, these four decisions do not address every potential situation or type of student expression that might be exhibited, and they do not provide clear guidance when school leaders are faced with competing interests. Student speech and expression that does not specifically align with an articulated First Amendment right forces school leaders to speculate about how much control they may exert to maintain a constructive learning environment.

The extent of students' constitutionally protected rights, and where limitations actually begin in relation to the annunciated rights, remains unclear. Lower federal court decisions, which apply the parameters of student speech and expression expressed by the Supreme Court, must be reviewed, analyzed, and interpreted to benefit school leaders. This is necessary so that education leaders may gain a greater comprehension of the

limits of protected student rights. This study will assist school leaders in understanding what should be considered when determining whether students have exceeded their protected rights or whether a proposed limitation on student expression is valid. A review and analysis of the current legal framework of student expression rights in school will provide valuable information that will assist education leaders in making informed decisions, rather than assumptions, regarding student speech and expression.

Purpose of Study

The purpose of this research study was to identify and review the current legal boundaries of student speech and expression rights in school, as developed and defined by the U.S. federal courts, to better enable educators to make informed decisions regarding student speech and expression when confronted with such situations. The study examined federal court student speech and expression decisions published between January 1, 1983 and December 31, 2008.[2] The study concentrated on reviewing and analyzing the Supreme Court's student speech and expression principles and the lower federal courts' application of these principles to a variety of circumstances involving student speech and expression rights.

This research and its findings will be a useful tool to guide educators when faced with circumstances requiring decisions about student speech and expression in school. The study was designed to emphasize the challenges administrators face in establishing, interpreting, and enforcing the limits of student speech and expression. It provides beneficial information for school leaders concerning the Supreme Court's and lower

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[2] The study also reviewed *Tinker* (1969), which constitutes the only decision analyzed in the study that was published outside the aforementioned timeframe. *Tinker* is included in the study because it represents the Supreme Court's first major decision regarding student expression in school and is crucial to a full discussion of student expression rights.

federal courts' development of student speech and expression rights in public school. The study assists in defining the extent of students' current speech and expression rights in school and the proper limits to these rights under the First Amendment to the U.S. Constitution. Educators can use the information to differentiate between constitutional student speech and expression that ignores or exceeds constitutional protections.

The specific questions addressed were:

1. To what extent do the Supreme Court's student speech and expression decisions provide public school leaders direction in making informed decisions regarding the extent of student speech and expression rights under the First Amendment to the United States Constitution?
2. To what extent does the lower federal courts' application of the Supreme Court's student speech and expression principles provide public school leaders clarification of the Court's decisions and provide direction for making informed decisions regarding student speech and expression in school under the First Amendment to the United States Constitution?

Definition of Terms

For the purpose of this study, the following terms are defined as follows:

1. Court: When capitalized, refers to the United States Supreme Court. If not capitalized, "court" refers to the specific lower federal court handing down a particular decision.

2. Supreme Court: Refers to the United States Supreme Court. Supreme Court decisions are considered precedent[3] and may only be overruled by later rulings of the Supreme Court or by an action of Congress (*Patterson v. McLean Credit Union*,[4] 1989; *Payne v. Tenn.*, 1991).[5] Federal courts of appeals and district courts are under the jurisdiction of the Supreme Court and must adhere to the doctrine of *stare decisis* regarding Supreme Court decisions (*Tenet v. Doe*, 2005).[6] Although the Court has original jurisdiction in limited circumstances (*Sosa v. Alvarez-Machain*, 2004),[7] the vast majority of the cases heard by the Supreme Court originate at the district court level. If one or more parties to a law suit are dissatisfied with the result at the district level, the case may be appealed to the appropriate

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[3] Precedent is defined as a decision that "furnishes a basis for determining later cases involving similar facts or issues" (Black's Law, 2004).

[4] Although the main holding of *Patterson* was later superseded by statute, the Supreme Court explained the importance of adhering to the doctrine of *stare decisis*, and stated that although prior decisions are "not sacrosanct," departure from the "doctrine of *stare decisis* demands special justification" (*Patterson*, p. 172). The Court went on to point out that Congress has the ability to alter what the Court has done (p. 173).

[5] In affirming the Tennessee Supreme Court's upholding of a defendant's death sentence, the Supreme Court overruled two of its previous decisions and held that evidence related to a victim and the impact of the death on the victim's family was admissible in the sentencing phase of a capital murder proceeding. In discussing its decision to break from its prior holdings, the Court explained the importance of *stare decisis*, and stated that following precedent "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Payne*, p. 827). However, the Court reasoned that when "governing decisions are unworkable or are badly reasoned," the Court is not bound to follow precedent, and that this is "particularly true in constitutional cases" (p. 828).

[6] In *Tenet*, a case involving a former espionage agent who claimed that the United States failed to provide promised financial assistance to the agent, the Supreme Court discussed the court of appeal's responsibility to follow precedent: "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" (*Tenet*, pp. 10-11).

[7] Although somewhat an ancillary issue, the Court articulated that the Constitution vested the Supreme Court with original jurisdiction over certain matters including cases affecting ambassadors and suits brought by diplomats.

United States court of appeals. After review and ruling by the appropriate court of appeals, a dissatisfied party may make application to have the case heard by the Supreme Court.

3. United States Courts of Appeals: Refers to the intermediate courts in the federal judicial system, which serve as the appellate court between federal district courts and the U.S. Supreme Court. A court of appeals hears cases that originate in the district courts within its legislatively defined geographical boundaries. There are currently 13 courts of appeals, and these courts are bound by the decisions of the Supreme Court and previous decisions of that particular court of appeals are considered precedent (*Tenet*, pp. 10-11; *Flagship Marine Servs. v. Belcher Towing Co.*, 11th Cir. 1994). [8] Although a court of appeals can look to the decisions of other courts for guidance, a court of appeals is not bound by the decisions handed down in other jurisdictions.

4. District Court: Refers to the United States district courts located in every state and territory in the Nation. Nearly all federal cases begin at the district court level, and the district court is the level at which trials and fact finding take place. Each State has at least one U.S. district court.

5. School: Encompasses public elementary schools, middle schools, junior high schools, senior highs, and high schools.

6. Student(s): Refers to a child enrolled in a public school in grades kindergarten through twelfth grade.

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[8] The Eleventh Circuit Court of Appeals stated that prior panel decisions become the law of the circuit and are viewed as circuit precedent.

7. Student Rights: Refers to student speech and expressive conduct adjudicated to be protected under the First Amendment to the U.S. Constitution.
8. Student Speech and Expression: Encompasses student speech; press; verbal and non-verbal expressive actions; distribution of petitions; literature and flyers; cyber communication including internet blogs, social networking profiles, email, instant messenger and texting; participation in saluting the flag; and expression through student attire. The terms ("speech" and "expression") may appear in conjunction or separately and represent the types of speech and expression included in the definition.

Limitations of the Study

This study was limited by the following factors:

1. This study was limited to Supreme Court decisions concerning student speech and expression rights in school, and lower federal court decisions rendered between January 1, 1983, and December 31, 2008, that focused on student speech and expression rights in school under the First Amendment to the U.S. Constitution.
2. The Chapter IV data included The Supreme Court student speech and expression decisions, and all identified federal court decisions concerning student expression in school rendered between January 1, 1983, and December 31, 2008. Although all these decisions were reviewed, the Chapter IV discussion was limited to decisions that were selected based on criteria fully explained in Chapter III. The discussed decisions included

the Supreme Court's four student expression decisions and lower federal court decisions that provide examples of the lower courts' application of Supreme Court student expression principles to factual situations not specifically addressed by the Supreme Court and assist in establishing the constitutional boundaries of student expression in school.

3. Only published decisions were reviewed and analyzed. Unpublished lower court decisions, although possibly persuasive, are not recognized as precedent by courts when deciding later cases concerning the same legal issue(s) (*Abdul-Muhammad v. Kempker*, 8th Cir. 2006). [9] Although unpublished decisions are accessible through Lexis/Nexis Legal database, these decisions are designated "unpublished" by the court, which is noted at the top of the decision, and were not reviewed as part of the study.
4. State court decisions were not included in the study.

Remainder of the Study

The study is divided into four additional chapters: Literature Review; Research Methods; The Limits of Student Speech and Expression as Articulated by the Federal Courts; and Conclusions, Implications, and Considerations.

Chapter II is organized in a chronological fashion based on the publication dates of the Supreme Court's student speech and expression decisions. The chapter begins by discussing articles published after January 1, 1983, and before *Fraser*, and then examines scholarly literature published between *Fraser* and *Kuhlmeier*. This is followed by a

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[9] Although overruled on other grounds, the Eighth Circuit reviewed unpublished opinions in making its determination in *Abdul-Muhammad*. The court specifically stated, "These unpublished opinions, though not precedential, have persuasive value" (*Abdul-Muhammad*, p. 352).

review of publications published after *Kuhlmeier*. The chapter concludes by looking at articles published since the Supreme Court handed down *Morse*.

Chapter III describes the research methods utilized in the study and the criteria used to select the decisions discussed in Chapter IV.

Chapter IV is divided into two section. Section one examines the four Supreme Court student speech and expression in school decisions. Section two analyzes lower federal court decisions published between January 1, 1983, and December 31, 2008, that have applied the principles of at least one of the Court's student speech and expression decisions. In section two, the decisions are separated into different categories of student expression. Rather than applying a chronological approach, the decisions are addressed topically so the lower courts' application, with regard to each category, is comprehensively explored before moving to the next category of student speech or expression.

Chapter V provides a summary analysis of the development of student speech and expression rights in school through federal courts decisions, and discusses the constitutional limits of student speech and expression in school. The chapter provides a reference table that breaks down the federal court decisions discussed in Chapter IV and each decision's relevance to the legal boundaries of student speech and expression in school. The reference table may be used by school leaders when faced with student speech and expression situations in the future. Chapter V concludes by briefly exploring this study's connection to past research on student expression in school and discusses potential future research in the area of student rights.

CHAPTER II

REVIEW OF THE LITERATURE

Introduction

Student speech and expression rights continue to be a crucial and highly publicized issue in education. The purpose of this literature review is to provide a review of the studies conducted and scholarly articles published in the area of student speech and expression in school over the last 25 years. The literature is presented in chronological order, and is divided into sections based on the publication dates of the Supreme Court's decisions. The first section addresses literature published between January 1, 1983, and the Court's decision in *Bethel Sch. Dist. v Fraser* (1986). The second section reviews publications from the two year period between *Fraser* and *Hazelwood Sch. Dist. v. Kuhlmeier* (1988). Section three includes articles and studies published between *Kuhlmeier* and the Court's most recent student expression decision, *Morse v. Frederick* in 2007. The last section addresses literature published after *Morse* until December 31, 2008.

The chronological approach reveals the evolution of scholars' interpretation(s) of the Supreme Court's changing approach to student speech and expression in school. It highlights the fact each subsequent Supreme Court student speech and expression decision made the student speech and expression analysis more complex, rather than bringing clarity to the issue of student speech and expression rights in school under the First Amendment to the United States Constitution. This study compliments and expands past research by examining the parameters of student expression as developed by the Court's four decisions and the lower federal courts' application of these decisions.

Furthermore, it provides school leaders with a decision table to reference when confronted with student expression situations in the future.

Student Expression before *Fraser*: Applying a Single Standard

For 17 years, *Tinker* was the only Supreme Court decision concerning student expression in schools. Prior to the Court revisiting student expression in *Fraser* in 1986, the literature on student speech and expression in schools focused on the material substantial disruption standard announced in *Tinker* and its application to a variety of factual situations. The reviewed literature provided a sense of the way educators were approaching student expression in school, and the lower federal courts' application of the Court's *Tinker* decision. The material also foreshadowed future decisions by the Supreme Court.

Freeman (1984) offered a proposed model for analyzing student expression rights in school. The purpose of his article was to "reconcile the inculcative function served by public education with First Amendment limitations on governmental authority" (Freeman, p. 3). In the article the author reviewed the competing interest of inculcating values and students' rights under the First Amendment. He analyzed relevant cases, including *Tinker* and *Board of Education v. Pico* (1982), and then focused on his proposed framework for resolving student First Amendment issues in school.

Freeman began with the proposition that the proposed framework strongly supported the role of the school as a place to inculcate students with certain values and rejected the idea that the classroom was a marketplace of ideas subject to student choice (p. 42). The framework proposed to provide "a basis on which to distinguish between permissible value inculcation and impermissible indoctrination and describes the

appropriate role of the courts in reviewing questioned decisions of state and school officials" (Freeman, p. 42). However, the author clearly intended to limit rather than expand students' rights. He argued that students do not have an unfettered right to access information or voice opinion, while school leaders have nearly unlimited discretion to determine the general curriculum and to determine the content of courses. The manner in which a teacher conducts a class dictates that he or she make numerous decisions about content and the restriction of some ideas and beliefs. Furthermore, class discussion must be guided and limited to keep on topic and maintain proper classroom decorum. Freeman argued that this was the only way public education could effectively meet educational goals and inculcative objectives (p. 47).

Freeman also argued that the nature of school did not allow students to simply reject ideas; rather, students could be compelled to read, study, and even learn the values of the school and community (p. 48). Further, he offered that time constraints on the school day and limited educational time dictated that decisions regarding educational content be made, and that school leaders were in the best position to make these decisions. Freeman argued that if school really offered students true access to ideas and information, students would end up dictating the curriculum and how educational time was spent (p. 48). He concluded that this would impair the inculcative duty and nature of school and result in an environment that restricted actual learning.

After extensively discussing the inculcative duty of the school and education leaders, Freeman did offer that the courts must be prepared to be involved when educational decisions are narrowly based on political, partisan, or religious indoctrination (p. 50). The author pointed out that there is a delicate balance between inculcation of

values and indoctrination of religious and political views. While respecting the rights of educators to determine the flow of information and best way of providing education, courts must ensure that improper religious and political indoctrination does not occur (p. 53-54).

Freeman took a very traditional view of education. While subsequent Supreme Court decisions limited the extent of student expression rights originally granted in *Tinker*, Freeman's proposed framework went further in limiting students' freedoms than the Court's subsequent decisions. While his work did not focus on a specific decision or specific right, it put forth a framework for evaluating the appropriate extent of students' expression rights.

In the midst of what Bartlett (1985) considered a time of one-sided publicity for the expansion of student rights, the author published an article aimed at calming the paranoia among educators over student initiated legal proceedings (p. 39). The article was a summary of a study (Bartlett, 1983) Bartlett had conducted two years prior regarding student responsibilities in school, and the article provided a list of "legal responsibilities of students as delineated by the federal courts" (Bartlett, 1985, p. 40). Although similar to the current study, Bartlett's work differed in the fact that he approached student rights from the standpoint of the federal courts creating – implicitly or expressly – student legal responsibilities. The current study looked at similar, but more recent, court decisions as establishing expressed limits on student rights rather than saddling students with affirmative obligations.

Despite the difference in methodology and approach, Bartlett's conclusions are valuable to this study. The author did not focus on the Court's *Tinker* decision, but a

number of his conclusions can be tied back to that decision. Bartlett concluded that students have a responsibility to refrain from infringing on other students' rights, not engage "in conduct that can reasonably be predicted to result in material and substantial disruption of the school environment," "refrain from acts of disrespect, and insubordination," and that students may be held accountable after the fact for "distribution of materials that disrupt the school environment" (Bartlett, 1985, pp. 40-41). Although Bartlett characterizes these as student responsibilities, they can all be traced back to the *Tinker* Court's pronouncement that schools may suppress student expression that substantially and materially disrupts the education process or infringes on the rights of other students.

Bartlett's (1985) conclusions also provided accurate predictions of the Supreme Court's future work. In 1985, Bartlett argued that students' had the legal responsibility to "refrain from using vulgar, profane, and obscene words, and making libelous or slanderous statements about other persons." Although phrased differently and articulated as a limit on students' expression rights, the next year the Supreme Court in *Fraser* provided that education leaders could limit the same type of speech that Bartlett argued students had a responsibly not to use. Bartlett also concluded that "school officials may place reasonable restrictions on the time, place, and manner of student distribution of printed materials" (p. 41). Again although phrased differently and limiting expression rights in a more extensive manner than Bartlett suggested, The Supreme Court, in 1988, limited students' expression rights in terms of student publications in its *Kuhlmeier* decision.

Bartlett's purpose, in 1983 and 1985, was to reassure educators that schools do win court battles and that students' rights in school are not expanding without limit (p. 39). However, Bartlett described these limits as affirmative student legal responsibilities rather than stating that in siding with school leaders in numerous court battles, the federal courts had limited students' rights. Bartlett concluded, "little doubt should remain that there are many aspects of student conduct … over which the power and authority of public school officials have not been greatly diminished as a result of federal court decisions" (Bartlett, p. 44). However, it is apparent that uncertainty existed at that time with regard to the exact extent of school leaders' authority, and how the federal courts' decisions should be interpreted and applied by school leaders.

In 1981, the Third Circuit Court of Appeals published a decision upholding a superintendent's ability to censor a school played based on his belief that the play was inappropriate. Faaborg (1985) took exception to the court's ruling and published an article that was highly critical of the decision calling it superficial as well as incorrect (p. 575). Although Faaborg focused on the Third Circuit's decisions in *Seyfried v. Walton,*[10] the article also provided great insight about concerns over student expression rights at the time, and drew several conclusions about the federal courts' approach to student speech and expression in school.

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[10] The article summarized the facts of the case. The musical department at Caesar Rodney High School in Dover, Delaware, selected *Pippin* for the spring musical. The director communicated to the cast that the script would be modified (it was modified because several scenes were considered too sexual in nature for a high school production). A parent read an unmodified version of the script and complained to the president of the board of education. The complaint was passed along to the superintendent. After reviewing a revised version of the script, the superintendent still determined that the production was inappropriate and directed that it not be performed. Although objection was made to the board of education, the board refused to become involved in the matter.

The district court concluded that the superintendent's decision to cancel the play because it was inappropriate for school sponsorship did not offend the students' expression rights. The Third Circuit Court of Appeals affirmed the decision. The students decided not to appeal to the Supreme Court because they were pessimistic that the Court would overrule the lower courts' decisions (pp. 577-578).

Faaborg began with a review of the Supreme Court's previous work on student speech and expression in school and focused on *Tinker*: "*Tinker* stands for the proposition that student's First Amendment rights can be restricted only when school authorities can demonstrate that the student's conduct materially disrupts or involved substantial disorder in the school environment or invaded the rights of others" (p. 579). Coupled with a recognition of these rights, Faaborg pointed out that school boards and educational leaders have managerial discretion in running schools, and that "the state is free to create an academic environment where teaching and learning will proceed free form disruption" (p. 579). However, she stated that such conduct by school leaders could not violate the constitutional limits set by the Supreme Court.

After providing general background, Faaborg focused on several specific areas of student expression. In terms of curriculum-related student expression, the author argued that a school's authority is not unlimited, and that discretion over curriculum is subject to constitutional limitation. She also claimed that student self-expression was at the heart of *Tinker* and that *Tinker* applies First Amendment speech and expression principles to student expressive activities in school, limiting school leaders' ability to quash students' self-expression (p. 580). Furthermore, she argued that the federal courts were sharply divided over school leaders' ability to censor student newspapers (p. 583). Faaborg claimed that schools could not cut funding to student papers simply because they disagreed with the content, and concluded that no school district had developed a school censorship policy that met constitutional standards (p. 585). In all three areas, the author supported broad student expression freedom.

With this background in place, Faaborg turned to the censorship of student theatrical productions. Although she began by arguing that the court ignored a line of Supreme Court decisions that dealt with the censorship of *adult* theatrical productions, she focused on the Third Circuit's characterization of the play as curriculum-related as rationale for upholding the superintendent's censoring of the production. She argued that the federal court's decision implied that there were no limits on the amount of control that school leaders could exert over curricular issues.

Faaborg concluded that this approach ignored First Amendment rights of students and faculty, and was an incorrect and incomplete analysis of student speech and expression rights. Furthermore, the decision left several issues unresolved, including: (a) what is the test for identifying a student activity as curriculum-related, (b) is a dramatic production protected speech, and (c) is the school auditorium a public forum? Faaborg answered her own questions, and concluded that a school play is *not* a curriculum-related activity, that the production of a play is clearly protected speech, and that the school theater was a limited public forum providing school leaders with some – but limited – ability to regulate the content of school plays (pp. 590-592).

Written in 1985 and based on the court decisions at the time, Faaborg's analysis, while extremely critical of the Third Circuit and the limits placed on student expression, was possibly correct. However, in the next three years, the Supreme Court published two decisions, *Fraser* and *Kuhlmeier,* which contradicted points Faaborg put forth in her article. *Fraser* established that students' rights are not the same as those of adults outside the school building (*Fraser*, p. 682), and although it did not address school plays specifically, *Kuhlmeier* established a broad definition of curriculum-related activity,

which has been interpreted to include school plays (*See gen. Kuhlmeier*, p. 272-273). This gave school leaders great latitude in limiting student expression in the context of school-sponsored or curriculum-related activities. Faaborg's article made compelling arguments with regard to school plays as protected student expression, but two decades later the arguments are still not being utilized or supported by the Court. The article provided a sense of the uncertainty surrounding the exact extent of students' speech and expression rights at the time. The article also was an example of many scholars' feelings that students' expression rights should be expanded, while the lower federal courts were following a trend of limiting students' rights.

Months before the Supreme Court published its decisions in *Fraser*, Dever (1985) reviewed the *Ninth Circuit Court of Appeal*'s application of *Tinker* to *Fraser v. Bethel School District* (1985). Dever reviewed the Supreme Court's decision in *Tinker*, and the facts of *Fraser*.[11] He analyzed the Ninth Circuit's mechanical application of *Tinker* and its conclusion that the school had abridged Fraser's rights because the speech did not materially and substantially disrupt school operations (Dever, p. 1164).

After reviewing the Ninth Circuit's handling of *Fraser*, Dever discussed what the Supreme Court would encounter when it decided *Fraser.* Dever articulated that the Court had developed three frameworks for evaluating speech and expression in general. He described the three approaches as: 1. Categorical Proscription, which allows for the regulation of certain types of speech; 2. Time, Place, and Manner Restrictions, which allows for restricting the "physical manner, location, or time of speech communication,

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[11] Matthew Fraser gave a speech during a school assembly in favor of a candidate for a student leadership position. Fraser's speech was characterized as crude and sexually aggressive. The day after giving the speech, Fraser was suspended for violating the school's disruptive conduct policy. Fraser challenged the suspicion using *Tinker* and argued that the speech did not materially and substantially disrupt school (pp. 1168-1169).

not what is being said;" and 3. Public Forum Doctrine, under which the amount of allowable restriction is directly related to the type of forum: public, limited public, and non-public (pp. 1172-1174).

Dever argued that although many considered *Tinker* to be the sole authority for governing student speech in school, the reality was that *Tinker* represented only one of the Court's three approaches to regulating speech: the Public Forum Doctrine (p. 1174). The authored reasoned that by limiting a student expression analysis to *Tinker*, numerous lower federal courts had failed to complete the full Supreme Court First Amendment analysis. Dever was careful to point out that *Tinker* did not expressly rely on the public forum doctrine, but argued that the elements of the doctrine were in the *Tinker* decision (p. 1176). Dever concluded that in *Tinker* the Court first established that the school setting was a limited public forum, and that the material and substantial disruption standard was an alternative way of stating that inappropriate expression is incompatible with the public forum status of the school. Thus, school officials could regulate the expression.

Dever argued that looking at *Tinker* as a public forum doctrine analysis "compels the conclusion that the material and substantial disruption standard is not dispositive on all questions of student speech; rather, it constitutes only one level of inquiry…" (pp. 1176-1177). Such a conclusion, Dever found, meant that courts must look at student expression under *Tinker* but also under terms of Categorical Proscription and Time, Place, and Manner. Dever concluded that this was something that the Ninth Circuit in *Fraser* failed to do, and that the Supreme Court must look at how Fraser's speech was incompatible with the school environment even if it was not disruptive (p. 1177, 1189).

Dever's conclusion regarding *Tinker* was an accurate prediction of the Court's approach in *Fraser*. In deciding that Matthew Fraser's speech was inappropriate and could be punished by school leaders, the Supreme Court moved away from *Tinker* and employed alternative rationale for finding that Fraser's expression fell outside Constitutional protection. Dever was correct in suggesting that federal courts should have been looking beyond the *Tinker* approach when examining student expression in school. The Supreme Court made this clear in *Fraser*, and it was later reinforced in *Morse*, when Chief Justice Roberts stated that *Fraser* provided that *Tinker* was not the only manner for evaluating student expression in school (*Morse*, p. 2627).

Incorporating a Second Possible Approach

The Supreme Court decided *Bethel Sch. Dist. v. Fraser* in 1986, and changed the way school administrators could limit or suppress student speech and expression. In 1987, Slaff looked specifically at the Court's decision in *Fraser*, and argued that the Court departed from *Tinker* to create a new standard for student speech in school. Slaff began with a brief summary of *Fraser* stating that the Court concluded that school officials acting in loco parentis could punish a student for lewd and indecent speech during a school assembly (Slaff, p. 205). In analyzing the *Frase*r decision, Slaff found that the Court considered society's interest in teaching students the realm of appropriate social behavior and relied on this consideration to justify sanctioning Fraser's behavior (p. 208). The author concluded that the Court's decision narrowed students' First Amendment rights in schools.

In reaching this conclusion, Slaff recounted the groundwork the Court had laid in *Tinker*, and found that in *Tinker* the Court emphasized that children needed to be able to

exercise their Constitutional freedoms. The author stated that under *Tinker*, students could express their views while on school grounds, so long as it was done without materially disrupting and substantially interfering with the operation of the school or education process (p. 211). Slaff argued that the purpose of granting students constitutional rights, in *Tinker* and other cases, was to safeguard the liberties of these future adults rather than to provide the children with autonomy (p. 214).

Slaff moved to a comparison between the reasoning used by the Court in *Fraser* and in *Tinker*. She found that the *Fraser* Court narrowed student expression rights by limiting the *Tinker* holding to passive student expression. This distinction, She argued, allowed the Court to determine that the school could regulate offensive speech, such as in *Fraser*, based on the idea that the speech undermined the school's educational mission (p. 215). The author went on to find that the Court inferred a distinction between Fraser's speech and the expression in *Tinker* by defining Fraser's speech as "low value," while the political expression in *Tinker* was considered "high value."

Based on the *Fraser* facts, Slaff believed that had the Court systematically applied *Tinker*, Fraser's speech would have failed to meet the threshold material disruption standard previously established by the Court. Slaff believed the Court decided to develop a new standard and focus on Fraser's actual speech rather than employ *Tinker*'s substantial disruption standard because of the possible outcome of such an analysis. The Court backed away from *Tinker* and the author concluded that *Fraser* muddied the spectrum of what actually constituted protected student speech and expression versus speech and expression that could be prohibited (p. 221).

Thibodeaux (1987) explained the Court's decision in *Fraser* without taking a critical stance towards the opinion or offering open support for the Court's work. The author stated that the obvious importance of the decision was the Court's renewed involvement in the realm of public school student's constitutional rights (p. 525). To reach her conclusions, Thibodeaux examined the Court's *Tinker* decision and then provided a breakdown of the arguments put forth by the majority, concurrence, and dissent in *Fraser*.

Thibodeaux traced the Court's work in the area of student rights back to the compulsory flag salutes cases of the 1940s (p. 518). She then turned to *Tinker*, and explained that *Tinker* was the first time the Court evaluated school leaders' actions against the fact that students possessed some First Amendment rights (p. 518). Before moving to *Fraser*, the author pointed out that the Court had also developed a stance that school leaders are considered state actors, with regard to students' constitutional rights, rather than just in a position of exercising in loco parentis (p. 521).

In examining *Fraser*, Thibodeaux began by noting that the Court quickly distinguished the facts of *Fraser* from *Tinker* stating that *Tinker* "did not involve student conduct that intruded upon the rights of other students" at school (p. 521). Instead, the Court stated that in *Fraser* it had to balance a student's right to advance controversial expression against the need and duty of school leaders to teach students appropriate social behavior (p. 522). She argued that the Supreme Court announced that prohibiting vulgar and offense language was an appropriate function of public schools. Thibodeaux also pointed out that the Court focused its attention on the young and impressionable age of some students that were in the audience to hear Fraser's speech and the need to protect

these students. In this way, Thibodeaux found that the Court's reasoning constituted a split from *Tinker* and the rationale that First Amendment protections were not dependent on age (p. 523).

Unlike Dever's (1985) prediction that the *Fraser* decision would be instrumental because it would provide an additional analytical approach to student expression in school, Thibodeaux found the decision "important because the Court became involved in a situation where the extent of the disruption was unclear and the objection to the student's conduct was not politically motivated but rather morally motivated" (p. 525). She argued that the Court had abandoned the progressive stance it had taken in *Tinker* and reverted to a paternalistic view of overseeing and protecting students. Further, it reestablished deferential treatment of school leader's decisions. However, Thibodeaux did not attempt to square the Court's decisions; rather, she concluded that by attempting to provide clear guidelines for student expression the Court had created confusion as to what students could actually say or express (p. 526).

Much like Thibodeaux, Zollo (1987) provided comment on *Fraser* but did not provide extensive commentary on how *Fraser* affected the student expression landscape or modified the proper student expression analysis. The article provided a summary of *Tinker*, an evaluation of the Court's work in *Fraser*, and an examination of First Amendment Supreme Court decisions published between *Tinker* and *Fraser*. Zollo's approach blurred the line between student expression in school and individuals' expression rights in other areas of society because the Court decisions the author referenced were outside the scope of student speech and expression in school.

As a starting point for her analysis of *Fraser*, Zollo stated that the Court's *Fraser* decision affirmed its work in *FCC v. Pacifica Foundation* (1978),[12] where the Court concluded that minors, in general, needed to be protected from offensive language (p. 198). Although the author did acknowledge that the Court distinguished *Tinker* from the circumstances in *Fraser*, the author was preoccupied with *Fraser*'s connection to *Pacifica* (*see gen.* 198-200), and focused the bulk of her analysis on the connection between *Fraser* and *Pacifica*; a decision outside the realm of student expression in school. The article provided little in terms of actually explaining how *Fraser* modified the student expression landscape; however, it did reflect the uncertainty surrounding the constitutional protections granted student speech and expression in school.

In terms of a conclusion, the author stated, "[t]he Court provides no constitutional standard that will guide schools in determining what speech or behavior is appropriate" (p203). Further, Zollo stated that the Court's decision left suppressing student speech and expression that could be considered vulgar to school leader's discretion, but failed to provide a constitutional standard for controlling the discretion (p. 203 - 204). Although Zollo's conclusion could be an accurate general statement regarding the outcome of *Fraser* because the Court did limit students' ability to communicate lewd language to other minors, the article did little to further the discussion of the limits of student expression or assist in developing a useable framework for evaluating student speech and expression in school.

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[12] In *Pacifica*, a radio stationed aired a comedian's monologue called "filthy words" at 2:00 in the afternoon. The monologue included and repeated "a number of colloquial expression for sexual and excretory activities and organs." A man heard the broadcast while driving in his car with his young son and complained to the Federal Communications Commission. The case eventually reached the Supreme Court and the Court ruled the FCC could sanction stations "who engaged in obscene, indecent, or profane broadcasting," and it did not constitute illegal censorship (p. 738).

Nineteen Years of Debate: *Tinker*, *Fraser*, and *Kuhlmeier*

Two years after *Fraser,* the Court addressed student expression in school in terms of student press and publication. Months after the Court published its decision in *Hazelwood Sch. Dist.* v. *Kuhlmeier,* Abrams and Goodman (1988) discussed what they believed was a further limiting of student expression by the Court in *Kuhlmeier*. During the first half of the article, the authors engaged in a general discussion of student press rights prior to *Kuhlmeier*. They examined the facts and circumstances surrounding the *Kuhlmeier* decision and provided a lengthy dissection of the actual decision, which included the arguments made by the parties and the reasoning articulated in the majority and dissenting opinions. The second half of the article was dedicated to the legacy of *Kuhlmeier* and the effect the decision could have on student press rights.

Abrams and Goodman addressed how the Court had changed the censorship standard for expression. Prior to *Kuhlmeier,* the standard for censorship had been substantial disruption. The authors found that after *Kuhlmeier* the broad guidelines for limiting student speech and expression had been modified to allow editorial control of student publications if the control is reasonably related to a legitimate pedagogical interest (p. 274, quoting *Kuhlmeier*, p. 273). Further, the authors found that *Kuhlmeier* was a case of viewpoint suppression, stating that the Court made an unnecessary change to the substantial disruption standard resulting in broad control of student speech and expression by school leaders (p. 725). The authors criticized the Court's decision and focused on schools' expanded ability to censor student publications and the resulting reduced learning opportunities available to students.

Buss (1989) drew conclusions very similar to those of Abrams and Goodman. In his article, Buss analyzed the *Kuhlmeier* decision, and specifically examined the three-prong analysis Justice White utilized in the majority opinion. He articulated Justice White's three components as: (1) the newspaper was not a designated public forum; (2) T*inker* was distinguishable; and (3) "the principal's decision to delete the articles was reasonable" (p. 508). Buss concluded that the Court's conclusions were arguably correct, but that the reasoning at each step was problematic.

First, Buss found that the Court's reliance on the school newspaper, *Spectrum*, as being a part of the curriculum was misplaced in making the determination that the paper was not a designated public forum. Buss argued that nothing prohibited the school from making the paper part of the curriculum and *also* giving students the freedom and authority to decide what should be published (p. 510). Second, in discussing the relation between *Tinker* and *Kuhlmeier*, Buss found "[o]nce the Court concluded that the school had not created *Spectrum* as a designated public forum, the school's power to deny student access to *Spectrum* is more straightforward than the majority opinion suggests" (p. 512). He went on to conclude,

> The *Hazelwood* decision is best explained in terms of the school's power to control its communicative resources, rather than as a power to regulate student speech. *Tinker* and *Hazelwood* are different in kind, not degree. In muting this distinction, the Court is taking a misleading step that could become a foot in the door for regulating student speech protected by *Tinker*. (p. 513)

Last, Buss found that it was appropriate for the school principal to consider the implications for the school if the controversial articles were published in the student newspaper. Buss took issue with the rationale employed by the Court that the principal's actions were related to a legitimate pedagogical purpose (p. 513). The author argued that

there was no basis for the principal's actions being characterized as taken in a teaching capacity, which made the Court's reasoning "contrived and unnecessary." He found this unnecessary because the principal's actions could have been deemed reasonable (and constitutional) based on the idea that they were taken to protect the school from civil liability, damage to the school's reputation, or political disadvantage in interacting with school constituents (p. 514).

The author was highly critical of the decision. He viewed *Kuhlmeier* as limiting student expression and opening the door to further limiting of student expression. Buss' overarching conclusion was that the Supreme Court's decision to not find the school newspaper a designated public forum constituted a warning that nearly any forum for public expression in school could be limited or narrowed based on the specific circumstances and school administration's prerogative.[13]

In 1990, Carder published a historical study of federal court decisions that affected the First Amendment rights of students in public school. Carder analyzed nineteen federal court decisions,[14] and focused on three specific areas: students' right to participate in symbolic speech, censorship of expression in school-sponsored activities and expression through appearance – specifically hair length (pp. 104-106). After reviewing the nineteen decisions, Carder provided a summary of the development of

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[13] Although focused on the new limits the Supreme Court placed on student expression, Buss pointed out that even after *Kuhlmeier,* a Court could still be receptive to a student argument that the school was trying to suppress unpopular speech. To advance such an argument, a student would have to show that the school had already created a forum for students to express their views but later attempted to suppress what it considered objectionable speech (p. 533).

[14] The majority of Carder's analyzed decisions were published outside the time frame of the current study. *Burch v. Barker* (1988) was the only lower federal court decision addressed by Carder that was inside the time frame of this study. *Burch* is included in this data collection and is analyzed in Chapter IV. *Tinker, Fraser,* and *Kuhlmeier* were also addressed in both studies.

students' First Amendment rights in school. Although she looked at specific student freedoms under the First Amendment, the study focused on the path of these rights over time (pp. 100-101).

The spotlight on three types of student expression – symbolic speech, expression in school-sponsored activities, and expression through student appearance – limited the usefulness of her study for the purposes of the current study. Carder concluded that numerous federal court decisions addressed student expression in school and that this number increased greatly after the Court decided *Tinker* (p. 103). She found that the federal courts' decisions have had a considerable impact on students' First Amendment rights, and that students' utilization of a variety of forms of speech and expression at school has actually been responsible for much of the progress. (p. 104). She also determined that the courts' position(s) shifted between favoring the student or the administration based on the expression right that was at issue (p. 105).

Carder did provide implications and considerations for school leaders. She offered that school leaders must be aware of local and global political changes (p. 109–110), practice successful communication (p. 111), practice appropriate and extensive planning to help address changes delineated by the courts (p. 111-112), recognize the close relationship between the law and education (p. 112), respect the balance between student rights and education established in the law (p. 113), and realize the power the courts have given local school boards (p. 114). Although all of these points are important for educators to know, they do little to provide educators with guidance in addressing student expression situations in their classrooms or schools. Carder did offer a checklist for school boards to utilize when formulating school policy:

1. What constitutes public policy with regard to the specific school function under consideration?
2. If the functional area reflects the interest of operation generated by a specific statute, how do the administrative agencies charged with supervising the state interpret its effect and practice its review?
3. Is the school staff philosophically compatible with the administrative regulations?
4. Are the board's policies and administrative practices an accurate reflection of the agency rules and regulations?
5. Is the administration scheme associated with the area of focus clear and precise?
6. Are burdens of proof and procedures fairly positioned with regard to availability of records or other evidence of proof?
7. Are administrative rules properly published and placed in the hands of those persons affected by them?
8. What may be done to harmonize the thrust of the law and the philosophies, attitudes, and practices of the professional staff? (p. 115)

Carder concluded, "[t]he future direction for educators with regard to the First Amendment rights of students in the nation's public schools is well-defined by the law. Educators need only be aware of it and act accordingly" (p. 116). Carder provided a conclusion that was at odds with most other academics, scholars, and legal minds at that time (and currently). The vast majority of scholarly publications have concluded that the extent of students' First Amendment rights was not clear and this created challenging situations for students and school leaders.

Like Freeman (1984), Lane (1992) addressed the extent of student rights in school in relation to the inculcative function of the public school system (p. 24). The study looked at several aspects of the development of first amendment rights in school. Lane began his study with a focus on the tension between the concepts of student autonomy and social integration in school (p. 46, 70). The author provided the arguments put forth by both sides. He highlighted the idea that social integration views children as needing

guidance and the school is charged with a responsibility of ensuring students receive certain protections (p. 71 – 72). Autonomous rights, the author argued, emphasis choice and provide students more freedom (p. 74).

Lane turned to the constitutional status of children and concluded that the courts had attempted to strike a balance between not granting children any rights and refraining from making children's' rights the same as adults (p. 77). Lane concluded that the Supreme Court had established a lower threshold of constitutional rights for children in *Prince* v. *Massachusetts* (1944), holding that school leaders may regulate students' to a greater extent than government leaders' may regulate adults in society (Lane, p. 78). In addressing the dichotomy between social integration and student autonomy and the Court's position that students have a reduced level of constitutional protection, Lane concluded that children require adult protection as well as autonomy from adult authority because while children can be immature and need protection, they must also be allowed to grow into adults (p.88).

Lane then focused on the relationship between the inculcative function of the public schools and the aims of free speech (p. 100). As he did in other sections of the study, Lane reported the arguments for each position. In terms of free speech, he focused on its importance in a democracy (p.105), as part of a market place of idea (p. 103), as a component of self-fulfillment (p. 106), disutility (p. 107), and as a theory of incompetence (p. 108). He also provide criticism of these ideals. Lane discussed the other side of the argument: inculcation of values. Lane described schools' inculcative function stating it "entails something more than the mere transmission of values, and something less than a totalitarian pedagogical weapon" (p.125). Lane concluded that it served the

aims of public education (p. 126) and that it is not necessarily at odds with student free speech in school (p. 130). He argued that this could be done if educators inculcated values in a non-coercive way (p.134).

With the inculcative nature of school and the relation to free speech as background, Lane turned to an examination of student speech. He divided student speech into three categories and provided a three tier analysis for his data. Lane reviewed independent student speech (p. 141), speech that required the assistance of school administrators (p. 158), and student access to non-student speech (p. 277). Lane concluded that independent student expression should be granted significant constitutional protection while speech requiring the assistance of school leaders should be under the discretion of school authority. Lane also concluded that school officials should have great discretion in determining the extent of student access to non-student speech because it involves primarily school district policy-making concerns (p. 317). In terms of students as recipients of First Amendment speech (speech of others), Lane concluded, "public school students do not merit a first amendment right to receive information because school authorities warrant substantial authority to determine the content of school materials and curriculum" (p. 326 – 327).

Lane's study was germane to the current research and provided an important perspective of students and First Amendment speech. Lane focused on his proposed three tier analysis, which provided a different approach to student speech and expression in school. Unlike the current study, Lane focused on the theoretical development of student speech rights and did not heavily examine the actual federal court decisions that created and shaped students' First Amendment speech and expression rights. Thus while

providing good background information on student speech and expression in school, the study's aim was different than the current study.

Hafen and Hafen (1995) looked at student speech and expression through the lens of student autonomy and argued "it is in children's and society's best interests to limit children's short-term legal autonomy in order to facilitate development of their long-term actual autonomy" (p. 307). They found that a premature granting of legal autonomy could undercut a child's development of actual autonomy as adults (p. 385), which led to Hafen and Hafen's research question: "how can we help our children realize their potential - and their culturally embedded right - to achieve truly meaningful autonomy?" (p. 385). The authors concluded that children's autonomy must be limited while in school to maximize their autonomy when adults (p. 385).

In reaching this conclusion, Hafen and Hafen reviewed *Tinker*, *Fraser,* and *Hazelwood*, drew conclusions about each decision, and discussed the effects each decision had on student speech and expression freedom and autonomy in school. The authors found that many courts had interpreted *Tinker* as establishing that students possess some inherent autonomy while at school. However, *Fraser* and *Kuhlmeier* restricted this autonomy and, as the authors argued, restored the school's right to limit student freedom in order to allow schools the freedom to do what they were established to do (pp. 386-387).

In evaluating the decisions in *Fraser* and *Kuhlmeier*, Hafen and Hafen found that the Court's *Fraser* decision granted educators broad discretion in restricting student speech and expression (p. 393), while *Kuhlmeier* gave schools "broad authority to define and supervise students' education, including the right to regulate the content of school-

sponsored student newspapers" (p. 394). Furthermore, *Kuhlmeier* distinguished private student expression – protected by *Tinker* – from student expression in a school-sponsored activity or publication.

After establishing the broad scope and applicability of *Kuhlmeier*, Hafen and Hafen discussed several student rights areas that had utilized the principles established in *Kuhlmeier*. First, they pointed to lower court cases that were decided on student speech toleration versus student speech promotion distinction. The authors found that lower courts utilized *Kuhlmeier* to separate situations where the school must tolerate student speech from situations in which the school may limit the speech because a failure to do so would in essence constitute a promotion of the student speech.[15] Second, they found that decisions handed down after *Kuhlmeier* still protected private student speech that was not disruptive.[16] Third, the authors looked at the extension of *Kuhlmeier* to faculty speech, finding that lower courts utilized the decision to allow districts to restrict not only student but also faculty speech in school. Next, it was noted that even though *Kuhlmeier* provided schools the discretion to regulate the content of the school newspaper, some lower courts

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[15] In making this point, several examples were given. The Fourth Circuit's decision in *Crosby v. Holsinger* (1987), held that a principal's decisions to eliminate the school mascot – "Johnny Reb" – did not violate students' First Amendment rights. In *Planned Parenthood of Southern Nevada v. Clark County School District* (1991), the court – after the publication of the *Kuhlmeier* decision -- held that a school did not need to allow the publication of planned parenthood materials in the school newspaper (p. 398). The Eleventh Circuit in *Virgil v. School Board of Columbia County* (1989) held that a school district could remove material it considered vulgar and sexually explicit because the action was "reasonably related to legitimate pedagogical concerns." In *Gerig v. Board of Education of the Central School District* (1988), a Missouri appeals court upheld a school district's right to terminate a teacher that had permitted the publication of "articles of dubious literary quality" in the student newspaper.

[16] The authors provided two examples for this point. In *Chandler v. McMinnville School District* (1992), the Ninth Circuit concluded that buttons worn by two high school students that supported an ongoing teacher strike constituted permissible speech under the First Amendment. In *Slotterback v. Interboro School District* (1991), a Pennsylvania district court held that the distribution of religious materials by several students was protected and should be "tolerated" by the school under the Tinker standards (p. 401).

found the decision – on the facts – inapplicable to student newspaper cases.[17] The fifth area the authors examined was an extension of *Kuhlmeier* to rights regarding free association. Hafen and Hafen concluded that lower courts utilized the decision to restrict other First Amendment freedoms beyond speech.[18] Next, they found that the decision had been extended to cover school-sponsored assemblies and graduation ceremonies because lower courts utilized the decision in the same manner as *Fraser*, but reasoned that the speech should be restricted because it was in "the best educational interest of the students" (p. 407).[19]

Hafen and Hafen concluded by summarizing the general significance of the Court's *Kuhlmeier* decision. They concluded that the decision gave educators additional latitude in making decisions to limit students short terms rights (pp. 411-412). Further, *Kuhlmeier* reinforced and reestablished the role of the public school. Last, the authors concluded *Kuhlmeier* was applicable in other legal contexts. Taken together, the authors concluded that *Kuhlmeier* could be used to properly limit student rights, and had constitutional significance beyond student expression.

Johnson (1996) focused on overall changes in students' First Amendment speech and expression rights in the 25 years following *Tinker*. Johnson concluded that students

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[17] In *Desilets v. Clearview Regional Board of Education* (1994), a New Jersey court distinguished *Kuhlmeier* concluding that the school failed to show a valid educational purpose for censorship when it attempted to exclude a student's review of two movies from the school paper because the movies were rated R.

[18] In *Bush v. Dassel-Cokato Board of Education* (1990), "a Minnesota district court held that Tinker, when read in light of Fraser and Hazelwood, did not prohibit schools from disciplining students who attended parties at which alcohol was consumed" (p. 406).

[19] In *Poling v. Murphy* (1989), the Sixth Circuit relied on *Kuhlmeier* (and the idea that civility is a reasonable pedagogical concern) and "held that the First Amendment does not give a high school student the right to make admittedly discourteous and rude remarks about school officials during a campaign speech delivered at a school-sponsored assembly" (p. 407). In *Brody v. Spang* (1992), the Third Circuit held that under *Kuhlmeier*, it was unlikely that a high school graduation could be designated a public forum.

and teachers possess First Amendment rights while in school; however, the rights of students are not coextensive with those of teachers and administrators (p. 64). For example, students have the right to speak and receive information, but these rights must be balanced against the school's need to maintain discipline. Students do not have the ability to wear obscene or offensive clothing to school, but students may wear materials that express political opinions, so long as they do not create a substantial disruption (p. 64).

Johnson approached the limitations in terms of administrator and teacher rights. "School districts may restrain speech when it will disrupt the operation of the school or infringe upon the rights of others," and "retain broad power to restrain free speech in a forum where the speech may be seen to have the imprimatur of the district" (pp. 64-65). Overall, Johnson concluded that student First Amendment rights, although present, are limited in the school setting.

Mitchell (1997) conducted a study of selected federal court cases concerning students' speech and expression rights that were decided between January 1943 and June 1997 (Mitchell, p. 19). Mitchell's study examined how the courts had addressed student First Amendment issues, the nature of the issue and how they had been resolved, what could create future litigation, and provided operational principles for school principles to use in the future (p. 17 – 18). Before addressing the courts' involvement, Mitchell spent several pages discussing the function of public schools (p. 53-54) and the differing philosophies that surround education (p. 36 – 38). After providing this background, Mitchell analyzed the decisions using a case brief method (p. 87), and then provided analysis and conclusions of the reviewed decisions.

Mitchell's work and this study are very similar in focus; however, Mitchell's study went beyond the speech and expression clause of the First Amendment and addressed decisions based on religious principles and related to the Establishment clause and religious expression (*see* p. 132, 331, 350, and 559). Based on his dissection of the First Amendment speech and expression rights, Mitchell developed 19 categories of speech and expression that the courts had addressed under the First Amendment to the U.S. Constitution (p. 609, 681). From these categories, the author developed a list of principles that could be concluded from the decisions.

Although more specific than many of the articles because of the in-depth nature of the study, Mitchell's conclusions were similar to other academics in that the Supreme Court had developed three standards for addressing student speech and expression (p. 677- 678), and that numerous lower federal court decisions had interpreted the principles in a variety of ways and for diverse reasons. Mitchell's work was extremely relevant to the current study as it approached the same area of study is a slightly different manner. Further, it provided operational principles that reflect some of the same conclusions reached in this study regarding the limits of student speech and expression. However, the works differ in that while overlapping they cover different time periods, Mitchell's review of the First Amendment was broader than the focus of the current study, and while reaching similar conclusions the principles developed by each study were categorized differently for use by school administrators.

While Johnson looked at overall changes in student expression rights, McCarthy (1998) reviewed student expression in terms of student clubs, student oral and written communication, and student attire. McCarthy found that any constraint on student

expression must be supported by sound educational principles (p. 18). Although McCarthy looked at expression in a broad context, she focused on principles that could fall under freedom of speech or religion.

In terms of students' oral and written communication, McCarthy focused on *Fraser* and *Kuhlmeier*. In addition to obscene, inflammatory, and libelous expression being beyond First Amendment protection, she found that the *Fraser* Court added "lewd" and "vulgar" to the list of speech that is not protected in school (p. 20). McCarthy explained that the Court pointed to the importance of inculcating students with the values of society as rationale for this addition. Therefore, it was within the school's prerogative to determine what student speech and expression advanced the inculcative objective.

McCarthy then turned to the Court's work in *Kuhlmeier* and reported that the *Kuhlmeier* Court held that schools have the authority to censor student expression in school-sponsored or related publications, if the decision to censor was based on legitimate pedagogical reasons (p. 21). Despite the Court's ruling in *Kuhlmeier*, McCarthy found that a school could not participate in blatant viewpoint discrimination, even if a school's action were based on legitimate pedagogical concerns. Furthermore, the *Kuhlmeier* Court drew a clear distinction between tolerated personal student expression and school promotion of student speech that could be reasonably interpreted as representing the school, which the school could censor.

McCarthy concluded that since *Kuhlmeier* and *Fraser*, the amount of student expression governed by *Tinker* was reduced drastically. *Tinker's* material disruption standard still governed "personal *student expression* of ideological views," but simply because this type of student speech enjoyed greater constitutional protection did not mean

that it was guaranteed full protection (p. 23). Even if the speech was permitted (and protected) under *Tinker*, a student could still be penalized later if the speech was disruptive, defamatory, or vulgar.

Hudson (2002) discussed the suppression of student free speech and expression in a time of increased school violence. The author argued that school officials have overreacted to alleged "threats" of violence. He focused his analysis on recent court decisions where the courts' emphasis on school violence allegedly influenced the decision.

Hudson provided a summary of the Supreme Court decisions in *Tinker*, *Fraser,* and *Kuhlmeier* and discussed how these three decisions governed the vast majority of First Amendment issues in schools:

> *Hazelwood* applies to school-sponsored student speech. *Fraser* applies to vulgar and lewd student speech. Most courts tend to apply *Fraser* to all student speech that is vulgar and lewd. A few courts have said that Fraser applies to only vulgar student speech that is school-sponsored. Unfortunately, a few courts have extended *Fraser* to ban almost any offensive student speech. *Tinker* applies to all student-initiated speech that does not otherwise fall into *Fraser*. (Hudson, p. 85)

After discussing the three decisions, the article examined relevant "true threat cases" that affected the limits of student expression (p. 86). In the examination of lower court cases, Hudson found that students were being punished for their creative expression (p. 103).[20] Schools cited safety concerns and violence prevention as reasons for censoring student

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[20] Hudson discussed lower federal court decisions that addressed the idea of threatening expression. The student "expression" was usually in the form of a poem, song, or artwork. The cases did not involve students expressly threatening other students or faculty, but rather expressive works that the administrators interpreted as threatening based solely on the content. The creative work usually included terms such as gun, kill, murder, hate and violence. However, the students argued that the work was fiction or simply an expression of feelings not a threat toward a particular person, and that suppression of the expression constituted a violation of student expression (e.g. pp. 92, 94, 99).

expression, and the courts have embraced this reasoning and utilized the arguments to uphold administrators' suppression of student expression that is considered threatening.

Hudson concluded that safety concerns have take precedent over student free speech rights in school (p. 104). Hudson based his conclusions on findings that school administrators were overreacting and punishing student expression believed to be threatening even when there was no true indication or evidence that the expression was actually a threat. He further concluded that school administrators should not unnecessarily censor, limit, or punish student expression because of an increased awareness of possible violence. To support this finding, Hudson argued that there had not been a clear increase in school violence and that overreaching suppression could lead to compromised security (pp. 104-105).

Although *Kuhlmeier* came down nearly two decades earlier, Boggs (2005) reexamined *Kuhlmeier* and its "far reaching ramifications." The study concentrated on the limitations the Court placed on the rights of student journalists with the analysis undertaken from a perspective of restricting student freedom. Boggs first concluded that the courts had not developed a definition of "materially disruptive." The author stated that the phrase was coined by the Supreme Court in *Tinker*, but concluded that the Court had never specifically defined the phrase (Boggs, p. 30). Boggs argued that administrators use "material disruption" indiscriminately to limit student expression. She found that the Supreme Court's decisions had stripped students of their rights to freedom of expression when the expression affected the education process. Secondly, she questioned whether this restriction had been used in the realm of publication. Ultimately, Boggs concluded that it had (p. 30).

After the Court published *Kuhlmeier*, 19 years would pass before the Supreme Court would once again revisit student expression in school. In the nearly two decades preceding the Court's decision in *Morse v. Frederick* (2007), the lower federal courts, and scholars, attempted to makes sense of the three approaches put forth by the Supreme Court. The published literature focused on dissecting one specific decision as related to the other two, evaluated the student expression spectrum as a whole, attempted to apply all three decisions to one specific type of expression, or contemplated possible developments in student expression during an era of increased school violence. Overall, the literature continued to showcase that a clear single approach to analyzing the legal boundaries of student expression in school did not exist.

Student Expression in the Wake of *Morse*

The Supreme Court's most recent decision, *Morse v. Frederick*, concerning student speech and expression in school was published in 2007. Three months before the Court published its decision in *Morse*, McCarthy (2007) reviewed the current state of student expression rights and predicted how the Court might handle *Morse*. McCarthy's assessment of the current climate of student expression in school was accurate and she described the frustration and difficulty of appropriately and uniformly applying the Court's three previous student expression decisions.

McCarthy provided that in interpreting the "Supreme Court Trilogy" – *Tinker*, *Fraser*, and *Kuhlmeier* - the lower federal courts had recognized three distinct forms of student expression: 1. school-sponsored (*Kuhlmeier*), 2. Obscene, lewd, vulgar, or plainly offensive (*Fraser*), and 3. Expression that falls in neither category (*Tinker*) (McCarthy, p.

18). McCarthy accurately described the frustration the lower courts' application of these principles has caused school leaders:

> These categories are deceptively discreet and have been referred to in numerous recent cases. Yet, **courts have not spoken with a single voice as to what expression falls in each category or how to apply the principles gleaned from the Supreme Court decisions**. (p. 18, emphasis added)

Following her general comments on the trilogy, McCarthy (2007) offered comment on each specific decision. She pointed out that courts had relied almost exclusively on *Fraser* and *Kuhlmeier* in the nineteen years that followed those decisions, and that the emphasis was so great that some scholars called into question whether *Tinker* was still relevant (p. 18). In terms of *Kuhlmeier,* the author confirmed that lower courts have provided an extremely broad interpretation of what constituted a curriculum related or school-sponsored activity (p. 18), and she reiterated that "the key consideration is whether the expression is viewed as bearing the school's imprimatur; only under such circumstances is *Hazelwood*'s broad deference to school authorities triggered" (p. 19).

McCarthy stated that while the lower courts had broadly interpreted *Kuhlmeier,* the interpretations of *Fraser* were extremely erratic. The numerous applications and interpretations of *Fraser* had aided in creating the tangled spectrum of constitutional student expression in school. Although there is a common understanding that *Fraser* allows schools to ban expression that is "vulgar, lewd, indecent, or plainly offensive," the lower courts' interpretation of what these terms actually mean added to the cloudy nature of students' expression rights (p. 20).

The author concluded this section of her article by briefly stating that *Tinker* had not been utilized nearly as often as the other decisions. Although there are two prongs to

the *Tinker* analysis, McCarthy found that only the material and substantial disruption prong was regularly utilized, and that whether the "expression interfered with the rights of others" had "rarely been interpreted" (p. 22). She noted that this had recently changed and that the Ninth Circuit relied on the second and seldom used point from *Tinker* in upholding a school's suppression of a student t-shirt degrading homosexuality (p. 22).

McCarthy concluded that it was "this murky context of First Amendment litigation applying the trilogy of Supreme Court decisions to assess public school students' expression rights" that brought *Morse v. Frederick* before the Court. McCarthy spent the second half of the article discussing the facts of *Morse*[21] and attempting to apply each of the Court's three previous decisions to the *Morse* facts to predict the Court's possible conclusion. After reviewing the standards articulated in *Tinker*, *Fraser*, and *Kuhlmeier*, McCarthy found "only … that the expression interfered with the work of the school or promoted values inconsistent with the school's mission – seem possible grounds for the Supreme Court to use in upholding the principal and school board" decision (p. 33).

The Supreme Court did uphold the school's suppression of the "BONG HiTS 4 JESUS" banner, but on grounds not discussed by McCarthy. Rather, the Court developed a fourth standard in its *Morse* holding separate from its previous three decisions. Although McCarthy and the Court were not in concert on the rationale for *Morse*, her work accurately recapped the confusion and uncertainty that surrounded not only the

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21 In *Morse*, a student (Frederick) and several friends unfurled a banner stating "BONG HiTS 4 JESUS" as the Olympic torch passed in front of Juneua-Douglas High School. The principal had released students from class to stand outside and watch the torch as it passed the school. After the principal (Morse) asked the student to take down the banner and the student refused, the banner was confiscated and the student was eventually suspended for the act. The student challenged the suspension as a violation of his constitutional rights.

extent of students' expression rights but the manner in which the lower courts were interpreting the Supreme Court's decisions. Although McCarthy offered the following statement as rationale for the Court hearing *Morse v. Frederick,* it is as accurate after the decision as before: "Clarification from the Supreme Court is sorely needed as to when *Tinker* applies and what limitations *Fraser* and *Hazelwood* impose on the protection of student expression under *Tinker*" (p. 34).

Nairn (2008) addressed student expression in school in the wake of the Court's decision in *Morse*. After providing the facts of *Morse* and reviewing the procedural background, Nairn analyzed the Court's opinion. Focusing on the special characteristics of the education environment usually examined by the Court when addressing student speech on school grounds, the author found that the Court articulated that Frederick's "BONG HiTS 4 JESUS" banner constituted speech and was a pro-drug statement distinguishable from political advocacy (p. 243). The Court used this definition and "framed the question as one related to the regulation of speech advocating drug use" (p. 243).

Nairn found the Court's decision a significant detour from its previous student expression rulings because it opened the door to content regulation of student expression; a practice the Court had avoided in the past. Nairn argued that the majority's holding – that all pro-drug speech may be suppressed – targeted a particular viewpoint that the Court deemed unworthy of First Amendment protection. This further limited student protected expression at school. Nairn concluded that this was a severe departure from the *Tinker* student expression standard and broadened the gap between protected adult and protected student expression (pp. 247-248).

Furthermore, Nairn concluded that the Court did not do enough to limit its holding to pro-drug messages or to distinguish drug related language from other dangers facing students. He argued that the decision left open the possibility for content regulation and restriction of student speech that advocated harmful rather than only illegal behavior (p. 252). The author raised concerns that the decision would allow schools to restrict legitimate expression on the topic of drugs. Further, the author suggested that the Court's ruling falsely assumed there was a clear line between political and non-political speech, which contributed to the overly broad nature of the decision (p. 253). In voicing disproval of the Court's *Morse* decision, Nairn warned, "Courts should be careful, however, to guard against content-based regulation of student speech that is not specifically and demonstrably necessary for the functioning of the school, lest that regulation stray into the realm of viewpoint discrimination" (p. 248).

In proposing that the Supreme Court heard the wrong student speech case after granting certiorari in *Morse*, Canter and Pardo (2008) argued the Court failed to provide meaningful guidance for student speech issues in its *Morse* decision. The authors began with a summary of *Morse*, and that the *Morse* Court held that schools could safeguard and protected students from speech that could reasonably be interpreted to promote illegal drug use (Canter & Pardo, p. 129). The authors pointed out that the Court stated that it did not rely on prior Court precedent and found neither *Kuhlmeier* nor *Fraser* controlling. The authors found that the Court did not rely on *Tinker* either; instead, the Court created a new category of speech that schools could prohibit: speech that promoted or encouraged illegal drug use (p. 130).

Canter and Pardo then argued that the Court should not even have heard "BONG HiTS 4 JESUS." The authors found that "BONG HiTS" was not about school speech, and the case did not fit under any of the three special characteristics of the school environment that the Court had traditionally turned to when evaluating student speech at school (p. 132). The authors articulated the three characteristic as: (a) the schools need to protect students, (b) the immaturity of the student audience present in the school and the schools need to protect captive students from offensive speech, and (c) the schools need to control the curriculum (pp. 132-133). The authors alleged that the banner was not a safety concern, was not vulgar, and was not related to the curriculum. Thus, the Court had to move away from its traditional analysis to conclude that the banner was not entitled to constitutional protection.

Canter and Pardo's second argument against the Court hearing *Morse* was that it presented a case of significant governmental interest against low-value student expression.[22] This meant the case was easy for the Supreme Court to decide because the government interest clearly outweighed the low-value expression. The authors made the argument because they believed there would have been greater value in the Court hearing a case that pitted high-value student expression against "other fundamental characteristics of the school setting" (p. 134). They concluded that the Court failed to use "BONG HiTS" as an opportunity to clarify student expression in schools (pp. 137-138).

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[22] The Supreme Court has drawn distinctions between certain types of expression and the protection afforded under the Constitution. Expression that is "lewd and obscene, the profane, the libelous, and the insulting or fighting' words" are considered of low value as opposed to political or religious expression which is granted greater value (*See Dennis v. United States*, 1951).

After discussing *Morse,* Canter and Pardo argued that the Court should have heard *Harper v. Poway* (2006) instead of *Morse*.[23] The case involved a conflict between a student's expression of religious beliefs and the possible disruption of the school day, general school safety, and other students' freedoms.[24] After originally granting certiorari, the Court remanded with direction to dismiss as moot because Harper had already graduated. The authors argued that by refusing to hear *Harper,* the Court missed an opportunity to resolve a conflict between a governmental interest and high-value student speech. Canter and Pardo saw the case as a chance for the Court to clarify student speech and expression in school precedent because *Harper* triggered two of the characteristics traditionally utilized to limit student speech: possible substantial disruption and offensive

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[23] *Harper* was the same decision McCarthy (2007) referenced when discussing the Ninth Circuit's application of the second prong of the *Tinker* analysis.

[24] The facts of *Harper* as stated in the article: "On the 2004 Day of Silence (an annual student-led event raising awareness of discrimination against homosexuals), Tyler Chase Harper, a sophomore at Poway [High School] and a devout Christian, decided to express his opposition to the Day of Silence. Harper believed that homosexual behavior was 'destructive to humankind ... and immoral' … He wore a t-shirt with 'I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED' taped on the front, and 'HOMOSEXUALITY IS SHAMEFUL' taped on the back, with a biblical citation. Apparently, no one noticed. The next day he changed the t-shirt message to read 'BE ASHAMED OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED' on the front, and 'HOMSEXUALITY [sic] IS SHAMEFUL' on the back, again followed by a biblical citation.

With this new message, Harper got a rise out of his fellow students, and was 'confronted by a group of students on campus' that very morning, resulting in a 'tense verbal conversation.' Soon afterward, his teacher noticed that Harper's t-shirt had 'caused a disruption' in the classroom. The teacher thought that Harper's t-shirt 'created a negative and hostile working environment for others,' and sent Harper to the front office.

Several school officials spoke with Harper. The school's deputy sheriff briefly met with Harper to document the t-shirt and assess the potential for violence. The deputy sheriff warned the school officials that, in his opinion, Harper's t-shirt 'could lead to disruption between the students.' Assistant Principal Edward Giles chatted with Harper … He suggested that Harper make the message more 'non-confrontational,' and encouraged him to become an officer of the Bible Club.

Principal Fisher spoke with Harper about the physical dangers that could result from Harper's t-shirt, and how inflammatory Harper's particular choice of language was to other students, but Harper would not change his t-shirt … Principal Fisher had Harper remain in the front office, gave him credit for attendance, and did not suspend him or place anything in his disciplinary file. Harper did not display the t-shirt message again, and [Principal] Poway did not further discipline Harper. Soon thereafter, Harper filed a complaint alleging that Poway violated his First Amendment right to freedom of speech" (pp. 139-142, internal citation omitted).

expression in the classroom (p. 142 - 143). The authors concluded that high-value expression versus governmental interest would have been a much tougher case for the Court to decide therefore providing much greater insight into the status of student speech in schools. “Harper places uniformly recognized values - free speech and children's safety - in direct conflict. This situation confuses conventional political lines and would make predicting the Court's decision difficult” (p. 143).

While Cantro and Padro argued that Court could have done more for clarifying the student expression framework by hearing a different case, Waldman (2008) offered a post-*Morse* framework for evaluating potentially hurtful student expression. Waldman focused on student expression that could reasonably be considered harmful, and specifically looked at religious expression in school. However, the article was still relevant to the current study because the author’s framework for evaluating student expression was at the heart of the argument.

Waldman’s concern was identifying how *Morse* could potentially effect student religious expression. She reviewed the Court’s holding and reiterated that the decision did not give schools carte blanche authority to limit expression based on the content. The paper was authored from a pro-religious expression perspective, and argued that religious groups’ amicus briefs appeared to be influential in the *Morse* decision. As support, Waldman pointed to the *Morse* decision’s narrow holding that “schools may restrict student speech that can reasonably be regarded as encouraging illegal drug use,” and

stated that it was a rationale originally proposed by the Liberty Legal Institute[25] in its amicus brief (Waldman, p. 465).[26]

Beyond dissecting the Court's actual holding, Waldman articulated that Justice Alito's concurrence was "critical" in that he joined the Court's opinion with the clear understating that the decision went no further than allowing school leaders to restrict speech that could reasonably be interpreted to promote illegal drug use, and that the decision did not allow for the restriction of *any* expression that could "plausibly be interpreted as commenting on any political or social issue" (p. 466, internal quotations omitted). The author saw this as a sympathetic religious view by the Justice, and a clear indication that the *Morse* decision was extremely narrow.

Although Waldman pointed out these important points from *Morse*, the majority of the piece was a discussion of religious based student expression, with a focus on speech and expression that opposed homosexuality and opposed abortion (p. 465). The author's view was through the lens of religious expression, but Waldman drew conclusions that were germane to all student speech and expression. In discussing that the federal courts had failed to reach consensus on how to approach religious based expression that is potentially harmful to other students, Waldman concluded, "The now-four Supreme Court cases on student speech – *Morse*, along with the well-known trilogy of *Tinker*, *Fraser*, and *Hazelwood*, do not provide clear answers here" (p. 467). Although

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[25] "The Liberty Legal Institute describes itself as a non-profit law firm dedicated to the preservation of First Amendment rights and religious freedom" (p. 464).

[26] An amicus brief is a legal document submitted to the Supreme Court regarding a case of which the brief's author is not a party, but he believes that the outcome of the case will have an affect on his interest. These briefs are used to provide additional information and arguments that outside parties believe the actual litigants have failed to provide the Court. The literal translation means "friend of the court." (Tech Law Journal, 2008).

centered on a specific type of student expression, the statement resonates across all student speech and expression, and is supported by the fact that the reviewed literature has not identified a single clear approach for addressing *all* student speech and expression in school in a consistent manner.

After establishing the ambiguity of the Court's approach to student expression, Waldman took elements from each of the Supreme Court decisions and offered a new standard for evaluating student speech and expression that could be viewed as harmful to other students (p. 468). Waldman offered that harmful expression must be divided into two categories: "(1) speech that identifies particular students for attack; and (2) speech … that expressed a general opinion without being directed at particularly named (or otherwise identified) students" (p. 469). She argued that schools should be given great latitude to restrict expression falling in the first category, but expression falling into the second group should only be suppressed if it is likely to create a material and substantial disruption. According to Waldman:

> To put it bluntly, a student can express his belief that Jesus Christ is the only path to salvation, or that homosexuality is sinful, without singling out non-Christian or gay students and telling them that they are going to Hell or calling them derogatory names. (pp. 494-495)

Waldman meticulously picked through the Supreme Court's four decisions and other federal court decisions to develop the framework for evaluating religious based hurtful student speech and expression, but the usefulness of the framework is limited to this specific type of student expression. More importantly, by attempting to construct a framework for one particular type of expression, the article exposed the Court's failure to develop an approach or even a cohesive set or rationale for addressing all student

expression in school. The article is useful because it reiterates, as many of the other reviewed scholarly pieces, the shortcomings of the Court's approach to student speech and expression in school. It is also in line with other scholars' conclusions that the *Morse* holding was limited to allowing school leaders to suppress expression that advocated illegal drug use, and did not alter the *Tinker, Fraser*, or *Kuhlmeier* analysis.

The Supreme Court's Four Posts of Student Speech and Expression in School

The reviewed literature demonstrates that the four main decisions, *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse,* guide student speech and expression rights in schools. The articles also portray a splintered and disjointed approach to the legal analysis of student speech and expression issues. The literature tracks the development of several approaches and provides the clear indication that *Tinker* is not the only approach utilized by federal courts when determining issues involving student speech and expression in school. However, the vast majority of the literature focused on a single decision or a specific area of student expression. The identified and reviewed scholarly pieces have not provided educators with a comprehensive guide as to which Supreme Court approach should be used in different specific student speech and expression situations.

Chapter IV will review the Supreme Court's four student expression decisions – *Tinker*, *Fraser*, *Kuhlmeier,* and *Morse* – and lower federal court student speech and expression in school decisions published between January 1, 1983, and December 30, 2008. The federal court decisions are examined to evaluate the manner in which the lower federal courts have applied the Supreme Court principles. Chapter V will provide an overall analysis of these decisions, identify the importance of the decisions to school

leaders, and provide a reference table that educators may consult when faced with student expression situations.

CHAPTER III

RESEARCH METHODS

Introduction

The purpose of this study was to identify and review the current legal boundaries of student speech and expression rights as developed and defined by the U.S. federal courts to better enable educators to make decisions regarding student speech and expression rights when confronted with such situations. The study examined federal court student speech and expression decisions published between January 1, 1983 and December 31, 2008.[27] The study concentrated on reviewing and analyzing the Supreme Court's student speech and expression principles and the lower federal courts' application of these principles to a variety of circumstances involving student speech and expression.

This research and its findings will be a useful tool to guide educators when faced with circumstances requiring decisions about student speech and expression in school. The study was designed to emphasize the challenges administrators face in establishing, interpreting, and enforcing potential limits of student speech and expression. It provides beneficial information for school leaders concerning the Supreme Court's development of student speech and expression rights in public school, and assists in defining the extent of students' current speech and expression rights in school and the proper limits of these rights under the First Amendment to the U.S. Constitution. The study's conclusions and findings, in the form of a reference table, provide direction for school administrators when faced with analyzing situations involving potentially protected student speech and

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[27] The study also reviewed *Tinker* (1969), which constitutes the only decision analyzed in the study that was published outside the aforementioned timeframe. *Tinker* is included in the study because it represents the Supreme Court's first major decision regarding student expression in school and is crucial to a discussion of student expression rights.

expression. Educators can use the information to differentiate between constitutionally appropriate student speech and expression and conduct that ignores or exceeds constitutional protections.

The specific questions addressed were:

1. To what extent do the Supreme Court's student speech and expression decisions provide public school leaders direction in making informed decisions regarding the extent of student speech and expression rights under the First Amendment to the United States Constitution?
2. To what extent does the lower federal courts' application of the Supreme Court's student speech and expression principles provide public school leaders clarification of the Court's decisions and provide direction for making informed decisions regarding student expression in school under the First Amendment to the United States Constitution?

Research Method

To address these questions, this study was conducted following a research methodology commonly referred to as historical research. The study did not attempt to create new data; rather, the study looked at existing documents and was therefore limited to primary and secondary source data. The collected data consisted of reported U.S. Supreme Court and lower federal court student expression decisions.

Historical research is "a process of systematically searching for data to answer questions about a past phenomenon for the purpose of gaining a better understanding of present . . . issues in education" (Marshall & Rossman, 2006, p. 644). It is particularly useful in reexamining questions that have ambiguous or indefinite answers (Marshall &

Rossman). The method is applicable to a review of federal court decisions that interpret rulings by the Supreme Court in subject areas that do not have explicit guidelines and limitations. Further, “it allows for the systematic and direct classification of data,” and utilizes established records and accounts to draw conclusions (p. 119). The objective is not to simply record and report facts, but to analyze data and make connections that establish relationships among the data (Goodman & Krueger, 1988, p. 319). The current study examined the parameters of student speech and expression in school as established by the Supreme Court, reviewed the lower federal courts’ application of the Supreme Court’s student expression decisions to specific student expression situations, and provides school leaders with a better understanding of the limits of student speech and expression rights in school.

Historical education research differs from other forms of educational research because it depends on sources that existed prior to the beginning of a study (Gall, Borg, & Gall, 1996, p. 645). The data is available before the creation of the thesis or research design, whereas other types of research usually require the creation of data as part of the study (p. 645). The data for this study included previously published federal court decisions and scholarly articles discussing those decisions. The study did not develop a case to be heard in federal court.

Historical research, however, is similar to other research methods in the actual process of conducting the study. A historical study delineates a problem, articulates questions, gathers and analyzes data, and draws conclusions based on an analysis of the data against the formulated questions (Best & Kahn, 1998; Goodman & Kruger, 1988). “It is a way of addressing data and sources, asking questions, and building theories based

on evidence" (Goodman & Krueger, p. 316). The current study followed this method by focusing on students' First Amendment speech and expression rights in school as a way to generate conclusions that school leaders could apply in the future.

Gall et al. (1996) described five types of educational problems usually studied through historical research: (1) Social issues, (2) The study of specific individuals, educational institutions, and social movements, (3) Exploration of relationships between events, (4) Synthesis of data, and (5) Reinterpretation of past events (pp. 649-650). Historical research can be classified as qualitative, quantitative, or a combination of both; however, the traditional qualitative approach does not preclude the use of scientific method as "it simply requires the synthesis and presentation of the facts in a logically organized form" (Best & Kahn, 1998, p. 82, quoting Brickman, 1982).

Conducting historical research depends heavily on primary and secondary sources, and criticism of these sources to ensure reliability and accuracy in the study (Brundage, 2002, pp. 16-27; Howell & Prevenier, 2001, p. 60). Primary sources are usually broken into four categories: (1) Quantitative records, (2) Written documents or records, (3) Oral records, and (4) Relics (Best & Kahn, 1998, pp. 85-86; Gall et al., 1996, p. 653). The most common type is documents and records. Legal records, court opinions, and court decisions fall into this category (Best & Kahn, p. 86; Gall et al., p. 653; Marshall & Rossman, 2006, p. 119). Secondary sources *report* on the actual event(s) and are recorded by individuals that were not present at the event (Best & Kahn, p. 87). These sources have limited worth because of the possible errors, personal interpretations, and potential biases that could exist (Best & Kahn, p. 87). Law review articles, as well as academic reports, concerning specific court decisions are placed in this category, as these

merely relay the author's interpretation of the courts' decisions rather than the actual decision (Brundage, pp. 23-25).

In addition, historical research requires that these sources undergo criticism (Howell & Prevenier, p. 60). Two types of criticism are used: external and internal. "External criticism establishes the authenticity or genuineness of data," while internal criticism attempts to evaluate the accuracy or worth of data after it has been authenticated (Best & Kahn, pp. 87-88). The value of a study is often determined by the researcher's ability to judge the validity of the sources and data (Gall et al., p. 657). Further, internal criticism is considered to be more complex because it requires the researcher to use judgment in determining the data's validity (p. 659). However, a historical study must undergo such criticism to ensure a valid study because the main focus of any historical study is a discussion of the "researcher's interpretation of the data obtained through a search of ... secondary and primary sources" (p. 667).

This study was conducted to gain a better understanding of the parameters of students' expression rights in school and the guidelines developed by federal courts to assist educational leaders in making informed decisions regarding student speech and expression rights. Supreme Court and lower federal courts' student expression decisions were reviewed in the study; interpreting past events to gain an understanding of current circumstances is one of the primary purposes of historical research (Gall et al., 1996, p. 644). Further, the study combined two of the five types of historical inquiry: synthesis of data and reinterpretation of past events (Gall et al., pp. 649-650).

Data Sources

The study identified Supreme Court and lower federal court decisions concerning student speech and expression rights in school published between January 1, 1983, and December 31, 2008. The decisions were reviewed individually and then analyzed as a collective whole to provide a better understanding of the current parameters of student speech and expression in school. After identifying and examining the principles of student speech and expression rights delineated through the Supreme Court decisions, the study focused on lower federal court student speech and expression decisions that interpreted and applied the Supreme Court's rulings. This approach allowed for an in-depth review and analysis of the current parameters of student speech and expression in school. A reference table reflecting this analysis is contained in Chapter V.

The synthesized decisions were reviewed utilizing a unique evaluative lens. Instead of looking at the decisions from the traditional student rights aspect, the study incorporated a revisionist approach, critiquing the decisions through the framework of constitutionally limiting student rights. The study was designed to shift the focus away from a specific type of student speech or expression to an analysis of the overall parameters and proper and constitutional limitations a school can establish concerning these rights. The approach also examined the factors that federal courts consider when evaluating the constitutionality of a school's limitation on student speech and expression. This evaluation technique was not utilized to stifle student rights or suggests that students do not retain constitutionally protected rights while in school. The approach was employed to provide school leaders a degree of reassurance when making informed decisions regarding student speech and expression.

In conjunction with reviewing the pertinent Supreme Court and lower federal court decisions, the study reviewed secondary sources to assist in the identification of the current parameters of student speech and expression rights. The secondary sources also provided greater context for the specific circumstances faced by school leaders. The reviewed sources included academic studies, articles published in professional education and academic periodicals, and legal journal and law review articles.

Data Collection Procedures

Published Supreme Court and lower federal court decisions were the primary data for this study. Data were collected utilizing the LexisNexis legal research system. The Shepard's Citation system and Westlaw Legal Database were also consulted to ensure comprehensive coverage.

LexisNexis

LexisNexis is a legal database containing all published court decisions in the United States. The method used to locate relevant court decisions entailed crafting "term" searches, which located decisions that included the specific terms and concepts contained in the search query. The "term" searches produced decisions that contained the terms "school," "pupil or student," "right or rights," and "speech or expression," and referenced *Tinker* v. *Des Moines Sch. Dist.* (1969), *Bethel Sch. Dist.* v. *Fraser* (1986), *Hazelwood Sch. Dist.* v. *Kuhlmeier* (1988), or *Morse* v. *Frederick* (2007). The search terms were required to appear in the same paragraph, and at least one of the Supreme Court decisions – *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* – had to be referenced in the decision. The search was restricted to federal court decisions published between January 1, 1983, and December 31, 2008.

Secondary searches utilizing the LexisNexis Headnote System also produced decisions concerning student expression issues. The Headnote system allowed for a search of the Lexis database utilizing pre-set terms developed by Lexis. Headnote searches provided decisions that contained the following Headnote sequence: Education Law > Student > Speech > General Overview. The utilization of LexisNexis' computerized Shepard's Citation function provided additional relevant material as it allowed for the tracing of a particular issue throughout numerous subsequent decisions and provided a link to decisions citing earlier relevant decisions. It also provided guidance in locating law review articles and other published documents that discussed the federal court decisions.

Westlaw

The Westlaw database system was utilized to obtain legal articles and additional secondary sources to supplement the decisions contained in the study. Westlaw is a comprehensive legal database reporting published and unpublished court decisions, law review and legal journal articles, state and federal statutes, as well as other legal materials. The Westlaw database contains much of the same information as LexisNexis and the two sources were used in conjunction to ensure comprehensive review.

Shepard's Citation

Shepard's Citation database provided assistance in locating court decisions. This database chronicles court decisions and allows the user to quickly determine whether the decision has been followed, questioned, or overturned by a later decision and informs the user of whether the decision has been cited by later courts. Shepard's allowed the researcher to identify a list of decisions that cited the specific Shepardized decision. The

generated lists began with the most recent decisions, with the remaining decisions listed in reverse chronological order. The located decisions were reviewed to determine whether the decision provided a discussion or analysis of the Shepardized case or if the decision had simply been cited for an ancillary purpose or point that was outside the study's scope.

Data Analysis Criteria

Once the databases identified decisions that matched the search terms, the returned decisions were read. Although all returned decisions were read, decisions included in the Chapter IV data discussion were selected based on specific criteria. The selected decisions were chosen as a representation of the current student speech and expression in school landscape and emphasized areas of student speech and expression not specifically addressed by the Supreme Court. The lower federal court decisions were selected to highlight the diverse challenges school leaders face in interpreting the Court's announced student speech and expression rights. The selected decisions also provided a view of the factors and considerations the federal courts use when making decisions regarding student speech and expression in school.

Decisions were included in the Chapter IV data set, if the decision: (a) discussed student speech or expression in school, (b) interpreted and utilized Supreme Court rationale from *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse*, (c) applied the analysis to a fact pattern that had not been adjudicated by the Supreme Court, and (d) produced rationale and a holding that clarified or furthered the interpretation of the Supreme Court's announced position. Furthermore, decisions that reviewed fact patterns similar to *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse*, but provided a varied analysis that extended or modified

the Supreme Court's holding were also included in Chapter IV.[28] Lower federal court decisions that specifically tracked the reasoning and rationale utilized by the Supreme Court in *Tinker*, *Fraser*, *Hazelwood,* or *Morse*, discussed a fact pattern and issues analogous to those previously considered by the Court, and produced a holding that merely restated what the Supreme Court had previously held were not included in the data set discussed in Chapter IV.

The same approach was taken when multiple lower federal court decisions concerning the same (or extremely similar) issues were encountered. Decisions that restated what a federal court had previously held, and failed to further the understanding of the Supreme Court's student speech and expression decisions or the current parameters of student speech and expression rights in school were excluded. If an opinion was published that had subsequently been overturned or rendered moot by a later Supreme Court or other federal court decision, the decision was excluded from the Chapter IV data set. In similar factual situations where a split occurred among the lower federal courts concerning a specific student speech or expression issue, decisions representing the different positions were included in the Chapter IV data set based on the previously discussed criteria.

Chapter IV Data Findings

Chapter IV reviewed and presented this study's data in two stages. First, the study reviewed Supreme Court student speech and expression decisions. The first stage findings began by reviewing the articulated parameters of student speech and expression

[28] An example of this type of decision would be a lower federal court decision that examined a student speech during a student election assembly like the Court did in *Fraser*. However, instead of applying a *Fraser* analysis the lower court applied a *Kuhlmeier* type analysis to the facts and examined the speech in terms of being given during the course of a curriculum related activity rather than examining the possible lewd and vulgar style of the speech.

in four Supreme Court cases: *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*. The decisions were summarized and discussed to provide a broad view of the principles the Supreme Court has established for addressing student speech and expression in schools. The second stage of findings reviewed lower federal court student speech and expression decisions. The discussion focused on the lower federal courts' interpretation and application of the Supreme Court's student speech and expression decisions in specific circumstances, and the identification of Court established guidelines that school leaders can use in making informed decisions regarding student speech and expression rights under the First Amendment. The lower federal court decisions were grouped by specific type of student speech or expression allowing a review of the federal courts' developing and shifting approach to each specific type of student speech or expression and the changing parameters of constitutional student speech and expression in school.

CHAPTER IV

THE LIMITS OF STUDENT SPEECH AND EXPRESSION RIGHTS AS ARTICULATED BY THE FEDERAL COURTS

Introduction

Since 1983, the federal courts have decided numerous cases involving students' rights and the education process. This chapter contains a discussion of federal court decisions concerning student speech and expression rights in school. The chapter is divided into two sections: (a) The Supreme Court and Student Speech and Expression; and (b) *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*: Federal Circuit and District Courts' Interpretations of Supreme Court Student Speech and Expression Decisions. The chapter includes a discussion of four Supreme Court decisions, as well as numerous lower federal court decisions concerning student speech and expression in school, published between January 1, 1983, and December 31, 2008.

The Supreme Court decisions in *Tinker* v. *Des Moines Indep. Sch. Dist*. (1969), *Bethel Sch. Dist.* v. *Fraser* (1986), *Hazelwood Sch. Dist.* v. *Kuhlmeier* (1988), and *Morse* v. *Frederick* (2007) provide the Supreme Court's perspective of student speech and expression in school and offer four principles for guiding the First Amendment analysis of student speech and expression situations. The lower federal court decisions applied these four principles to a variety of circumstances and addressed an array of challenges faced by school leaders over the last 25 years. The lower federal court decisions populate the areas of the student speech and expression spectrum between the Supreme Court's four decisions, revealing that each lower court decision incorporates or references at least one of the Supreme Court's four announced principles.

The Supreme Court and Student Speech and Expression

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there of; 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. (USCS Const. Amend. 1)

In *Tinker*, the Supreme Court articulated that students do not shed their constitutional rights when they enter the schoolhouse (*Tinker*, p. 506). Although this remains true, since *Tinker* the Supreme Court has limited the extent of students' speech and expression rights in school. The Court has concluded that students' rights are not the same as those of adults in other facets of society, and that the special characteristics of the school environment dictate that school leaders may exert more control over student speech and expression on school grounds than student speech offered off school grounds.

The Supreme Court's four decisions on student speech and expression in school attempt to strike a balance between respecting students' First Amendment rights and school leaders' responsibility for maintaining a productive educational environment. The Court addressed the facts of four different specific situations, but the decisions for the cases developed principles that have applicability beyond the circumstances that came before the Court. Conducting a review of these decisions and providing a discussion of the lower federal courts' utilization of the identified principles will assist school leaders. The conclusions of this review will provide school leaders direction for making informed decisions when confronted with student speech and expression dilemmas in the future.

Wearing The Tinkers' Armband

In December 1965, after meeting with family and community members, several students decided to wear black armbands to school to protest the Vietnam War. The school administration learned of the planned student action and adopted a policy, which mandated that any student wearing an armband would be asked to remove it. If any student refused, he or she would be sent home, suspended, and not allowed to return until the student returned without the armband. John Tinker, his sister and one other student wore their armbands to school and were advised that day of the new school regulation. They were sent home and suspended until they agreed to return without them (*Tinker*, p. 504).

Tinker filed suit in the U.S. District Court for the Southern District of Iowa claiming a violation of his First Amendment freedom of expression. The district court upheld the school district's action as reasonable to prevent disruption of the education process. An evenly split Eighth Circuit Court resulted in the district court opinion being affirmed.

In *Tinker* v. *Des Moines Indep. Sch. Dist.*, the Supreme Court addressed a conflict between students' First Amendment expression rights and school leaders' ability to maintain the educational process. The Court's opinion focused on determining the extent of students' speech and expression rights while in school. The Court began with the proposition that the armband demonstration "was closely akin to 'pure speech' which…is entitled to comprehensive protection under the First Amendment" (pp. 504-506). The preliminary conclusion was used as a springboard by the Court to extensively discuss the state of students' constitutional rights in school.

The Court established a point that has since been articulated in nearly every student rights decision since *Tinker*:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. *It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.* This has been the unmistakable holding of this Court for almost 50 years. (p. 506, emphasis added)

Thus, the Court began from the position that John Tinker (and all school children) possess rights under the U.S. Constitution, and that these rights must be respected by school leaders. Since the *Tinker* decision, the idea that students do not shed their constitutional rights at the schoolhouse gates has been broadened from encompassing only speech and expression to including privacy in searches as well as religious rights (e.g., *Board of Educ.* v. *Earls*, 2002, p. 844). However, the special characteristics of the school environment idea, embedded in the *Tinker* Court's statement, has since been utilized by the Court to counterbalance these constitutional freedoms and justify reduced levels of students' rights in school (*Tinker*, p. 506; *see also New Jersey* v. *T.L.O.*, 1985, p. 348; *Hazelwood Sch. Dist.* v. *Kuhlmeier*, p. 266).

In reinforcing the idea of students' constitutional rights in school, the Court found that teachers and school leaders do not have absolute authority over students (*Tinker*, p. 511), and whether in or out of school, students are considered people under the Constitution. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views" (p. 511). The *Tinker* Court stated that students' rights do not merely exist in the classroom, but are also present in the cafeteria, on the playing field, and in other places on the school's campus. Further, under *Tinker*, a student may express his or her views, even if

controversial, in any of these locations as long as they are expressed without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without trampling other students' rights (p. 513).

The Court stated that the challenge of the case was addressing a situation where the exercising of student free expression rights collided with school rules and authority (*Tinker,* p. 508). The Court specifically articulated when it believed that the state or school district could regulate speech:

> In order for…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 that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained. (p. 509)

The Court found that the students wearing armbands did not provide any reason for school authorities to believe it would cause disruption, materially interfere with the education process, or impinge on other students' rights (p. 509).

> School officials banned…silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be left alone. (p. 508)

Instead, the Court found the school officials' actions were based on a desire to avoid any controversy that might arise because of certain students' expression of opposition to the nation's participation in Vietnam. Further, the Court found that the position taken by the school district constituted viewpoint discrimination because the school had not prohibited the wearing of other political symbols. The ban was not based on an actual disruption or

the reasonable forecast of a substantial and material disruption. Thus, school officials prohibiting the wearing of black armbands as a political expression was unconstitutional (p. 511).

Through this decision, the Court established that students retain constitutional rights while at school and specifically have First Amendment speech and expression rights. However, the Court did not go so far as to state that students enjoyed unlimited speech rights. In his dissent, Justice Black adamantly voiced:

> One does not need to be a prophet or the son of a prophet to know that after the Court's holding…some students…will be ready, able and willing to defy their teachers on practically all orders…It is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools. (p. 525)

As a result of the position taken by Justice Black, the majority repeatedly stated that students' First Amendment rights were not without limit.

The Court did not grant students unlimited free speech. Instead, it provided parameters for the proper exercise of the rights, while also noting that the students had affirmative obligations to the state that must be respected and exhibited while at school (p. 511). T*inker* established that private passive student expression did not offend the Constitution, was protected by the First Amendment, and that students had the right to express this type of speech on school grounds during the school day. However, the decision also articulated that students have the responsibility to exercise their free speech rights in a way that does not materially or substantially disrupt the educational process or invade the rights of others (p. 513). The Court's conclusion in *Tinker* established the first principle for evaluating student speech and expression in school: **Students may voice private political expression, and school leaders may only limit the expression if it**

substantially and materially disrupts the educational process or invades the rights of other students.

The *Tinker* v. *Des Moines Indep. Sch. Dist.* Decision ushered in a new era of Court involvement with student rights and responsibilities in schools. *Tinker* specifically addressed students' speech and expression rights; however, the mandates of *Tinker* concerning students' constitutional freedoms have transcended all areas of student rights, and the *Tinker* rationale has been used in the context of privacy, search, and religion. Although the Court has moved away from the *Tinker* standard in certain circumstances or created exceptions that threaten to swallow the rule, *Tinker* continues to be viewed as the foundation for students' rights in school (see *Morse* v. *Frederick*, Justice Thomas concurrence, p. 2636).

Fraser's Lewd Speech

Eighteen years after the Court first safeguarded students' right to freedom of expression in school in the form of private and non-disruptive political expression, the Court examined the constitutionality of student speech during a school-sponsored activity. In *Bethel Sch. Dist.* v. *Fraser* (1986), the Court was faced with the question of "whether the First Amendment prohibits a school district from disciplining a high school student for giving a lewd speech at a school assembly" (*Fraser*, p. 677). The Ninth Circuit held that such a speech did not offend the Constitution and was protected by the First Amendment. The Supreme Court reversed and held the school district acted within its authority by punishing Matthew Fraser for his "offensively lewd and indecent speech" (p. 685). Further, the Court found that the district took appropriate action in

disassociating from Fraser to show vulgar and lewd speech or conduct was inconsistent with the fundamental values of public education (pp. 685-688).

During a student council officer election assembly, Fraser delivered a speech in support of a candidate, which was characterized as lewd and obscene and described the candidate in "elaborate, graphic, and explicit sexual metaphors" (*Fraser,* p. 678). Fraser exclaimed:

> I know a man who is firm -- 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 every one of you. So vote for Jeff for A. S. B. vice-president -- he'll never come between you and the best our high school can be. (*Fraser,* p. 687)[29]

The assembly was considered a "school-sponsored educational program in self-government" and was attended by approximately 600 students, some as young as 14 years old. Prior to giving the speech, Fraser discussed his speech with two teachers and was told he probably should not give the speech. The morning after the assembly, Fraser was notified he had violated the school's disruptive conduct rule prohibiting the use of obscene language. He was given an opportunity to explain his conduct and he admitted to purposely giving the speech and deliberately using sexual innuendo. He was then notified that he would be suspended for three days and his name removed from the list of

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[29] Justice Brennan provided the text of Fraser's speech in his concurrence and stated that it was hard to believe it was the same speech described by the majority.

potential graduation speakers.[30] Fraser served two days of the suspension before returning to school (pp. 678-679).

After exhausting his administrative remedies, Fraser filed suit in the U.S. District Court for the Western District of Washington alleging a violation of his First Amendment right to freedom of speech. The district court held that the school's sanctions violated Fraser's freedom of speech, the school disruptive conduct rule was unconstitutionally vague and overbroad, and that the removal of Fraser's name from the list of possible graduation speakers violated the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit Court of Appeals affirmed the district court's decision and held that Fraser's speech was indistinguishable from the *Tinker* armbands. The Supreme Court granted certiorari and reversed (*Fraser,* pp. 679-680).

The Court acknowledged that in *Tinker,* the Supreme Court stated, "Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Fraser,* p. 680), but the Court went on to express,

> The marked difference between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker* this Court was careful to note that the case did 'not concern speech of action that intrudes upon the work of the school or the rights of other students'. It is against this backdrop that …we consider the level of First Amendment protection accorded to Fraser's utterance and actions before an official high school assembly. (p. 680)

The Court first discussed the purpose of America's public schools, and determined that schools must inculcate students with values and manners of civility.

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[30] Fraser was elected graduation speaker by write-in vote and delivered a speech at the commencement ceremony.

These values included the tolerance of diverse political and religious views, but these "fundamental values" must take into account the sensibilities of other students. This led to the Court's announcement of a balance that must be struck in the school setting: "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" (*Fraser,* p. 681).

In its *Fraser* opinion, the Supreme Court turned to another area of student rights – Fourth Amendment search and privacy – and cited *New Jersey v. T.L.O.* (1985) to reaffirm that students' constitutional rights in public school are not automatically coextensive with adults' constitutional rights. The Court was specifically referring to the idea that although adults may not be prohibited from using offensive or lewd expressions in making what the speaker considers a political statement or expression, students in public school are not necessarily extended the same courtesy (*Fraser*, pp. 682-683). To support this point, the Court pointed to other limits it had established for First Amendment speech, including recognizing an interest in protecting minors form vulgar and offensive language, limiting sexually explicit speech from reaching an unlimited audiences that could contain children, and acknowledging that a school board may remove books from the public school library that are pervasively vulgar (p. 684).

The Court refrained from defining "lewd and vulgar speech." Instead, the Court deferred to local school officials: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" (*Fraser,* p. 683). Further, the Court noted, "Schools…may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd,

indecent, or offensive speech and conduct" (p. 683). The Supreme Court then held that the school district acted well within its authority by sanctioning Fraser for his offensively lewd and indecent speech.

The Court pointed out that unlike in *Tinker*, the sanctions received by Fraser were not related to a political viewpoint: "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic education mission" (p. 685). The Court made mention of the political context of the speech, but quickly moved away from this component of the case's facts, focusing instead on the school's responsibility to inculcate values and to prevent the disruption of the educational process.

Dissenting to the Court's decisions, Justice Stevens began, "Frankly, my dear, I don't give a damn" (*Fraser,* p. 691). The Clark Gable quote was not an attempt to show that the Justice had no interest in the case, but was used to make the point that standards change over time. Although Clark Gable's statement shocked many people when it was first uttered, Justice Stevens argued that during the mid-1980s, the statement might not have been as offensive, and that "a group of judges who are at least two generations and 3,000 miles away from the scene" might not be in the best position to determine what speech is currently lewd or obscene (p. 692).

Beyond stating that there was a possible disconnect between the Court and the general public, especially teenagers, Justice Stevens dissented because of what he considered to be the unfair punishment of a student who was not aware of the possibility of punishment for his actions. The majority concluded that Fraser's due process rights had not been violated because his discussion with two teachers and the student handbook

had provided him sufficient warning about the possible consequences and sanction (*Fraser,* p. 686). Although Justice Stevens agreed that a school should be able to regulate content and style of student speech that is carried out in furtherance of the school's education mission, he stated that if a student was going to be punished for utilizing inappropriate speech, that student is entitled to fair notice of the possible consequences and the prohibited expression. He believed the protections of the First Amendment and the Due Process Clause of the Fourteenth Amendment mandated this conclusion (p. 692).

Despite the dissent, the Court concluded that the school's actions were reasonable and did not violate Fraser's constitutional rights. In the process, the Court distinguished the passive, private, political speech in *Tinker* from lewd speech offered at a school-sanctioned event. The Court held that a school could not only disassociate itself from such speech, but that "the First Amendment did not prevent the school officials from determining that to permit a vulgar and lewd speech…would undermine the school's basic educational mission" (*Fraser,* p. 686). Thus, the Court established the second principle for constitutionally limiting student speech and expression: **School officials may prohibit or suppress student expression that is lewd, uncivil, vulgar, or obscene in the classroom or at school assemblies.**

Kuhlmeier and the Student Press

Only two years after *Fraser*, the issue of student expression in the context of a school-sponsored activity once again was back before the Supreme Court; however, this time, it was an issue of student press and publication in a school-sponsored or endorsed newspaper. In *Hazelwood Sch. Dist.* v. *Kuhlmeier* (1988), the Supreme Court addressed

the "extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum" (p. 262).

Three former Hazelwood East High School students filed suit against the school principal, Robert Reynolds, the Hazelwood School District, and various other school officials, alleging that the school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of the school newspaper, *Spectrum*. The U.S. District Court for the Eastern District of Missouri held that no First Amendment violation had occurred based in part on the Supreme Court's holding in *Fraser*. The Eighth Circuit Court of Appeals reversed the holding that *Spectrum* was a public forum, which precluded school officials from censoring its content. The Eighth Circuit based its holding on the Court's opinion in *Tinker* (*Kuhlmeier*, pp. 263-266). The Supreme Court granted certiorari and reversed the Eighth Circuit.

Spectrum was written and edited by the school's Journalism II class. The board of education allocated funds to help pay for the production of the paper. The general practice at Hazelwood East was that prior to publication of the paper, page proofs were submitted to Reynolds for his review. When Reynolds reviewed the proofs for the May 13th issue, he objected to two of the articles that were scheduled to appear in the paper. The first story described Hazelwood East students' pregnancy experiences and the second was a story about the impact of divorce on students at the school. Reynolds did not believe the pregnancy story could keep the identity of the pregnant students private, even though the names had been changed. He was also concerned that the information concerning sexual activity and birth control was inappropriate for younger students. As for the story concerning divorce, Reynolds believed that a student's derogatory comments

about her father, which were included in the article, required that the girl's family should have been contacted and given an opportunity to respond, which the article's author had not done (*Kuhlmeier*, pp. 262-263). Reynolds felt that there was insufficient time to rewrite the stories and still get the paper to press on time. He directed the Journalism II teacher to withhold the pages containing the articles from the paper, and publish the May 13th edition without the two pages.

The Court began by revisiting its decisions concerning student rights and looked not only to student speech and expression precedent, but also to the precedent the Court had established in the context of students' Fourth Amendment rights in *T.L.O*. The Court focused on its announcement that students' right are not coexistent with those of adults, that students' rights must be examined and applied "in light of the special circumstances" inherent in the school context, and that a school is not required to tolerate speech that is inconsistent with the school's education mission (*Kuhlmeier*, p. 266). The Court went on to reiterate that it was the local school board's position, not the federal court's, to determine what constitutes inappropriate classroom and school assembly speech. It was against this student speech and expression backdrop that the Hazelwood student's claims had to be considered (p. 267).

The Court first reviewed whether *Spectrum* was a public forum as the Eighth Circuit had concluded. The Court found the evidence relied on by the Eighth Circuit "equivocal at best," and that the school district had neither created nor endorsed *Spectrum* as a public forum (*Kuhlmeier*, p. 269). Before reaching this conclusion, the Court pointed out,

> School facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities

> 'for indiscriminate use by the general public,' or by some segment of the public such as student organizations. If the facilities have instead been reserved for other intended purposes, 'communicative of otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers and other members of the school community. (p. 267)

The Court's interpretation dictated that a school must take affirmative steps to create a public or limited public forum.

After establishing how a public forum was generally created by a school district, the Court specifically looked at Hazelwood East's policies and practices to determine if the school district had designated *Spectrum* a public forum. The Court determined that *Spectrum* was a component of the curriculum, was defined as such by board policy and the Hazelwood East curriculum guide, and was not a public forum (*Kuhlmeier*, p. 268). The Court pointed out that *Spectrum* should be viewed as a portion of the curriculum because Journalism II was taught by a school faculty member and students received a grade for their work on *Spectrum*. The Court also found that the district had not deviated from treating *Spectrum* as part of the curriculum because the journalism teacher retained final authority over nearly every aspect of the student newspaper, including content. Further, even after the Journalism teacher approved the paper, Principal Reynolds reviewed the paper before publication. The Court concluded, "School officials did not evince either by policy or by practice" any intent to open the pages of *Spectrum* to "indiscriminate use by its student reporters and editors, or by the student body generally" (p. 270). The school utilized the paper as a supervised learning experience for students in Journalism II. The Court stated that it was this standard, rather than the holding in *Tinker*,

that gave school officials the ability and right to regulate the content of *Spectrum* in a reasonable manner.

The majority and the dissent agreed that the Court's decision parted ways with the standard established in *Tinker*. The majority explained the distinction and need for a different approach because of the different questions addressed in the cases:

> The question whether the First Amendment requires a school to tolerate particular speech…is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech…The latter question concerns educators authority over school-sponsored publications…that students, parents, and member of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum. (pp. 270 -271)

The Court articulated three reasons for educators exercising greater control over the second type of student speech and expression: (a) to insure that students learn the lessons the class or activity intended to teach, (b) to safeguard against learners being exposed to information and material that is inappropriate for their maturity, and (c) to prohibit an individual speaker's view from being attributed to the school (p. 271). The Court went on to posit that schools need authority to set high standards for student speech that is published or communicated "under its auspices" (p. 271). The standards may be higher than those utilized in the public, and schools have the right to refuse to disseminate student speech that does not reach these standards (pp. 271-272).

Without giving schools this freedom and without giving students a raised level of responsibility, the Court found that schools would be unduly constrained in fulfilling their role of helping students adjust to their environment, assisting in their educational development, and stimulating their cultural awareness (*Kuhlmeier*, p. 272.). The Court concluded that the *Tinker* standard did not need to be the standard utilized when

determining "when a school may refuse to lend its name and resources to the dissemination of student expression" (p. 272). In place of the *Tinker* standard, the Court held that "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" (p. 273).

The Court reasoned that this new standard respected the view that the primary responsibility of educating students rests with the local school board, teachers, and parents. "It is only when the decision to censor a school-sponsored publication…has no valid educational purpose that the *First Amendment* is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights" (*Kuhlmeier*, p. 273). This new position dictated judicial action that was almost in direct contradiction of the Court's opinion in *Tinker*, where the Court announced that a school could censor student expression *only* if "it materially disrupts class work or involves substantial disorder or invasion of the rights of others" (*Tinker*, p. 513). Less than 20 years after *Tinker*, the Court had gone from protecting private student expression rights and limiting when a school *could* interfere to announcing that the courts will only step in to curb school censorship when the censorship of student expression in a school-sponsored publication is not "reasonably related to a legitimate pedagogical concern" (*Kuhlmeier*, p. 273).

Justice Brennan, in his dissenting opinion, acknowledged the break from *Tinker*, but argued it was not needed. He argued that the Court applied the *Tinker* test to *Fraser*, but instead of continuing to utilize *Tinker*, the *Kuhlmeier* majority created a dichotomy in which *Tinker* applied to one type of expression but not to another. Brennan believed that

Tinker should have been utilized because under *Tinker,* the school still had the freedom to "constitutionally censor poor grammar, writing, or research because to reward such expression would 'materially disrupt' the newspaper's curricular purpose (Brennan dissent, p. 284). Justice Brennan's position, however, assumed that a break had not already occurred from *Tinker*: "From the first sentence of its analysis, *Fraser* faithfully applied *Tinker*" (p. 282).

The *Kuhlmeier* majority did not thoroughly address the applicability of *Tinker* to *Fraser*, merely noting Justice Brennan's argument in a footnote. [31] However, the majority did note that the *Fraser* decision rested on the lewd and vulgar character of a speech delivered at a school-sponsored event, cited the *dissent* from *Tinker* as support for the Court's decision in *Fraser* (*Kuhlmeier*, p. 271, ftnt. 4), and indicated that the *Fraser* majority had moved away from a strict *Tinker* analysis. Thus, the Supreme Court's holding in *Kuhlmeier* created a third distinct standard for addressing students' First Amendment speech and expression rights in school, not merely a dichotomy as Justice Brennan's dissent suggested.

Utilizing this third approach for addressing student speech and expression in school, the Court concluded that under the particular circumstances of the case Principal Reynolds acted reasonably and had not violated the students' speech and expression rights. The Court believed that the identifying information in the pregnancy article potentially violated any pledge of anonymity given to the subject of the article, that it was

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[31] The majority in *Morse* v. *Frederick* (2007), 20 years after *Kuhlmeier* and the next Supreme Court student speech decision, also took issue with Justice Brennan's stance stating that the Court broke from *Tinker* in *Fraser* and then the *Kuhlmeier* majority established a *third* student speech standard (*Morse*, p. 2626). Justice Thomas' concurrence in *Morse* also noted the move away from *Tinker* in *Fraser*: "Distancing itself from *Tinker's* approach, the *Fraser* Court quoted Justice Black's dissent in *Tinker*" (*Morse*, p. 2634).

reasonable for the principal to be concerned about the content of the article being inappropriate for the younger students, and that it was reasonable for the principal to believe that the father discussed in the divorce article was entitled to an opportunity to defend himself (*Kuhlmeier*, pp. 274-275). Further, the time constraints relating to publication made the principal's decision to exclude the pages containing the articles reasonable. "In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither…article…was suitable for publication in *Spectrum*…the principal's decision to delete two pages of *Spectrum*…was reasonable ... Accordingly no violation of First Amendment rights occurred" (p. 276).

Kuhlmeier created a third principle for evaluating students' speech and expression rights and responsibilities. Instead of articulating it in terms of students' rights, the Court announced the new approach in terms of school officials' rights: **School leaders may exercise "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"** (pp. 272-273). This limited students' rights and specifically established that students were not free to publish articles in curriculum related newspapers concerning any issue they wished.[32] In broad terms, it gave school

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[32] Numerous states have passed statutes, which grant students' freedom of the press rights that extend beyond the limited rights established in *Kuhlmeier*. The laws have been nicknamed "anti-Hazelwood statutes" (Sanders, p. 168). Arkansas has adopted a chapter governing student press titled the "Arkansas Student Publication Act" (*see* ARK. CODE ANN. §§6-18-1201 to -1204, 2008), which specifically provides "Student publications policies shall recognize that students may exercise their right of expression, within the framework outlined in § 6-18-1202. This right includes expression in school-sponsored publications, whether such publications are supported financially by the school or by use of school facilities, or are produced in conjunction with a class" (A.C.A. § 6-18-1203, 2008).

The California student press statute provides, in part "Students of the public schools shall have the right to exercise freedom of speech and of the press…whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous…Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications

subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section. There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section. "Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee" (CAL. EDUC. CODE § § 48907, 2008).

The Colorado General Assembly codified public school students' publication rights. The statute specifically states: "students of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section ... Nothing in this section shall be interpreted to authorize the publication or distribution in any media by students of the following: (a) expression that is obscene; (b) expression that is libelous, slanderous, or defamatory under state law; (c) expression that is false as to any person who is not a public figure or involved in a matter of public concern; or (d) expression that creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school or that violates the rights of others to privacy or that threatens violence to property or persons." The Colorado General Assembly further directed that if a student publication is made generally available the publication will be designated a public forum (COLO. REV. STAT. § 22-1-120, 2008).

Iowa has granted student journalist broad freedom with limited exceptions. "Students of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications. 2. Students shall not express, publish, or distribute any of the following: *a.* Materials which are obscene. *b.* Materials which are libelous or slanderous under chapter 659. *c.* Materials which encourage students to do any of the following: (1) Commit unlawful acts. (2) Violate lawful school regulations. (3) Cause the material and substantial disruption of the orderly operation of the school." The statute further established that there would be no prior restraint by school officials except if the publication violated the guidelines provided in the statute, and student editors have content control over publications. The statute also disassociated the school from the student expression in the publication; "any expression made by students in the exercise of free speech, including student expression in official school publications, shall not be deemed to be an expression of school policy, and the public school district and school employees or officials shall not be liable in any civil or criminal action for any student expression made or published by students" (IOWA CODE § 280.22, 2007).

The Kansas Student Publication Act provides "liberty of the press in student publications shall be protected. School employees may regulate the number, length, frequency, distribution and format of student publications. Material shall not be suppressed solely because it involves political or controversial subject matter." Like Iowa, the act provided that student expression in school-sponsored student-created publications was not an expression of the school (KAN. STAT. ANN. § 72-1504 to -1506, 2008).

Massachusetts provides, "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions. Any assembly planned by students during regularly scheduled school hours shall be held only at a time and place approved in advance by the school principal or his designee. No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students. For the purposes of this section and sections eighty-three to eighty-five, inclusive, the word student shall mean any person attending a public secondary school in the commonwealth. The word school official shall mean any member or employee of the local school committee" (MASS. GEN. LAWS ANN. ch. 71, § 82, 2008).

Each of these states has adopted laws that expand student speech, expression, and press rights. Although states have the constitutional right to pass laws and regulations that grant students more freedom than those provided by the Supreme Court and the federal Constitution, states *cannot* pass measures that

leaders great latitude in controlling student expression that was voiced or published during a school-sponsored or curriculum-related activity.

Back to Black

Twenty years after he filed his dissenting opinion in *Tinker*, Justice Black's *Tinker* dissent was cited in the next two student speech and expression cases addressed by the Supreme Court. The Court had limited student expression in *Fraser* and *Kuhlmeier* in a manner that was somewhat consistent with his dissent in *Tinker*. Justice Black stated:

> The crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech – 'symbolic' or 'pure' – and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent…I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. (Black dissent, p. 517)

Although the second question seemed included for dramatic effect, the *Fraser* and *Kuhlmeier* majority opinions reiterated that the primary responsibility for educating students, making decisions concerning the content of curriculum, and determining what manner of speech is inappropriate in the classroom or at a school-sponsored event does rest with the local school officials (*Fraser* p. 683; *Kuhlmeier*, p. 273). However, the *Fraser* and *Kuhlmeier* decisions also answered Justice Black's first question; the answer was no. Students and teachers are not unconditionally allowed to utilize the school as a platform for exercising their First Amendment free speech and expression rights.

Justice Black warned that the *Tinker* decision subjected all public schools "to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students" (*Tinker*, p. 525). The Court addressed Justice Black's fear in the form of Matthew Fraser.

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articulate student rights in a manner that is more restrictive than the protections the Constitution provides, as determined by the Supreme Court.

Although Fraser might not fit the description of the student Black provided, the point that Justice Black was attempting to communicate materialized in Fraser's speech. Fraser was a well-liked student that offered a speech of questionable taste after being warned that it was inappropriate. When he was punished for it, Fraser grasped the rationale of *Tinker* for protection.

In condemning Fraser's behavior, the *Fraser* Court turned to Justice Black for the proposition that "the Federal Constitution [does not] compel teachers, parents, and elected school officials to surrender control of the American public school system to public school students" (*Fraser,* p. 686 quoting *Tinker* dissent, p. 526). In holding that the school could sanction Fraser for offensively lewd and indecent speech and could separate itself from student expression that is vulgar and lewd, *Fraser* embraced principles articulated by Justice Black in his *Tinker* dissent. Black offered, and the *Fraser* Court reiterated through its holding, "the truth is that…[a] high school pupil no more carries into a school with him a complete right to freedom of speech and expression than" any person to enter into the Supreme Court or the Senate "contrary to their rules and speak his mind on any subject he pleases" (*Tinker* dissent, pp. 521-522).

The *Kuhlmeier* Court also restricted student speech and expression rights in a manner that was consistent with arguments first articulated by Justice Black. Justice Black reasoned, "Children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders…taxpayers send their children to school on the premise that at their age they need to learn, not teach" (p. 522). Although speaking in the context of political expression and about Iowa schools, Justice Black stated,

> Public schools…are operated to give students an opportunity to learn, not talk politics by actual speech, or by 'symbolic'

> speech…here the Court should accord Iowa educational institutions the…right to determine for themselves to what extent free expression should be allowed in schools. (p. 524)

Although not citing this point, (possibly because the Court was announcing a different test from *Tinker*), the *Kuhlmeier* Court's reasoning about school leaders' ability to censor student expression in school-sponsored or curricular-related activities falls in line with Justice Black's statements. The *Kuhlmeier* Court articulated legitimate pedagogical reasons for restricting student press when such a program (the school newspaper) was developed as part of a curriculum, (i.e., as a learning tool for students), and school officials could reasonably restrict student speech and expression in that forum (*Kuhlmeier*, p. 267). Further, the Court again stated that the main responsibility for educating students rested with the school board and local school authorities, not with the courts. Two decades after Justice Black expressed concerns about giving students too much First Amendment speech and expression freedom, the Supreme Court had restricted the freedoms Justice Black opposed when they were originally granted.

NO "BONG HiTS 4 JESUS"

Nearly twenty years lapsed after *Kuhlmeier* before the Supreme Court once again addressed student expression in school. On January 24, 2002, the Olympic torch passed through Juneau, Alaska, and proceeded along a street in front of Juneau-Douglas High School (JDHS). The school's principal, Deborah Morse, permitted students and school staff to participate in the Torch Relay as a sanctioned school activity (*Morse*, p. 2622). Students were excused from classes to watch the torch relay, while teachers and administrators watched and monitored student actions. Joseph Frederick, a JDHS senior, stood with a group of friends across the street facing the school to watch the torch relay.

"As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: BONG HiTS 4 JESUS" (p. 2622). After seeing the banner, Principal Morse immediately approached the students and told them to take the banner down; all of the students complied except Frederick. She told Frederick to report to her office. After meeting with him, Morse suspended Frederick for 10 days. Frederick appealed the suspension and the school district superintendent upheld the suspension but limited it to 8 days, which he had already served (p. 2623).

Frederick filed suit against the school district and Morse in the U.S. District Court for the District of Alaska, claiming that Morse and the school board violated his First Amendment rights. The district court granted Morse and the board summary judgment finding that they had not infringed Frederick's First Amendment rights. The Ninth Circuit Court of Appeals reversed this finding, holding that the district violated Frederick's First Amendment rights because "the school punished Frederick without demonstrating that his speech gave rise to a risk of substantial disruption" (*Morse,* p. 2623). The Supreme Court granted certiorari on two questions: (a) did Frederick have a First Amendment right to display his banner, and (b) if so, was the right so clearly established that Morse may be held liable for damages. The Supreme Court found that Frederick did not have a constitutional right to display the "BONG HiTS 4 JESUS" banner, which dictated that the Court did not need to decide the second question (p. 2625).

Frederick argued that the case did not involve an in-school student speech and expression issue because the events took place across the street from the school. However, the Court determined that Frederick's speech was school-related. The Court identified six factors that showed Frederick's speech was school-related: (a) he was at an

event that occurred during normal school hours, (b) the principal approved the students attending the event, (c) district rules specifically stated that students attending approved social events or field trips are subject to school rules,[33] (d) teachers and administrators supervised the students, (e) the high school band and cheerleaders performed, and (f) the superintendent argued, "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" (p. 2624). The Court agreed with the superintendent's argument. Not only did the Court find that the banner was school-related speech, it went on to state that the facts of *Morse* did not even present a close case that approached the area of "uncertainty at the outer boundaries" of the Court's school-speech jurisprudence (*Morse,* p. 2624). [34]

Next, the Court debated the meaning of the banner. Frederick claimed that "BONG HiTS 4 JESUS" was simply nonsensical, created to attract the attention of the television cameras. The dissent argued that the message could be characterized as anything from obscure to silly to stupid. The Court acknowledged nonsensical gibberish was a "possible interpretation of the words on the banner, but not the only one, suggesting that dismissing the banner as meaningless ignores its undeniable reference to illegal drugs" (*Morse,* p. 2625). The Court concluded that at least two interpretations of the banner endorsed or advocated illegal drug use. Principal Morse advanced these two interpretations and the Court embraced both theories. The message could either be seen as "an imperative: [Take] bong hits," or viewed as "celebrating drug use – bong hits [are

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[33] The school rules referred to by the Court are Juneau School Board Policy No. 5520: "The Board specifically prohibits any assembly or public expression that...advocates the use of substances that are illegal to minors;" and No. 5850: "pupils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program" (p. 2623).

[34] The Court did not discuss what constituted the "outer boundaries" of its school-speech jurisprudence.

a good thing] or [we take] bong hits." The Court viewed both interpretations as promoting the use of illegal drugs (p. 2625).

After establishing that Frederick's "BONG HiTS 4 JESUS" banner was speech, constituted speech related to a school event, and promoted drug use, the Court articulated a new narrower issue: "The question becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may" (*Morse*, p. 2625).

In reaching this conclusion, the Supreme Court briefly reviewed its prior student speech and expression decisions and noted the importance of each decision. The Court stated two points from *Tinker*. First, "the Court made clear that First Amendment rights, applied in light of the special characteristics of the school environment" are retained by students when they enter the school building, and second, student expression may not be suppressed unless "school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school" (*Morse,* p. 2626). In looking at *Fraser*, the *Morse* Court noted that the mode of interpretation utilized by the Court was not clear because the *Fraser* Court focused on the content of Fraser's speech, but also stated that school boards have the authority to decide the manner of speech that is inappropriate in classrooms or school assemblies. The *Morse* Court reasoned that it did not need to resolve the debate; instead, the Court pointed to *Fraser*'s holding that student's constitutional rights in school are not coexistent with adult's rights in other

settings and that *Fraser* established that the *Tinker* analysis was not absolute (p. 2627).[35] In looking at *Kuhlmeier,* the Court found that *Kuhlmeier* was not controlling because a reasonable person could not conclude the "BONG HiTS 4 JESUS" banner was a school publication or school-sponsored or endorsed expression. However, the *Kuhlmeier* decision was still influential because it held that school officials could regulate speech in school that could not be regulated outside the school context, and confirmed that *Tinker* was not the only basis for restricting student speech and expression in school (p. 2627).

The Court also referred to its student privacy and random drug testing decisions. The Court referenced these decisions as support for designating the increasing drug problem and schools' battle against illegal drug use by students as a legitimate pedagogical concern. "The cases [*T.L.O.*; *Vernonia Sch. Dist. 47J* v. *Acton*, 1995; and *Earls*] also recognize that deterring drug use by schoolchildren is an 'important – indeed, perhaps compelling' interest" (*Morse*, p. 2628).[36] Based on these decisions, the *Morse* Court found that student speech and expression at a school event endorsing illegal drug

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[35] The Court noted, "Whatever approach *Fraser* employed, it certainly did not conduct the substantial disruption analysis prescribed by *Tinker*" (p. 2627).

[36] In *Fraser*, *Kuhlmeier*, and *Morse*, the Supreme Court turned to precedent it had established in the context of its students' Fourth Amendment rights decisions to support points being made in the context of student speech and expression in school. Likewise, the Court has relied on points from its speech and expression cases when making determinations in the student search and privacy context. Justice Roberts in his majority opinion in *Morse* specifically stated:

> Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that while children assuredly do not shed their constitutional rights…at the schoolhouse gate…the nature of those rights is what is appropriate for children in school. In particular the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an important – indeed, perhaps compelling interest. (pp. 2627-2628, internal citations omitted)

The cases Justice Roberts referenced, *T.L.O.*, *Acton*, and *Earls*, constitute the Supreme Court's three major decisions concerning the extent of students' privacy rights and Fourth Amendment protections in school. This exemplifies the cross-over between areas of student rights jurisprudence. It also highlights the Court's willingness to utilize principles developed in one area to other student rights circumstances.

use posed a legitimate and serious challenge for school officials trying to protect students from the dangers of illegal drugs. After articulating the influences of its past student rights decisions, the Court created a new category of student expression that could be reasonably and constitutionally restricted. The Court held, "The special circumstances of the school environment and the government interest in stopping student drug use…allow schools to restrict student expression that they reasonably regard as promoting illegal drug use" (p. 2629). The Court established that a particular viewpoint – endorsement of illegal drug use – expressed by students in school or at school related activities could reasonably and constitutionally be censored and sanctioned by school officials without running afoul of the First Amendment.

Although in agreement with the Court's decision, Justice Alito, joined by Justice Kennedy, wrote separately to emphasize that the Court's decision:

> (a) goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue. (*Morse,* p. 2636)

Justice Alito specifically included social and political commentary concerning the war on drugs and the legalization of marijuana as areas to which the court's decision did not extend. This concurrence is key because it emphasizes Justice Alito's position, which provided the majority its needed votes, and that *Morse* was an extremely narrow holding. The decision only provides school leaders with the ability to suppress student expression, in the school setting, that promotes illegal drug use (p. 2636). It did not provide educators (or courts) the foundation to suppress any student speech or expression based on content.

The Court's conclusion and creation of a new category of unprotected student speech, (i.e., speech that could be reasonably and constitutionally regulated by school officials), generated a fourth principle for determining the constitutionality of certain student speech and expression in school: **School officials may restrict student expression they reasonably believe promotes or advocates illegal drug use in school or at school related activities**. The Court's *Morse* decision utilized portions of the approaches used by the Supreme Court in other cases, but distinguished the facts of those cases and the speech or expression at issue from the circumstances faced by the *Morse* Court (e.g., *Morse*, pp. 2626-2627).

Although *Tinker* expressly articulated students' First Amendment speech and expression rights in school, the Court reduced student speech and expression rights in *Fraser* and *Kuhlmeier*, and had created three different principles for addressing student speech and expression in the process (*Morse*, 2007, pp. 2626-2627). The *Morse* decision added a fourth principle. In his *Morse* concurrence, Justice Thomas referenced Justice Black's *Tinker* dissent, and stated:

> Justice Black may not have been 'a prophet or the son of a prophet' but his dissent in *Tinker* has proved prophetic. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in the public schools. (p. 2636)

Thomas wrote separately in *Morse* to argue that the *Tinker* standard had no constitutional basis, and concluded:

> I join the Court's [*Morse]* opinion because it erodes *Tinker*'s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so. (p. 2636)

Forty years after *Tinker* was decided, Justice Black's dissent, as well as *Tinker*'s holding, continues to influence the Supreme Court's opinions concerning student speech and expression in school. As Justice Black encouraged, student speech and expression rights have been restricted, but as Justice Thomas pointed out, the approach has been a "patchwork of exceptions" (*Morse*, p. 311). As of December 31, 2008, the *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* decisions constituted the Supreme Court's perspective of student speech and expression in school.

Tinker, *Fraser*, *Kuhlmeier*, and *Morse*: Federal Circuit and District Courts' Interpretation of Supreme Court Student Speech and Expression Decisions

The four Supreme Court decisions regarding student speech and expression have generated four principles for evaluating student speech and expression in schools. Application of these principles has resulted in varied approaches to student speech and expression issues by lower federal courts. However, each lower federal court decision concerning student speech or expression discussed in this chapter included an interpretation of, or reference to, *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse,* regardless whether the court ruled in favor of the student or the school.

In *Tinker*, the Court established that students retain First Amendment rights when they enter school, although the rights must be examined in light of the special characteristics of the school environment. Student expression may not be suppressed unless "school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school" (*Morse,* p. 2626). *Tinker* is best described as governing private, passive, non-disruptive student expression (*Fraser,* p. 680).

In *Fraser*, the Court focused on the manner of Fraser's speech and the ability of a school to regulate speech that is lewd and obscene. The Court articulated that school boards have the authority to decide the manner of speech that is inappropriate in classrooms or school assemblies. *Fraser* posited that schools can regulate speech delivered "in a lewd or vulgar manner as part" of a school program (*Morse*, Alito concurrence, p. 2637).

Interpretation of *Kuhlmeier* suggests that schools can "regulate what is in essence the school's own speech; that is, articles that appear in a publication" published or endorsed by the school (*Morse*, p. 2637). This has been expanded include speech that is disseminated under any curricular activity, or published under the auspices of the school, and requires that the suppression be reasonably related to a legitimate pedagogical interest (p. 2637).

In *Morse*, the Court concluded that schools could "restrict student expression that they reasonably regard as promoting illegal drug use" (p. 2629). The majority opinion provided that schools retain the ability to censor speech and expression that takes the viewpoint of endorsing or celebrating drug use, which is expressed at a school event or sponsored activity. The concurring Justices made clear that *Morse* extended no further than speech and expression that endorses or promotes illegal drug use.

It is against the backdrop of these four decisions and announced principles that lower federal courts attempt to delineate the constitutionality of specific students' First Amendment speech and expression acts. The result has been a quagmire of lower court decisions that have taken different approaches in applying the Court's student speech and expression principles. The lower courts' navigation of the four posts of the Supreme

Court's student speech and expression jurisprudence has produced varying degrees of interpretation of student rights depending on the specific circumstances confronting the court. Further, the decisions have added depth to the areas of the student speech and expression spectrum that exist among and between the Supreme Court's announced principles, and have further defined such terms as "School-sponsored or curriculum-related activity," and "legitimate pedagogical interest."

The section is broken into 10 subsections that address different types of student speech and expression that the courts have encountered under the broad umbrella of student speech and expression in school. A number of the lower court decisions address categories of student expression that have previously been in front of the Supreme Court. However, in the context of student free speech and expression in school, several issues, including Internet speech and expression and student-athlete speech, have been only addressed by lower federal courts.

Official School Newspapers, Publications, and other Co-Curricular or School-Sponsored Activities

The Supreme Court's third major student speech and expression decision, *Kuhlmeier*, provided that schools can regulate student speech and expression that is given in the context of a school-sponsored event or program or published under the auspices of the district. A lower federal court in Florida held that *Kuhlmeier* "controls all expression that (a) bears the imprimatur of the school and (b) occurs in a curricular activity" (*Bannon* v. *Sch. Dist. of Palm Beach County*, 2004, p. 1214). Further, that court determined that activities are considered curricular if:

> (1) supervised by faculty members, and (2) designed to impart particular knowledge or skills to student participants and

> audiences…*Kuhlmeier* never defined curricular activity in terms of whether student participation was required, earned grades or credit, occurred during regular school hours, or did not require a fee. (p. 1214)

This broad definition expanded (and clarified) *Kuhlmeier*'s reach beyond official student newspapers to nearly any activity associated with or sponsored by the school. This position was affirmed by the Supreme Court in *Morse* (p. 2637). Lower courts have agreed on the principles of *Kuhlmeier* and applied them in a variety of curricular situations, yet they have reached varying conclusions concerning the extent of suppression based on different facts facing each court.

Even before the Supreme Court's decision in *Kuhlmeier*, some lower courts were utilizing reasoning that mirrored the eventual *Kuhlmeier* foundation. In *Bell et al.* v. *U-32 Board of Educ. et al.* (1986), the U.S. District Court for the District of Vermont decided that students' First Amendment rights were not violated when the school administration refused to allow the production of the play, *Runaways*,[37] as the annual spring musical. The federal district court found that the school district funded a significant portion of the production, allowed its name to be used in promoting the play, the performers and crew were high school students, students received grades for participation, and the play was considered part of the curriculum. The court concluded that the school board "acted within its authority to safeguard the well-being of its students and did not violate [the students'] First Amendment rights in refusing to sponsor *Runaways* as its spring musical" (p. 945).

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37 *Runaways* "focuses on the emotions and reflections of several child runaways concerning the problems at home, which they fled, and the problems they face alone in the city" (*Bell*, p. 941). The play covers topics including child abuse, child prostitution, alcohol and drug abuse, and rape.

Although the Supreme Court had not decided *Kuhlmeier* at the time of *Bell*, the District Court for the Eastern District of Missouri had issued its opinion in *Kuhlmeier* v. *Hazelwood Sch. Dist.* (1985), and the *Bell* court cited to and relied on the Missouri federal district court's opinion for guidance. The *Bell* court stated that the play was challenged by the administration because of questions concerning the appropriateness of the school- sponsored play for students of various ages. Further, the decision was classified as curriculum-related because the play was considered part of the school curriculum; however, "The distinction between curricular and extra-curricular activities is not particularly pertinent in this context. It is enough that the activity at issue is a school sponsored program" (*Bell*, p. 944, citing *Kuhlmeier* v. *Hazelwood Sch. Dist.*, pp. 1462-1465 [E.D. MO 1985]). As students' First Amendment rights are "somewhat limited, in light of the special circumstances of the school environment,"[38] the court concluded that students' speech and expression rights "must give way to the board's responsibility for the well-being of the larger student body that would be affected by production of the play" (p. 945).

In the three years prior to the Supreme Court's *Kuhlmeier* decision, the Eighth Circuit decided two cases concerning prior restraint and a school's ability to censor student speech or expression when it is expressed in the context of a school-sponsored publication or event. In the case of *Kuhlmeier*, the Eighth Circuit held that a school could not censor student speech because the school had created an open forum, stating that the school violated student free speech and expression rights when it deleted two pages of the school-sponsored student newspaper (*Kuhlmeier*, p. 1374, 8th Cir. 1987). In *Bystrom et*

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[38] Although included as a precursor to *Kuhlmeier*, the *Bell* opinion also referenced language from *Tinker* in its acknowledgement of the special characteristics of the school.

al. v. *Fridley High School et al.* (1987), the Eighth Circuit upheld a school policy that gave school administrators the right to review publications prior to distribution on the school's campus. The decision spoke only to the facial constitutionality of the particular school policy governing review before distribution (p. 755).[39] Six months after *Bystrom*, the Supreme Court published *Kuhlmeier* and provided a new standard: when the school has not affirmatively designated a school publication, activity, or program a public forum, "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" (*Kuhlmeier*, p. 273).

The year after the Supreme Court's decision in *Kuhlmeier*, the Ninth Circuit, in *Burch et al.* v. *Barker et al.* (1988), invalidated a school policy that required prior review and possible censorship of "all student-written non-school-sponsored materials distributed on school grounds" (p. 1150). Students challenged the policy after the school required the students allow administrators to review an unofficial (or student underground) newspaper prior to publication and distribution. The Ninth Circuit acknowledged that *Kuhlmeier* was the controlling Supreme Court authority, but unlike *Kuhlmeier*, the policy at issue "aimed at curtailing communications among students, communications which no one could associate with school sponsorship or endorsement" (p. 1150). The Ninth Circuit held that the school policy violated students' free speech and expression rights, and applied a *Tinker* analysis. The court also found that the policy violated *Tinker* because it allowed the censorship of unobjectionable material not

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[39] Bystrom is discussed in more detail in the "Distribution of Student Published or Promoted Materials" Section (Infra, p. 122).

presented to the administration for review prior to distribution and was based on an "undifferentiated fear of disruption" (p. 1150).

The Ninth Circuit concluded that the Supreme Court's decision in *Kuhlmeier* broadly defined "curriculum" and encompassed "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" (*Burch,* p. 1158, citing *Kuhlmeier*, p. 569). The court reasoned that unofficial or student underground newspapers, like the one at issue in the case, are in "no sense school-sponsored" and are outside the realm of material over which the school can exercise editorial control. Further, there was no justification for a policy that *required* school approval before the distribution of any student written material on school grounds (p. 1158). The court reasoned that "interstudent communication" enriches the education process, and in this situation, the school failed to show that the student publications hindered the education process.

The Ninth Circuit reiterated that student speech, under either *Tinker* or *Fraser*, could not be stifled because of an undifferentiated fear of possible disruption or embarrassment (*Burch,* p. 1158). However, the court clarified that its decision applied only to the content-based pre-approval policy. It did not affect schools' ability to punish students for disruptive conduct after the speech or expression was published. Published only a year after *Kuhlmeier*, the Ninth Circuit's *Burch* decision began a movement of interpreting the Supreme Court's *Kuhlmeier* opinion as providing a broad definition of what constitutes a "school-sponsored" or "curricular-related activity." However, *Burch* also reiterated that *Kuhlmeier*'s applicability was limited to student expression that was

actually communicated or disseminated in the course of a school-sponsored publication or activity. Student speech or expression offered outside that context remained subject to *Tinker* or *Fraser* (or now, *Morse*).

In *McCann* v. *Fort Zumwalt Sch. Dist.* (1999), the U.S. District Court for the Eastern District of Missouri applied *Kuhlmeier* outside the student newspaper context. The court concluded that it could not deem as unreasonable a superintendent's decision to prohibit a school marching band from playing a song that the superintendent concluded advocated drug use. The school argued that allowing the band to play the song, *White Rabbit*, by Grace Slick, would "send a message inconsistent with the District's strong anti-drug policy" (*McCann*, p. 921).[40]

The court found that marching band performances clearly constitute school-sponsored speech, and *Kuhlmeier* governed such speech controversies. The district court relied on *Kuhlmeier*'s broad definition of curriculum-related and school-sponsored activities to reach its conclusion. Further, the court found that school band performances "bore the imprimatur of the high school and the district." Together these findings dictated that *Kuhlmeier,* not *Tinker*, governed the student expression (*McCann*, pp. 923-924).

The court concluded that the district's interest in not promoting student drug use constituted a legitimate pedagogical interest on the part of the school. The superintendent's belief that allowing the song would send the wrong message to parents, teachers, students, and the community was a reasonable basis for making the decision to prohibit the song. Because the decision was reasonably related to a legitimate pedagogical concern, the court concluded that the students' First Amendment rights were

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[40] The school leaders believed that the song related or referred to using drugs. He also believed that the band Jefferson Airplane and its lead singer, Grace Slick, were associated with the "drug culture" (p. 921).

not violated (p. 925). Although decided eight years prior, the *McCann* holding is in line with the Court's ruling in *Morse*. The Supreme Court provided the same rationale – prohibiting student drug use or endorsement or illegal drug use – as one of the justifications for upholding the school's actions in its *Morse* decision.

Several students, in their individual capacities and on behalf of a student group, the Lubbock High School Gay Straight Alliance, filed suit against their school and school district, claiming violations of First Amendment free speech and assembly rights and violations of the Equal Access Act after the school denied the group official school recognition and permission to meet on campus (*Caudillo* v. *Lubbock Indep. Sch. Dist.*, 2004). The plaintiffs wished to have the Gay Straight Alliance formally recognized as a student organization, which would allow them to post fliers in the school, use the school's PA system to make announcements, and meet on school grounds like all other student groups. The school district had previously banned "the entire subject matter of sexual activity" and had an abstinence-only sex education policy. The principal, superintendent, and school board denied the group's request. The denial was based on information included on the group's website, links to other websites, and the group's listed goals, which the school deemed to be in violation of the abstinence-only policy. Further, the school believed the information, provided on the group's website, was inappropriate for younger students and was lewd and indecent (*Caudillo*, p. 558).[41]

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[41] The group listed safe sex education as one of its goals. The group's website included links to information such as "New Sexy Gay Game Pics and Favorite Questions…articles on (1) Why Am I Having Erection Problems?; (2) How Safe is Oral Sex?; (3) The Truth About Barebacking; (4) First Time With Anal Sex; (5) Kissing and Mutual Masturbation; (6) How Safe Are Rimming and Fingering?; (7) The Lowdown on Anal Warts." This material was available at the time of the original request, was reviewed by administrators, but removed before the district made the final decision. Content such as How to Use a Condom; Discuss Safer Sex with Your Partner…Unprotected Oral Sex, and Safer Sex: How?" and other sexual materials were still accessible at the time of the district's decision and safe sex remained a stated goal (pp. 557-558).

In analyzing the situation, the court concluded that the school was a limited public forum, which allowed the school to limit the subject-matter topics discussed on campus, but not the individual viewpoints on the permitted subjects (p. 560). The court concluded the subject matter restriction reasonable in light of the educational mission of the school district: “a school need not tolerate student speech that is inconsistent with its basic educational mission” (p. 563, quoting *Kuhlmeier,* p. 266). Further, the court concluded that the school’s decision was reasonable and did not violate the students’ free speech rights.

The court also found that the decision was viewpoint neutral because the school would have denied access to any group that violated the school’s policy regarding discussion of sexual activity, and “the group was, at its core, based on sexual activity” (*Caudillo*, p. 561). The court stated that it was inappropriate to make the information available to younger students, and that a portion of the information contained on the group’s website and the “group’s goal of discussing sex” was within the purview of speech and expression that was indecent. Under Supreme Court precedent, the district was found to have the right to regulate this type of speech and expression. As the abstinence-only policy was reasonable, the school did not have to tolerate speech and expression that violated the policy. The court concluded that denying access to the student group was legal in light of the school forum and the group’s violation of the abstinence-only policy by encouraging conversations about sex. The decision did not constitute viewpoint discrimination, and did not violate the students’ First Amendment speech and expression rights (p. 564).

Boca Raton Community High School in Florida was undergoing substantial renovations and the school administration invited students to paint murals on the temporary construction walls to help beautify the school while the renovations were taking place. Sharah Bannon and other members of the school's Fellowship of Christian Athletes student group decided to participate in the beautification project (*Bannon* v. *Sch. Dist. of Palm Beach County*, 2004). The school did not specifically inform students that they were prohibited from including religious messages in the murals, but made it clear the murals could not be profane or offensive to anyone. Sharah and her friends painted three murals, all with religious messages. One mural was next to the school's main office, the second only a few wall panels away, and the third was located in the school's main hallway.[42] The following school day, the murals generated a great amount of discussion and controversy among teachers and students and attracted the attention of the local media. In response, the school administration asked Sharah to paint over the "overt religious words and sectarian symbols," however, no disciplinary action was taken against her (p. 1211).[43]

Sharah filed suit claiming that her free expression (and free exercise) rights under the First Amendment had been violated because of the removal or modification of the murals. Sharah argued that the expression was private and passive student expression protected under *Tinker*. The school district argued that *Kuhlmeier* was applicable. In reaching the conclusion that the school district could reasonably restrict Sharah's

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[42] Mural 1 contained "a crucifix in the background, and paraphrased *John* 3:16 as 'Because He Loved, He Gave.'" The second mural read "Jesus has time for you; do you have time for Him?" The third mural read "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God."

[43] Although the Supreme Court usually refers to students by last name in decisions (*see gen. Tinker; Morse*), the lower federal courts often refer to the student by first name. In reviewing the federal court decisions, the study stayed consistent with the name utilized by the court in a particular decision.

expression and that such restrictions did not violate the First Amendment, the Eleventh Circuit found that the decision in *Kuhlmeier* provided the appropriate framework for analysis.

The court established that murals inside the school, painted by school students, under the direction of school authorities did not create a public forum and constituted school-sponsored expression (*Bannon*, pp. 1213-12144). The court then applied a *Kuhlmeier* analysis that addressed two questions: (a) did the murals bear the imprimatur of the school, and (b) did the painting occur in a curricular activity? The court found that it was clear that students, parents, and the community members might reasonably believe that the murals were supported and/or endorsed by the school, especially because one mural was located right next to the administration's office and another in the school's main hall (p. 1214). The court also found that the beautification project was a curriculum-related activity under *Kuhlmeier* because expressive activities are considered curricular if "supervised by faculty members, and designed to impart particular knowledge…to student participants and audiences" (p. 1214). Although Sharah did not paint the murals in a classroom, the court concluded, "Her expression still occurred in the context of a curricular activity" (p. 1214). The court concluded that the expression fell within the guidelines of the *Kuhlmeier* decision rather than *Tinker*. Further, the school did not participate in content-based censorship of the school-sponsored speech because the suppression was reasonably related to a legitimate pedagogical concern: "avoiding disruption to the school's learning environment." The school's decision related to prohibiting religious messages on the school's walls was reasonably related to a pedagogical concern because it ended the disruption the murals initially caused (p. 1217).

Although the case could be viewed as a dispute concerning student expression, it is also an interpretation of what constitutes curriculum-related activity under *Kuhlmeier*. Sharah believed her expression was private, silent, passive expression while the school saw it as school-sponsored expression. Regardless of a student's intentions with regard to her speech, the circumstances surrounding a student's passive, private expression can transform the speech into school-sponsored expression, subjecting it to greater restriction by school officials. Painting the murals was not an assignment and the students did not receive grades; however, under the definition of curricular-related activity, the speech was determined to be school-sponsored.

Four years later, the Tenth Circuit Court of Appeals encountered a factual situation comparable to the situation encountered by the Eleventh Circuit. In *Fleming* v. *Jefferson County Sch. Dist.* (2002), the Tenth Circuit reached a similar conclusion as the Eleventh Circuit in *Bannon*. In the summer of 1999, after the horrific events that had transpired at Columbine High School during the spring, Columbine High School sponsored a project that allowed students and members of the community affected by the shooting to create tiles that would be hung in the halls of the school. Columbine teachers supervised the painting of the tiles, and the school had established guidelines for the project, which required that the tiles could make no reference to "the attack, to the date of the attack, April 20, 1999, or 4/20/93 [sic], no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive" (*Fleming* p. 921). Ninety of the approximately 2,100 tiles did not meet the guidelines and were removed from the project. The guidelines were later relaxed to allow people to paint children's' names, initials, dates (other than 4-20), and the Columbine ribbon, but

religious symbols, the date of the shooting, and anything obscene or offensive were still prohibited (p. 922).

Parents, students, and other individuals who painted tiles filed suit claiming that the school's restriction on the content of the tiles violated their First Amendment free speech rights. The plaintiffs argued that the expression was private speech governed by the ruling in *Tinker* while the school alleged that the tile project constituted school-sponsored expression governed by *Kuhlmeier*. The Tenth Circuit agreed with the school and concluded that it was school-sponsored expression (p. 923).

The court stated:

> Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school constitute school-sponsored speech, over which the school may exercise editorial control, so long as its actions are reasonably related to legitimate pedagogical concerns. (pp. 923-924)

The court went on to state that this standard was based on the Court's *Kuhlmeier* decision, and explained that "pedagogical concern" means related to learning and can extend beyond academics (p. 925).

However, the court also concluded that under *Kuhlmeier* educators may make viewpoint based decisions about school-sponsored student expression (p. 926). The court found that the special characteristics of the school situation dictated that educators be allowed this deference. The Tenth Circuit admitted that the U.S. Circuit Courts of Appeals are split on the issue of viewpoint based decisions, but sided with the circuits that had previously held the viewpoint-neutrality was not necessary when a school was controlling school-sponsored expression.

> Given the types of decisions that the *Kuhlmeier* Court recognized face educators in 'awakening the child to cultural values' and

> promoting conduct consistent with 'the shared values of a civilized social order,' we conclude that *Kuhlmeier* does not require viewpoint neutrality. (pp. 928-929)

Utilizing *Kuhlmeier*, the court determined that the project was not an open forum and that the school maintained control of the project from beginning to end (p. 929). The court reasoned that by affirmatively retaining editorial control, the school refrained from opening the project for indiscriminate use and participation. The court also determined that the tiles were school-sponsored. They were affixed to the walls of the school and showcased the school's approval of each tile. The fact that the school organized the project, oversaw the completion of the tiles, and mounted them on the school walls could reasonable convey a message of the school's approval of the content. Thus, the tiles bore the imprimatur of the school (p. 931). The project also had a legitimate pedagogical interest, which was helping beautify the school after the shooting. The court found that this purpose fell under the broad umbrella of pedagogical concern established by *Kuhlmeier*. Further, the school wanted to avoid any entanglement or disruption by affixing religious messages to the school's walls. The restrictions were imposed in a school-sponsored activity and were reasonably related to these pedagogical interests. Thus, the restrictions did not violate the plaintiffs' First Amendment rights.

In *Hansen* v. *Martin* (2003), the U.S. District Court for the Eastern District of Michigan concluded that a student's free speech rights were violated when the school prohibited her from giving a "what diversity means to me" speech and excluded her viewpoint from a homosexuality and religion panel during the school's diversity week programming. Betsy Hansen was a student at Ann Arbor Pioneer High School. She was a member of "Pioneers for Christ," (PFC) the school's Christian student club and wanted to

be involved in the school's diversity week. Diversity Week activities included a panel discussion on religion and homosexuality organized by the school's Gay/Straight Alliance Club (GSA). Instead of having students sit on the panel, the panel consisted of adult religious leaders from Ann Arbor. Betsy desired to have the PFC viewpoint represented on the panel; however, her request was denied, and the panel took place with "six pro-homosexual adult clergy and religious leaders…None of the clergy…was Roman Catholic nor shared the Roman Catholic beliefs regarding homosexuality" (pp. 789-791).

In an attempt to placate Betsy, because of her exclusion from the panel, the school offered to let her speak at the school's general assembly. School administrators, however, objected to a portion of her speech because it "targeted an individual group, specifically homosexuals," and Betsy was ordered to change the speech (*Hansen,* pp. 791-792).[44] As a result of these events, Betsy filed suit claiming that the school violated her First Amendment free speech rights.

The court concluded that the *Kuhlmeier* decision applied to both situations because the panel and the assembly constituted school-sponsored activities, but reiterated that even under *Kuhlmeier*, "A school's restrictions on speech reasonably related to legitimate pedagogical concerns must still be viewpoint-neutral" (*Hansen*, p. 796). The court found that the school's restrictions and actions were not viewpoint neutral and

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[44] The objectionable portion of the speech read: One thing I don't like about Diversity Week is the way that racial diversity, religious diversity, and sexual diversity are lumped together and compared as if they are the same things. Race is not strictly an idea. It is something you are born with; something that doesn't change throughout your life, unless your [sic] Michael Jackson, but that's a special case. It involves no choice or action. On the other hand, your religion is your choice. Sexuality implies an action, and there are people who have been straight, then gay, then straight again. I completely and whole-heartedly support racial diversity, but I can't accept religious and sexual ideas or actions that are wrong" (pp. 791-792).

"were predominantly motivated by their disagreement with Betsy's and the PFC's message" (p. 800). The school made Betsy change her speech because she stated that she could not accept "sexual orientation or religious teachings that she believes are wrong" (p. 800), and that her exclusion (and PFC's) from the panel was motivated by similar concerns. The court cited numerous examples and quoted a statement from the GSA advisor in the student newspaper as evidence of the suppression being based on disagreement with Betsy's viewpoint (p. 800).[45]

The court concluded that it was Betsy's viewpoint, not a pedagogical concern, that drove the administration's decision to exclude her participation. "That defendants can say…they were advancing the goal of promoting acceptance and tolerance for minority points of view by their demonstrated *in*tolerance for a viewpoint that was not consistent with their own is hardly worthy of serious comment" (*Hansen,* pp. 801-802, emphasis in original). The court stated that the concerns were not based on pedagogical concerns but political, cultural, or religious concerns, none of which constituted a legitimate basis for restricting Hansen's speech. "The record is quite clear that Defendants' motivation was precisely the opposite [of viewpoint neutral]: to ensure that only one viewpoint was presented by the panel" (p. 803). The Court held that Betsy's free speech was violated by the school's actions.

The *Hansen* court took the opposite side of the viewpoint neutrality argument from the *Fleming* court. This dichotomy illustrates lower courts' disagreement over certain nuances contained in the Supreme Court's student speech and expression

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[45] The advisor stated in the paper, "allowing adults hostile to homosexuality on the panel would be like inviting white supremacists on a race panel" (p. 800). It is ironic that the GSA advisor would use the race example because it would more than likely also be unconstitutional to exclude a white supremacist from a panel on race issues for many of the same reasons that Betsy's exclusion was unconstitutional.

principles. As the Tenth Circuit articulated in *Fleming*, the circuit courts are split on whether *Kuhlmeier* requires viewpoint neutrality when suppressing student speech and expression (*Fleming*, pp. 926-927). Without Supreme Court clarification on the issue, educational leaders' ability to make viewpoint-based decisions concerning curricular-related or school-sponsored speech or expression hinges on the location of the school because certain court circuits have found the practice constitutional while others have viewed it as a violation of students' First Amendment rights . A school in Colorado may be able to censor school-sponsored student expression based on the expressed viewpoint, while a school in Michigan would not have the same ability.

Erica Corder and fourteen classmates were named valedictorians of the 2006 graduating class at Lewis Parker High School in Colorado. Each valedictorian was allowed to give a short speech as part of the school's graduation ceremony. However, the students were required to present the speech to the school principal for review prior to the ceremony to ensure that the speech complied with the school's policy governing student expression.[46] Erica presented her speech to the principal and at that time it did not contain any religious connotation or mention her faith or Jesus. However, at the graduation ceremony Erica offered the following remarks:

> Throughout these lessons our teachers, parents, and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ.

[46] The student expression policy made no specific reference to religious speech, but did "prohibit a variety of types of speech such as slander and profanity as well as speech that tends to create hostility or otherwise disrupt the orderly operation of the educational process" (*Corder*, p. 1241).

> If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006. (*Corder* v. *Lewis Palmer Sch. Dist.*, 2008, p. 1241)

At the end of the ceremony, Erica was escorted to the assistant principal and was informed that she would not receive her diploma until she met with the principal.

At her meeting, Erica was ordered to issue a written public apology before she received her diploma. In the apology, she did not apologize for the content of the speech but for making the religious comments without the principal's prior approval.[47] Erica wrote the statement, received her diploma, and the statement was distributed via email to students. Erica filed suit claiming that her First Amendment rights had been violated in that her speech had been suppressed and that she had been forced to participate in compelled speech through the apology. The U.S. District Court for the District of Colorado decided these issues in *Corder*.

The school district argued that Erica's First Amendment rights were not violated as the graduation speech constituted school-sponsored expression and was governed by *Kuhlmeier*, while Erica argued that her speech was purely private speech governed by *Tinker*. The Colorado federal district court concluded that a valedictorian speech is school-sponsored speech. It found that the school had limited who could speak at

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[47] The apology stated: "At graduation I know some of you may have been offended by what I said during the valedictorian speech. I did not intend to offend anyone. I also want to make it clear that Mr. Brewer did not condone nor was he aware of my plans before giving the speech. I'm sorry I didn't share my plans with Mr. Brewer or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff." The principal required Erica to add one sentence: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did" (*Corder*, p. 1241).

graduation and screened the speeches before they were given during the ceremony (p. 1245). Thus, the school had not transformed the school setting into a public forum, opened graduation for indiscriminate use, or given up control of the students' expression. In addition, the court found that a graduation ceremony clearly bears the "imprimatur of the school." Thus, the school leaders could reasonably regulate the content of the graduation speeches (p. 1245).

The court also found, as is required by *Kuhlmeier*, that there was a legitimate pedagogical interest imbedded in the graduation ceremony. The school offered that the ceremony is a final lesson for graduating seniors and that eliminating or limiting religion from the ceremony serves the school's pedagogical interest of maintaining a position of neutrality with regard to political and religious issues (p. 1245). The court found this reason to be legitimate, and that Erica's rights were not violated when the school screened her speech. Further, Erica's evasion of the principal's screening of the speech provided "legitimate justification to require an apology" (p. 1245).

The court concluded that the principal's requirement of Erica to issue a written apology did not constitute compelled speech. Erica specifically alleged that she was not apologizing for the content of the speech only that the comments were given in contradiction to the principal's requirement that the speech be screened and approved prior to the graduation ceremony. The court found that Erica was not coerced to adopt a specific belief; rather, she was only required to apologize for ignoring the principal's instructions. The court concluded that forcing her to offer such an apology was within the school's authority and did not constitute coerced speech (p. 1246).

The preceding decisions mainly focus on the breadth of *Kuhlmeier*; however, this view of the *Kuhlmeier* decision shortchanges its applicability in the school context. These decisions establish that school-sponsored and curriculum-related activities are broadly interpreted by the courts, and extend *Kuhlmeier*'s reach beyond the school newspaper setting originally addressed by the Supreme Court. An activity does not necessarily have to be offered as part of the school's curriculum for student speech and expression offered in the course of the activity to be considered school-sponsored.

The decisions also begin to reveal that a single Supreme Court principle cannot be applied in a vacuum, as *Tinker* and *Fraser* were also influential in certain decisions. Further, the different interpretations utilized by the lower federal courts also become noticeable. One of the largest differences was the question regarding whether the *Kuhlmeier* decision requires viewpoint neutrality when suppressing student speech and expression that is considered school-sponsored (*Compare Hanson* and *Fleming*). *Kuhlmeier*'s influence, as well as *Tinker* and *Fraser*'s influence, is discussed further in the following subsections concerning the distribution of student-created or endorsed materials, student speech in the classroom, and student campaigns and elections. However, as is clear from these decisions, *Kuhlmeier* may be utilized for student expression associated with the marching band (*McCann*), school plays (*Bell*), school beautification projects (*Bannon*), school programs (*Hansen*), and graduation ceremonies (*Corder*), as well as the school newspaper context originally discussed by the *Kuhlmeier* court.

Distribution of Student-Published or Promoted Materials

Although the publishing of non-curricular student newspapers, pamphlets, fliers, and other materials has led to disputes over the realm of student speech and expression rights in school, the *distribution* of these non-curricular or school-related student produced publications or materials on school grounds has also raised questions concerning the extent of students' free speech and expression rights. The Eighth Circuit Court of Appeals addressed the issue of distribution of student produced publications on high school campuses shortly after it published its *Kuhlmeier* opinion (8th Cir., 1987) but prior to the Supreme Court's issuance of its *Kuhlmeier* decision (1988). In 1987, in *Bystrom et al.* v. *Fridley High Sch. et al.*, the Eighth Circuit held that on its face, a school policy regarding prior approval of student publications was constitutional. The policy provided school administrators the right of prior review for any publication or material published by students, rather than the school, that was to be distributed on school property. The school reserved the right to prohibit the distribution if the publication did not comply with the district's "Distribution of Unofficial Written Material on School Premises" policy.[48]

Although the Eighth Circuit had just ruled in *Kuhlmeier* (8th Cir., 1987), which concerned school-sponsored publications, the Eighth Circuit relied more on *Tinker* and *Fraser* in *Bystrom* because the publication at issue was an underground newspaper, which was not school-sponsored. Accordingly, the court limited the issue to "distribution on school property…The school district asserts no authority to govern or punish what

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[48] The court upheld the constitutionally of all sections of the policy except section (E), which prohibited the dispersal of publications that invaded the privacy of others, because it was overly vague. The rule prohibited the publication of materials that were obscene to minors, libelous, indecent or vulgar, promoted illegal activity or products, constituted fighting words, or would likely create a materially disruption (p. 755).

students say, write or publish to each other or to the public at any location outside the school building and grounds" (Bystrom, p. 750).[49] Further, the *Bystrom* court concluded that the distribution policy applied to minors, not adults, stating that the policy was in place to "preserve some trace of calm on school property." The court saw the policy as an expression of legitimate community interest in promoting certain moral and social values (p. 751). As such, the court upheld the policy, allowing prior review because it was not actually suppressing what the students were expressing and because the court was bound by precedent that prior restraint was constitutional.

After confirming the validity of each portion of the student publication distribution policy, the Eighth Court reminded the school district that under *Tinker,* it was not allowed to suppress student speech and expression simply because it disagreed with the speech, and that *Fraser* required that any penalties be unrelated to the political viewpoint expressed by the students. Further, the Court reiterated that it was not upholding the wisdom of the student publication distribution policy, only the policy's Constitutionality (*Bystrom,* p. 755).[50]

Michael, An eighth-grade student at Jefferson Middle School in Michigan, wanted to participate in the 3rd Annual Pro-Life Day of Silent Solidarity, held in October 2006,

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[49] Although the Eighth Circuit relied on its *Hazelwood* opinion for the notion that prior restraint of an official school message was not *per se* unconstitutional, in *Bystrom* it parted ways with what it held in *Hazelwood*. In *Hazelwood* (8th Cir., 1987) the Eighth Circuit found that *Spectrum* was an open forum and that the school could not censor the content except in very limited circumstances (*Hazelwood*, p. 1374, 8th Cir.). The Eighth Circuit held that the school had violated the students' First Amendment rights. The Supreme Court published its *Hazelwood* decision (1988) six months after *Bystrom* and reversed the Eight Circuit in *Hazelwood*. In the decision, the Supreme Court affirmed a number of the findings and some of the rationale utilized by the Eastern District of Missouri District Court when it decided *Hazelwood*.

[50] Comparing *Bystrom* and the Ninth Circuit's decision in *Burch*, the Eighth Circuit and Ninth Circuit looked at similar prior restraint policies, with relation to underground newspapers. The Eighth Circuit, six months before the Supreme Court's decision in *Hazelwood*, held the policy constitutional. The Ninth Circuit, six months after *Hazelwood*, held the policy it reviewed unconstitutional. However, both courts looked to *Tinker* and *Fraser* for justification to support their conclusions and still reached different results.

by wearing a sweatshirt that stated, “Pray to End Abortion,” wearing red armbands, tape over his mouth, and distributing leaflets containing information concerning abortion and abortion statistics while at school (*M.A.L.* v. *Kinsland*, 2008). During the day of the protest, Michael was told to remove the tape from his mouth and turn his sweatshirt inside out, and that he must stop distributing the leaflets because they had not been pre-approved by administration (*M.A.L.*, p. 844). No further disciplinary action was taken against Michael during the October Pro-Life Day.

Prior to a similar national pro-life recognition day scheduled for January 2007, Michael filed suit seeking to enjoin the school from limiting his speech and expression during the protest. Before the day of the January 31, 2007, protest, Michael and the school compromised and struck a deal that allowed him to wear a sweatshirt with the phrase “Pray to End Abortion” and red tape on his wrists, but he could not wear tape over his mouth. The parties failed to reach resolution on the distribution of the leaflets.

The school had a student distribution policy that stated, in part, that “any literature which a student wishes to distribute…will first be submitted to the principal…for approval,” and gave the principal the right to deny approval if it was determined that the literature to be distributed:

> Would cause a substantial disruption of or a material interference with the normal operation of the school or school activities. b. Is potentially offensive to a substantial portion of the school community due to the depiction or description of sexual conduct, violence, morbidity or the use of language which is profane or obscene which is inappropriate for the school environment as judged by the standards of the school community. c. Is libelous or violates the rights of privacy of any person. d. Is false or misleading or misrepresents facts. e. Is demeaning to any race, religion, sex, or ethnic group. f. Encourages violation of local, state or federal law. (*M.A.L.*, p. 845)

Michael failed to provide copies of the proposed leaflets or seek official permission to distribute the leaflets on January 31st. However, the school offered to allow him to post the material on bulletin boards in the hallways and to distribute the leaflets in the cafeteria during lunch (p. 845). Michael rejected the offer and argued that under *Tinker,* the school could only impose this type of time, place, manner restriction on his expression if the leaflets were likely to cause a materially and substantial disruption (p. 846). The school countered by arguing that it could impose time, place, manner restrictions under the distribution policy and that *Tinker* did not apply.

In addressing this dispute, the Sixth Circuit Court of Appeals began by reiterating that America's public school areas such as hallways and cafeterias are nonpublic forums and allow for school leaders to exert a certain amount of control over student expression, depending on the type of expression (*M.A.L.*, pp. 846-847). For the hallways to transform from nonpublic to public forum status, the Sixth Circuit turned to *Kuhlmeier* and stated that the school must take action that affirmatively opens the forum for public use. The court found that "Jefferson school authorities have done nothing to indicate that the…hallways have been opened for indiscriminate use by the public, and the hallways therefore constitute a nonpublic forum" (p. 847).

The Sixth Circuit then concluded that the school's action in curtailing Michael's distribution was reasonable because it allowed Michael to post the information on bulletin boards and distribute the material during lunch in the cafeteria, even though he never sought permission as required by the distribution policy. Further, there was no evidence to suggest that the school's proposed time, place, manner, regulation of Michael's speech was based on a desire to suppress his anti-abortion viewpoint (*M.A.L.*,

p. 847). The court found that it was reasonable for the school to require prior approval of student literature proposed for distribution as the policy was viewpoint neutral and provided guidelines for school leaders to follow when making determinations (p. 848).

Contrary to Michael's argument, the court found that *Tinker* did not govern the situation because unlike in the facts in *Tinker*, Michael's school only wanted to regulate the time, place, and manner of his distribution rather than suppress the expression because of disagreement with the students' viewpoint (*M.A.L.*, p. 849). The court reasoned that schools only need to meet the higher *Tinker* standard when "they seek to foreclose particular viewpoints [rather] than when they seek merely to impose content-neutral and viewpoint-neutral regulations of the time, place, and manner of student speech" (p. 850). Further, none of the Supreme Court's student expression decisions "control viewpoint-neutral time, place and manner restrictions" (p. 850).

This creates an interesting situation for school leaders because it adds an additional step when determining the constitutionality of student expression. Under the Sixth Circuit analysis, a school leader could determine that the student expression falls under *Tinker* because it is not lewd and did not bare the imperator of the school (McCarthy, 2007). However, the school leaders could still have an opportunity to regulate the expression. The school cannot prohibit the speech or expression, if protected speech, but could reasonably impose time, place, and manner restrictions on the expression or distribution of the expressive materials if such restrictions were content and viewpoint neutral.

Although not stating them as time, place, and manner restrictions, other federal courts have reached similar conclusions regarding the regulation of the distribution of

student publications rather than the suppression of student speech. In *Harless* v. *Darr* (1996), the District Court for the Southern District of Indiana considered whether the restriction of an elementary student's distribution of religious tracts violated the student's First Amendment free speech rights. Bryan Harless was a first-grader who had been distributing religious literature to classmates in the classroom as students were preparing to go to lunch. When the teacher discovered that Bryan was passing out the leaflets, she asked the students to return the literature to Bryan and told him that he could no longer pass out the religious material because it violated school policy. After Bryan passed out similar literature a second time, the principal "called Bryan into her office and spoke with him about other ways in which he could witness [at school] other than passing out Christian tracts" (*Harless*, p. 1342). Soon after the second incident, Bryan's parents filed suit on his behalf claiming that prohibiting him from distributing the religious materials violated his free speech rights. After filing the complaint, Bryan again distributed religious tracts; this time on the school bus. Although the principal again talked to him about the conduct, Bryan was never disciplined for handing out the religious literature.

The school had a policy in place that required a student who wished to distribute literature at school (more than 10 copies) to notify the principal at least 48 hours in advance of the distribution and provide a copy of the literature. The district court phrased the question facing it as "whether Franklin [Elementary School]'s current policy regulating distribution in its schools is an unconstitutional prior restraint" (*Harless*, p. 1353). The court found that the policy on its face did not give the school censorship power for content-related reasons. A student simply had to give notification of what he wished to distribute. Further, the court found that the policy did not require students to

wait for approval before distributing information to other students. “Thus, the court concluded that the policy requiring students to submit a copy of the literature to be distributed does not constitute an impermissible prior restraint” (pp. 1353-1354). The policy did not violate Bryan’s free speech rights because it did not prohibit distribution; it only required the school be notified before the distribution occurred.

Seven years later in *Walz* v. *Egg Harbor Twp. Board of Educ.* (2003), the Third Circuit Court of Appeals also examined whether an elementary school student had a First Amendment free speech right to distribute materials related to “an unsolicited religious message during an organized classroom activity.” For three consecutive years, Daniel Walz attempted to distribute gifts to his classmates that contained or were attached to notes that contained religious messages. During his pre-kindergarten year, Daniel attempted to distributed pencils imprinted with the message “Jesus (heart symbol) The Little Children.” Daniel’s teacher noticed the imprint and confiscated the pencils. The principal and superintendent later determined that the pencils could not be distributed because of the potential for students and parents to perceive that the school endorsed the religious message (p. 274). At the winter party during Daniel’s kindergarten year, he attempted to distribute candy canes with a religious story attached.[51] Daniel was

[51] The story read: A Candymaker in Indiana wanted to make a candy that would be a witness, so he made the Christmas Candy cane. He incorporated several symbols for the birth, ministry, and death of Jesus Christ. He began with a stick of pure white, hard candy. White to symbolize the Virgin Birth and the sinless nature of Jesus, and hard to symbolize the Solid Rock, the foundation of the Church, and firmness of the promises of God. The candymaker made the candy in the form of a "J" to represent the precious name of Jesus, who came to earth as our Savior. It could also represent the staff of the "Good Shepherd" with which He reaches down into the ditches of the world to lift out the fallen lambs who, like all sheep, have gone astray. Thinking that the candy was somewhat plain, the candymaker stained it with red stripes. He used three small stripes to show the stripes of the scouring [sic] Jesus received by which we are healed. The large red stripe was for the blood shed by Christ on the cross so that we could have the promise of eternal life. Unfortunately, the candy became known as a Candy Cane [sic] a meaningless decoration seen at Christmas time. But the meaning is still there for those who ‘have eyes to see and ears to hear.’ I pray that

informed that he *could* distribute the candy canes, with the attached story, but only before or after school or during recess, and not during the party. The following year, Daniel again attempted to distribute the candy canes with the same attached story to students in his first grade class during the winter party. School officials prohibited the distribution during the party but allowed him to distribute the candy canes at recess, after school as students walked to the bus, and in the school hallways (p. 274). Following this prohibition on Daniel's distribution, Daniel, through his mother, sued the school district alleging a violation of his First Amendment rights to freedom of expression and free exercise of religion. Daniel's claim was based on the school's continual quashing of his distribution of the candy canes with the attached religious story at the classroom winter party.

The Third Court found that the age of students and the context of events are key in the elementary setting and drive the free speech and expression analysis at that age level. In elementary school setting, "the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise" (*Walz*, p. 276). The court went on to state that the primary grades are not a place for student advocacy, and permitting the promotion of a specific message could undermine the school's "legitimate area of control" (p. 276).

The court also concluded:

> In an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents

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this symbol will again be used to witness to The Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today" (p. 274).

> who trust the school to confine organized activities to legitimate and pedagogically-based goals. (p. 277)

Elementary school students do not have the maturity possessed by high school students to understand that the school does not always endorse or support speech, but merely tolerates it (*Walz,* p. 277). Making the determination of the appropriate boundary should be reserved for the school district rather than the court; “Accordingly, where an elementary school's purpose in restricting student speech within an organized and structured educational activity is reasonably directed towards preserving its educational goals, we will ordinarily defer to the school's judgment” (pp. 277-278).

The court stated that in the context of a curricular activity, elementary school leaders may restrict student speech promoting a specific religious message (*Walz,* p. 278). Daniel promoted his religion and distributed symbols of his belief “during classroom activities that had a clearly defined curricular purpose to teach social skills and respect for others…Because of the tender age of the students, the school prohibited the exchange of gifts with…religious undertones that promoted a specific message” (p. 279). There was extensive evidence that the seasonal parties contained an educational component. Evidence also showed that the school maintained control of the parties. “It was well within the school’s ambit of authority to prevent the distribution” of items promoting a religious message “during the holiday parties” (p. 279).There was no violation of Daniel’s constitutional rights when the school prevented him from distributing items containing religious messages during the seasonal parties.

Twenty years after *Kuhlmeier*, the District Court for the Western District of Virginia in *Raker* v. *Frederick County Pub. Sch.*(2007), decided that a school policy, which limited the distribution of more than one copy of non-school materials to before

the start or after the completion of the instructional day, was overly broad and violated students free speech rights.[52] Andrew Raker was a student at Millbrook High School and wanted to distribute anti-abortion literature to his classmates during non-instructional time, including lunch and in the halls between classes. On the "3rd Annual Pro-Life Day of Silent Solidarity," Andrew distributed small anti-abortion flyers to classmates during non-instructional times. The school admitted that the distribution did not create any disturbance. However, the day after he distributed the flyers, Andrew was called to the office and informed that he could distribute flyers only before or after school, and not during non-instructional times in the middle of the school day (*Raker*, p. 636).

After informing Andrew of the restriction and after Andrew's attorney contacted the school about the restriction, the school developed a policy codifying what the principal had told Andrew and his attorney. The court found that the policy "gave students who, like Andrew, are not associated with an approved student organization or curricular program, no option for the distribution of non-school materials during the school day" (*Raker*, p. 637). Even after the student obtains the mandatory pre-approval of the content, distribution was still limited to before and after school. "The regulation virtually bans the circulation of all written communication during the instructional day, including during lunch and between classes" (p. 638).

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[52] At this stage in the litigation, the plaintiff was only seeking a preliminary injunction and the full record had not been developed. In determining if to issue a preliminary injunction, the court must balance four factors: "(1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest" (*Raker*, p. 638, quoting *Child Evangelism Fellowship of Md., Inc.* v. *Montgomery County Pub. Schs*, 2004). Because Raker's irreparable harm was linked to his claim that his First Amendment rights were violated the court had to analyze the likelihood of success on the merits of the First Amendment claim. There have been no further opinions published in this case.

The district court applied *Tinker* and found that the school acted with a remote apprehension of disturbance because there had been no history of material disruption or invasion of other students' rights when the anti-abortion materials were distributed during the school day. Further, there was no reasonable anticipation of any in the future. The court found that the school's fear of disruption was unsubstantiated given the facts surrounding Andrew's previous distribution. The court also found that the designation of the school as a closed forum was irrelevant because the policy was overbroad; it did not allow for the distribution of *any* non-school-related materials during the school day. The court concluded that Andrew was likely to succeed at trial and that the regulation would be deemed overbroad and unconstitutional. The court specifically stated that Andrew was "attempting to engage in important civic and public discourse in a manner that has not been shown to be disruptive," and he should be permitted to distribute his flyers as protected by the First Amendment (*Raker*, p. 642).[53]

During the 2004 Day of Remembrance, Michelle Heinkel wanted to participate in the event by wearing a "Day of Remembrance" t-shirt, take a vow of silence during non-instructional time, and distribute materials about abortion to her classmates.[54] Two days prior to the Day, Michelle sent the superintendent a request to distribute literature pursuant to the school district's distribution policy. The superintendent denied the request stating that the materials would create a "substantial disruption in the school environment" (*Heinkel* v. *Sch. Board*, 2008, p. 607).

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[53] The federal courts have not issued any additional opinions in this case.

[54] "The Day of Remembrance is a day set aside to remember the 40 million children who have been lost to elective abortion and to remember the pain experienced by women who have had abortion" (p. 605).

The Eleventh Circuit addressed the impasse in *Heinkel* v. *Sch. Board* (2008). Unlike the courts that had taken a time, place, manner approach, the Eleventh Circuit applied *Tinker* and found that the circumstances "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" (*Heinkel*, p. 610).[55] The court upheld the superintendent's denial of Michelle's request to distribute literature. The court found it persuasive that Michelle was a middle school student and wanted to distribute abortion material to 11-year-old to 14-year-old children. Further, the court found that birth control and abortion are not part of the middle school curriculum. Thus, the court concluded that it was reasonable to believe that providing sensitive material to younger students could create a substantial and material disruption allowing for the suppression of the distribution even though Michelle's speech could be considered political and fall under *Tinker* (p. 610).

The distribution cases shift the focus from the actual expression to the mode of communicating the message. The decisions demonstrate that *Tinker*'s substantial and material disruption principle plays a role in the distribution situations (*see Heinkel*). However, they also show that regardless of the First Amendment protection afforded student speech and expression, schools may still be able to impose content-neutral time, place, manner restrictions (*see M.A.L.*). This provides educators an additional tool in making informed decisions regarding student speech and expression in school. Further, the decisions highlight that differences exist between high school and elementary school buildings. Comparing *Walz* to *Raker*, it is clear that courts look at the circumstances surrounding the distribution, including the maturity of the student audience, when

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[55] The court did mention time, place, manner restrictions, but it did not constitute the thrust of the argument or analysis.

deciding if a school's restraint of student speech or expression violated a student's First Amendment rights. *Heinkel* also reiterated that age may play a role in determining the appropriateness of the distribution of certain student expression. However, like many other areas of student free speech rights, the particular facts of the situation will likely determine whether the school's or the student's actions are constitutional.

Classroom and Curricular Activities

Students have asserted a variety of free speech and expression violations based on limits teachers have imposed in the classroom. The Supreme Court and the lower courts have repeatedly stated that the primary mission of the school system includes educating students (see *Settle* v. *Dickson County Sch. Board*, 1995), which largely takes place in the classroom. Regardless of this specific purpose of school systems, students and their parents continue to challenge the restrictions teachers and schools place on students while trying to achieve this legitimate pedagogical purpose.

In *Settle* v. *Dickson County Sch. Board*, the Sixth Circuit decided that a teacher did not violate a student's free speech rights when the teacher prohibited the student from turning in a research paper entitled "The Life of Jesus Christ" (p. 153). The teacher gave the student a zero for refusing to write on a different topic. In reaching its conclusion, the court found that the teacher (and school) articulated several reasons for rejecting the paper: (a) the student failed to receive permission for the topic, (b) grading a paper on Jesus Christ presented problems because of the student's possible perception that it was criticism of religious belief rather than the quality of the paper, (c) the teacher believed the school didn't deal with personal religion, (d) the student knew a great deal about Jesus Christ and the assignment was to research a topic unfamiliar to the student, (e) the

teacher believed the law required that teachers were not supposed to deal with religion in assignments, and (f) the teacher felt that the student would only use one primary source, the Bible, rather than the four required by the assignment. The court found that all six reasons fell within the "broad leeway of teachers to determine the nature of curriculum and the grades to be awarded to students" (p. 156).

The circuit court stated, "[l]earning is more vital in the classroom than free speech" (*Settle,* pp. 155), and free speech rights of students must be limited in the classroom because effective education depends in part on keeping focused on class assignments (*Settle,* pp. 156). Further, the court stated that it was not the court's place to overrule a teacher's decision that a student should write a paper on a topic other than her own theology. Although the teacher's belief about the law – concerning the interaction between religion and school – might be mistaken, the Sixth Circuit held that it was not the federal court's place to intervene in conflicts concerning the daily operation of schools that do not sharply implicate constitutional concerns (p. 155). The court concluded that it is a teachers' responsibility to "draw lines and make distinctions," and teachers must be given broad discretion to "conduct class based on the content of speech" (p. 156). Thus, the teacher's decision to prohibit the paper fell within her discretion as a teacher, as the decision did not violate the free speech rights retained by the student in the classroom.

In *Sonkowsky* v. *Board of Educ. for Indep. Sch. Dist. No. 721 et al.*(2002), district court in Minnesota concluded that while students do have a constitutional right to receive an education, they do not have a right to wear particular football jerseys to school

(*Sonkowsky*, p. *13).[56] This was the holding of the Minnesota District Court when faced with the question of whether a student's free speech and expression rights were violated when he was not allowed to wear a Green Bay Packer's jersey during a class photo that was part of a class project.

Rocky Sonkowsky's class was involved in a lesson called GridIron Geography Curriculum, which included a contest involving 400 Minnesota elementary classes. As part of the curriculum, students were supposed to create pictures of a football player in Minnesota Viking's colors (purple and gold) and participate in a class photo and parade wearing Vikings attire or purple and gold. As an avid Packers fan, Rocky created a picture of a football player wearing green and yellow, Packers colors, and attended school wearing a Packers jacket on the day of the parade and a #4 Packers jersey on the day of the class picture.[57] After turning in the picture, Rocky was informed that he had not followed directions and was instructed to color another picture. Rocky acquiesced, but again turned in a picture colored in green and yellow. When the pictures of football players clad in purple and gold were hung on the classroom bulletin board, Rocky's picture was not included (pp.*2-5).

Rocky claimed that the teacher's actions constituted a violation of his First Amendment free speech rights. The court acknowledged that Rocky retained certain rights when he entered the school building but that at the elementary level, his rights may be restricted even more than at the high school level (*Sonkowsky*, 2002, p. *11, citing

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[56] Decisions are occasionally assigned page numbers by Lexis. These page numbers are indicated by an asterisk (*) as to not create confusion that the page number correlates to a page number in the appropriate federal reporter.

[57] Brett Favre wore #4 for the Green Bay Packers for 16 years.

Tinker and *Fraser*). The court articulated the threshold question as whether Rocky suffered a deprivation of his constitutional rights. The court concluded that his education had not been affected by the school's actions, his grades were not affected, and he was not expelled or suspended because he was a Packers fan. His rights were not violated when the teacher refused to post his unsatisfactory homework or allow him to wear a Packers Jersey in the class photo or participate in the parade because these events did not significantly affect Rocky's education or a constitutional right (p. *14).[58]

As part of a class project in her second grade class, Kelly DeNooyer wanted to show a video of her performing a religious song at her church. Kelly was the "VIP of the week," a program her classroom teacher had been conducting during the school year. Kelly brought the video to school and asked that it be shown as her presentation for the program. The teacher reviewed it privately and concluded that it was inappropriate for her class and for the program. The teacher stated that the video had not been approved as required by district policy and allowing the video frustrated the purpose of the VIP program: developing students' self-confidence and verbal communication skills. Allowing it could establish a bad precedent and she was concerned about the perception of broadcasting the religious message to a room of second-graders. Along with a free exercise claim, Kelly and her mom filed a claim in federal court asserting that the school had violated her First Amendment right to expression (*DeNooyer* v. *Livonia Pub. Sch.*, 1993, pp. *2-5).

Kelly argued that her expression was protected under *Tinker*; however, the Sixth Circuit found that *Kuhlmeier* clearly governed. The Circuit Court found that the

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[58] The court acknowledged that a factual dispute existed concerning the reason Rocky did not participate in the parade but stated that regardless if Rocky or the school's position was correct the conclusion did not change.

presentation was part of the class curriculum and the classroom was not an open forum; therefore, the teacher (and school) could regulate the content and style of Kelly's presentation (*DeNooyer*, p. *8). Further, the court believed that the pedagogical aims of the project would be frustrated if students were allowed to present videos. Pedagogical concerns apply not only to the content but also to the medium, which was the showing of a video. Thus, the court concluded that regardless of the content of the video, the concern over the style of the presentation (the use of a video) was sufficient justification for the teacher prohibiting the presentation (p. *9). The court held that the rejection of the video was reasonably related to pedagogical concerns, and the school did not violate Kelly's First Amendment rights.

A group of students in the Bethlehem Area School District in Pennsylvania believed the school district's community service graduation requirement violated their First Amendment free speech and expression rights (*Steirer et al.* v. *Bethlehem Area Sch. Dist. et al.*, 1992). The district adopted a policy that required every student perform sixty hours of community service between the time he or she started ninth grade and finished twelfth grade. The students received .5 credits for completion of the hours (p. 1340). Although students were free to choose the type of services they wanted to perform, the project had to meet four course objectives.[59] The students asserted that the community service requirement violated their First Amendment free speech because through their actions, they were being forced to declare, "Altruism is a desirable life philosophy" (p. 1346). The district court responded that the Supreme Court had made it clear that

[59] The four course objectives stated: "(1) students will understand their responsibilities as citizens dealing with community issues; (2) students will know that their concern about people and events in the community can have positive effects; (3) students will develop pride in assisting others; and (4) students will provide services to the community without receiving pay." Furthermore the district superintendent articulated several educational purposes of the community service project requirement (p. 1339).

community service programs did not fall within the protections of the First Amendment (p. 1346). The court characterized the plaintiffs' claim as "an attempt to place the kernel of expression implicit in all activity within the protection of the First Amendment," but the court reiterated that the Supreme Court had rejected this type of First Amendment argument (outside the school context), which mandated the rejection of plaintiffs' argument (p. 1346).[60] In conclusion, the court characterized the community services as any other educational activity, and held the same place in the curriculum as any other class (p. 1346).

Students in a Wisconsin school claimed that the school's prohibition against showing R-rated movies as part of the curriculum violated their First Amendment rights (*Borger* v. *Kenosha Unified Sch. Dist. No. 1*, 1995). In considering the issue, the court stated:

> School officials have abundant discretion to construct curriculum, and they only violate the First Amendment when they limit access to materials for the purpose of restricting access to the political ideas or social perspectives discussed in them, when the action is motivated simply by the officials' disapproval of the ideas involved. (pp. 99-100, quoting *Board of Educ.* v. *Pico*, 1982)

The school district had a policy that prohibited the showing of R-rated movies. The court found that not subjecting students "to movies with too much violence, nudity, or 'hard' language" was a viewpoint-neutral, legitimate pedagogical concern and application of the policy. The court concluded that the restriction was a reasonable and constitutional exercise of the school board's authority and did not violate students' rights (p. 101).

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[60] The district court quoted the Supreme Court: "in deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it" (p. 1346, quoting *Spence* v. *Washington*, 1974). The court stated it was bound by the Supreme Court precedent.

In a 2008 case, the Sixth Circuit addressed whether an elementary student had a First Amendment expression right to promote his religious beliefs during a school-sponsored curricular activity in a Michigan school (*Curry* v. *Saginaw City Sch. Dist.*, 2008). The curriculum- related event, Classroom City, provided fifth-grade students the opportunity to create a product, market it, and sell (for faux money) the product to other students during a simulated market-style event in the school gym. Joel Curry decided to create and sell Christmas tree ornaments shaped like candy canes with a card attached that explained the candy cane as a symbol of Christianity. Although Joel's teacher, who was overseeing the event, knew Joel was creating and planned to sell candy canes, she had no prior notice that he was going to attach the religious message cards. After discovering the cards were attached, the school administration alerted Joel (and his parents) that he could not sell the items with the attached religious message because the "Classroom City" project constituted instructional time.

Joel claimed that the school's refusal to let him sell the ornaments with the attached religious message was a violation of his free speech. In addressing the claim, the Sixth Circuit determined that *Kuhlmeier* applied to the case because Classroom City was clearly part of the fifth grade curriculum (*Curry*, p. 577). Because the principles of *Kuhlmeier* apply when the expression is part of a school activity, the court acknowledged that the restriction of Joel's expression had to be reasonably related to a pedagogical concern. The court found that the school's desire to refrain from offending students or parents with the curricular activity and the school's desire to shield young students from unsolicited religious messages qualified as legitimate pedagogical concerns (p. 578). The Court held that the school administrator's decision that the cards should not be sold was

reasonably related to an educational purpose and fell within her discretion as an administrator. Thus, there was no violation of Joel's First Amendment free speech and expression rights.

The line of cases addressing student speech and expression in the classroom and curricular activities establishes several points. First, teachers' responsibility to educate students and provide the curriculum directed by the district supersedes students' speech and expression rights. Running parallel to this and concluded by inference, students have a responsibility to learn in the style and manner directed by teachers and the school. Students do not have the freedom to substitute their own judgment or lesson designs for those developed and expressed the by the school and classroom.

The decisions reiterate that *Kuhlmeier*'s mandate that schools can regulate speech and expression that is offered in the course of a school-related or sponsored activity is clearly very broad. The lower federal court decisions embraced the concept that the definition of pedagogical concern extends beyond lessons imbedded in the curriculum (*see Kuhlmeier,* p. 271) and as stated in *Fraser,* can relate to values that the school is trying to inculcate in students or practices from which it is trying to protect them. Further, the decisions concerning elementary classrooms reinforce that courts view the rights of students at the elementary and high school levels differently. [61] These decisions also conform to Justice Black's argument that the federal Constitution does not require teachers and administrators to surrender control of the schools to students (*Tinker,* Black dissent, p. 526).

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[61] This is exemplified by *Curry* and was addressed previously in *Walz* (*supra* p. 127). Although *Walz* was addressed in the context of distribution, the circumstances were very similar and the courts focused, in part, of the age of the students involved in determining that the limitations did not offend the students First Amendment speech and expression rights.

Student Campaigns and Elections

In *Fraser,* the Supreme Court focused on the lewd and obscene nature of Matthew Fraser's speech when determining if the school violated Fraser's First Amendment rights in punishing him for his statements. Since *Fraser,* the lower federal courts have addressed similar situations concerning constitutionally questionable student speech and expression during school elections and campaigns. Although similarities can be drawn between the lower court cases and *Fraser,* the facts make each individual decision unique and worth exploring. However, the lower federal courts have often turned to the *Kuhlmeier* rationale over that found in *Fraser* in providing schools greater control over student speech and expression in school campaigns and elections. The courts have based their decisions on the school-sponsored nature of the campaign and the school's legitimate pedagogical interests in holding student elections. Further, the lower courts have distinguished *Fraser,* limiting its applicability to speech that is lewd and vulgar, while the lower federal courts have embraced *Kuhlmeier* as applicable to all circumstances involving speech and expression that can be deemed offered under the auspices of the school. The fact that Fraser's speech took place in the context of a school election has not influenced lower courts to embrace *Fraser* as the standard for all speech and expression offered in the context of a student election.

The year after the Supreme Court rendered its decision in *Kuhlmeier,* the Sixth Circuit ruled that a school did not violate a student's First Amendment free speech rights when the school deemed Dean Poling ineligible in a student election race because of negative comments he made about the school administration during his campaign speech in a school assembly (*Poling* v. *Ellis Murphy*, 1989). The circuit court phrased the

question as whether a high school student's "discourteous and rude" comments about the school administration given during a school-sponsored assembly are protected by First Amendment free speech rights.[62] Although the Sixth Circuit stated that the question was serious, the court believed the answer was obvious (p. 758).

The Sixth Court reasoned that the Supreme Court had distinguished private student expression that merely occurs on school grounds from student speech that is given in the context of a school-sponsored activity. Speech and expression offered in the context of a school activity is subject to greater control under the *Kuhlmeier* holding (*Poling*, p. 762). As the election assembly was sponsored by the school, the Court found that Dean's speech "was speech sponsored by the school and disseminated under its auspices" (p. 763). Thus, the court held that the school could exercise control over the context and style of Dean's speech. His disqualification from the election for comments the school deemed contrary to a legitimate pedagogical concern was reasonable and did not violate his free speech rights.

Adam Henerey applied to run for junior class president, and used "Adam Henerey, The Safe Choice" as his campaign slogan. As required, Adam met with the student council advisor, signed a contract stating he would obey all school rules, understood that all posters and flyers needed to be approved by the administration, and

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[62] Dean's speech read: "Hi, I'm Dean Poling and I'm running for president of the Student Council. It's a common practice of politicians to cut down each other. Instead of doing this, I'm going to cut down you, the audience. Why am I going to do this? Because you idiots are too darn gullible. For example, what is black and blue and wrapped in plastic? A baby in a trash bag, of course. I just made you laugh at something incredibly sick. If I can do this to you, then the administration could probably take advantage of you also. For example, have you noticed that each year there are less and less assemblies? How many of you would like at least a chance at open campus? Would you like a better chance of having the prom in Johnson City? Is there something in this school you would like changed? "The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted. All you have to do is vote for me, Dean Poling."

had the school administration review and approve his campaign slogan. On the day of the election, Adam handed out stickers stating his slogan, which he attached to condoms. He had not informed the administration that he would be distributing condoms with his slogan attached. After being informed of the condom distribution, the principal decided that Adam should be disqualified for failing to abide by the campaign rule requiring administrative approval of distributed materials. The vote later revealed that Adam had won the election. Adam subsequently filed suit claiming that the school had suppressed his First Amendment free speech and expression rights.

In *Henerey* v. *City of St. Charles, Sch. Dist. et al.* (1999), the Eighth Circuit addressed the question of whether in an election, which is a school-sponsored activity and part of the school's curriculum,[63] the school's decision to disqualify Adam was "reasonably related to legitimate pedagogical concerns" (p. 1133). The Eighth Circuit reiterated that *Kuhlmeier* provided the appropriate analysis.[64] The point of contention in the case was the constitutionality of the school rule that required prior approval of materials distributed during a campaign. The school asserted that Adam was disqualified for violating the rule while Adam contended that the rule was unconstitutional as a prior

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[63] Adam initially argued that the election took place in a public forum, restricting the school's ability to regulate his speech. The circuit court concluded that the school had not opened the election and intended to control student speech, which was evident from the candidates' agreement to abide by school rules, seek prior approval for campaign materials, and that only enrolled students could participate in the election (p. 1133).

[64] The circuit court based this conclusion on the finding that the supervision of the election by school officials, the election time parameters established by the school, the requirement that candidates seek pre-approval for materials they wished to distribute, and that the election operated under the "auspice" of the school could lead a reasonable person to conclude that campaign materials were distributed with the approval of the school. Further, the election was held to teach students leadership skills and to experience the democratic process (p. 1133).

constraint on speech (pp. 1133-1134).[65] The court found that the rule furthered the school's legitimate pedagogical interests, specifically "assuring that school hours and school property are devoted primarily to education as embodied in the district's prescribed curriculum, and the interest in preserving some trace of calm on school property" (p. 1134). Based on these findings and applying *Kuhlmeier*, the court concluded that the rule was constitutional because it furthered pedagogical interests. The school acted reasonably in suspending Adam for violating the rule by distributing condoms without prior approval.

Although the court held that the school's decision was based on a violation of a school rule, the circuit court also stated that even if Adam's expression had been protected speech, the school still could have had reason to prohibit the expression or punish the behavior after the fact. Because Adam's expressive act of handing out condoms during a school-sponsored student election "carried the implied imprimatur of the school," the school district had the right to separate itself from sensitive topics such as teenage sex (*Henerey*, pp. 1135-1136). Further, the court cited *Poling* for the proposition that legitimate pedagogical interests extend outside the classroom, and that schools have an interest in "teaching the shared values of a civilized social order" (*Henerey*, p. 1135,

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[65] The rule at issue, Board Policy KJ-R states: *ADVERTISING IN THE SCHOOLS* (Board Policy KJ-R) 1. *Places* - The distribution of such items may take place in a location approved by principal of the school. …. 3. *Approval* The approval must be obtained the previous day or earlier from the principal or assistant principal. (For materials not readily classifiable or approvable more than one school day should be allowed.) The approved articles will bear the official stamp of the school, "Approved for Distribution or Posting" …. 5. *Unacceptable Items* Hate literature which attacks ethnic, religious or racial groups, other irresponsible publications aimed at encouraging hostility and violence; pornography, obscenity and materials unsuitable for distribution in the schools is unacceptable as well as: a. Materials judged libelous to specific individuals in or out of school b. Materials designed for commercial purposes -to advertise or promote a product or service for sale or rent. c. Materials which are designed to solicit funds unless approved by the superintendent or his assistant d. Materials the principal is convinced would materially disrupt class work or involve substantial disorder or invasion of the rights of others 6. *Acceptable Materials* All materials not proscribed in "Unacceptable items" (pp. 1133-1134).

citing *Poling*, p. 762, quoting *Fraser*, p. 683). The court relied on *Fraser* and *Kuhlmeier* in reaching its conclusion, and held it was within the school district's discretion to disqualify Adam because he distributed condoms, which contradicted a legitimate pedagogical interest of the district, and was done so during the course of a school-sponsored student election (p. 1136).

Like Adam in the *Henerey* case, Mary Philips had been required to sign a list of election rules when she decided to run for seventh grade student council representative. The list included a requirement that campaign posters receive prior principal approval. Mary hung posters in her middle school in Mississippi that stated "He chose Mary…You should too," and in the middle was a reproduction of Duccio's "Madonna and Child." After receiving complaints about the posters and conferring with the superintendent, the principal ordered the posters removed. Mary filed suit and Oxford Separate Municipal School District became a defendant in *Phillips et al.* v. *Oxford Separate Municipal Sch. Dist.* (2003).

The Mississippi Federal District Court hearing the case reviewed *Tinker*, *Fraser*, and *Kuhlmeier* and determined that *Kuhlmeier* applied in the decision because the election was a school-sponsored event. The court cited the *Poling* decision for this conclusion. The district court acknowledged that *Kuhlmeier* required the announcement of a legitimate pedagogical interest by the school in limiting Mary's speech (*Phillips*, p. 646). The court found that the school had a legitimate pedagogical interest in responding to complaints that the poster was sacrilegious and that it violated the Establishment Clause. The court held that the removal was reasonable under the facts and did not violate Mary's First Amendment speech and expression rights.

The campaign cases, although resembling the facts of *Fraser* (especially *Poling*) in many respects, reveal that the lower federal courts have routinely interpreted *Kuhlmeier* as controlling student speech and expression in the process of student elections. The elections are seen as school-sponsored events, and *Kuhlmeier* is the appropriate approach for deciding the constitutionality of student speech in school-sponsored expressive activities (*Phillips*, p. 646). [66] The courts have repeatedly held that student elections are not open forums, and in this context school leaders have broad authority to exercise control over the content of students' speech and expression (*Henerey*, p. 1132). The *Poling* court reasoned that educational leaders had this authority because educators have a legitimate pedagogical interest in assuring that participants in the sponsored activity "learn whatever lessons the activity it is designed to teach" (*Poling*, p. 762, quoting *Kuhlmeier*, p. 271). In many respects, the focus of the campaign cases, with the exception of *Poling*, has been about the legitimacy of school rules and the schools' ability to enforce its rules.

Student Protest, Political Messages and Expression

Student free speech and expression rights came to the Court's attention initially because of the suppression of John Tinker's (and his sister and friend's) silent protest against the United States involvement in Vietnam. Forty years after *Tinker*, students continue to exercise their rights to silent protest and political speech. Schools, students, and courts continue to debate the extent of these rights in the school setting.

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66 *Henerey* and *Phillips* both referred to *Poling* for the idea that there is "no doubt" a school election is a school-sponsored event (*Henerey*, p. 1133; *Phillips*; p. 647). *Hazelwood* stated that to be school-sponsored the activity does not need to be conducted in a classroom but will be considered school-sponsored so long as the activity is supervised by a faculty member and "designed to impart particular knowledge or skills to student participants and audiences" (*Hazelwood*, p. 271).

In *Chandler* v. *McMinnville Sch. Dist.* (1992), the Ninth Circuit was faced with a situation concerning students' right to wear buttons containing political messages while in school. Following the commencement of a legal teacher strike, two students, David Chandler and Ethan Depweg, entered their high school in Oregon wearing and distributing a variety of buttons supporting the striking teachers. The students' fathers were among the striking teachers (*Chandler*, p. 526). Slogans included on the buttons stated "I'm not listening Scab," "Do Scabs bleed?," "Students United for fair settlement," and "Scab" with a circle drawn around the word and then a diagonal line through "Scab." Chandler and Depweg were called to the office and told by the vice principal to remove the buttons because they were disruptive. The boys replied that they had worn them in their classes and there had been no disruption. The vice principal again ordered the two boys to remove the buttons and they refused, believing the buttons constituted protected speech. The students were suspended for willful disobedience. The students filed suit claiming that their First Amendment rights to free speech and expression had been violated. In addition, they claimed the school violated their First Amendment right to freedom of association because Chandler and Depweg had been singled out for leading the protest.

The Ninth Circuit briefly reviewed the three Supreme Court student speech and expression decisions and determined that *Tinker* was the most applicable because the buttons were not school-sponsored as under *Kuhlmeier* and did not constitute lewd speech as under *Fraser*. The Ninth Circuit specifically stated that in order for the school to suppress Chandler and Depweg's speech under *Tinker*, the school would have to show

that facts existed, which reasonably led school officials to "forecast substantial disruption of or material interference with school activities" (*Chandler*, pp. 529-530).

The court found that the "Scab" buttons were not inherently disruptive.[67] Where "political speech is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion" (*Chandler*, p. 531). The Circuit Court concluded that the use of the word "Scab" did not establish, as a matter of law, that the buttons could be suppressed and "the passive expression of a viewpoint in the form of a button worn on one's clothing is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom" (p. 531, internal citation omitted).[68] Thus, the actions of the school were found to have violated the students' First Amendment free speech and expression rights.

Alex Smith authored and read aloud at the school lunch table a three-page commentary critical of his high school's tardy policy. The statement was not only critical of the policy, but also made personal attacks on the school's administrators.[69] As a result

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[67] The school district only challenged the buttons that contained the word "Scab." The Circuit Court found that use of the word was not lewd or inherently offensive. Furthermore, the term had a history of close association with employment strikes and labor disputes, which was applicable in the circumstances of the case.

[68] The court acknowledged that if the school district could show that the "Scab" buttons were a derogatory statement directed specifically at the replacement teachers rather than political expression associated with labor disputes, the conclusion of whether the expression could reasonably lead administrators to forecast disruption might be different.

[69] The district court described the statement: "The commentary stated that the tardy policy was made by a Nazi, and gave the names of some teachers who the plaintiff believed supported the policy, referring to these teachers as "teacher gestapos [*sic*]." The plaintiff devised a crude abbreviation for the tardy policy, calling it "turd. lic.," which he also designated as "turd licking." Aside from criticizing the tardy policy, the commentary discussed the belief that the high school principal, Betty Kirby, had divorced her husband after having an affair with another school principal whom she later married. Mrs. Kirby was referred to as a "skank" and "tramp" to whom people did not want to talk because "no one likes to think about two school principals having sex." The commentary also stated that Assistant Principal Michael Travis was confused about his sexuality" (p. *Smith*, 989).

of his expression, Alex was charged with "verbal assault" under the school's student conduct code and suspended from school for 10 days *(Smith* v. *Mount Pleasant Pub. Sch.,* 2003). The U.S. District Court for the Eastern District of Michigan had to decide whether the school district's "verbal assault" policy was unconstitutional and whether Alex's First Amendment free speech rights were violated when he was punished for his commentary on the school's tardy policy.

The court found that both the *Tinker* and *Fraser* holdings applied to the circumstances. Although the comments were lewd and possibly obscene, which would simply require a *Fraser* analysis, the court found they were also related to a political viewpoint (*Smith,* p. 997). In order for the comments to serve as the basis for discipline, the school needed to show that the comments were a substantial disruption to the school's operation or impinged on other students' rights (*Smith,* p. 997). The court found Alex's comments "disruptive and interfered with discipline" because they attempted to undermine the administration's authority by questioning one administrator's sexuality and announcing another's marital infidelity. The court also found that the remarks impinged on the rights of students sitting near Smith's lunch table that complained about having to listen to the rant. The district court concluded that although the "verbal assault" policy was unconstitutionally vague and overbroad, the school district could punish Alex for his "insulting remarks," without the school violating the First Amendment (*Smith,* p. 989).[70]

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[70] The policy stated: "Assault: Intimidation of students or staff; the act of verbally, physically, sexually or otherwise threatening the well-being, health, safety, or dignity of persons on school property or going to and from school, including any school activity under Board sponsorship. MINIMUM SUSPENSION OF TEN (10) DAYS. REFERRAL TO THE SUPERINTENDENT/BOARD OF EDUCATION, AND/OR LEGAL AUTHORITIES…*The [School] Board shall...expel a student in grade six or above for up to 180 school days if the student commits a physical assault at school against another*

After increased racial tension and incidents between black and white students at Derby High School and Middle School in Derby, Kansas, the Derby Unified School District adopted a Racial Harassment and Intimidation Policy (*West* v. *Derby Unified Sch. Dist. No. 260*, 2000).[71] Plaintiff T.W. was suspended for three days under the policy after he drew a Confederate flag on a piece of paper during math class, which a classmate showed to the teacher. T.W. was aware of the policy because he had previously reviewed it with a school administrator when he was suspended under the policy for calling a student "blackie" (West, p. 1363). It was undisputed that T.W. did not intend to harass or intimidate any particular student with the drawing. However, the suspension was still justified as T.W. knew of the policy, intentionally violated the policy, and displayed the drawing to classmates, and classmates had warned him that he would be disciplined if he drew the Confederate flag (p. 1364). After being suspended, T.W. filed a complaint alleging that the suspicion violated his right to freedom of expression under the First Amendment and the policy was unconstitutional.

T.W. claimed that the drawing was a peaceful and non-threatening expression. The Tenth Circuit however concluded that the suspicion did not violate T.W.'s First Amendment rights. The court acknowledged T.W.'s expression could be considered

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student, commits verbal assault against a District employee, volunteer, or contractor or makes a bomb threat directed at a school building, property, or a school-related activity" (p. 990, emphasis in original).

[71] The policy provided in part: District employees and student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and *students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred.* (*Examples*: clothing, articles, material, publications or *any item that denotes* Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, *Confederate flags* or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive). Violations of this policy shall result in disciplinary action by school authorities. For students there will be a three day out-of-school suspension for the first offense with a required parent conference prior to readmittance" (*West*, p. 1361, emphasis in original).

protected political speech *outside* the school context, but that the Supreme Court had recognized students' rights in school as not co-existent with the rights of people outside the school setting. "A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school" (*West*, p. 1366, citing *Kuhlmeier*, p. 266).

The court concluded that based on the history of racial tension and past events at the school, it was reasonable for the school to believe that T.W.'s display of the Confederate flag could cause disruption to the education process and interfere with other students' rights. "School officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline" (*West*, p. 1366). It was more than a mere desire on the part of the school district to avoid the discomfort associated with the expression of an unpopular viewpoint. The district had the power and right to act before disruption actually occurred. Enforcement of the policy against T.W. was ruled reasonable and did not violate T.W.'s First Amendment rights.

The circuit court also discussed the policy in terms of general applicability and found that the policy was not overbroad or vague because it was implemented to focus on a particular and legitimate concern. As applied, the "policy permits the administrator to consider whether the student's conduct was willful, whether the student displayed the symbol in some manner," and if the conduct created ill will. Further, the district's interpretation of the policy did not "prohibit the use or possession of such symbols for

legitimate educational purposes. These limitations make it likely that the policy will only apply in circumstances where it is constitutional to do so" (*West*, p. 1368).

In *Nuxoll* v. *Indian Prairie Sch. Dist. No. 204* (2008), the Seventh Circuit decided whether a student's free speech rights were violated when he was prohibited from making negative comments at his high school about homosexuality. The day after the Gay/Straight Alliance Club at Neuqua Valley High School sponsored a "Day of Silence," which was held to draw attention to harassment of homosexuals, students at the school, including Alex, participated in a "Day of Truth," which was sponsored by national organizations that oppose homosexuality. As part of the "Day of Truth," students wore shirts that stated "My Day of Silence, Straight Alliance" on the front and "Be Happy, Not Gay" on the back (*Nuxoll*, pp. *3-4). The school banned the students from wearing the "Be Happy, Not Gay" slogan because it violated a school rule that prohibited "derogatory comments, oral or written that refer to race, ethnicity, religion, gender, sexual orientation, or disability. The school deemed 'Be Happy, Not Gay' a derogatory comment on a particular sexual orientation" (p. *4).

The circuit court attempted to strike a balance between Alex Nuxoll's free speech rights, the rights of students that found Alex's speech offensive, and the school's need to maintain order and fulfill its educational mission. The school argued that the rule protected the rights of students that are the subject of the comments. The circuit court recognized that students' First Amendment free speech and expression rights are not unlimited but also acknowledged that the school does not have an unbridled right to prevent speech that it does not agree with or that is critical of other's lifestyles. Further,

the court found that there was no evidence that Alex's comments about homosexuality were defamatory or targeted at specific students (*Nuxoll*, p. *10).

The court offered that the school's better argument would have been that the rule "strikes a reasonable balance between the competing interests – free speech and ordered learning" (*Nuxoll*, p. *11). The Seventh Circuit expanded *Morse* beyond viewpoint suppression of illegal drug endorsement speech in developing its conclusion. The court reviewed the Supreme Court student speech and expression decisions, and concluded:

> From *Morse* and *Fraser* we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school--symptoms therefore of substantial disruption--the school can forbid the speech. The rule challenged by the plaintiff appears to satisfy this test. It seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way. It is not as if the school forbade only derogatory comments that refer, say, to religion, a prohibition that would signal a belief that being religious merits special protection. The list of protected characteristics in the rule appears to cover the full spectrum of highly sensitive personal-identity characteristics. And the ban on derogatory words is general. (pp. *15-16, internal citations omitted)

The court went on to state that the rule prohibited derogatory comments that referenced religion, gender, ethnicity, disability, sexual orientation, or race. The court stated that this was a restriction on expression, but that in the high school context "school authorities have a protective relationship and responsibility to all the students" that allows such a restriction (p. 17).

The circuit court held that that the rule was not unconstitutional on its face. As applied, the rule could be unconstitutional because the phrase "derogatory comments" could be stretched to cover too much speech and expression. Applying the rule to the "Be Happy, Not Gay" shirt, the court found that the rule was stretched too far by school

officials and the characterization of the slogan as "derogatory or demeaning" was too strong given the fact that there was no evidence of disruption. Thus, the court concluded that the school rule prohibiting derogatory comments was valid, but as it applied to the "Be Happy, Not Gay" shirt, it violated the students' free expression rights (*Nuxoll*, pp. *21-22).[72]

The result of the Seventh Circuit interpretation and application of *Morse* could have much greater implications than the court's specific holding. In discussing *Morse* and its applicability to the facts of the case, the Seventh Circuit acknowledged Justice Alito's concurrence, but watered down his opinion stating, "The concurring Justices [in *Morse*] wanted to emphasize that…the Court was not giving schools carte blanche to regulate student speech" (*Nuxoll*, p. 12). In reality, Justice Alito had stated,

> The Court's decision…*goes no further* than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use…I join the opinion of the Court on the understanding that the opinion *does not hold* that the special characteristics of the public school necessarily justify *any other speech restriction*. (*Morse*, p. 2637, emphasis added)

The Alito concurrence was not a mere general statement about schools' ability to limit speech. It was a specific announcement that *Morse* did not create an avenue for schools to participate in viewpoint discrimination that went any further than prohibiting the encouragement or endorsement of illegal drug use.

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[72] The case was only at the preliminary injunction stage and the Circuit Court anticipated that a more complete record would be complied in the future, and that the facts contained therein might change the analysis. At this time, there have been no further published opinions.

After acknowledging Justice Alito's statement, the Seventh Circuit did exactly what Justice Alito stated *Morse* did not allow.[73] The Seventh Circuit concluded that a rule, which prohibited a certain viewpoint inside a category of speech, was constitutional and justified because of the special circumstances of the school environment. The dissenting Justices in *Morse* warned that courts could in the future try to extend *Morse* to allow further viewpoint discrimination (pp. 2639, 2645-2646, 2651). Admittedly, in his dissent, Justice Stevens stated, "It might well be appropriate to tolerate some targeted viewpoint discrimination in this [school] unique setting" (p. 2643). However, nothing in the dissent suggested that the Justices would favor a categorical limitation on a broad viewpoint. Justice Stevens went on to state, "It would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech…yet would permit a listener's perceptions to determine which speech deserved constitutional protection" (p. 2647). A reasonable interpretation of the court's opinion suggests that this is exactly what the school policy, upheld by the Seventh Circuit, allowed school officials to do.

In *Morse,* the concurring justices had joined the majority opinion with the specific expression that the decision did not extend viewpoint discrimination beyond illegal drug use and the dissenting justices discussed the complications with participating in selective viewpoint discrimination. Only nine months after the *Morse* decision, the Seventh Circuit arguably used *Morse* in a manner a majority of the Supreme Court – the concurring and dissenting Justices in *Morse* – suggested was inappropriate.

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[73] The Seventh Circuit also mentioned there was little of history of disruption at the school based on this type of student commentary, which eliminated a *Tinker* analysis.

Gillman v. *Sch. Board for Holmes County* (2008) presented a federal district court in Florida with a question regarding "whether a public high school may prohibit students from wearing or displaying t-shirts, armbands, stickers, or buttons containing messages and symbols which advocate the acceptance of and fair treatment for persons who are homosexual" (p. 1361). Heather Gillman alleged that the school district deprived her of her First Amendment expression rights and participated in viewpoint discrimination when it would not let her wear items advocating acceptance of homosexuality in support of her friend Jane Doe who had been targeted by the principal for being gay. The court agreed.

The Holmes County School Board and principal of Heather's high school banned students from wearing certain buttons, t-shirts, and stickers displaying numerous slogans, including: "Equal, Not Special Rights;" "Gay? Fine By Me;" "Gay Pride" or "GP;" "I Support My Gay Friends;" "I Support Gays;" "God Loves Me Just the Way I Am;" "I'm Straight, But I Vote Pro-Gay;" "I Support Equal Marriage Rights;" "Pro-Gay Marriage;" and "Sexual Orientation is Not a Choice. Religion, However, Is," as well as rainbow and pink triangle symbols (G*illman*, p. 1362). Heather challenged the ban and the court utilized *Tinker*'s substantial and material disruption standard in making its determination. In considering *Tinker*, district the court pointed out that the Eleventh Circuit had previously "protected the free speech rights of students when such speech was unaccompanied by material and substantial disruption or collision with the rights of other students to be secure and left alone" (p. 1368, internal quotations omitted). However, the court acknowledged that the Eleventh Circuit has upheld the suppression of expression when the student expression caused a material and substantial disruption or collided with other students' rights.

With this standard in mind, the court attacked the actions of the school district for banning the political expression:

> The facts in this case are extraordinary. The Holmes County School Board has imposed an outright ban on speech by students that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness, and support for not only a marginalized group, but more importantly, for a fellow student at Ponce de Leon. The student, Jane Doe, had been victimized by the school principal solely because of her sexual orientation. Principal David Davis responded to Jane Doe's complaints of harassment by other students, not by consoling her, but by shaming her. Davis interrogated Jane about her sexual orientation, informed her parents that she identified as homosexual, warned her to stay away from other students because of her sexual orientation, preached to her that being homosexual was not "right," and ultimately suspended her for expressing her support for herself and for other homosexual students. (p. 1370)[74]

The court stated that if any unrest or disruption had occurred, it had been created by the principal and his mistreatment of Jane Doe and his animosity towards students that supported their homosexual classmates (p. 1371). The school was unable to provide any evidence of disruption created by the wearing of the banned pro-gay rights materials. There had been no threats of violence, students did not skip class or force their beliefs on their classmates. In short, no substantial and material disruption occurred and the school could not have reasonably forecast that such disruption would occur. Further, the expression did not collide with or trample the rights of other students. The court found that the school board was not justified in banning the pro-gay rights expression (p. 1373).

The court also found that the ban on the student expression was motivated by the school board' angst about political expression in school. Further, the court concluded that

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[74] Jane Doe was not the plaintiff or even a part to this action; however, the events that she experienced led to increased awareness and support for gay and lesbian students and increased depiction of slogans and "symbols which advocate[d] the acceptance of and fair treatment for persons who are homosexuals" (p. 1361).

the board's action was promoted and harshly enforced because of the principal's personal bias and disagreement with homosexuality. The unfettered fears and biases of the district's educational leaders did not constitute legitimate grounds for the suppression of the students' speech and expression. The court concluded that the school district's actions constituted a violation of Heather's First Amendment rights and the students should have been allowed to wear slogans and symbols supporting equal treatment of gay and lesbian students.

The student political speech cases can provide factual circumstances that can result in multiple Supreme Court student speech and expression principles coming into conflict. *Tinker* guarantees students the right to private passive expression; however, *Fraser* gives school leaders the ability to suppress lewd and obscene student speech and expression. When a student uses lewd or obscene language in making a political statement, applying a straight forward *Fraser* analysis does not always achieve a constitutional result.

As the *Smith* decision illustrated, a student can use lewd and vulgar language in making a political statement, and the court must look to *Tinker* rather than *Fraser* to determine if the speech could be suppressed. Although the speech could be considered lewd and obscene, the political nature of the statement required the school to demonstrate the speech created a substantial and material disruption to justify censoring the political expression (*Smith*, p. 997). Further, *Chandler* points out that when the criticism is pointed at the individuals (school leaders) attempting to quash it, they must be extremely conscious that constitutional suppression requires more than just a mere disagreement with the expression or sense of discomfort because of it (*Chandler*, p. 531). Thus, school

leaders have to do more than merely claim that a student uttering an obscene phrase in itself created a material and substantial disruption.

However, a proper analysis could require an additional step involving *Kuhlmeier*. The lower federal courts have concluded that school campaigns and elections fall under the broad umbrella of curricular-related activity governed by *Kuhlmeier* (see *Henerey*, p. 1133; *Phillips*; p. 647). If a student offered the lewd and obscene political speech in the course of a school election, there is a reasonable argument that it could be punished utilizing *Kuhlmeier*, without *Fraser* or *Tinker*, because the election was considered a school-sponsored activity (assuming that the school could establish that it based the punishment on a legitimate pedagogical concern). However, a student could give the same speech in the lunch room and the school would have to show (or reasonably forecast) that the expression created a substantial and material disruption before suppressing it (*see Smith*, p. 997; *see also Tinker*).

The lower federal court student political speech decisions establish that there are limits to student political speech in school, a point the Supreme Court originally made clear in its *Tinker* opinion. However, distinguishing exactly what Supreme Court principle should be applied to determine the constitutionality of the political expression is not always as clear. Simply because a student is making a political statement or protesting a policy does not give the student the right to utilize lewd and obscene speech. At the same time, school leaders cannot automatically prohibit or punish lewd speech if it carries a political message. The circumstances surrounding the speech, whether it was offered in the classroom, the hallway, or in the course of a school-sponsored event, will play a factor in determining if the speech is protected under the First Amendment.

The Student Athlete and Free Speech

Collisions between students' right to voice opposition to a school's practice or decision and a school district's need to maintain order and control have played out further in the specific context of student athletes' rights. Several courts have addressed student athletes' constitutional rights to speak out against their coaches. In *Pinard* v. *Clatskanie Sch. Dist. 6J* (2006), eight members of the high school varsity basketball team in Clatskanie, Oregon drafted a petition stating that they would no longer play for the current basketball coach because of his abusive nature (pp. 760-761). In addition, the players decided that they would not play in the next game if the coach remained, and ultimately refused to board the bus to the away game. The plaintiffs claimed they did not board the bus as a show of protest against the coach and to demonstrate their sincerity with regard to the petition. In response to the players signing the petition and refusing to board the bus, the school permanently suspended the players from the team (p. 763).

The players filed suit claiming that the suspension violated their First Amendment free speech rights and that the petition and bus protest were protected expression. The United States Court of Appeals for the Ninth Circuit stated that the petition constituted free speech, but the court did not decide whether the bus protest constituted pure speech because even if the refusal to board the bus was considered protected expression, it was still properly punishable in the school context under *Tinker* (*Pinard*, p. 765). In determining that *Tinker* applied to the situation the Ninth Circuit stated:

> The First Amendment protects all student speech that is neither school-sponsored, a true threat nor vulgar, lewd, obscene or plainly offensive unless school officials show 'facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities.' (p. 767)

The circuit court concluded that although the petition and complaints were protected speech, regardless if the refusal to board the bus was protected speech, the act "substantially disrupted and materially interfered with a school activity" (*Pinard*, p. 769). Thus, the school did not violate the students' First Amendment rights by permanently suspending them from the team. The court found that disruption had occurred because it was an away game, the school had rented a bus, secured and scheduled the opponent, coordinated and hired officials, and the boycott was an act disrupting an official component of the school's varsity boys' basketball program, which forced the school to either cancel the game or play with replacement players.[75]

. The Ninth Circuit concluded that this conduct clearly interrupted a school activity and the school's affairs. "Even if we viewed the plaintiffs' boycott as symbolic speech within the First Amendment, school officials could permissibly discipline the players for the disruptive conduct" (*Pinard*, p. 770). Thus, the suspension of the players did not violate their constitutional rights under *Tinker*.

Similar circumstances occurred at Jefferson County High School in Tennessee when the varsity football coach permanently removed several players from the team after the players had drafted a document which stated, "I hate coach Euvard [sic] and I don't want to play for him," and signed the statement (*Lowery et al.* v. *Euverard et al.*, 2007, p. 585). After learning of the petition, Coach Euverard met with each player individually. Student athletes who signed the petition, but apologized were allowed to stay on the team; only athletes who admitted signing the petition and refused to apologize were suspended.

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[75] The school played with replacement student athletes and was beaten soundly.

The plaintiff students, after being removed from the team, filed suit claiming that their First Amendment rights had been violated, as the petition was protected speech and expression. The Sixth Circuit Court of Appeals phrased the question facing it as "what is the proper balance between a student athlete's First Amendment rights and a coach's need to maintain order and discipline" (*Lowery*, p. 587). The circuit court found that *Tinker* governed, and concluded that it was reasonable for the coach to believe that the petition would substantially disrupt the team by eroding the coach's authority and dividing the players. As in *Pinard*, the Sixth Circuit held that the coach and school did not violate the student athletes' First Amendment rights because the potential disruption created by the petition took the students' actions outside the realm of *Tinker's* protections (p. 598).[76] It was not necessary that a disruption actually occur so long as the coach and school could reasonably forecast that the petition would disrupt the team.

Beyond the narrow holding of the case, the Sixth Circuit's analysis of student athletes' rights is relevant to understanding the lower federal courts' interpretation of the Supreme Court's student speech and expression principles and the relation to other Supreme Court student rights' decisions. In reaching its conclusion, the circuit court stated that students do not have a right to participate in extracurricular activities. Pointing to Supreme Court student drug testing decisions, *Brd. of Edu.* v. *Earls* (2002) and *Vernonia Sch. Dist.* v. *Acton* (1995), the court reiterated that the Supreme Court had held that student athletes are subject to greater restrictions than the general student body (*Lowery*, p. 589). The court reaffirmed a previous Sixth Circuit decision that stated

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[76] The Sixth Circuit distinguished *Pinard*. In *Pinard* the coach had previously told his players that if they did not want to play for him and told him such, he would quit. The Sixth Circuit characterized this as the coach inviting criticism and the coach and school could not later claim that the invited speech created a disruption. Thus, while the student petition was protected by *Tinker* in *Pinard*, the uninvited petition in *Lowery* was not entitled to the same protection.

regulations that could be inappropriate for the entire student body may be appropriate for a voluntary athletic program (p. 597). Further, the circuit court distinguished coaches from classroom teachers. Where the classroom teacher's role is to guide academic development and promote discussion of various student viewpoints, a coach has the responsibility to train student athletes to win on the field. "Plays and strategies are seldom up for debate. Execution of the coach's will is paramount," and coaches are entitled to respect from their athletes (pp. 589, 594).[77]

The court drew on the Supreme Court's conclusion that school officials have a duty to maintain discipline and order to support its holding and found that the plaintiffs' actions were an attack on the coach's authority and undermined his ability to lead the team. Further, the petition threatened team unity (*Lowery*, p. 594). By utilizing Supreme Court student Fourth Amendment rights decisions, the circuit court distinguished student athletes' free speech rights from those of the general student body. The court articulated that students do not have broad freedom to question a coach's authority and escape possible reprimand. The circuit court did not say that the students were prohibited from expressing their views of the coach; however, if they chose to express their opinions, it was reasonable for the coach to suspend the athletes from the team because of the negative effect such behavior could have on the team.

The Sixth Circuit referenced *Pinard* and *Wildman* v. *Marshalltown* (2001) in its discussion of student athletes' First Amendment rights. *Wildman* involved a high school basketball player who wrote a letter to her teammates after her coach failed to select her for the varsity girls' basketball team. The letter contained the word "bullshit," which the

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[77] The circuit court did acknowledge that there are many reasons students participate in school sports but the most immediate is to win games, and a coach directs students towards this goal.

Eighth Circuit characterized as inappropriate language, and the letter encouraged the players to unite against the coach (p. 772). When the coach learned of the letter, he requested that the student athlete apologize. She refused, and the coach dismissed her from the junior varsity team.

In ruling on these issues in *Wildman*, The Eighth Circuit referred to *Tinker* and *Fraser* and held that the letter and student's actions materially disrupted a school activity (girls' basketball) and removal of the student from the team was reasonable (*Wildman*, p. 772). In reaching this holding, the court recognized a difference between the athletic field and the classroom:

> The school sanction only required an apology. The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter. (p. 772)

The Eighth Circuit also noted that coaches are entitled to a certain amount of respect, particularly in the school setting. The court concluded that under the circumstances, the plaintiff's speech amounted to insubordinate speech against the coach and was not entitled to constitutional protection. As in the other circuit court decisions, the Eighth Circuit acknowledged that the coach's decision might not have been the best approach, but under the circumstances, the approach was reasonable.

Although eluded to and used in all of the decisions, *Lowery* specifically acknowledged that the Supreme Court had concluded student athletes have fewer rights in the area of privacy and search, and are subject to greater regulation than the general student body. The circuit courts have utilized this Supreme Court Fourth Amendment analysis and transplanted it to the student speech and expression context. The few

available student athlete speech decisions are consistent in differentiating between student athletes' rights and those of the general student body. The courts have articulated distinctions between the classroom and the playing field, as well as the voluntary nature associated with playing sports as compared to the mandatory obligation of attending class. The federal courts have established that student speech and expression, such as letters and petitions, that could constitute protected speech in the general student population, are not afforded the same level of protection in the student athlete setting. These actions, when taken by student athletes, have the potential to create disruption, materially interfere with a school activity, possibly undermine the coach's authority, and divide the team. Further, the courts acknowledged differences between the role of a teacher and a coach and the deference a student athlete must show a coach. As the Sixth Circuit stated, student athletes are subject to greater restrictions, and circuit court decisions provide detailed examples of how schools can limit student athletes' speech and expression rights comparable to the general student population.

Saluting the Flag and Saying the Pledge of Allegiance

Although the Supreme Court has heard and rendered decisions in cases concerning state statutes and school regulations that require students to salute the flag or say the Pledge of Allegiance ("Pledge"), school districts and states continue to enact such regulations, and students and parents continue to challenge them as unconstitutional. The Supreme Court addressed a regulation requiring mandatory flag salute in 1943 in *West Virginia State Board of Educ.* v. *Barnette*. The Supreme Court concluded that compelling students to salute the flag violated students' First Amendment rights (p. 642). In 2004, the Supreme Court heard a case concerning student rights regarding reciting the Pledge;

however, the challenge was based on violations of the Establishment Clause and Free Exercise Clause rather than the Free Speech Clause of the First Amendment (*Elk Grove Unified Sch. Dist.* v. *Newdow*, 2004). Further, the Court did not reach the merits of the case because the Court decided the case on the narrower procedural grounds that the father did not have standing to file suit as his daughter's "next friend." The lower federal courts have not wavered from the Supreme Court's holding in *Barnette*.

In *Frazier* v. A*lexandre* (2006), Cameron (Cam) Frazier challenged a Florida School District's policy that required students to stand and say the Pledge or required parental permission to obtain exemption. Even if the student received parental permission for exemption from *saying* the Pledge, the statute still required the student to stand during it. Cam was an eleventh-grader who, after being disciplined for failing to stand during the Pledge or bringing parental permission for his behavior, filed suit claiming that the school's actions and the Florida statute violated his First Amendment rights.[78] Cam specifically alleged that unless the court intervened he would "continue to be subject to verbal abuse or other punishment for the exercise of his First Amendment right of expression by remaining seated" and silent during the Pledge (p. 1355). The district court characterized Cam's challenge as not involving the daily recitation of the Pledge or its contents, but only the state's authority to "override his conscience and compel his participation in such an exercise" (p. 1363).

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[78] Cam's teachers had excused him from standing for the pledge for several years; however, during a school day that utilized a modified schedule, Cam was in a different classroom than usual during the Pledge. The teacher ordered Cam to stand for the Pledge. When he refused, the teacher told him he had no respect, was un-American and ungrateful, told him he needed parental permission, continued to berate him, and eventually sent him to the office (*Frazier*, p. 1353-1354). The principal also told Cam that he would have to stand for the Pledge, but that talking to his mother, on the phone, constituted sufficient parental consent for not *saying* the Pledge.

The court concluded that the Florida statute and the school regulation were clearly unconstitutional in requiring students to stand even if they did not want to participate in the Pledge and violated students' First Amendment free speech and expression rights. The statute and regulation's requirement that students obtain parental permission to be excused from the Pledge was also unconstitutional (*Frazier*, p. 1368). The district court established that Cam, and all students, were exercising First Amendment rights personal to the student in refraining from saying the Pledge. Thus, parental consent was not needed to exercise the right (p. 1359).

At the outset of the discussion, the court acknowledged that the Constitution protects "affirmative and negative free speech rights" (*Frazier*, p. 1362). The district court then summarized several federal court cases that had affirmed students' rights regarding saluting the flag and saying the pledge, concluding that federal courts have long respected a student's right to refrain from saying the Pledge. In *Walker – Serrano ex rel. Walker* v. *Leanoard* (2003), the Third Circuit Court of Appeals stated that students' right to refrain from saying the Pledge had been protected for over 50 years, and that "punishing a child for non-disruptively expressing her opposition to recitation of the pledge would seem to be as offensive to the First Amendment as requiring its oration" (*Frazier*, p. 1365, quoting *Walker – Serrano*, p. 417). The Northern District of New York in *Rabideau* v. *Beekmantown* (2000) concluded "a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so" (*Frazier*, p. 1365, quoting *Rabideau*, p. 267).

The Third Circuit in *Circle School* v. *Pappert* (2004) struck a Pennsylvania statute that required parental notification when a student refused to participate in saying

the Pledge or salute the flag because it violated students' First Amendment free speech rights (*Circle School*, p. 174). The Third Circuit reasoned that the parental notification would discourage, or *chill*, students exercising their First Amendment right to refrain from participating in the exercises. Further, the notification provision constituted viewpoint discrimination because it was only triggered when students chose *not* to speak (p. 180). The Third Circuit found that the state lacked a compelling interest for the notification provision and as such the provision constituted "significant infringement" on students' free speech rights (p. 181).

The day after a classmate was chastised by his teacher and punished by the principal for failing to say the Pledge of Allegiance, Michael Holloman stood silently with his fist raised while the Pledge was said during his class. Holloman did not disturb other students, touch anyone, or distract his fellow students' view of the flag. The teacher immediately condemned his behavior in front of the class and called his actions disappointing, disrespectful, and inappropriate. The teacher told the school principal of Holloman's actions and Holloman was summoned to the principal's office. Holloman explained that he raised his fist as a protest for what happened to his friend the previous day. The principal punished Holloman by sentencing him to three days detention, stated that Holloman could not receive his diploma until he completed the punishment, and required Holloman to apologize to the class. Due to the short amount of time between the incident and graduation, there was not enough time for Holloman to serve his detentions. The principal offered Holloman a paddling as an alternative punishment; Holloman accepted the paddling as the classroom teacher watched.

Holloman filed suit claiming that his First Amendment rights had been violated because he had been "chastised, threatened, and punished for refusing to say the Pledge of Allegiance." In *Holloman* v. *Harland*, (2008), the Eleventh Circuit Court of Appeals reexamined students' right to abstain from saying the Pledge. The court reiterated that the Supreme Court has long held that schools may not compel students to say the Pledge (*Holloman*, p. 1268). Further, students have the right to refuse to say the Pledge (p. 1269). The statements appear to be the same argument; however, the court was clarifying that students not only retain a right to be free from compelled speech under the First Amendment but also have an affirmative First Amendment expression right to refrain from saying the Pledge. The Supreme Court has "clearly and specifically established that schoolchildren have the right to refuse to say the Pledge of Allegiance…any reasonable person would know that disciplining Holloman for refusing to recite the pledge impermissibly chills his First Amendment rights" (p. 1269, internal citations and quotations omitted).

Holloman also argued that he had an affirmative right to express himself by raising his fist rather than merely standing silently during the Pledge. The Eleventh Circuit agreed. The court determined that Holloman raising his fist was clearly an expressive message, and stated that the standard was "whether the reasonable person would interpret it [the raised fist] as some sort of message, not whether an observer would necessarily infer a specific message" (p. 1270). The court found that Holloman's raised fist was an expressive message qualifying for First Amendment protection consideration, and that at least some of his classmate's would recognize the specific message – a protest against his classmate's reprimand and punishment the previous day –

while others would reasonably see the general message of a protest against the school (p. 1270).

The court explained that under the First Amendment and *Tinker*, a school can not ignore or suppress expression with which they simply wish not to contend. The school cannot infringe on a student's First Amendment rights simply because it disagrees with the political message the student is attempting to communicate. The school must show that the expression created a substantial and material disruption of the operation of the school and "more than a brief, easily overlooked, de minimum impact, before it may be curtailed" (p. 1272).[79] The court found that there had been no real disruption (or reasonable forecast of disruption) and that the school's "undifferentiated fear or apprehension" was insufficient to overcome Holloman's expression rights. Likewise, the school cannot allege that the punishment was for insubordination and failure to follow directions (in this case, saying the Pledge and placing the hand over the heart). "School officials may not punish indirectly, through the guise of insubordination, what they may not punish directly" (p. 1276).

Further, Holloman's classmates' disagreement with his political statement was also insufficient grounds for the school punishing his expression. This was true even if the disagreement is disguised as offense or veiled in threats to the speaker (p. 1275). The court reasoned that students cannot be afforded "less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason" (p. 1276). A principal must maintain order of the school, but cannot do so by

[79] The court noted that this standard allows schools to suppress expression that is lewd and vulgar as it would undermine the school's basic educational mission (p. 1271).

ignoring right and wrong and punishing a student for exercising a constitutional right because of fear of illegal behavior from the students' peers.

Holloman's affirmative act of raising his fist was entitled to First Amendment protection. He also retained a constitutional right to refrain from reciting the Pledge. His punishment for refusing to participate in the Pledge and raising his fist violated his protected First Amendment rights.

Together, *Circle School*, *Frazier*, and *Holloman* reiterate students' free expression right to refrain from participating in the Pledge or saluting the flag. Although the decisions do not override *Tinker*'s substantial disruption exception, students may not be forced to stand for the Pledge even if the school suggests that the reason for the standing requirement is simply to show respect. Students have an affirmative right to political expression in school as long as it does not create a substantial and material disruption. As the *Frazier* court stated, "Since *Barnette*, federal courts have established a body of case law that irrefutably recognizes the rights of students to" refrain from participating in the Pledge or saluting the flag (*Frazier*, p. 1365).

Student Dress Codes

Numerous cases have been decided concerning student dress codes. The decisions are split between upholding student attire policies and finding that they violate students' First Amendment free speech and expression rights. In *Boroff* v. *Van Wert City Board of Educ.* (2000), The Sixth Circuit upheld a school administration's decision to prohibit students from wearing Marilyn Mason t-shirts to school. School officials told Nicholas

Boroff that he could not wear shirts with Marilyn Mason depicted on them to school.[80] A school authority stopped Nicholas during the school day, and when Nicholas was given the choice to turn the shirt inside out, take it off, or go home, he left school for the day. Nicholas wore a different Marilyn Manson t-shirt on each of the next three days and each day he was told that he could not wear the shirt while at school. At the time of Nicholas's shirt incidents, Van Wert High School (in Ohio) had a "dress and grooming" policy in place that stated, "clothing with offensive illustrations, drug, alcohol, or tobacco slogans…are not acceptable" (pp. 466-467).

Nicholas filed suit and alleged that the school violated his First Amendment right to freedom of expression by prohibiting his wearing of the Marilyn Manson shirts. The court established that *Fraser* applied to the situation and found it was a "highly appropriate function" of the school to prohibit vulgar and offensive expression in school (*Boroff*, p. 468). Applying the standard to the case, the court found the school believed the shirts to be offensive because of the bands promotion of "destructive conduct and demoralizing values," which were contrary to the school's educational mission. The band had a pro-drug persona and Manson admitted drug use and promoted its use. The band's mocking of certain religions ran afoul of the school's mission to respect other students' beliefs (pp. 469-470). The court concluded that the school acted reasonably in banning the t-shirts because they promoted values that were patently offensive to the school's educational mission and were deemed vulgar and offensive (p. 470).

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[80] Nicholas wore a variety of shirts. The front of the first shirt "depicted a three-faced Jesus, accompanied by the words "See No Truth. Hear No Truth. Speak No Truth." On the back of the shirt, the word "BELIEVE" was spelled out in capital letters, with the letters "LIE" highlighted. Marilyn Manson's name (although not his picture) was displayed prominently on the front of the shirt." Nicholas wore three additional shirts with "pictures of Marilyn Manson, whose appearance can fairly be described as ghoulish and creepy" (p. 467).

The U.S. District Court for the District of Massachusetts reached a similar conclusion concerning t-shirts that offered sexual slogans or referenced male genitalia.[81] In *Pyle* v. *The South Hadley Sch. Committee*, the district court held that a policy that prohibited students from wearing the shirts did not violate the students' First Amendment free speech and expression rights. The court concluded "if a school…administration decides to limit clothing with sexually-provocative slogans…in order to protect students and enhance the educational environment…the court is unlikely to conclude that this action violates the First Amendment" (p. 11).

In a situation concerning expression closer to political speech, a student wore a t-shirt to school displaying a photo of President George W. Bush with the caption "International Terrorist" below the picture. The student stated the shirt was a political expression about President Bush's foreign policy and the Iraq war. Dearborn (Michigan) High School, where the student attended, had a student population at the time that was 31% students of Middle Eastern descent. When the principal saw the student wearing the shirt in the lunchroom, he asked the student to turn the shirt inside out or take it off. When the student refused, the principal sent him to the office where the student called his dad and then the student left for the day. The principal explained that he ordered the student to remove the shirt because it had created a disruption, he was concerned it would create an even greater disruption, and was worried about the student's safety. The principal admitted that the shirt did not violate the student code of conduct and did not promote drugs, alcohol, or terrorism (*Barber* v. *Dearborn Pub. Sch.*, 2003).

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[81] Two shirts were in question; the first stated "Coed Naked Band; Do it to the Rhythm." The other stated, "See Dick Drink See Dick Drive. See Dick Die. Don't be a Dick."

In examining plaintiff's claim that the school violated his First Amendment freedom of expression, the court determined that *Tinker* applied because the shirt was not lewd or obscene and it was clearly not school-sponsored or endorsed speech and expression. As such, the school had to show that the t-shirt created a "substantial disruption of or a material interference with school activities or created more than an unsubstantiated fear or apprehension of such disruption or interference" to withstand constitutional scrutiny (*Barber*, p. 856). The court found that banning the shirt was based on the principal's belief that the t-shirt expressed an unpopular political stance, which equated to little more than a desire to avoid the discomfort associated with an unpopular opinion and was not sufficient to ban the student's political expression expressed in the form of a President Bush t-shirt. The court reiterated "maintaining a school community of tolerance includes the tolerance of even the most intolerant or disagreeable viewpoints" (p. 858). The school was unable to show that the t-shirt created a material disruption or was reasonably likely to create such a disturbance, and without this showing the school could not limit the student's right to wear the shirt.

The mascot of the University of Virginia is a Cavalier wielding a saber, and the Albermarle County (Virginia) High School's mascot is a patriot grasping a musket. Across the street from the high school, Albermarle's feeder middle school, Jack Jouett Middle school, had a dress code policy that prohibited the depiction of any guns or weapons or slogans discussing guns or weapons on student attire (*Newsom* v. A*lbermarle County Sch. Board*, 2003). Alan Newsom was a student at Jack Jouett. During his sixth grade year, Alan wore a purple t-shirt to school, "which depicted three black silhouettes of men holding firearms superimposed on the letters 'NRA' positioned above the phrase

'SHOOTING SPORTS CAMP.'" The assistant principal at the school saw Alan and claimed that the depiction reminded her of sharpshooters and the events at Columbine High School. She also thought that Alan's classmates would get the same idea. She had a lengthy conversation with Alan and asked him to remove the shirt. Alan questioned why he needed to remove the shirt and was told the school had a policy that prohibited the promotion of drugs, alcohol, guns and weapons, or the use of any of these products. Alan eventually complied.

During the next year, Alan wore shirts on at least three occasions that referenced the "NRA" but did not depict guns. He was never asked to change these shirts. The middle school dress code policy stated, in part, "students were prohibited from wearing…messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race of ethnic group" (*Newsom*, p. 253). Alan filed suit claiming that the dress code was vague and overbroad, infringing on his First Amendment rights to speech and expression. He argued that the policy was overbroad in that it prohibited even expression related to lawful possession of firearms. The Fourth Circuit Court of Appeals framed the relevant question: "whether the Jouett Dress Code, which prohibits…messages on clothing…that relate to…weapons is unconstitutionally overbroad on its face because it reaches too much expression that is protected by the First Amendment" (p. 255).

The circuit court initially established that even absent the policy, the middle school could prohibit the display of violent, threatening, lewd, obscene or vulgar images and expression related to weapons; however, nonviolent and non-threatening messages

and images related to weapons fall within *Tinker*'s substantial disruption standard. Thus, *Tinker*, not *Fraser* or *Kuhlmeier*, was utilized to determine the constitutionality of the policy (*Newsom*, p. 256). The court also pointed out that the special characteristic of the school environment granted schools more discretion in suppressing student expression:

> Courts have recognized that, even though speech codes in general are looked at with disfavor under the First Amendment because of their tendency to silence or interfere with protected speech, a public school's speech/disciplinary policy need not be as detailed as a criminal code ... the demands of public secondary and elementary school discipline are such that it is inappropriate to expect the same level of precision in drafting school disciplinary policies as is expected of legislative bodies crafting criminal restrictions. (p. 258, quoting *Fraser*, p. 686)

Against the backdrop of *Tinker* and the special circumstances of the school environment, the Fourth Circuit evaluated the dress code. The court found that there was no evidence that the clothing that contained messages related to weapons worn by students substantially disrupted or materially interfered with school operations. The court concluded that the dress restriction was not needed to maintain discipline at the school (*Newsom*, p. 259). As such, the school policy could "be understood as reaching lawful, nonviolent, and non-threatening symbols of not only popular, but important organizations and ideals." The circuit court provided several examples of speech, expression, and symbols that would be prohibited under the policy, including the State Seal of Virginia, the University of Virginia insignia (two crossed sabers), and images of the district's high school mascot. Further, under the policy, a student could wear a shirt that read "No War" but neither a shirt that depicted American troops sitting atop a tank with the message "Support our Troops" nor a shirt that displayed the insignia of many of the armed forces fighting units. Last, "the quintessential political message the school here is trying to

promote – ‘Guns and School Don’t Mix’ – would, under a reasonable interpretation, be prohibited” under the policy (p. 260).

The court concluded that the dress code policy was overbroad because it was “practically limitless” and “excluded a broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory” (*Newsom*, p. 260). The circuit court held that the dress policy was unconstitutional as a violation of students’ First Amendment rights.

Wrestling with the issue of student expression through clothing and appearance in *Barr* v. *Lafon* (2008), the Sixth Circuit stated the question facing it as “how to balance some students’ rights to free speech with the rights of other students to be secure and to be left alone” (p. 562). At issue in the case was students’ right to wear clothing depicting the Confederate flag. The Blount County School District in Tennessee enacted a ban on wearing clothing displaying the Confederate flag after increased levels of racial tension. Racial tension was illustrated through racial graffiti, threats against black students, fights between white and black students, “hit lists,” and threats of bringing guns to school and hanging students. The school district’s attempt to quash the tension by enacting the ban did not have an immediate effect; in an eight-month period following the ban, there were 23 violations of the dress code that involved wearing a depiction of the Confederate flag.

The court began by establishing that *Tinker* governed the situation because wearing the clothing constituted pure speech that was not lewd or endorsed by the school. Because the Confederate flag clothing was considered pure speech, the court had to determine if the ban was necessary to “avoid material and substantial interference with schoolwork or discipline” (*Barr*, p. 565, internal quotations omitted). The students

favoring wearing depictions of the Confederate flag argued that there was no evidence that the students wearing depictions of the Confederate flag actually caused disruption. However, the court pointed out that *Tinker* does not require a disruption to actually occur.

The court expressed that it was only required to determine if the school acted reasonably in forecasting substantial disruption. The court found that there was substantial evidence of potential disruption because of the racial tension between students, and graffiti depicting the confederate flag with a noose. The court concluded that the tension and the symbolism of the Confederate flag "meant that the Confederate flag would likely have a disruptive effect on school" (p. 567). The court explained that the ban was not based on the notion that some students found the Confederate flag offensive but was a constitutional action because of "the disruptive potential of the flag in a school where racial tension is high and serious racially motivated incidents, such as physical altercations or threats of violence, have occurred" (p. 568).[82]

The dress code cases consider numerous factors and the discussed decisions represent the different approaches that the courts utilize when addressing dress code free speech/expression claims. Further, the specific circumstances under which a dress code is implemented often play an important role in determining the constitutionality of the dress code. The specific nature of the cases makes it difficult to generalize specific student speech rights regarding dress. Depending on the circumstances and history surrounding the school and the context of the student attire policy, a student might have the right to wear a certain shirt in one district, but the shirt could be prohibited in the neighboring

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[82] The court also briefly discussed the view-point neutrality of the enforcement of the ban. However, the court determined that the plaintiffs failed to make a showing that the school had enforced the ban in a discriminatory manner (p. 575). Also the court pointed out that the dress code, as it related to the Confederate flag, would be upheld – regardless of possible viewpoint discrimination - because it met the *Tinker* substantial disruption test.

district's schools. The Supreme Court has not addressed student dress codes in terms of First Amendment free speech and expression. Even if the Court did hear a dress code case, the lower court opinions suggest that the outcome would still be fact-specific and possibly fail to provide a general principle beyond those already announced in *Tinker*, *Fraser*, *Kuhlmeier,* and *Morse*.

Speech, Expression and the Internet

An emerging area of students' speech and expression rights is students' use of the Internet and its social networking sites, blogs, email, instant messenger, and student-created web sites. The Internet is active in students' private, as well as their school, lives. Personal material(s) developed and published at home can be accessed at school, while school-related materials can be reached from home through the "web." A body of case law is quickly developing concerning students' speech and expression rights related to material generated for, posted to, or visited on the Internet.

Avery Doninger, a student at Lewis S. Mills High School in Connecticut, posted a message on a social networking site critical of the school district and high school administration concerning their treatment of a musical festival she planned. Avery's post was characterized as "offensive and inappropriate" because it used vulgar slang to describe the administration,[83] contained false or misleading information about the musical festival, and stated that phone calls to the superintendent had "pissed her [the superintendent] off" (*Doninger* v. *Niehoff*, 2007, p. 202). When the posting was

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[83] "Post," or "posting," is a term used to describe the writing of a message or placing of material on a website. Avery's post read as follows: "jamfest is cancelled due to douchebags in central office....basically, because we sent [the original Jamfest email] out, [Superintendent] Paula Schwartz is getting a TON of phone calls and emails and such....however, she got pissed off and decided to just cancel the whole thing all together, anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do[,] it is going to be after the talent show on may 18<th>" (p. 206).

discovered by school administrators, they disqualified Avery from running for senior class secretary. Before she created the post, the administration had cautioned Avery about the proper way to raise concerns at school. The disqualification was Avery's only punishment. School officials claimed the posting "failed to display the qualities of civility and citizenship that the school expected of class officers and leaders" (*Doninger*, p. 202).

Avery filed suit in federal court claiming that her First Amendment free expression rights had been violated and sought a preliminary injunction that would have forced the school to remove the current senior class secretary and hold another election in which Avery could participate. The court sided with the school, and an injunction was not issued ordering the school to re-hold the senior class officer election. The court took two approaches in addressing Avery's claim. First, the court concluded that Avery did not have a First Amendment right to run for a voluntary extracurricular officer position "while engaging in uncivil and offensive communications regarding school administrators" (*Doninger*, p. 216). The court found that the Internet post violated the school's policy on "cooperative conflict resolution" and contained inappropriate and offensive language. The administrators' decision not to let her run was based on the idea that the views expressed in the post were inconsistent with the values of civility and respect embedded in the role of a class officer (p. 215). The court characterized teaching these qualities as a legitimate school objective and, although possibly not the best resolution to the problem, the court found the solution was reasonable and within the administration's discretion.

Second, the court stated that if forced to apply one of the Supreme Court's student speech and expression frameworks, *Fraser* applied rather than *Tinker*. The court admitted

that the expression was created off campus, unlike *Fraser*, but that Avery had every intention of the expression being carried on campus. The expression could be considered on-campus rather than off-campus expression because the content related to school issues and it was reasonably foreseeable that students and school officials would view the post. Thus, the court looked at the expression as school-related and offensive. Although under different factual circumstances, (or if the administration had disciplined Avery in a more severe manner), the result might have been different, the court concluded that the actions of the administration in prohibiting Avery from running for a student leadership position were constitutional (*Doninger*, p. 217). The court reasoned that it is highly appropriate for the school "to prohibit the use of vulgar and offensive terms in public discourse" (p. 217, quoting *Fraser*, p. 683).[84]

Aaron Wisniewski was "IMing" with his friends using AOL's Instant Messenger (IM) application on his home computer. As part of the IM program, individuals can develop a personal icon that appears on their friends' screen whenever the friend receives an instant message from the person. The icon can be copied and shared with others by the friend. As his IM icon, Aaron had a small picture of a gun firing a bullet at a person's head with dots representing blood splatter above the head. Below the drawing was the caption "Kill Mr. VanderMolen." Mr. VanderMolen was Aaron's English teacher at Weedsport Middle School in upstate New York (*Wisniewski* v. *Board of Educ. of the Weedsport Central Sch. Dist.*, 2007). Aaron sent the icon to 15 of his school friends, but not to Mr. VanderMolen nor any school official. Aaron did not access the program from school. The icon was available to his friends for three weeks, and one of Aaron's

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[84] Citing *Fraser*, the court distinguished this case from several others that used *Tinker* in examining internet use on the grounds that Avery intended for the expression to infiltrate the school and targeted the treatment of an official school-sponsored activity in which she was involved.

classmates informed Mr. VanderMolen of the icon and brought him a printed copy of it (*Winsiewski*, p. 36).

Mr. VanderMolen forwarded the image to the high school and middle school principals. The principals contacted the police and called Aaron's parents. Aaron acknowledged creating the icon and was suspended for five days. After conducting an administrative hearing, the board of education adopted the hearing officer's recommendation and suspended Aaron for one semester for threatening a teacher and creating an environment that threatened the health, safety, and welfare of others. Aaron filed suit claiming that the icon was not a "true threat" and the expression was protected under the First Amendment (*Wisniewski*, pp. 36-37).

Although the federal district court concluded that the icon was a "true threat" lacking First Amendment protection, the Second Circuit, on appeal, determined that addressing the icon as a "true threat" applied the wrong First Amendment standard. Because of the broad authority possessed by schools to sanction student speech and expression, the circuit court concluded that *Tinker* provided the proper guidelines rather than the stricter "true threats" doctrine. This approach by the Second Circuit differed drastically from other courts that had considered threatening student behavior and applied a "true threats" analysis; however, the approaches have render similar results (*See infra S.G.*.v. *Sayerville Board of Educ*., 2003; *Lovell* v. *Poway Unified Sch. Dist.*, 1996).

Applying *Tinker*, the court found that "student expression may not be suppressed unless "school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school" (*Wisniewski*, p. 38, quoting *Morse*, p. 2626). The court concluded that even if Aaron's icon was viewed as expression under

Tinker, "It crosses the boundary of protected speech and constitutes student conduct that poses a reasonable foreseeable risk that the icon…would materially and substantially disrupt the work and discipline of the school" (*Wisniewski*, p. 39). For this type of student behavior, "*Tinker* affords no protection against school discipline" (p. 39).

The court also discussed that the fact Aaron created and disseminated the icon from his computer off school grounds did not insulate him from the school's reach and potential discipline. The Second Circuit had previously held that off-campus conduct can create a "foreseeable risk of substantial disruption" inside the school building. The court found that it was reasonably foreseeable that the icon, after being distributed to 15 friends many of whom were classmates, would be seen or brought to the school's attention, and the threatening nature of the icon made it reasonably foreseeable that substantial disruption could or would occur in the school (*Wisniewski*, pp. 39-40). "Foreseeability of both communication to school authorities, including the teacher, and the risk of substantial disruption is not only reasonable, but clear" (p. 40). This permitted school discipline regardless of Aaron's intention behind creating the icon (p. 40 citing *Morse*). Aaron did not have a protected speech right in creating and using the icon and the school's disciplining of Aaron did not violate the First Amendment.

In terms of internet student expression, *Tinker* has also been utilized by some federal courts to uphold students' rights. Using the *Tinker* framework to address a student's claim that his suspension for creating a parody profile of the school's principal on "MySpace.com" violated his free speech rights, the District Court for the Western District of Pennsylvania reached a contrary conclusion to the Second Circuit Court of

Appeals concerning student internet expression created off school property.[85] In *Layshock* v. *Hermitage Sch. Dist.* (2007), the district court had to "balance the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning" (p. 595). During December of his senior year, Justin Layshock, using his grandmother's computer while at her house, created a mock MySpace profile for his high school principal.[86] He followed the template provided by MySpace, gave nonsensical answers to questions, cut and pasted the principal's picture from the school website, and then sent the link to numerous friends using a function available on the MySpace page. Shortly after Justin created his parody, three other parody profiles were created, by other students, for the principal. The school administration learned of the profiles and attempted to prohibit access to MySpace from school computers. Blocking the site took several days, and in the interim the school was forced to limit student computer use and Internet access because of fear over possible disruption from students accessing the parody profiles.

An investigation revealed that Justin had created only one of the profiles. After a meeting with the superintendent, Justin was suspended for 10 days, placed in the district's alternative education program for the spring semester, and banned from participation in any school activity including graduation (*Layshock*, pp. 593-594). Justin filed suit claiming that the discipline violated his First Amendment rights as the parody was protected First Amendment free speech and expression.

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[85] Pennsylvania is in the Third Circuit and the federal district courts in Pennsylvania are not bound by the decisions of the Second Circuit Court of Appeals.

[86] MySpace is an interactive social networking web site that allows individuals to create a personal profile, connect their profile to different web locations, provide information about what is going on in his or her life, and invite other individuals to be "friends" on the site.

The court began its discussion by noting that the Supreme Court's *Morse* decision was not controlling because the Court had determined that the speech in *Morse* was school-related (*Layshock*, p. 595). The speech in this case was clearly not school-sponsored and the relevant question was whether the school had the authority to punish Justin for the parody. The court acknowledged schools' general authority to control the conduct of students, but stated "they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system" (p. 597). School administrators' disciplinary reach is not limited by the physical property lines of the school; however, in situations involving off-campus expression, "the school must demonstrate an appropriate nexus" between the expression and the school (p. 599).

The court found that *Fraser* did not give the school authority to punish Justin's expression. Although possibly lewd, the speech at issue in *Fraser* was given during a school-sponsored assembly and the *Fraser* decision did not expand the school's authority to reach off-campus expression (*Layshock*, p. 559). Although applicable, the circumstances did not justify punishment under *Tinker* because the district failed to establish a sufficient nexus between Justin's expression and substantial disruption. There were three other parodies created on social networking sites and the school could not connect the disruption to Justin's profile, especially in light of the fact that the other profiles contained much more lewd and obscene material than Justin's parody. Further, the court found that the disruption was extremely limited and resulted in no violence or student disciplinary action. The situation did not provide school officials with a "reasonable fear of disruption" substantial enough to trump Justin's freedom of

expression. The court concluded that the suspension violated his freedom of expression, as he was punished for speech protected by the First Amendment (p. 600).

This decision should not be read as establishing that student speech and expression uttered or created off-campus can never be punished, as evidenced by the Second Circuit's *Wisniewski* decision. The *Layshock* facts made it extremely difficult for the school district to constitutionally punish the expression because there were multiple disruptive causes and the disruption could not be specifically tied to Justin. Plus, the disruption was extremely limited. The case does establish that (in the Western District of Pennsylvania) school administrators must demonstrate a sufficient nexus between the off-campus expression and the on-campus disruption to exercise authority over the student speech and expression that takes place off campus.

Two students created a mock profile for their middle school principal and posted it on the social network site MySpace.com. The students did not use the principal's name but took his picture from the school district website and used it on the profile page. They described the principal as "a forty year old, married, bisexual man living in Alabama". The students also listed his interests as "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents" (*J.S.* v. *Blue Mountain Sch. Dist.*, 2008).[87] The eighth-graders had created the profile on a home computer during non-school hours.

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[87] The profile contained other indecent material including a statement that was entitled, "HELLO CHILDREN" and read: "yes. It's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL Rave come to myspace so I can pervert the minds of other principals to be just like me. I know, I know, you're all thrilled. Another reason I came to myspace is because I am keeping an eye on you students who I care for so much) For those who want to be my friend, and aren't in my school, I love children, sex (any kind), dogs long walks on the beach, tv, being a dick head and last-but

The two students that created the profile gave classmates access to the page, and the next day at school numerous students were discussing the profile. The school principal was able to access the profile three days after the students claimed to have set it to "private," and he was told of the page by at least one teacher. Once it was determined who created the profile, the principal summoned the students, J.S. and K.L., to the office for questioning. Eventually, the students admitted that they created the profile. The principal found that the students' actions violated the school's policy against making false accusations against school staff and that it violated the school district's computer use policy because students cannot use copyrighted material without permission. This violation occurred because of the use of the principal's picture, which was copied from the district site. Both students received 10 days out-of-school suspension for creating the website (p. *6).

One student, J.S., filed suit claiming a violation of her First Amendment rights and became the plaintiff in *J.S.* v. *Blue Mountain Sch. Dist.*[88] She claimed that the First Amendment did not allow school leaders to suspend her from school for a non-threatening non- obscene parody profile (*J.S.*, p. *7). The student claimed that the school could not punish a student for off-campus conduct that did not disrupt classes or school administration. She argued that *Tinker* governed and that the school must establish that her expression created, or it could be reasonably forecasted to create, a substantial and material disruption of the learning process (p. *10). J.S. claimed that no such disruption occurred. The court found this argument and rationale unconvincing.

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not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN so please feel free to add me, message me whatever" (p. *3).

[88] Although receiving the same punishment, K.L. was not a party to the suit.

Instead of *Tinker*, the district court looked to *Fraser* and *Morse*, and mentioned as an aside that *Tinker* was not the only standard for analyzing student speech and expression in school. The court found that the parody was clearly lewd and vulgar, made no political expression, and simply attacked school personnel (p. *17). The court concluded that the parody resembled the lewdness of *Fraser* rather than *Tinker*'s political expression. "As vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights…even though it arguably did not cause a substantial disruption" (p. *18).

The court also referenced *Morse* and the idea that the student's expression "promoted illegal actions" because the expression could have been the basis for criminal charges against the students even though none were filed. The argument is novel and does track some of the rationale in *Morse* concerning the *illegal* nature of drug use and the school's ability to prohibit expression that encouraged illegal drug use. However, making such an argument ignores the limited nature of the *Morse* holding. The argument was not needed to show that the school could properly punish J.S's expression, and takes a broad view of *Morse* that is at odds with the concurring Justices in *Morse* (*see* Alito concurrence, *Morse*, p. 2636).

The court next addressed the claim that the school could not punish the expression because it was created off campus. The court found that there was a clear connection between the off-campus action and the on-campus effect: (a) the focus of the site was the school principal, (b) the target audience was the school's student population, (c) a paper printout of the profile was brought into the school, (d) it was created in retaliation for a previous punishment for violating the dress code, and (e) although not reaching the level

of *Tinker* substantial and material disruption, some disruption did occur (*J.S.*, pp. * 21-22). Because of this clear connection to the school and the lewd and vulgar nature of the profile, the court found no error in the punishment of the student.

In reaching its conclusion, the court distinguished *Layshock*. Two different Pennsylvania federal district courts rendered the decisions in *J.S.* and *Layshock*. The *J.S.* court pointed out that the *Layshock* court considered the circumstances in *Layshock* a "close call." The *J.S.* court stated that J.S.'s web creation was much worse in terms of vulgarity and led the district court to reach a different conclusion than the *Layshock* court (pp. *25-26).

J.S. and *Wisniewski* demonstrate that lower federal courts can take different approaches to comparable situations and reach similar results. While courts such as *Wisniewski* used *Tinker's* substantial and materially disruption for punishing expression that was created off school grounds, *J.S.* exemplifies that *Fraser's* lewd and vulgar speech standard may also be utilized depending on what is contained in the expression. Understanding these varied approaches provides educational leaders with additional information to draw on when making determinations regarding student speech and expression in school. Further, it illustrates the intricate nature of the student speech and expression spectrum, and the complications that can occur when student expression situations seems to spill into more than one category.

The cyber cases demonstrate that this is still an unsettled area of student speech and expression rights. Part of the difficulty is that conduct undertaken off school campus can quickly transform into on-campus school conduct because of the wide accessibility of material on the web. Further, as the *Layshock* opinion demonstrates, there are questions

concerning whether a school even has the authority to regulate speech that is developed privately at home. Although the court in *Wisniewski* stated that the student's intent behind creating the icon did not matter, other courts have held that a student's intent – especially when the student did not intend for the material to be shared – does play a factor in the extent a school can regulate student speech and expression (*see Lavine* v. *Blaine Sch. Dist.*, 2001, *infra* p. 195; *Doe v. Pulaski County Special Sch Dist.*, 2002, *infra*, p. 200). The broad accessibility of the web and ability to access, copy, and distribute other's information has created additional difficulty when school leaders attempt to determine the balance between student speech and expression on the internet and maintaining order and discipline in school. This also places students in a place of uncertainty regarding the rights they have when using the Internet not only at school but also at home or another location off school grounds.

School Violence and True Threats

In the wake of the Columbine school shooting and other acts of violence at elementary and high schools, there has been a raised level or concern and awareness surrounding future possible school violence. This has led to school personnel being proactive in trying to prohibit violence or to defuse volatile situations. The circumstances range from physical altercations between students to interpreting creative works that contain violent references. The result has been an increase in litigation concerning the extent of students' First Amendment free speech and expression rights.

In a game of cops and robbers on the playground during recess at his New Jersey elementary school, A.G. – a kindergarten student – exclaimed to his friends, "I'm going to shoot you." A classmate not involved in the game heard A.G.'s comments and reported

him to a teacher. The teacher reported the incident to the principal, and A.G. was suspended for three days. In the day's leading up to A.G.'s conduct, the school had suffered several incidents of students – either seriously or in jest – making comments about inflicting violence on other students, and in each incident, the student received a three-day suspension.[89] A.G.'s father filed an action in federal court on A.G.'s behalf alleging that the suspension violated A.G.'s First Amendment free speech rights (*S.G.* v. *Sayerville Board of Educ*., 2003).

Plaintiffs argued that A.G.'s statements were made in the course of a game, that they did not threaten actual harm, and did not substantially disrupt school operations or interfere with other's rights. The school argued that prohibiting threatening speech furthered a legitimate pedagogical interest. The court concluded that a First Amendment violation had not occurred in disciplining A.G. because the "Supreme Court has recognized that a balance must be struck between the student's rights and the school's role in fostering what the Court in *Fraser* termed socially appropriate behavior" (*S.G.*, p. 422). The Third Circuit found that after school administrators determined that simulated gun play and threats of violence were unacceptable, "the balance tilts in favor of the school's discretionary decision making" (p. 423) Further, the court stated that the school's ability to control speech at the elementary level is greater than at the high school level, and that the school's prohibition of gunplay was a reasonable decision related to a legitimate pedagogical concern. Thus, A.G.'s suspicion was reasonable and the suppression of his gun related speech did not violate his First Amendment speech and expression rights.

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[89] One student told a classmate he was going to shoot the teacher, another student told a friend he would put a gun in his friend's mouth and kill him, and the third told friends that his mom let him bring guns to school.

In a case involving a violent poem written by a high school student, the Ninth Circuit balanced a "student's First Amendment right to free expression against school officials' need to provide a safe environment," and addressed the question "against a backdrop of tragic school shootings, occurring both before and after the events at issue" (*Lavine* v. *Blaine Sch. Dist.*, 2001, p. 983). James Lavine drafted the poem "Last Words" at home one evening.[90] James had been absent from school the three previous days, but attended school the day after he wrote the poem. He took the poem to school for his English teacher to review even though the poem was not an assignment or for extra credit. Concerned over what she read, the teacher contacted the school counselor and the vice principal. Based on the poem, additional information from school personnel, previous discipline incidents, a turbulent home situation, and prior communications to school officials concerning suicide, the principal decided to "emergency expel" James. As part of an agreement with the district, James met with a psychiatrist and after three visits and missing 17 days of school, he was allowed to return to school (*Lavine*, pp. 984-986). James filed suit in federal court claiming the poem was protected speech and he was unconstitutionally punished for the content of his speech (p. 987).

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[90] The final version read: "As each day passed, I watched, love sprout, from the most, unlikely places, wich [sic] reminds, me that, beauty is in the eye's, of the beholder. As I remember, I start to cry, for I, had leared [sic], this to late, and now, I must spend, each day, alone, alone for supper, alone at night, alone at death. Death I feel, crawlling [sic] down, my neck at, every turn, and so, now I know, what I must do. I pulled my gun, from its case, and began to load it. I remember, thinking at least I won't, go alone, as I, jumpped [sic] in, the car, all I could think about, was I would not, go alone. As I walked, hrough [sic] the, now empty halls, I could feel, my hart pounding. As I approached, the classroom door, I drew my gun and, threw open the door, Bang, Bang, Bang-Bang. When it all was over, 28 were, dead, and all I remember, was not felling, any remorce [sic], for I felt, I was, lensing [sic] my soul, I quickly, turned and ran, as the bell rang, all I could here, were screams, screams of friends, screams of co workers, and just plain, screams of shear horror [sic], as the students, found their, slayen [sic] classmates, 2 years have passed, and now I lay, 29 roses, down upon, these stairs, as now, I feel, I may, strike again. No tears, shall be shead [sic], in sarrow [sic], for I am, alone, and now, I hope, I can feel, remorce [sic], for what I did, without a shed, of tears, for no tear, shall fall, from your face, but from mine, as I try, to rest in peace, Bang!" (pp. 983-984).

The circuit court began its analysis by reiterating, “school violence is an unfortunate reality that educators must confront on an all too frequent basis” (*Lavine*, p. 987). The court found that the school must strike a balance between protecting students’ safety and respecting those students’ constitutional rights. The court determined that James’s poem fell into the category of speech governed by *Tinker* and that a *Tinker* analysis required the court to look at the totality of the circumstances. The court found: (a) the school had a duty to prevent potential violence on campus, (b) the school was aware of previous suicidal ideations by James, (c) James was involved in a domestic dispute with his father, (d) the family was under extreme financial pressure, (e) James had broken up with his girlfriend and was (reportedly) stalking her, (f) James had past discipline problems, (g) James had been absent for three days prior to submitting the poem, and (h) The content of his poem, “Last Words.” The court acknowledged that individually, a single finding would not have justified the expulsion, but looking at all the factors the court held the circumstances were adequate to lead school leaders to reasonably forecast a substantial and material disruption (p. 990). On the basis of the totality of the circumstances, the court held that the emergency expulsion was reasonable.

The court went on to explain that the poem’s content was only one factor in James’s expulsion and it was because of the poem that the school’s actions were evaluated under the First Amendment. The record clearly demonstrated that several other factors played into the expulsion decision. The school was generally concerned about the students’ safety, which the court believed was demonstrated by the immediate action that took place after the poem was submitted to the teacher. James was not disciplined *exclusively* for the specific content of the poem; it was one factor in making the decision

that the expulsion for *safety* concerns was reasonable. The court concluded the decision did not violate James's First Amendment rights.

Sarah Lovell threatened her school counselor when meeting with her about changing Sarah's schedule. The guidance counselor claimed that Sarah told her "if you don't give me the schedule change I'm going to shoot you;" however, Sarah stated that she only said "I'm so angry, I could just shoot someone." The guidance counselor sought out the vice principal and told him that she felt threatened by the student's statement. The guidance counselor also stated that Sarah was angry and emotionally out of control when making the statement. The vice principal met with Sarah, the counselor, and Sarah's parents to discuss the situation. After the meeting, Sarah was suspended for three days. Sarah's parents learned that a discipline report agreeing with the counselor's account of events was placed in Sarah's file, and they filed suit claiming that the suspicion violated Sarah's First Amendment free speech rights (*Lovell* v. *Poway Unified Sch. Dist.*, 1996).

At the outset of its discussion, the Circuit Court stated that threats are not afforded any First Amendment protection regardless of the forum. Thus, the court did not need to use the Supreme Court's student speech decisions because it did not matter where the statement was uttered, it would not receive constitutional protection if deemed a "true threat" (*Lovell*, p. 371). To determine if a statement is considered a "true threat" and afforded no constitutional protection, courts use an objective test: "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm of assault" (p. 372).

The court determined that in light of the increasing violence in schools, a reasonable person would have foreseen that the counselor would have taken the comment

as a legitimate threat. The court concluded that because a reasonable person would have foreseen that the statement would be interpreted as a threat in the school setting; the statement was not entitled to First Amendment protection and the school did not violate Sarah's right to freedom of speech or expression in suspending her for threatening the school counselor (*Lovell*, p. 373). The court reiterated that the decision was not based on the counselor's fear, but rather on the notion that Sarah (or a person in her position) would have reasonably known that such a statement would be taken seriously.

The Eighth Circuit Court of Appeals also considered a "true threat" situation in *Doe* v. *The Pulaski County Special Sch. Dist.* (2002). During the summer before his eighth grade year, "J.M. drafted two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder K.G, his ex-girlfriend" (*Doe,* p. 619). Over the summer, J.M. had several conversations with K.G., told her about the letters, and informed her that they contained statements about killing her. However, J.M. refused to read the letters to K.G. or give them to her. J.M.'s best friend, D.M., found the letters one night while spending the night. He read the letters, but J.M. refused to provide him copies. At K.G.'s prodding D.M. took the letters without J.M.'s permission, transported the letters to school, and gave them to K.M. on the second day of school. K.M. read the letters in her gym class and a classmate immediately reported the threat to the school resource officer. The resource officer visited the gym and found K.M. crying. The officer reported the situation to the school principal. After conducting an investigation that revealed the previously stated facts, the principal recommended that J.M. be expelled for

his eight-grade school year for making terroristic threats against K.M. (pp. 619-620). [91] The school board upheld the principal's recommendation and J.M. filed suit in federal court seeking reinstatement and claiming that the expulsion violated his First Amendment free speech rights.

The Eighth Circuit immediately proceeded with a true threats inquiry. The court noted: "Free speech protections do not extend…to certain categories or modes of expression, such as obscenity, defamation, and fighting words" and that the "Supreme Court recognized that threats of violence also fall within the realm of speech that the government can proscribe without offending the First Amendment" (*Doe*, p. 622). The court explained that the government had an "overriding interest" in protecting its citizens from violence or threatened violence. The Eighth Circuit articulated the challenge as determining exactly what constitutes a true threat:

> The federal courts of appeals that have announced a test to parse true threats from protected speech essentially fall into two camps. All the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm. The views among the courts diverge, however, in determining from whose viewpoint the statement should be interpreted. Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat. Our court is in the camp that views the nature of the alleged threat from the viewpoint of a reasonable recipient. (p. 622)

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[91] The applicable school rule states, "Students shall not, with the purpose of terrorizing another person, threaten to cause death or serious physical injury or substantial property damage to another person or threaten physical injury to teachers or school employees… Students will be suspended immediately and recommended for expulsion."

Before looking at the actual speech at issue in the case, the Eighth Circuit provided that "a true threat is a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another" (p. 624).

The court also had to dispose of the issue of how the letters made their way to school and into K.M.'s hands. The court acknowledged that although the speaker did not need to actually intend to carry out the threat for the speech to constitute an unprotected true threat, the speaker must intentionally and knowingly communicate the expression to someone before he can be punished for it (*Doe*, p. 624). The court concluded that J.M. intended to communicate the letters because he told K.M. about the letters on the phone and let D.M. read the letters.

The Court then determined whether a reasonable person would have interpreted the letters as a serious expression to commit harm against another. "There is no question that the contents of the letter itself expressed an intent to harm K.G." (*Doe*, p. 625). [92] The court went on to state that most 13-year-old girls "(and probably most reasonable adults)" would find the letters frightening and fear possible violence if they received J.M.'s letter (p. 625). The fact that J.M. did not deliver the letters did not dissuade the court from concluding that the letters were still threatening. The Eighth Circuit upheld the expulsion. The court concluded that a reasonable person standing in K.G.'s place would have considered the letter a serious expression of potential harm, and determined the letter to be a true threat. (pp. 626-627).

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[92] The court based this conclusion on the fact that "The letter exhibited J.M.'s pronounced, contemptuous and depraved hate for K.G. J.M. referred to or described K.G. as a bitch, slut, ass, and a whore over 80 times in only four pages. He used the f-word no fewer than ninety times and spoke frequently in the letter of his wish to sodomize, rape, and kill K.G. The most disturbing aspect of the letter, however, is J.M.'s warning in two passages, expressed in unconditional terms, that K.G. should not go to sleep because he would be lying under her bed waiting to kill her with a knife" (p. 625).

Although reaching the same conclusions regarding the "true threat" student expression that was before each court, the Eighth and Ninth Circuits utilized different standards for determining what constitutes a true threat (*compare Lovell* and *Doe*). The Ninth Circuit stated it used an objective test that evaluated whether a reasonable person standing in the place of the speaker would foresee that the statement would be interpreted by a listener as a serious expression of intent to harm (*Lovell*, p. 372). The Eight Circuit also used an objective standard; however, the Eighth Circuit viewed the situation from the perspective of the listener and evaluated how a reasonable person standing in the position of the message recipient would interpret the communication (*Doe*, p. 622). The two views provide an additional example of how the lower courts can take differing approaches to parallel factual situations but still reach similar conclusions.

David Riehm wrote a fantasy murder suicide essay inspired by the shooting that took place at Columbine High School (*Riehm* v. *Engelking*, 2008).[93] David was a 17-year-old high school student at Cook County High School in Grand Marais, Minnesota. The essay was authored for his creative writing class and was entitled: "Bowling for Cutchenson." The essay contained a graphic depiction of a student returning to school after being expelled from Ms. Cuntchenson's English class and killing her. Ms. Merdhon, David's teacher, found the essay disturbing and a personal threat. She reported David to the principal. After reading the essay, the principal suspended David. The material was forwarded to the Assistant Cook County Attorney and a "Child Welfare Assessment" case was opened based on the situation. David spent one night in state custody undergoing a psychiatric evaluation because of the threatening nature of the writing and

[93] David actually wrote three short essays. All three essays were considered "disturbing;" however, the third essay formed the basis for the litigation.

the fear that David may be a danger to himself or others; however, he was released to his mother the next day. In response, David filed suit claiming that the school (and city) violated his First, Fourth, and Fourteenth Amendment rights.

In regard to the First Amendment claim, the Eighth Circuit Court of Appeals reiterated that the First Amendment does not protect speech that is considered a true threat (p. 963). The court described the essay as depicting "an obsession with weapons and gore, a hatred for his [David's] English teacher with a similar name,…a surprise attack at a high school, and the details of his teacher's murder and the narrator's suicide" (p. 695). The detail created a clear conclusion that the essay was a serious threat to David's English teacher. Thus, it was not protected private expression under *Tinker* and not afforded First Amendment protection.

During a diversity assembly at New Brighton Area High School in Pennsylvania, Cory Johnson was invited on stage to participate in a demonstration conducted by the guest speaker. For the demonstration, the presenter nicknamed each student; Johnson was nicknamed "Osama bin Laden." Johnson did not object at the time and participated in the presentation. The next day students and at least one teacher referred to Johnson as "Osama" or "Osama bin Laden" (*Johnson* v. *New Brighton Area Sch. Dist.*, 2008, p. *2). When a friend approached Johnson in the library and asked, "What's up Osama?" Johnson claimed that he replied in a joking fashion, "If I were Osama, I would already have pulled a Columbine" (p. *3).[94] The librarian heard the exchange. Although she thought Johnson might be joking, she interpreted the comment as a threat and notified administration of the outburst. She did not say anything to Johnson or prohibit him from

[94] The librarian claimed that students were yelling at Johnson – "Yo, Osama, go to class," and Johnson responded, "If you guys don't quit calling me that, I'm going to pull a Columbine" (p. *3).

leaving the library before making the call. In response to the call, the principal met with Johnson. Johnson admitted making the statement and the principal suspended him for 10 days and precluded him from attending his senior prom. The superintendent upheld the suspension because the "Columbine statement constituted a terroristic threat" (p. *6).

Johnson filed suit claiming that the speech was First Amendment free speech protected under *Tinker*. Although the court applied *Tinker*, it found that the evidence revealed that the school "perceived Johnson's speech to be in violation of the core educational mission of the school, and more importantly, led them to be concerned for the safety of all the other school students" (p. *25). The court concluded that the school's actions were not based on a desire to avoid controversy; rather, they were taken because the school officials forecasted "substantial disruption or material interference with school activities would occur" (p. *25).

The court also noted that Johnson's speech fell "outside the bounds of political speech described in *Tinker*" (p. *26). The reference to Columbine made the speech more of a "true threat" or "fighting words." The court concluded that the term "Columbine, connotes death as a result of one or more students shooting another and school staff," and when uttered at school while a student seems angry, can be reasonably understood by the administration as a true threat (p. *26). Thus, the *Tinker* analysis did not need to be applied because the First Amendment offers no protection to speech that constitutes a "true threat."

Violence and threats of violence are legitimate concerns in America's public schools. The courts' decisions demonstrate that school administrators will be granted discretion in maintaining safety in the school building. Although some courts have

utilized *Tinker* and *Fraser* in determining the constitutionality of threatening speech and expression, the judicial trend has been treating this type of student expression in school as a true threat, which is afforded no constitutional protection. The courts have provided school leaders with great latitude in suppressing this type of expression because as the Eighth Circuit stated, "the government has an overriding interest in protecting individuals from the fear of violence…and from the possibility that the threatened violence will occur" (*Doe*, p. 622). Schools and the courts have put a premium on keeping students safe, and this duty seems to trump students' First Amendment free speech rights in school.

Conclusion

Although the lower federal court decisions demonstrate that the federal courts usually apply the principles from the Supreme Court's student speech and expression decisions with uniformity, the decisions reveal that the varied circumstances under which the courts must apply the Supreme Court's announced principles can result in diverse conclusions and some divergence about concepts within the principles. The review shows that the specific facts involved in a student speech or expression situation play a prominent role in the outcome. The lower court decisions display that determining the extent to which school administrators may limit student speech and expression is not as simple as defining or restating the Supreme Court's holdings.

The Supreme Court's decisions do not cover every circumstance. The lower federal courts (and school administrators must) evaluate specific facts in light of the special characteristics of the school environment and apply the Supreme Court's principles to reach constitutional solutions to specific situations. The lower federal court

decisions are important because they connect specific student speech and expression issues to the principles established by the Supreme Court and demonstrate the complexity of the student speech and expression in school landscape.

CHAPTER V

CONCLUSIONS, IMPLICATIONS, AND CONSIDERATIONS

Educators must be knowledgeable of student speech and expression rights in school under the First Amendment to the U.S. Constitution. They must be comfortable with the awesome responsibility of maintaining a sound educational environment while respecting students' First Amendment speech and expression rights in school, and confidant in their decisions that affect this balance. This study's conclusions will assist educational leaders in making informed decisions regarding student speech and expression rights in school and provide a reference table that educators may utilize when faced with student speech and expression decisions in the future.

Chapter V contains a summary analysis of the Supreme Court's rulings on student expression rights in school and the principles developed by the Supreme Court for constitutionality limiting student speech and expression. The analysis is followed by a discussion of how the lower federal courts have applied the Supreme Court principles, and a table summary of the federal courts' decisions for school administrators to reference when faced with student speech and expression situations in the future. This study's connection to past and potential future research concerning students' First Amendment free speech and expression rights in school is also addressed.

The Supreme Court's Perspective of Student Expression in School

In rendering decisions concerning students' speech and expression rights and corresponding limitations, several constants appear throughout the Supreme Court's decisions. The principles were described by the Supreme Court in *Tinker* v. *Des Moines*

Indep. Cmty. Sch. Dist. (1969), *Bethel Sch. Dist.* v. *Fraser* (1986), *Hazelwood School Dist.* v. *Kuhlmeier* (1988), and *Morse* v. *Frederick* (2007). These principles have been identified and utilized by the lower federal courts.

First, since *Tinker,* the Court has embraced the conclusion that special circumstances exist in the school environment (s*ee Tinker,* p. 507). The special circumstances of the school setting mandate that student rights in school may be limited differently and more extensively than constitutional rights outside of school (*Morse*, pp. 2628-2629). Although the Court has acknowledged that students retain constitutional rights in school, the Court has announced that student rights are not coexistent with those of adults and can be limited in the school setting (*Fraser*, p. 267). As the Supreme Court reiterated in *Morse*, "While children assuredly do not shed their constitutional rights…at the schoolhouse gate…the nature of those rights is what is appropriate for children in school. In particular, the school setting requires some easing of the restrictions," to which school leaders would be subject outside the school context, allowing greater curtailing of student rights in school (pp. 2628-2629).

Second, the Court has specified that the age and maturity level of a student may play a role in the extent of constitutional protection afforded in the school setting (*Fraser*, p. 684; *Hazelwood*, p. 271). The Court has considered not only the age of the child offering the speech or expression but also the age of students that hear or receive the expression (*Fraser*, p. 684). This does not mean that elementary or younger secondary level students do not retain First Amendment speech and expression rights, but the schools' freedom to regulate student rights is greater in the elementary context than at the high school level because of the reduced maturity level of the students.

Third, the Court has reinforced that the primary responsibility for educating students rests with the local school authorities (*Hazelwood*, p. 273). "The education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of the federal judges" (*Hazelwood*, p. 273). Although the Court is willing to decide the constitutionality of a school rule or the constitutional limits of a student right, the Court has consistently shown deference for educators' decisions when the decisions related to pedagogical concerns and involve expression offered in the course of a school-sponsored activity or curriculum-related event (*Hazelwood*, p. 272; *Morse*, p. 2625).

Last, the Court has established *Tinker*, *Fraser*, *Hazelwood*, and *Morse* as delineating the boundaries of student speech and expression in school (*Morse*, pp. 2625-2626). The Supreme Court summarized its past student expression decisions in *Morse*:

> *Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school ... [T]he mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, or an urgent wish to avoid the controversy which might result from the expression ... was not enough to justify banning a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.
>
> This Court's next student speech case was *Fraser*…[T]he Court also reasoned that school boards have the authority to determine what manner of speech in the classroom or in school assembly is inappropriate ... For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser*'s holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings…Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute.
>
> …*Kuhlmeier*, concerned expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. This Court

> reversed, holding that "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…And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech (*Morse*, pp. 2626-2627, internal citations and quotations omitted).

In *Morse*, the Court established an additional limitation for student expression and determined that the First Amendment to the U.S. Constitution does not require school officials to tolerate student speech and expression in school or at school events that promotes or endorses illegal drug use or the dangers associated with drug use (*Morse,* 2629).

The Supreme Court's Principles for Addressing Student Speech and Expression in School

The Supreme Court's approach – discussed in the previous section – provides a foundation for addressing student speech and expression in school. This research concludes that the Supreme Court has developed four specific principles for addressing student speech and expression issues in school. These principles are outlined in Table 1.

Table 1

Supreme Court Principles for Addressing Student Expression in School

1. School officials may restrict students from participating in speech and expression that materially and substantially disrupts the educational process, the maintaining of discipline, could reasonably be forecasted to disrupt the educational process, or infringes on the rights of other students.	*Tinker*, 1969
2. School officials may suppress or limit student speech and expression that is lewd, uncivil, vulgar, or obscene in the classroom or school activities and may take steps to separate the school from the speech or expression.	*Fraser*, 1986
3. When students participate in school-sponsored or curriculum-related activities, school officials may exert the most control over student speech and expression and limit such expression when based on legitimate pedagogical concerns.	*Hazelwood*, 1988
4. School officials may restrict student speech and expression that promotes or encourages illegal drug use.	*Morse*, 2007

Through its decisions, the Court has articulated limitations on student expression; the four principles described in Table 1 constitute the express Supreme Court limitations. School officials do not have to tolerate speech that materially disrupts the educational process or the learning environment or expression that they reasonably believe could create a substantial disruption in the future. Similarly, school officials may prohibit students from using speech and expression that is lewd, vulgar, or uncivil, or promotes or endorses the use of illegal drugs. Last, school officials may suppress and limit student speech and expression when the student is engaged in a school-sponsored or curriculum-related activity and the limitation is reasonably related to a legitimate pedagogical concern. The Court has broadly defined curriculum-related activity to include a range of activities and learning experiences that take place outside the classroom. Further, the

Court has held that a legitimate pedagogical concern does not have to specifically reflect a portion of the curriculum. These limitations inform school officials that student speech and expression rights are not absolute and articulate broad categories of expression that may be curtailed depending of the specific circumstances confronting the school leader.

The Supreme Court discussed student speech and expression in terms of conduct that students should avoid and limitations school administrators may impose; the decisions do not articulate behaviors that students *must* exhibit. Expression that exceeds the announced limits provides school officials with the ability to limit the speech or expression and exposes the student to possible discipline because the speech or expression was not constitutionally protected. Further, the decisions assist school administrators in making informed decisions regarding student speech and expression without violating students' constitutional rights.

For example, in *Morse* the Supreme Court specifically stated the narrow issue as whether "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use" (*Morse*, p. 2625). The Court stated that the "special circumstances of the school environment…allow *schools* to *restrict* student expression" (p. 2629, emphasis added). The reasoning and holding spoke to school administrators' abilities related to constitutionally limiting student expression; it did not speak to an affirmative responsibility on the part of the student. The decision provided a principle for school officials to use in making informed determinations regarding the types of student speech and expression that may be limited. It did not saddle students with an express specific legal responsibility. The decision provided school officials the ability to limit how a

student spoke about illegal drug use during a school-sponsored event, if he chose to speak on the topic.

In *Fraser*, the Court spoke of the school's right to limit speech that was lewd and vulgar. The Court spoke in terms of schools having the right to separate themselves from speech and conduct that was "wholly inconsistent with the fundamental values of" the school, and that the school had a responsibility to protect other students from vulgar language (*Fraser*, pp. 681, 683, 686-687). The opinion focused on the appropriate conduct of the school and school administrators in constitutionally limiting student expression.

Forty years ago, the Supreme Court established that students do not shed their First Amendment speech and expression rights when they enter the schoolhouse. Since the pronouncement of the recognized student First Amendment rights, the Court has wrestled with the proper extent of constitutional protection that should be extended to students while in school or on school grounds. The broad freedom of student speech and expression originally granted in *Tinker* is gone. The material and substantial disruption principle remains, but it has been joined by three other student speech and expression principles that have muddied the actual speech and expression freedom *Tinker* was perceived to provide. As Justice Thomas offered in *Morse*, the Court has taken a patchwork approach to defining the extent of students' First Amendment speech and expression rights in school (*Morse*, p. 2636).

This study concludes that the Supreme Court has provided four principles that express the broad limitations of student speech and expression in school. Because of the fact-specific nature of the circumstances in each case, the four Supreme Court decisions

concerning student speech and expression do not specifically or overtly address every possible speech and expression situation that a school administrator could potentially face. The principles provide school officials direction with regard to the type of expression that may be limited; however, the principles, in abstract form, provide educators with limited guidance on how they might be applied to a particular factual situation beyond those already specifically addressed by the Supreme Court. The data reveal that lower federal court decisions regarding student speech and expression in school provide a more specific framework for how the Supreme Court principles can be applied in varied circumstances and a more complete picture of the student speech and expression landscape.

Further Defining the Limitations of Student Speech and Expression through Lower Federal Court Decisions

The lower federal courts have utilized the Supreme Court student speech and expression principles, expressed in Table 1, for evaluating the constitutionality of school authorities' decisions regarding student speech and expression in a variety of specific circumstances. In doing so, the lower courts have addressed factual situations that were different from those encountered by the Supreme Court in its original decisions. They have also reviewed factual situations similar to the facts confronted by the Supreme Court in *Tinker*, *Fraser*, and *Kuhlmeier*, but in certain situations they have used variations of the student expression principles originally utilized by the Court to reach conclusion.

The analyzed data reveal that the lower federal courts consistently return to the four Supreme Court principles when making decision regarding the constitutionality of

student speech and expression or school officials' imposed limitations. The lower federal courts' interpretations (and application) of the Supreme Court principles reiterate that the four Supreme Court principles provide the basis for any decision school officials should make when limiting student speech and expression in school, as well as provide rationale for why certain student expression is constitutionally protected. The individual decisions showcase the spectrum of speech and expression situations that can be covered by the principles, provide examples of circumstances school administrators might confront in the future, and explain how each situation relates back to one (or more) of the four Supreme Court principles contained in Table 1.

The lower federal court decisions provide information to fill in gaps between the broad Supreme Court principles and assist in bringing detail to the spectrum of student speech and expression rights in school under the First Amendment to the U.S. Constitution. The decisions track the changes in the Supreme Court's position on the proper extent of student speech and expression rights in school. The decisions showcase the flexibility and wide applicability of the principles and reveal how the principles overlap and intersect. They reinforce the idea that more than one principle might be applicable to a given set of facts, and provide innovative rationale for supporting students' right or a school leader's proposed limitations.

The lower court decisions take the Supreme Court principles out of a vacuum and apply the abstract principles – "material and substantial disruption," "school-sponsored or curricular related activity," and "legitimate pedagogical concern" – to practical use. Like the Supreme Court decisions, the lower federal court decisions cannot cover or address every possible circumstance an educator might face. However, they do provide additional

direction for interpreting a situation and determining how to apply the appropriate Supreme Court principle to specific facts where the constitutionality of student speech or expression is at issue.

The purpose of this study was to identify and review the current legal boundaries of student speech and expression rights in school, as developed and defined by the U.S. federal courts, to better enable educators to make informed decisions in limiting student expression when confronted with such situations. Table 2 serves these purposes. The table identifies and summarizes decisions in specific student speech and expression categories and connects each decision to at least one of the specific Supreme Court principles. It is designed to highlight areas of student speech and expression that exist among and between the Supreme Court's four explicitly addressed situations, and articulates the relevance of the lower court decisions for school leaders. Table 2 addresses a wide array of circumstances that have been encountered by school administrators and addressed by the federal courts. It identifies current boundaries surrounding student speech and expression in school, and illustrates the complex nature of the student speech and expression rights spectrum and the challenges associated with making informed decisions regarding student speech and expression under the First Amendment to the U.S. Constitution.

Table 2

Lower Federal Courts' Approach to Student Speech and Expression in School with Regard to Supreme Court Principles

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student distribution of speech and expression, and Time, Place, Manner Restrictions	*Burch et al.* v. *Barker et al.*, (1988)	• School had policy of prior review of all student publications prior to distribution; • Students created underground student newspaper – no school affiliation; • Students challenged policy.	• School-Sponsored or Curriculum-Related Expression principle applied; • Curriculum related activity is broadly defined; • An underground newspaper is *not* school-sponsored and outside realm of school control; • Prior review violated student expression rights and was unconstitutional restraint.	• School leaders must first determine whether the information to be distributed qualifies as material that bears the imprimatur of the school or could reasonably be considered as school-sponsored. If so, the expression would be considered school-sponsored and the school could reasonably restrict as long as the restriction was based on a pedagogical concern; • The federal courts are split on whether this censorship must be content-neutral; • If the speech or expression is not school-sponsored, the educational leaders may only limit the distribution if the material is lewd or vulgar or if
	Raker v. *Fredrick County Pub. Sch.*, (2007)	• Student wanted to distributed abortion information during non-instructional time; • School had policy that limited distribution of non-school materials to before or after the school day.	• Substantial Disruption principle applied; • Policy violated student's rights because it was based on a remote apprehension of possible disturbance rather than a material disruption; • The school had no-history of material disruption or invasion of other students' rights because of distribution of abortion literature (or other literature); • Nothing support the school's fear of possible future disruption	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student distribution of speech and expression, and Time, Place, Manner Restrictions (Cont.)	*M.A.L.* v. *Stephen Kinsland* (2008)	• Student wanted to distribute literature concerning abortion to classmates during non-instructional time; • School had policy that any material to be distributed needed to be provided to administration prior to distribution; • School denied request for distribution but offered to allow posting of materials on bulletin boards in school.	• School hallways and cafeteria are not a public forum and school has right to impose certain restrictions on distribution and expression (depending on type of expression); • School requirement of prior approval for distribution is reasonable when policy is viewpoint neutral and provides guidelines for educators when making distribution determinations; • School may impose viewpoint neutral time, place, manner regulations on student distribution and expression without offending students' First Amendment rights; • *Tinker*, *Kuhlmeier*, *Fraser*, and *Morse* do not apply when school imposing viewpoint neutral time, place, manner restrictions.	the distribution would create a material and substantial disruption; • Even if the material is constitutionally protected speech or expression, the school may still impose reasonable time, place, manner restrictions. This allows the school leadership to direct how the material is distributed without completely suppressing the expression.
	Harless v. *Darr* (1996)	• First grade student distributed religious flyers as students left for lunch and on the bus; • School had policy that principal must be informed 48 hours prior to the distribution of materials.	• School-Sponsored or Curriculum-Related Expression and Substantial Disruption principles applied; • Students were only required to provide notification of distribution, policy did not require approval from school; • Policy only requiring that a copy of material to be distributed be submitted prior to distribution is a valid limitation and does not violate student expression rights.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Marching Band	*McCann* v. *Fort Zumwalt Sch. Dist.*, (1999)	• Principal claimed band planned to perform song that advocated illegal drug use; • Prohibited playing of song; • Decision challenged as violation of free expression.	• School-Sponsored of Curriculum-Related Expression principle applied; • Band performance constituted school-sponsored expression and bore imprimatur of the school; • Decision to prohibit reasonably related to legitimate pedagogical interest of preventing drug use; • Limitation and suppression constitutional.	• School Band performances by school sponsored or curricular related bands are subject to limitations being place on music content by school leaders as long as the limitations are reasonably related to a legitimate pedagogical concern.
School Murals and School Beautification	*Bannon* v. *Sch. Dist. of Palm Beach County*, (2004)	• School invited student groups to paint murals on school's internal walls; • Fellowship of Christian Athletes painted three religious themed murals; • Murals created controversy among students and staff and attracted media attention; • School required group to paint over religious messages.	• School-Sponsored or Curriculum-Related Expression principle applied; • Murals painted inside school, by school students, under direction of school authorities constitute school- sponsored expression; • Parents and community members could reasonably believe that the religious murals were endorsed / sponsored by the school; • Suppression of student expression constitutional.	• School beautification projects have been viewed as school sponsored activities as the federal courts have seen school beautification as a legitimate pedagogical concern. This allows schools to maintain control over the project and set guidelines for what is appropriate to place on the school walls; • The school must be careful to maintain control of the project and set guidelines; • If the school fails to maintain

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
School Murals and School Beautification (Cont.)	*Fleming* v. *Jefferson County Sch. Dist*., (2008)	• In wake of Columbine shooting, school initiated a project that allowed students, parents and community members to paint tiles that would be placed on the walls in the school; • The school imposed restrictions regarding what could be painted on the tiles – references to the shooting, references to religion, and other statements were prohibited; • Parents opposed the restriction as a violation of First Amendment expression rights.	• <u>School-Sponsored or Curriculum-Related Expression principle applied;</u> • The tiles constituted school sponsored expression and the school could reasonably restrict the content of the tiles; • The school planned and oversaw the project and affixed the tiles to the school walls; a clear indication that the school not only maintained control of the project but that it bore the imprimatur of the school; • Legitimate pedagogical interests - maintain a position of neutrality concerning political and religious issues, and the project was designed to help beautify the school which fell under the broad umbrella of curriculum related and / or school sponsored activity; • The school imposed restrictions on the content of the tiles did not offend the First Amendment;	control and allow indiscriminate participation by the community, the project could be viewed as an open forum and the school could lose the ability to maintain editorial control over what individuals choose to place on the school walls; • In approaching a school beautification project, school leaders must be conscious of communicating the (pedagogical) reason for the project, establishing reasonable parameters and procedures for participants to follow, and enforce these procedures uniformly for all participants; • The Tenth Circuit (*Fleming)* stated school restrictions on school-sponsored speech did not have to be content neutral – this constitutes a split in the Circuit Court or Appeals and thus whether a restriction must be content neutral will vary depending on where a school is located.

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Groups	*Caudilo* v. *Lubbock Indep. Sch. Dist.*, (2004)	• School had abstinence-only sex education policy and had banned entire subject matter of sexual activity; • Student group wanted Gay Straight Alliance recognized as student group; • Request denied based on information from the group's website and other materials that administration believed violated the abstinence-only policy.	• School-Sponsored or Curriculum-Related Expression principle applied; • The abstinence-only policy was reasonable as related to the educational mission; • Restriction was view-point neutral and constitutional because would have denied access to *any* group that violated policy regarding discussion of sexual activity.	• Student groups are viewed as school-sponsored activities and subject to school leadership censorship; • A school may develop reasonable guidelines and limitations that groups must abide by; failure to follow these rules may result in school administration censoring the messages the group(s) attempt to disseminate.
Student Speech at School Assemblies	*Hansen* v. *Martin* (2003)	• Student wanted to give what "diversity means to me" speech; • School administrators prohibited the speech because it included the student's view that homosexuality is wrong.	• School-Sponsored or Curriculum-Related Expression principle applied; • Restriction on speech must be viewpoint neutral; • Restriction was based on administration's disagreement with student's view of homosexuality and political, cultural and religious concerns – not a legitimate pedagogical interest; • School's restriction was *not* neutral and violated student's constitutionally protected speech rights.	• Although *Fraser* was decided in the context of a student speech at a school assembly, the lower federal courts have evaluated student speech at school assemblies in terms of the assembly being a school sponsored event; • The school may limit student speech in such forums if it expresses a legitimate pedagogical interest;

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Speech at School Assemblies (Cont.)	*Poling* v. *Ellis Murphy,* (1989)	• Student was deemed ineligible to run for student election after making negative comments about the school administration in a campaign speech during school assembly.	• School-Sponsored or Curriculum-Related Expression principle applied; • Because the speech was offered during a school assembly, it was deemed school sponsored and disseminated under the school's auspice and subject to greater control; • The rude comments concerning school administration were deemed contrary to a legitimate pedagogical concern of respect for authority and teaching shared values of society; • Disqualification did not violate student's speech rights	• The assembly decisions suggest that school restrictions must be content neutral; however, certain circuits have ruled that when making decisions concerning student speech that is offered under the auspice of the school, the restrictions do not have to be content neutral; • This is an area where school districts can exert a greater amount of control over what students express.
Student Speech at Graduation	*Corder* v. *Lewis Palmer Sch. Dist.*, (2008)	• Student graduation speakers were required to provide their speeches to the school principal prior to the ceremony; • Student provided a copy to the principal; however, gave different speech at graduation that made references to religion and Jesus; • Student was prohibited from receiving diploma until she made public apology stating that she gave speech without permission of the school and that she would not	• School-Sponsored or Curriculum-Related Expression principle applied; • Graduation is a school sponsored activity and speeches at graduation are school-sponsored expression; • Graduation clearly bears the imprimatur of the school; • Graduation provides a legitimate pedagogical interest in teaching seniors a final lesson and the school has a pedagogical interest in remaining neutral in regard to issues of religion; • School officials are entitled to reasonably regulate the content of graduation speeches; • The school's action to distance itself from the speech by requiring the student to issue an apology to receive her	• Graduation ceremonies have been viewed very similarly to school assemblies; • They are characterized as school related events and schools have been able to establish legitimate pedagogical interest in the ceremony such as teaching seniors a final lesson about the importance of education before the seniors matriculate into the world; • Courts have held that it is a reasonable restriction to limit the topics that may be discussed by graduation speakers and may require

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Graduation Speech (Cont.)	*Corder* (cont.)	have been allowed to discuss religion had she asked the administration; • Student claimed violation of free speech rights.	diploma did not violate her First Amendment rights.	students to seek administrative approval prior to offering a graduation speech.
Student Election Speech and Expression	*Henerey* v. *City of St. Charles, Sch. Dist. et al.* (1999)	• During school sponsored student election, student handed out condoms featuring his campaign slogan, "Adam Henerey, the safe choice;" • School rules required that all election materials be approved prior to distribution; • The student did not have the condoms approved and was disqualified from the election; • The student claimed it was a violation of free expression; school saw it as a violation of a school rule.	• School-Sponsored or Curriculum-Related Expression and Lewd and Vulgar principles applied; • The school rule requiring prior approval of campaign materials was deemed constitutional as the election was a school-sponsored event and the limitation was reasonably related to a legitimate pedagogical concern – ensuring the school was used for educational purposes and preserving calm in the building; • Regardless of the school rule, the school could punish the conduct because the school has the right to separate itself from student expression on sensitive topics, such as teenage sex.	• The campaign cases have been as much about the enforcement and following of school rules as student speech rights; • School elections and campaigns are usually considered school sponsored or curriculum related event but require the school to offer a legitimate pedagogical interest; • Schools may establish reasonable school rules to govern these activities and may require students to follow these rules to participate in the election; • The decisions also reveal that the expression may not be lewd or obscene – this could require that a school leader utilize multiple concepts when

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Election Speech (Cont.)	*Phillips et al.* v. *Oxford Separate Municipal Sch. Dist.*, (2003)	• Student hung campaign poster proclaiming, "He Chose Mary…You Should too," and had a picture of Duccio's Madonna and Child; • Posters were supposed to have principal approve before campaign but did not; • After receiving complaints, the principal order the posters removed.	• School-Sponsored or Curriculum-Related Expression principle applied; • Court found that school had a legitimate pedagogical interest in responding to complaints that the poster was sacrilegious and possibly violated the Establishment Clause; • Removal of posters was reasonably related to the pedagogical interest and the limitation was not a violation of the Student's First Amendment expression rights.	addressing student expression that is offered in the context of a student election.
Expression at the Elementary School Level	*Walz* v. *Egg Harbor Township Brd. of Educ.*, (2003)	• Student attempted to distribute gifts with religious messages three years in a row; • Although allowing distribution at the end of the school day, the school prohibited the distribution during the classroom holiday party; • Student believed the restriction quashed violated his expression rights.	• School-Sponsored or Curriculum-Related Expression principle applies; • The limitation was constitutional; • Permitting the promotion of a single specific (religious) message could be seen as undermining the school's legitimate area of control; • Court identified that the age and maturity level of the students is a factor and that the school may exert more control over younger students; • In the elementary setting, the line between school-endorsed speech and allowable student speech is more easily blurred than at the high school level; • In the context of a curricular activity, school officials have the right to restrict	• School leaders mat exert more control over student speech and expression that is offered at the elementary level; • Because of what is considered the increased impressionableness of younger children, the decisions illustrate that the line is easily blurred between personal speech and school endorsed or supported speech. • The student expression is more frequently considered (or mistaken as) school-sponsored allowing school leaders to exhibit increased

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Speech and Expression at the Elementary School Level (Cont.)	*Walz* (Cont.)		student expression promoting a specific (religious) message.	control over the speech; • The legitimate pedagogical concern being that because the line between personal and school sponsored speech is easily blurred among younger students, schools most have the ability to ensure that parents and students do not interpret certain students' expression as endorsed by the school.
	Sonkowsky v. *Brd of Educ. for Indep. Sch. Dist. No 721 et al.*, (2002)	• Student claimed that free expression rights were violated when he was excluded from a class photo – which was part of a class project – for wearing Green Bay Packers Jersey and his colored picture – a Green Bay Packers football player – was not displayed in front of the classroom because it violated the rules of the class assignment.	• School-Sponsored or Curriculum-Related Expression principle applied; • Elementary Student does not have right to wear a certain football jersey to school; • Rights of students may be restrained more at the elementary level than high school level; • Court concluded that constitutional rights were not violated because the imposed limitations on student's attire did not effect his grades or education	
	DeNooyer v. *Livonia Pub. Sch.*, (1993)	• Student wanted to show a video of her performing a religious song as part of a class project; • Teacher believed the video was inappropriate for the class (because of impressionable age), and	• School-Sponsored or Curriculum-Related Expression principle applied; • Because the presentation was part of a class project the teacher could regulate the content and style of the presentation; • Pedagogical concerns extend beyond content to also the medium of presentation; • Rejection of video was reasonably	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Speech and Expression at the Elementary School Level (Cont.)	*DeNooyer* (Cont.)	that it frustrated the purpose of the class project because it was a video rather than live presentation.	related to a legitimate pedagogical concern – live presentation of class project.	
	Heinkel v. *Sch. Brd*, (2008)	• 8th grade student wanted to distribute materials regarding abortion and abortion alternatives to classmates during the Day of Remembrance; • Student submitted materials as required by the school distribution policy; • Superintendent denied the request because of the potential disruption that could occur.	• Substantial Disruption principle applied; • Circumstance could reasonably lead school leaders to forecast substantial disruption; • Fact that student was an 8th grader, that abortion and birth control were not part of the middle school curriculum, and that the intended audience was students between the ages of 11-14 justified restriction even though expression could be considered political; • The suppression of the distribution was reasonable and did not violate student's First Amendment rights.	
Saluting the Flag and Saying the Pledge of Allegiance	*Frazier* v. *Alexandre* (2006)	• School had policy that students must stand and say the Pledge of Allegiance, but could get parental permission to be exempt from *saying* the pledge, not standing; • Student was disciplined for not participating in the saying of the Pledge.	• Substantial Disruption principle applied; • Rule requiring students to participate or stand for the pledge is unconstitutional and violates student speech rights; • The right to refrain from saying the pledge is personal and passive and does not require parent permission.	• Students have an affirmative right to refrain from saluting the flag; • Students also have a right to be free from being coerced to say the Pledge of Allegiance or salute the flag; • School administrators may not make student say the Pledge of Allegiance or salute the flag;

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Saluting the Flag and Saying the Pledge of Allegiance (Cont.)	*Circle School* v. *Pappert*, (2004)	• Pennsylvania had statute that required parental notification when students refused to say Pledge. • Students claimed that requirement violated speech rights that was personal to the student.	• Substantial Disruption principle applied; • Parental notification violated students' First Amendment speech rights because it discourages students from exercising the right to refrain from saying the Pledge; • Notification also constituted viewpoint discrimination because it was only triggered when a student refused to say the Pledge.	• (Not) Saluting the flag constitutes political speech and students are bound by *Tinker*. Although they may not be forced to say the Pledge of Allegiance or salute the flag, school administrators do not have to tolerate behaviors that constitute a material and substantial disruption. The disruption must amount to more than discomfort or fellow students' disagreement or even disgust with their classmate(s) refusal to salute the flag or say the Pledge.
	Holloman v. *Harland*, (2008)	• In protest of classmate's decision to not say the Pledge the previous day, a student raised his fist and remained silent during the Pledge; • Student was chastised and punished for failing to say the Pledge and the affirmative act of raising his fist; • Student claimed that his First Amendment speech and expression rights were violated.	• Substantial Disruption standard applied; • Supreme Court has established that the school cannot compel students to say the Pledge; • Students have constitutional right to refrain from saying the Pledge; • Raising of the fist constitutes an expressive message and is protected expression under the First Amendment because of the specific (protest of classmate's treatment) and general (protest against school) message it contained; • School may not suppress private political expression unless there is a material and substantial disruption or reasonable forecast of such and may not suppress if simply disagree with political statement; • Rights violated by suppressing student's expression and punishing for failure to say Pledge and raise fist.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Classroom Activity	*Settle* v. *Dickson County Sch. Brd.*, (1995)	• Student claimed that expression rights were violated when teacher would not let her write paper on Jesus Christ; • Teacher articulated numerous reasons for rejecting the topic, including failure to get permission and use of insufficient sources.	• School-Sponsored or Curriculum-Related Expression Principle applies; • Court concluded that it was not place of court to overrule decision of teacher regarding educational concerns that do not sharply implement constitutional concerns; • Teacher must be given broad discretion to conduct class based on content of speech; • Limitation on student's essay topic did not violate student's constitutional rights.	• Classroom activities are considered school sponsored and curriculum related activities; • Certain courts have gone as far as to say that free speech must give way to teachers' ability and need to carry out the curriculum and actually provide an education; • Student rights (in regard to speech and expression) are reduced in the context of classroom activities and school leaders have the ability to limit or censor student expression in this context, but must provide a legitimate pedagogical interest; • These interests are broadly defined and have included separating the school from what could be considered religious speech, as well as limiting expression because it falls outside the guidelines of the assignment or activity.
	Borger v. *Bisciglia* (1995)	• School district had a policy that prohibited showing R rated movies as part of the curriculum; • Students believed that the policy violated student expression rights.	• School-Sponsored or Curriculum-Related Expression principle applied; • School officials have abundant discretion to construct curriculum and only violate the First Amendment when student access is limited because of political or social ideas discussed in material; • Prohibition of R rated movies was a viewpoint neutral legitimate pedagogical concern as the school sought to refrain from exposing students to excessive violence, nudity and vulgar language.	
	Curry v. *Saginaw City Sch. Dist.* 2008)	• Student sought to create and sell candy canes with a religious message attached during class project entitled Classroom City;	• School-Sponsored or Curriculum-Related Expression principle applied; • School desire to refrain from offending parents or students by the perception that it endorsed the sale of religious items during a curricular related activity	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Classroom Activity (Cont.)	*Curry* (Cont.)	• Teacher refused to let student sell candy canes with message attached; • Student believed that refusal violated student expression rights.	constituted a legitimate pedagogical interest; • The limitation was not a violation of students First Amendment Rights.	
Student Political Expression	*Chandler* v. *McMinnville Sch. Dist.*, (1992)	• Following the commencement of a teacher strike, students wore buttons to school supporting the striking teachers; • The buttons contained terms such as "Scab" and other references to the teachers' strike; • School administrators order the students to remove the buttons	• Substantial and Material Disruption principle applied; • The buttons did not constitute school sponsored speech and were not lewd; • The buttons, including the word "scab", were not inherently disruptive, and were passive expressions of a political viewpoint; • To suppress, the school would have to show that the buttons created or forecasted substantial disruption; • The suppression violated the students free expression rights;	• Students maintain the ability to offer private political speech on school grounds; • In order to limit this expression, school administrators must show that the speech or expression constituted a substantial and material disruption; • The disruption must cause more than mere discomfort or advocate an unpopular viewpoint;

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Political Expression (Cont.)	*Chandler* (Cont.)	claiming that the buttons created a material and substantial disruption; • The students were suspended when they refused to remove the buttons.		• If speech or expression is considered lewd or vulgar, school must still show a material and substantial disruption because of the political nature of the student speech; • Further, school leaders may not silence or suppress student expression because the student's classmates threaten violence against the student – in such circumstances the courts have stated that the students proposing the illegal behavior (harming classmates) must be punished rather than limiting the student's constituently protected political speech.
	Smith v. *Mount Pleasant Pub. Sch.*, (2003)	• Student offered impromptu speech at school lunch table concerning the tardy policy; • The speech allegedly attacked the administration and contained vulgar language; • School punished the student for his remarks.	• Substantial Disruption and Lewd and Vulgar principles applied; • The remarks were lewd and obscene; however, because of political nature they had to create a substantial disruption to be limited; • Comments created disruption because they undermined administrations' authority by making personal attacks.	
	West v. *Derby Unified Sch. Dist. 260*, (2000)	• Student drew confederate flag on piece of paper; • School claimed it violated the Racial Harassment Policy, which student was aware; • Student was suspended under the policy; • Student claimed policy violated right to free expression.	• Substantial Disruption principle applied; • Based on history of racial tension at school, it was reasonable for the school to believe that the display of the Confederate flag could cause substantial disruption; • School's concern was more than a mere discomfort over an unpopular political viewpoint and suspension did not violate student's rights.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Political Expression (Cont.)	*Nuxell* v. *Indian Prairie Sch. Dist. 204*, (2008)	• Student wore shirt stating "Be Happy, Not Gay;" • School banned the shirts because shirt violated school rule prohibiting derogatory comments about ethnicity, gender, religion, sexual orientation.	• Substantial Disruption principle applied; • Rule went too far in characterizing the shirt as demeaning as there was no evidence that the shirt created a disruption; • The rule prohibiting derogatory comments was valid but as specifically applied to "Be happy, not gay" it violated the student's expression rights.	
	Gillman v. *Sch. Brd. for Holmes County*, (2008)	• School banned all symbols and clothing supporting or promoting a homosexual lifestyle; • Students attacked the ban claiming that it was a violation of First Amendment speech and expression rights.	• Substantial Disruption principle applied; • To suppress the symbols and clothing school had to show that expression created a material and substantial disruption; • Any disruption was created by the principal and his attacks on homosexual students and their classmate advocates; • The suppression was grounded in the principal's bias and disagreement with homosexuality, and the school district's desire to avoided potentially unpopular political speech; • The ban was a violation of students' First Amendment rights and was not based on any legitimate purpose or reasonable idea of possible substantial and material disruption.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Athlete Speech and Expression	*Pinard* v. *Clatskanie Sch. Dist. 6J* (2006)	• Members of the varsity basketball team drafted a petition stating they would no longer play for the coach because of his abusive behavior; • Players refused to board the bus to the game and were suspended from team; • Students claimed that the petition and bus protest were protected expression.	• Substantial Disruption principle applied; • The expression was punishable because the petition and boycott substantially and materially disrupted a school activity – a varsity basketball game; • The disruption principles extend beyond the classroom to activities such as athletics and other school activities; • The Suspension did not violate the students' constitutional rights.	• Student athletes have reduced levels of speech and expression freedom as compared to the regular student bodies; • The lower federal courts utilized precedent from the Supreme Court's rulings regarding students' privacy rights to discern that student athletes give up some of their constitutionally protected rights when joining school athletic teams; • Student athletics are considered school sponsored activities and speech that could be considered private or political when offered from a student in the regular student body can be considered school sponsored when offered by a student athlete.
	Lowery et al. v. *Euverard et al.*, (2007)	• Players were removed from team after signing statement that stated, " I hate coach Euvard [sic] and I don't want to play for him;" • Only students that signed and refused to apologize were suspended; • Students claimed the suspicions violated speech rights.	• Substantial Disruption principle applied; • It was reasonable for the coach to believe that the statement would substantially disrupt the team by eroding the coach's authority and dividing the team; • The potential disruption removed the expression from constitutional protection; • Disruption did not need to occur as long as it was reasonable the coach could forecast potential disruption.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Expression through Dress and Attire	*Boroff* v. *Van Wert City Brd. of Educ.*, (2000)	• Student wore shirts featuring musician Marilyn Manson to school on consecutive days; • Student was told to remove shirts because they violated the school's policy concerning clothing that illustrated or promoted illegal drugs; • School believed Marilyn Manson promoted demoralizing behavior and pro-drug persona.	• Lewd and Vulgar principle applies; • It was a highly appropriate function of the school to prohibit vulgar and offensive expression in school; • Reasonable for school to ban shirts that were patently offensive to the school's educational mission and the shirts were deemed vulgar and offensive; • Prohibiting the shirts did not violate student's expression rights.	• The circuits are split on student dress and the appropriate principle(s) that can apply to a specific dress code or inappropriate attire in question; • Past events can play a role in the constitutionality of a restriction on dress; • As a general principal, school leaders may restrict student dress and attire that is offensive to the school's educational mission; • The lewd and offensive principle often applies, but the political nature of some attire can also require a material and substantial disruption principle application.
	Barber v. *Dearborn Pub. Sch.*, (2003)	• Student wore a shirt displaying a photograph of President Bush that stated "International Terrorist" below the picture; • Principal asked student to remove shirt because he believed the shirt had and would create a disruption; • The shirt did not violate the student conduct code or promote drugs, alcohol, or terrorism.	• Substantial Disruption principle applied; • Banning the shirt was based on the principal's belief that the t-shirt promoted an unpopular political stance and only a desire to avoid discomfort; • Principal's discomfort is insufficient to ban the political expression on a student's shirt; • School could not show that the shirt actually created a substantial and material disruption.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Expression through Dress and Attire (Cont.)	*Newsom* v. *Albermarle County Sch. Brd.*, (2003)	• School had policy that students could not wear attire that promoted drugs, alcohol, tobacco, weapons, violence, or sex; • A student wore shirt to school referencing the NRA and a sports shooting camp; • Principal asked student to remove shirt because principal believed it would remind students of violence and recent school shootings.	• Substantial Disruption principle applied; • School could prohibit the display of violent, threatening, lewd, obscene or vulgar images on student attire; • Non-threatening images may only be banned if they create a substantial disruption or can be reasonably forecasted to do so; • No evidence (or school history) that attire featuring the legal use of weapons created a substantial disruption or materially interfered with the operation of school; • Enforcement of the dress code (in this situation) violated students' expression rights.	
	Barr v. *Lafon*, (2008)	• Blount County School District enacted ban on clothing depicting the Confederate flag; • Ban imposed because of increased levels of racial tension - racial graffiti, racially motivated altercations, and threats of violence; • Students challenged ban as violation of expression rights; • Students claimed that the ban was not viewpoint neutral as the	• Substantial Disruption principle applied; • School did not have to wait until an actual substantial and material disruption occurred; • The reasonable belief that the display of the Confederate flag could cause a potential disruption was sufficient under *Tinker* analysis to make the ban constitutional.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Expression through Dress and Attire (Cont.)	*Barr* (Cont.)	school did not ban other symbols.		
Student Speech and Expression and the Internet	*Doninger* v. *Niehoff*, (2007)	• Student posted message on internet social networking site that was critical of school's handling of a student planned music festival; • The post was considered offensive and inappropriate, and used vulgar slang (douchebag) to describe district administrators; • Before the student created the post, she was informed of the proper ways to raise concern; • Student was disqualified from running in a school election after school administrators discovered the post because post failed to display the qualities of civility and citizenship expected of school leaders.	• Lewd and Vulgar principle applied; • The post contained inappropriate and offensive language; • School decision based on idea that student's views were inconsistent with the values that the school attempts to teach students through leadership positions; • These values constituted a legitimate pedagogical interest and school had right to separate itself from such expression; • Although the speech was created off campus, student intended the speech to reach students (and faculty) on campus.	• Internet speech and expression is a developing arena of student speech. • The lewd and vulgar and the material and substantial disruption principles usually apply; • Schools must establish a reasonable nexis between the off campus expression and the on campus disturbance to justify suppressing the expression or punishing the student; • If the expression is threatening, the speech may also be evaluated under a true threats analysis.

Table 2 Continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Speech and Expression and the Internet (Cont.)	*Wisniswski* v. *Brd. of Educ. of the Weedsport Central Sch. Dist.*, (2007)	• Student developed personal icon - for use on personal computer - that depicted a gun pointed at a person's head and "Kill Mr. VanderMolen" written underneath – VanderMolen was student's teacher; • Icon sent to numerous friends but no school officials; classmate forwarded icon to the teacher; • Student suspended for a semester for threatening a teacher and creating a threatening environment.	• Substantial Disruption principle applied; • The icon represented a (reasonably) potential of substantial and material disruption of school because of effect on teacher and future interaction between teacher and the student as well as with other students; • Fact that created off campus did not alleviate possibility that icon could create a substantial disruption on school grounds and off campus creation did not afford student additional constitutional protection; • It was reasonably foreseeable that after the icon was sent to the student's friends, disruption could occur at school.	
	Layshoch v. *Hermitage Sch. Dist* (2007)	• Student created a parody "MySpace" page for school principal from an off campus computer and forwarded the link to friends; • Student suspended for 10 days and placed in alternative education setting for the spring.	• Substantial Disruption principle applied; • The district failed to connect the disruption that occurred at school to the parody posted by the student (three other parodies had also been created); • Disruption was extremely limited and no reasonable fear of further disruption; • Suspension violated student's freedom of expression.	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Speech and Expression and the Internet (Cont.)	*J.S.* v. *Blue Mountain Sch. Dist.*, (2008)	• Student created mock profile of principal on MySpace.com. The profile contain lewd and vulgar descriptions and information and utilized a picture of the principal from the school's website; • The profile was created off campus on a private computer; • Creator gave classmates permission to access the page, print out of the page brought to school, and students and teachers discussed at school; • Student suspended for 10 days for creating the profile; • The student claimed school could not punish a student for creating parody profile off-campus that was not lewd or vulgar and was non-threatening.	• Lewd and vulgar principle applied, and • Promotion of Illegal Drug Use or Illegal Activity principle applied (caution as court's application arguably goes beyond what the Supreme Court held in *Morse*); • Profile was clearly lewd, vulgar and offense; it was not political and simply made an attack on the principal; • Profile was lewd and vulgar because of use of terms such as "fraintrain," "fagass," and "fucking in my office;" • School did not violate student's rights by punishing for profile because of its lewd and vulgar nature even though it did not create a material and substantial disruption; • Clear connection existed between the off campus expression and on campus effect as the intended audience was the student's classmates, the profile targeted the school principal, and the profile was discussed at school and a hard copy of the profile was brought into the school.	

Table 2 Continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Student Speech, Expression, and School Violence	*S.G.* v. *Sayerville Brd. of Educ.*, (2003)	• Student was playing game of cops and robbers on playground and told student, "I'm going to shoot you" in course of the game; • Student was suspended for three days for comment; • School had history of violence between students and had established that students making comments regarding violence would receive three day suspension.	• Substantial Disruption principle applied; • Balance must be struck between students' rights and fostering socially appropriate behavior; • Educators have broader authority to limit student rights at the elementary level than at the secondary level; • Prohibition of gun play was reasonably related to a legitimate pedagogical interest of preventing violence and promoting socially appropriate behavior; • Student's suspension was a valid decision and did not violate student's expression rights.	• Although the courts have often discussed the possible material and substantial disruption that a threat can cause when offered on school grounds, the courts have addressed the situation using a true threats analysis. Such an approach takes the speech outside the realm of *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* because true threats are provide no protection under the First Amendment; • To establish that an expression constitutes a true threat and is not provide protection, the circuit courts are split on the objective test that applies. • In certain circuits, school leaders must show that a reasonable person standing in the place of the expression's recipient would consider the expression to be a serious threat of harm or assault. • In other circuits, school leaders must establish that a reasonable person standing in the place of the speaker would foresee that the listener would interpret the communication as a serious intention to do harm.
	Lavine v. *Blaine Sch. Dist.* (2001)	• Student was absent for three days and upon return submitted a poem to a teacher with shooting his classmates as the subject matter; • The student was expelled under the emergency expel policy.	• Substantial Disruption principle applied; • Substantial disruption requires that the school look at not only the incident but the surrounding circumstances (Totality of Circumstances); • The poem coupled with students' past behavior, and recent school violence was sufficient to create a reasonable forecast of potential substantial disruption; • The suspension did not violate the student's expression rights;	

Table 2 continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Expression, Threats and School Violence (Cont.)	*Riehm* v. *Engelking*, (2008)	• Student wrote a fantasy murder suicide essay inspired by the shootings at Columbine High School; • The essay was submitted to his creative writing teacher. The teacher interpreted the essay as a threat and reported it to the principle; • The student was suspended and referred to child services for an evaluation.	• Substantial Disruption principle applied; • The First Amendment does not protect speech or expression that is considered a true threat; • The violence and realistic detail created a reasonable belief that the essay was a threat to the student writer's teacher; • As such, the essay was not protected expression under *Tinker* and afforded no First Amendment protection.	
	Johnson v. *New Brighton Area Sch. Dist.*, (2008)	• During a diversity assembly skit, a student was nicknamed "Osama bin Laden;" • The next day at school, several students referred to the student by this name; • On one occasion after being called Osama, the student made a comment to the effect that if he were Osama he would have "pulled a Columbine" on the school; • The comment was reported to the principal	• Substantial Disruption principle applied; • The comment violated the educational mission of the school, and created concern for the safety of all students; • School's actions were based on rationale belief that comment could lead to substantial disruption of the education process; • Student Expression was more akin to a true threat than the political expression described in *Tinker*; • Although court applied the material and substantial disruption principle, it was not needed because true threats are not afforded any constitutional protection; • The fact that statement was uttered in a school environment – even if meant in	

Table 2 Continued

Student Expression	Case Name (year)	Facts	Applicable Supreme Court Principle and Findings by the Court	School Leader Takeaway
Expression, Threats and School Violence (Cont.)	*Johnson* (Cont.)	by a teacher that it interpreted it as a threat; • Student was suspended for ten days.	jest – can be interpreted as a threat by school leaders and punishment for the statement did not violate student's rights.	
	Doe v. *The Pulaski County Special Sch. Dist.* (2002)	• Student wrote letter to ex-girlfriend that graphically described killing her; • Student shared letter with friend who took the letter without student writers permission and gave it to the ex-girlfriend at school; • Principal was informed of the situation and student writer was expelled for a year for making terroristic threat.	• True threats are not afforded any First Amendment protection; • Eighth Circuit determines if a statement is a true threat based on whether a reasonable recipient would interpret as threatening harm; • Letter qualified as a true threat because of graphic nature; • Did not matter that student writer did not give permission for the letter to be given to girlfriend because had already intentionally communicated the threat by telling girlfriend about the letter and letting friend read; • The explosion was upheld as the letter was afforded no constitutional protection and qualified as a true threat.	

Table 3

Definition of Supreme Court Principles Applied by the Lower Federal Courts

1. Substantial Disruption principle applied: Refers to school officials' ability to restrict students' speech and expression that substantially and materially disrupts the educational process, the maintaining of discipline, or could reasonably be forecasted to disrupt the educational process.	*Tinker*, 1969
2. Lewd and Vulgar principle applied: Refers to school officials' ability to suppress or limit student speech and expression that is lewd, uncivil, vulgar, or obscene.	*Fraser*, 1986
3. School-Sponsored or Curriculum-Related Expression principle applied: Refers to when students participate in school sponsored or curriculum-related activities, and that school officials' ability to exert the most control over student speech and expression and limit such expression based on legitimate pedagogical concerns.	*Hazelwood*, 1988
4. Promotion of Illegal Drug Use or Illegal Activity principle applied: Refers to school officials ability to restrict student speech or expression that promotes or encourages illegal drug use.	*Morse*, 2007

Table 2 provides educators with guidance as to how a specific student speech and expression circumstance aligns with one (or more) of the four Supreme Court principles. The table can be used as a reference tool by school leaders to provide direction when making informed decisions concerning whether student speech or expression, or a potential limitation on the speech or expression, is legal and constitutional.[95] For educational leaders' purposes, it brings clarity to the legal quagmire that surrounds student speech and expression in school by arranging pertinent information in an easily readable table format. Beyond providing clarification to the varied applications of the Supreme Court student speech and expression principles, the table is practical because it reflects actual circumstances faced by school leaders in the past.

This study concludes that the constitutional boundaries of student speech and expression rights in school are identified by applying the Supreme Court's student speech and expression principles to specific factual situations encountered by school leaders and addressed by the federal courts. As the Supreme Court has stated, while students do not "shed their constitutional rights…at the schoolhouse gates…the nature of those rights is what is appropriate for children in school" (*Morse*, p. 2627, quoting *Tinker*, pp. 506 and citing *Acton*, pp. 655-656). Table 1 identifies the Supreme Court student speech and expression principles and Table 2 displays the spectrum of identified possible student speech and expression situations. Furthermore, Table 2 exemplifies how the expression principles may be applied to a specific set of facts. These conclusions add depth to the

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[95] Table 2 should not be utilized in place of legal counsel, and does not represent legal advice. It is meant to inform and educate school leaders with regard to the parameters of student speech and expression in school and the manner in which these rights may be limited without infringing on students' rights under the First Amendment to the U.S. Constitution.

student speech and expression landscape by identifying specific speech and expression situations and providing detail about the federal courts' approach(es) to student speech and expression issues that do not necessarily reflect the exact factual situations faced by the Supreme Court in *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse*.

Connection to Past Research

The research and conclusions in this study complement and extend research that has already been conducted in the area of federal court legal limitations on student speech and expression rights in school. The located articles drew broad conclusions that the Supreme Court decisions limited student speech and expression rights in schools. The articles differed as to whether the limitations articulated by the court were proper or in the students' best interest, and in defining the exact extent of student speech and expression rights as limited by the Supreme Court. This research does not opine on the wisdom of the Court's view, but does track past research in terms of the Supreme Court's actions that created greater restrictions on student speech and expression in school.

This study differs from past research in that it extends the discussion on student speech and expression through a focus on the application of the four Supreme Court's student speech and expression principles by the lower federal courts to specific factual situations, and produced conclusions concerning how school leaders could use this data in the future. Most of the reviewed literature focused on the limits created by a specific Court decision, such as Buss (1989) and his analysis of *Kuhlmeier* or Nairn (2008) and the *Morse* decision. This study also addressed the broad spectrum of possible student speech and expression situations through the lower federal court decisions rather than focusing on one or two particular areas, such as Hudson (2002) and expression in a time

of increased school violence. This study's conclusions that the Supreme Court's decisions created greater restrictions on student speech and expression and provided school officials with greater authority to limit student expression are inline with past research in the area.

Future Research

This research evaluated primary source data developed between January 1, 1983, and December 31, 2008, concerning the limits of students' speech and expression rights in school under the First Amendment to the U.S. Constitution. Two areas of further study seem relevant to extend the work regarding students' rights conducted in this study. Court decisions should be collected and analyzed concerning Supreme Court and lower federal court decisions in other areas of student rights in school such as search, religion, and drug-testing. Those findings would be valuable to determine the extent to which the lower courts have utilized, developed, and extended – in specific factual situations – the principles put forth by the Supreme Court in those areas.

The second area of research that could extend the current research is an examination of state law cases concerning student speech and expression rights in school and educational leaders' decisions regarding limiting those rights. This research would encompass state court decisions that not only addressed student speech and expression rights under the federal Constitution but also under state constitutions. Although the results concerning specific rights could differ because of the language contained in state constitutions, the focus should be on determining the principles utilized by the state courts in reaching their decisions. Further research would provide a more in-depth picture of the extent of student speech and expression rights in school, the (upheld) limits that

have been imposed on those rights, and the principles that courts utilize when making decisions regarding student rights. Because education is a local endeavor and state constitutions provide varying degrees of increased protection, the landscape of student rights could differ among states and individual school districts.

Closing Thoughts

While the Supreme Court's student speech and expression decisions provide direction for school leaders and the lower federal courts application of these principles add clarity to the student speech and expression spectrum, the student speech and expression landscape can quickly become muddled and as Justice Thomas has stated represents a patchwork approach to addressing student speech and expression rights in school. This study concludes that data and conclusions regarding the current boundaries of student speech and expression are most useful when presented as a table reference guide. The result of this conclusion is Table 2. The Table identifies the current legal boundaries of student speech and expression, and draws connections between the Supreme Court principles and specific circumstances confronted by education leaders and reviewed by the lower federal courts. More importantly, it provides educators with important information that will aid them in making informed decisions regarding First Amendment student speech and expression rights in school.

Educational leaders are charged with the massive responsibility of educating the nation's students and maintaining a positive educational environment. However, the constitutional rights of students cannot be trampled in an attempt to carry out school leaders' educational goals. Teachers, school administrators, and district leaders must be aware of the legal and constitutional limits that surround student speech and expression in

school and what should be considered when making determinations regarding student speech and expression issue. The purpose of this study was to identify and review the current legal boundaries of student speech and expression rights in school to enable educators to make better informed decisions when confronted with such situations. Providing educators this study's data and reference table will assist them in fulfilling their educational mission while still respecting students' First Amendment speech and expression rights.

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