A LEGAL ANALYSIS OF THE EFFECTS OF MORSE V. FREDERICK ON STUDENT SPEECH IN K-12 EDUCATION

by

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ABSTRACT

Joseph A. Moree. A legal analysis of the effects of *Morse v. Frederick* on student speech in K-12 education. (Under the direction of DR. DAVID M. DUNAWAY)

The purpose of this study was to determine the effects of *Morse v. Frederick* on student speech in K-12 public schools. Cases meeting the research criteria were selected from federal court districts. Those cases were briefed and analyzed. The results of the research were used to develop findings that were placed into four categories: (1) the concurring opinion's support for school safety, (2) political and social commentary, (3) harassment of school officials, and (4) speech concerning possession, distribution, and use of illegal drugs while at school. The findings led to the development of recommendations for school officials to consider regarding student speech and the development of a Four-Prong Speech Progression Test.

DEDICATION

This writing is dedicated to my wife, Mary Catherine, my son, John Andrew (Drew), and my daughter, Layla Rene'. My children provided many hugs, laughs, and occasional distractions, which were often needed, from researching and writing. My wife, especially, is owed so much. She was there through the good times and challenging times during my coursework. She was my sounding board from beginning to end and refused to let me give up. I would not be writing these words if it were not for her love and support. They are and continue to be the most wonderful things to ever happen to me.

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I must begin by acknowledging several principals that I was fortunate to work under while learning to be an administrator and completing this program: Mr. Millard Lamm, Dr. Wendy Kelly-Jordan, Dr. Theresa Gardner, and Mr. Keith McKenzie. Mr. Linwood Huffman offered me a job teaching in July 2004 at Rockingham Junior High School. He was the first person to encourage me to think about becoming a school administrator. I am forever indebted to each of them.

I began my association with UNC-Charlotte in the Fall of 2010 when I began work toward my Master's in School Administration. That semester, I began learning about giants in education, that until then, were completely oblivious to me – DeFours, Sizer, Lezotte, Marzano, Reeves, and the list goes on.

What I did not realize then was that I was learning from *my* giants: Dr. Mickey Dunaway, Dr. Jim Bird, Dr. Rebecca Shore, Dr. Jim Watson, Dr. Jim Lyons, and Dr. Tracey Benson. In my professional practice as an educator, not a day goes by where I do not apply something they taught me in their courses. I am forever indebted.

Dr. Dunaway deserves a special mention. Since 2010, he has served me in many ways: friend, professor, mentor, and chairperson for this dissertation. He refused to accept less than my best and was not afraid to tell when that was. The only way I could ever thank him enough for his guidance and support would be to live out what he taught me about being an educator.

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Chapter I: Introduction

Public Schools and the United States Supreme Court

The American public school is vital to teaching constitutional freedoms to the American public and is the "marketplace of ideas."[1] Written 51 years ago, the words of Justice Brennan are no less critical. Arguably, they are now of more considerable significance as both the American public school system and classrooms have changed in ways unimagined. Pedagogies and curricula are drastically different now than in 1969. iPads and laptops are as standard in the classroom as slate boards were in generations of the past. While instructional changes were led, to no small degree, by educators in the education community, other changes, such as student rights, trace their lineage to the United States Constitution. As a result, the United States Supreme Court has been viewed by some as the school board for the nation.[2]

Statement of the Problem

School leaders need a sound understanding of the law, and as a nation of laws, court decisions determine the answers to constitutional questions. According to court rulings, educational leaders develop school system policies and codes of student conduct relating to student speech rights. However, some research indicated comments that school environments do not respect students' constitutional rights.[3] Leaders will make changes

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[1] *Tinker v. Des Moines, 393 US 503 (1969)*, 512.
[2] Driver, J. (2018). The schoolhouse gate: Public education, the Supreme Court, and the battle for the American mind. New York: Pantheon.
[3] Hudson, David L., Losing the Spirit of Tinker v. Des Moines and the Urgent Need to Protect Student Speech (March 4, 2018). 66 Clev. St. L. Rev. Et Cetera 2 (2018), Belmont University College of Law Research Paper No. 2018-15, Available at SSRN: https://ssrn.com/abstract=3227034

to school and district policy based upon current legal standards. Aligning policy with the law will best inform daily practices to avoid going awry of the law.[4] Appropriate application of K-12 public education law protects the rights of students to express themselves within the law. Moreover, the law's appropriate application guarantees that schools can maintain safety and orderly operations through legally accepted limitations of student speech rights. School leaders have many responsibilities - buses, observations, improving instruction, and personnel issues - it is easy to fail to stay informed of educational law changes.[5]

Educators should attempt to hedge against this tide of legal illiteracy. Forty-five years ago, researchers noted that educators needed more understanding of student and teacher rights. Furthermore, a lack of understanding could often result in being victimized by those with superior legal knowledge. As a result, students may fail to develop a respect for the law.[6]

As far back as 1968, research concluded that public schools were sitting at a threshold of a new era of individual rights. The secondary level is increasingly affected by this change.[7] What some might have viewed as a supposition then would certainly

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[4] Militello, M., Schimmel, D., & Eberwein, H. (2009). If They Knew, They Would Change: How Legal Knowledge Impacts Principals' Practice. *NASSP Bulletin*, *93*(1), 27–52.

[5] Gooden, M. (2012). An Examination of Ohio Principals' Attitudes toward Technology and First Amendment Law: Implications for Leadership. *Journal of School Leadership*, *22*(6), 1130–1154. https://doi.org/10.1177/105268461202200605

[6] Schimmel, David, and Matthew Militello. "Legal literacy for teachers: A neglected responsibility." *Harvard Educational Review* 77, no. 3 (2007): 257-284.

[7] Griffiths, William E. "Student constitutional rights: The role of the principal." *The bulletin of the National Association of Secondary School Principals* 52, no. 329 (1968): 30-37.

hold today, given the emerging platforms for expressing one's right to free expression. Cunningham noted that administrators are not always confident in their understanding of First Amendment law.[8] However, others have pointed out that school administrators are given wide latitude by the courts to determine how to meet student safety and education expectations.[9] The courts appear to have given school leaders a large gavel to wield, but school officials tend to demonstrate a lack of confidence when to strike the block.

Administrator knowledge of student rights is a needed skill to assist those under their supervision. By having this knowledge, administrators could assist teachers within their classroom and help them avoid negative factors resulting from a dearth of undergraduate courses on educational law, including paranoia caused by over-thinking the law and worrying about lawsuits and limiting risk-taking in the classroom. Emphasizing the positive influences of legal knowledge highlights their effect - awareness of the law, understanding, sensitivity for the law in the current educational environment, and appropriate instruction and decision-making.[10] The K-12 education profession is becoming more litigious.[11] According to Bathon, some researchers have stated that the only certainty about student expression is that public schools will generate a steady litigation stream.[12] Educational leaders may be held liable for failing to know the

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[8] Cunningham, Audrey E. Wagstaff. "Administrators and the First Amendment: What High
School Administrators Know (and think they know) about the Fourth Estate." (2013).
[9] U.S. Const. Amend. I
[11] Davies, Troy Allen. "The worrisome state of legal literacy among teachers and administrators." *Canadian Journal for New Scholars in Education/Revue canadienne des jeunes chercheures et chercheurs en éducation* 2, no. 1 (2009).
[12] Ibid., 36.
[13] Bathon, Justin M., and McCarthy, Martha M. "Student Expression: The Uncertain Future." *Educational Horizons* 86, no. 2 (2008): 75–84.

law and applying it correctly. A national survey of secondary principals from 2009 showed that most principals were uninformed or misinformed about school law issues. [13] Consequently, they acknowledged a desire to change daily practices after learning of the survey results. However, the literature is scant with precisely how educational law knowledge would affect educators' daily practices.[14]

Undoubtedly, educators require consistently reliable and correct legal knowledge to make the right decisions, such as student constitutional rights, curriculum established through state legislatures, and personnel law. School officials need not worry about becoming lawyers, but thinking like one may be a useful skill.[15] Nationally, school systems are collectively spending over 400 million dollars per year on attorney fees.[16] These fees will likely increase should educators' legal knowledge not improve daily educational and managerial school practices. Avoiding costly legal battles allows school systems to focus resources on educating students and preparing them for their future.

Research Purpose and Question

What is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education? In 2007, a student displayed a banner at a school event that read "Bong Hits for Jesus."[17] When principal Deborah Morse subsequently suspended student

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[14] Militello, M., Schimmel, D., & Eberwein, H. (2009). If They Knew, They Would Change: How Legal Knowledge Impacts Principals' Practice. *NASSP Bulletin*, *93*(1), 27–52. https://doi.org/10.1177/0192636509332691

[15] Ogletree, E. J., & Lewis, N. (1985). School law: A survey of educators. *DePaul L. Rev.*, *35*, 259.

[16] Delaney, J. (2009). The Value of Educational Law to Practising Educators. *Education Law Journal*, *19*(2), 119–137. Retrieved from http://search.proquest.com/docview/212965482/

[17] Ibid., 29. Article amount is $200 million but is adjusted for 2019 dollars.

[17] *Morse v. Frederick, 127 S. Ct. 2618 (2007)*

Joseph Frederick for displaying the banner, neither likely expected this situation to traverse the federal courts and, ultimately, arrive at the United States Supreme Court. In *Morse v. Frederick,* the Court, once again, examined student speech rights, but different than their three previous endeavors, this time considering whether advocating illegal drug use in public schools was protected speech.

Before *Morse*, the United States Supreme Court cases established the constitutional limits of K-12 student speech. In *Tinker v. Des Moines* (1969), the United States Supreme Court expressed that students do not shed their right to freedom of speech at the schoolhouse gate.[18] In this case, students wore black armbands to protest against the Vietnam War, and school officials disciplined them for violating a rule banning armbands. The United States Supreme Court would later determine the students' actions did not materially and substantially disrupt school, and their protest was constitutionally protected because no disruption took place.

Next, in *Bethel v. Fraser* (1986), a student gave a speech riddled with sexual innuendos in an address given to the student body. The Court decided that school officials could prohibit student speech that was lewd and offensive.[19] The Court concluded the student's speech was not political; therefore, not protected under *Tinker*.

Finally, in *Hazelwood v. Kuhlmeier* (1989), the last pre-*Morse* case, the Court ruled that school officials could censor student writing in a school newspaper produced in a scheduled class.[20] In *Hazelwood*, a school principal directed students to redact a school newspaper article about topics the principal viewed as inappropriate. He reasoned the

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[18] *Tinker v. Des Moines*, 393 US 503 (1969)
[19] *Bethel v. Fraser, 478 US 675 (1986)*
[20] *Hazelwood v. Kuhlmeier, 484 US 260 (1988)*

articles could be misrepresented as an official opinion of the school on teen pregnancy and divorce issues since the journal was a product of a school-sponsored class.

In *Morse*, the Court expanded school authority in limiting student speech by applying a safety measure relating to the promotion of using illegal drugs.[21] The Court held for the principal, with a 5-4 split among the Justices. Their interpretation and decision would be met with confusion and puzzlement, and in doing so, school systems were left no less confused or puzzled.

Morse has a unique position in the legal and scholarly communities. The case has been called highly unrepresentative and criticized for focusing on a dimension of student speech - promoting illegal drug use - that school administrators and lower courts do not regularly encounter.[22] The decision has been described as fractured among the Justices and quirky given the unique factual history.[23] The decision seemed inconsequential due to the nature of the speech itself and the narrowly tailored decision to limit speech promoting illegal drugs. Other critics of the decision agreed.[24] The decision unexpectedly morphed into a new stance on student speech, with some suggesting that the decision has led lower federal courts to equate illegal drug use to the promotion of an unlawful act.[25] Others see the decision as a step back from *Tinker's* pro-student speech standards.[26]

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[21] *Morse v. Frederick, 127 S. Ct. 2618 (2007)*
[22] Schauer, F. (2007). Abandoning the Guidance Function: Morse v Frederick. *The Supreme Court Review*, *2007*(1), 205-235.
[23] Calvert, Clay. "Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression." *Seattle UL Rev.* 32 (2008): 1.
[24] Ibid., 2.
[25] Calvert, C., p. 3
[26] Nau, Sara. "Small Town Values and the Gay Problem: How Do We Apply Tinker and Its Progeny to LGBTQA Speech in Schools." *Tex. J. Women & L.* 22 (2012): 131.

Schools aim to create an environment that allows for vigorous discussion. Still, the danger exists when school authorities claim that student speech stands against their educational mission but might be subjective to the school administration's political and social views.[27]

By answering the research question, a determination can be made on whether *Morse v. Frederick* has resulted in a new speech standard in public schools compared to *Tinker v. Des Moines'* long-accepted guidelines. In *Tinker,* the Court made clear that students had constitutional rights when they determined that students' armbands in protest of the Vietnam War did not disrupt school; therefore, affirming their First Amendment right.[28] Therefore, this analysis of court decisions on Tinker-free speech issues after the United States Supreme Court's decision in *Morse v. Frederick* is needed. Continuing, this research seeks to understand the state and the direction of common law regarding the protections for student speech stemming from this case by answering the research question: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

Clarification on the Use of the Words

This researcher chooses to use the words teacher, school official, administrator, in the same meaning – a representative of a state government agency – with decision-making authority associated with their job expectations and duties as determined by various state statutes and local school boards.

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[27] Nau, Sara. "Small Town Values and the Gay Problem: How Do We Apply Tinker and Its Progeny to LGBTQA Speech in Schools." *Tex. J. Women & L.* 22 (2012): 131
[28] *Tinker v. Des Moines*, 393 US 503 (1969)

Significance

Decisions made at each court level can have a far-reaching impact in determining the current understanding of students' constitutional rights.[29] Effective school leaders may benefit from a knowledge of current legal expectations concerning student speech, given that free speech issues in public schools are not a passing trend. Students' right to freedom of speech was acknowledged as an area with implications for increased litigation going back 36 years ago[30] and remains so still. Students possess rights protected by court decisions; however, the American Civil Liberties Union in 2015 noted school officials are still punishing students for using constitutionally protected speech.[31]

Educators unintentionally get involved in student speech issues that lead to litigation in several ways. Lack of confidence in their knowledge and legal illiteracy can unknowingly lead to litigation. Policies built on legal reasoning may not act as a failsafe against litigation but may be useful if that litigation occurs. Student speech cases typically involve a balance between students' speech rights and the school's ability to control its message and achieve educational goals.[32] Schools have a vital mission to educate students to be critical thinkers, preparing them for a yet undetermined future. Knowing and following the rule of law is a likely way for educators to prepare students for their future.

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[29] Ogletree, E. J., & Lewis, N. (1985). School law: A survey of educators. *DePaul L. Rev.*, *35*, 259., 259.
[30] Ibid., 274.
[31] "American Civil Liberties Union." American Civil Liberties Union. Accessed June 16, 2019. https://www.aclu.org/.July 31, 2015.
[32] Zeidel, Rebecca L. "Forecasting disruption, forfeiting speech: Restrictions on student speech in extracurricular activities." *BCL Rev.* 53 (2012): 303.

An examination of student speech cases where *Morse v. Frederick* (2007)[33] served as the legal analysis method is needed to determine *Morse's* effect on the reasonably well-understood principles defined in *Tinker.* After *Morse v. Frederick*, lower federal court rulings are critical in deciding *Morse's* impact on K-12 student speech. Additionally, this review of student speech cases using *Morse* identifed emerging patterns among decisions that could guide school leaders in developing policies consistent with prevailing law.

Limitation and Delimitations

Limitations

This study is limited in at least two ways. The United States Supreme Court could rule on a student speech case with *Morse* implications while completing this study and potentially altering or canceling this study's conclusions. Second, cases could be litigated after completing this work and overturn established precedents that invalidate some or all of the findings and recommendations.

A brief analysis of the student speech cases showed that many courts used the *Morse* ruling to connect the school speech to illegal activity, such as threats to school safety; as a result, prohibiting student speech where illegal activity could or would occur. The United States Supreme Court previously ruled on what constitutes a "true threat."[34] However, they have yet to hear a case where the issue dealt with a violent threat to school safety with an element of student speech. Given the number of school shootings since the

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[33] *Morse v. Frederick, 127 S. Ct. 2618 (2007)*
[34] *Watts v. United States*, 394 U.S. 705 (1969).

Morse decision, and the need to prevent such violence, it is likely that a case involving a threat to school safety could reach the Supreme Court in the future.

Delimitations

The focus of this study was an analysis of how the *Morse* decision affects student speech in K-12 public schools. The effects were determined by assessing lower federal court interpretations of the decision.

Summary

American K-12 public school students have the right to exercise their freedom of speech rights within acceptable law. A thorough review of case law stemming from *Morse v. Frederick* could provide school and district administrators and policymakers with more precise and current case law interpretations. The rules of law created by *Morse's* rules of law and the application thereof by lower courts could provide a complete understanding of its effects. Against the backdrop of student expression, uninformed educators, the cost of litigation, a need for legal literacy among educators, and confusion among scholars and the courts, the question remains to be answered: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

Chapter 2: Literature Review

Introduction

American public school students can exercise their right to free speech at school. However, their rights have limits. The federal courts have played the determining role in deciding what is allowable in student speech at school. The ultimate authority for all unsettled United States Constitution questions is the United States Supreme Court. However, cases do not begin at the Supreme Court. While the Supreme Court is the ultimate arbiter, most school free speech cases never reach the Court. Over the past 52 years, the Court has ruled on student speech on only four occasions – *Tinker, Bethel, Hazelwood,* and *Morse*. As a result, school systems rely on the law to establish policy and create student codes of conduct. While the first three cases set more apparent limits on student speech, the fourth, *Morse v. Frederick*, wrestled with a school's ability to prohibit speech that was deemed non-political or vulgar. *Morse v. Frederick's* effect on student speech in K-12 public education becomes the essential question for this study.

An investigation into the literature concerning the three branches of the federal government's role in education, student speech in schools, legal understandings of school officials, and actual cases are needed to help frame the question. The literature review is divided into six sub-headings, identifying essential focus areas: theoretical framework, the federal governments' role in public schools, landmark Supreme Court cases, *Morse v. Frederick*, the significance of *Morse*, and knowledge and application of student speech rights.

Theoretical Framework

A theoretical framework in legal studies is generally found within the context of grounded theory methodological discussions.[35] Glaser and Strauss introduced grounded theory in 1967.[36] In this framework, the researcher develops a theory that is grounded in analyzed data.[37] Strauss and Corbin expounded on grounded theory by writing that theories are generated from collected data and do not come "off the shelf."[38] Grounded theory is useful when examining how something has changed over time, including student speech rights.[39] Having already established that classrooms and society have changed since *Tinker* was decided in 1969, one could conclude that an evolutionary approach to the study of public school law and interpretations might well fit into grounded theory research.

Legal research is driven by a need to understand developing issues. Additionally, some have concluded that legal research is conducted to summarize the current state of legal affairs to inform practices within societal and academic relevance. Zamboni writes that modern schools of legal theories are exploring the relationship between law and politics.[40] To extrapolate this point, consider that schools are well-positioned to benefit society by teaching and modeling democratic ideals. However, given that schools are

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[35] Taekema, Sanne. 'Theoretical and Normative Frameworks for Legal Research: Putting Theory
into Practice', LaM February 2018, DOI: 10.5553/REM/.000031
[36] Merriam, Sharan B., and Elizabeth J. Tisdell. 2016. *Qualitative research: a guide to design and implementation*.
[37] Ibid., 31.
[38] Strauss, Anselm, and Juliet Corbin. *Basics of qualitative research techniques*. Thousand Oaks, CA: Sage publications, 1998.
[39] Merriam, Sharan B., and Elizabeth J. Tisdell p. 32
[40] Zamboni, M., & European Academy of Legal Theory. (2007). *The policy of law: A legal theoretical framework*. Oxford: Hart.

governed by elected bodies, from a local board through to the state and federal governments, an understanding and study of how law and politics reconcile in the classroom and the courtroom deserve more attention.

Federal Government Role in Public Schools

The United States Constitution makes no mention of federal involvement in education. However, one former presidential candidate, Adlai Stevenson, remarked that "the free common school is the most American thing about America."[41] No matter how connected schools and the Constitution may seem to be, in 1973, the United States Supreme Court declined to find any explicit or implicit positive right to education in the Constitution in deciding *San Antonio Independent School District v. Rodriguez.*[42]

Before *San Antonio*, the United States Supreme Court, in *Tinker*, had determined that students do possess First Amendment speech rights at school.[43] Some argue that public schools are now an important site for Constitutional interpretation, therefore, strengthening a need for judicial oversight.[44] Even though *San Antonio* established that there is no United States constitutional right to an education, the federal courts have consistently examined students' civil rights while in school, especially student speech rights.

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[41] Driver, Justin. "The courts, the schools, and the Constitution." *Phi Delta Kappan* 100, no. 3 (2018): 14-17.

[42] In *San Antonio v. Rdoriguez* 411 U.S. 1 (1973), the United States Supreme Court found that the Texas system of funding education did not discriminate all poor students, because the United States Constitution did guarantee a federal right to education.

[43] *Tinker v. Des Moines, 393 US 503 (1969)*

[44] Driver, J. (2018). The schoolhouse gate: Public education, the Supreme Court, and the battle for the American mind. New York: Pantheon.

Despite not declaring that students have an outright expectation to education in the Constitution, the literature strongly demonstrated a decisive federal judicial oversight role in determining the limits of students' rights guaranteed by the Bill of Rights.[45]

The literature shows that the federal government's most significant role in K-12 public education is through the continuous flow of funds to America's public schools and the strings attached. In 1965, President Lyndon Johnson signed the Elementary and Secondary Education Act (ESEA).[46] This federal legislation divided one billion dollars amongst state education agencies and created educational federalism by redefining the federal role in education.[47] With this bill's passage, the federal government committed itself to provide funds to state educational agencies to improve education. However, with the additional federal dollars came regulations that strongly influence state and local policy.[48]

A focus on equity in educational funding was a crucial part of ESEA. Title I, part of ESEA, was of importance to poverty-stricken areas. Title I provided funding to schools with higher percentages of poor students (students identified as qualified for free or reduced lunch).[49] There is debate on the successes of Title I in ending school-poverty issues, but, financially, Title I has proven to be the federal government's most significant

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[45] See cases (*Lemon v. Kurtzman(1971), TLO v. New Jersey* (1985), *Goss v. Lopez (1975*)
[46] Nelson, Adam R. "The Elementary and Secondary Education Act at fifty: A changing federal role in American education." *History of Education Quarterly* 56, no. 2 (2016): 358-361.
[47] Ibid., 359.
[48] Ibid.
[49] Farkas, George, and L. Shane Hall. 2000. "Can Title I Attain Its Goal?" Brookings Papers on Education Policy, January, 59–123. http://search.ebscohost.com/login.aspx?direct=true&db=eric&AN=EJ898334&site=ehost-live&scope=site.

contribution to public education. In the first thirty years following the implementation of Title I, the federal government had given 118 billion dollars to state education agencies.[50] A feature of the federal government's continuing role in education is that ESEA is often reauthorized under new names.

In 2001, under President George W. Bush, the act was reauthorized and rebranded as the No Child Left Behind Act, continuing the substantial funds' pattern in exchange for considerable influence and control.[51] Most recently, ESEA was rebranded under President Barrack Obama as the Every Student Succeeds Act. This most recent rebranding was a shift from earlier federal roles. While the acts mentioned above shifted the federal government's balance, this most recent reauthorization put more power back into the states' hands.[52]

Though none of the above acts were met with legal challenges before the United States Supreme Court, if future acts are, the Court could examine the financial role of the federal government and more explicitly determine the federal role in education, especially as it could align with equity, race, gender, and sexual identification questions.

Landmark United States Supreme Court Speech Cases

As of 2021, the United States Supreme Court has ruled on four cases involving student speech rights. This section examines the first three cases.

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[50] Farkas, George, and L. Shane Hall. 2000. "Can Title I Attain Its Goal?" Brookings Papers on Education Policy, January, 59–123.
[51] Nelson, Adam R. "The Elementary and Secondary Education Act at fifty: A changing federal role in American education." *History of Education Quarterly* 56, no. 2 (2016): 358-361.
[52] Plans, Accountability. "The every student succeeds act: Explained." *Education Week* (2015).

Tinker v. Des Moines Independent School District 395 U.S. 503 (1969)

Facts and Procedural History

Several students, including brother and sister, John and Mary Tinker, were suspended from school for wearing black armbands to protest the Vietnam War in December of 1965.[53] The Tinkers and others held a meeting before this time and formed a plan. The meeting took place at another student's house with their parents present. Participants at the meeting had previously expressed their non-support of the Vietnam conflict elsewhere. School administration became aware of the plans and decided to create a new policy prohibiting armbands.[54] Students wearing armbands to school would be asked to remove them. If a student refused, they would be suspended for failing to comply with instructions. John and Mary did not comply with instructions from school officials to remove their armbands. The Tinkers were suspended for their protest. They did not return until after Christmas break, as they had planned to wear the bands until that time.[55] Claiming their right to free speech was violated by the school district's action, the students sought relief at District Court.

The District Court ruled in favor of the school, citing that a disruption of normal school activities might result from wearing armbands in protest of the Vietnam War.[56] Unsatisfied with this ruling, the Tinkers appealed to the Eighth Circuit Court of Appeals. At an *en banc* hearing, the Appeals Court sided with the District Court but offered no

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[53] *Tinker v. Des Moines Independent School District 395 U.S. 503 (1969)*
[54] Ibid., 504.
[55] *Tinker v. Des Moines Independent School District 395 U.S. 503 (1969)*, p. 504
[56] Ibid., 505.

opinion. Seeking a final answer, the Tinkers appealed to the United States Supreme Court.[57]

Issue

Is the prohibition of students wearing armbands in protest a violation of their right to Freedom of Speech as given by the First Amendment?

Reasoning and Rule of Law

Justice Fortas argued that both students and teachers share the same rights to freedom of speech at school. He wrote that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[58] Fortas continued by emphasizing the students' form of protest was silent and was no threat to disrupting the school environment.[59] If, on the other hand, they had planned and carried out actions that would have disrupted the school environment or infringed upon other students' rights, then the school would have had grounds to limit their speech.

The District Court's fear of disruption was not substantial enough to decide that it would violate freedom of speech rights.[60] To prohibit speech, school officials must demonstrate the speech "materially and substantially interferes" with school order. [61] No such actions took place that resulted in a school disruption when the armbands were worn.

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[57] *Tinker v. Des Moines Independent School District 395 U.S. 503 (1969)*, p. 505
[58] Ibid., 506.
[59] Ibid., 508.
[60] *Tinker v. Des Moines Independent School District 395 U.S. 503 (1969)*, p. 509
[61] Ibid.

The Vietnam War was incredibly polarizing throughout the United States, and this polarization was reflected in schools across the country. School officials only created the policy to avoid an unpopular topic.[62] However, other students were allowed to wear politically significant symbols such as campaign buttons; singling out the Tinkers' form of freedom of speech while allowing other students to conduct the same kind of speech is a violation of their right to freedom of expression.[63] Fortas concluded that students are entitled to expressing their views unless there is a valid constitutional reason to limit student speech.

Reversed and remanded.[64]

To underscore the significance, Christopher Eckhardt, a litigant from *Tinker*, remarked:

> "What George (Washington) and the boys did for white males in 1776, what Abraham Lincoln did to a certain extent during the time of the Civil War for African-American males, what the women's suffrage movement in the 1920s did for women, the *Tinker* case did for children in America[65].

Bethel School District no. 403 v. Fraser, 478 U.S. 675 (1986)

Facts and Procedural History

In April of 1983, student Fraser delivered a speech to the student body to support another classmate running for a school government-type office.[66] Fraser delivered his address to the student body in an assembly that was mandatory unless students attended

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[62] *Tinker v. Des Moines Independent School District 395 U.S. 503 (1969)*, p. 509
[63] Ibid., 511.
[64] U.S. Supreme rejected the previous decisions, and the matter was sent back to the lower court for further proceedings.
[65] Hudson Jr, David L. "Losing the Spirit of Tinker v. Des Moines and the Urgent Need to Protect Student Speech." (2018).
[66] *Bethel School District no. 403 v. Fraser, 478 U.S. 675*

study hall; six hundred students attended.[67] Though not lengthy, his speech drew the ire of school administration. During the speech, Fraser made many sexually explicit metaphors regarding the student he was supporting.

> "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 to the climax--for each and every one of you. So, vote for Jeff for ASB vice president--he'll never come between you and the best our high school can be."[68]

Two teachers warned Fraser that his speech was inappropriate. They suggested that should he give his address, he could likely face severe consequences.[69] During his speech and afterward, some students hooted and yelled while some others appeared embarrassed. The next day, one teacher had to take designated lesson time to talk about the speech and the assembly. Two days after his speech, Fraser was suspended. Fraser appealed to the school district for relief from punishment. The school system found that his language was obscene and affirmed the school's decision.

Fraser's father asked the school district to change their decision, but they declined. Because he believed a violation of his son's First Amendment right to free speech had occurred, Fraser's father sought relief from the Federal District Court. He sought injunctive and monetary relief. In District Court, the school rule used to punish

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[67] *Bethel School District no. 403 v. Fraser, 478 U.S. 675* p. 678
[68] "Text of Speech Made by Student for Nomination." Los Angeles Times. March 02, 1986. Accessed June 12, 2019. https://www.latimes.com/archives/la-xpm-1986-03-02-mn-1388-story.html.
[69] *Bethel School District no. 403 v. Fraser, 478 U.S. 675,* p. 678

Fraser was deemed overbroad, and they ruled in favor of the student.[70] The Court of Appeals for the Ninth District affirmed the lower Court's ruling citing the speech did not disrupt school norms and rejected the school's argument of a compelling interest to protect minors in an audience from lewd and indecent language. Lastly, they rejected the notion that schools can regulate speech related to expressing ideas in a school-sponsored event.[71] Because the school system believed they had authority over speech in this instance, they sought relief from the United States Supreme Court.

Issue

Does the First Amendment protect speech that has been determined to be lewd and obscene when it is delivered in a school setting to the school's students?

Reasoning and Rule of Law

Justice Byron White wrote that the Court of Appeals' interpretation of *Tinker* and its protections concerning student speech were incorrect.[72] The speech in question was not political and disrupted normal school activities. By carefully examining *Tinker*, White concluded that the students' actions, in that case, did not cause any disruption. Schools have a strong desire to maintain order and limit disruption to promote the mission of schools.[73] Chief Justice Warren Burger concluded that public schools have a function to regulate language that is vulgar and, as a result, offensive on these grounds.

Furthermore, types of expression allowed in schools rest largely within individual school board authority, according to the Constitution. The Court also stated that schools have a mission to teach students how to act civilly and within social values. Fraser's

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[70] *Bethel School District no. 403 v. Fraser, 478 U.S. 675,* (1986), p. 679
[71] Ibid., 680.
[72] Ibid.
[73] *Bethel School District no. 403 v. Fraser*, p. 683.

conduct and speech do not fall within the civilized social order as it was lewd, indecent, and offensive to both students and teachers. The Court is interested in protecting children from exposure to sexually explicit, indecent, or lewd speech and vulgar and offensive language. The school acted within their authority, and the subsequent punishment was not related to political viewpoints.

Holding

The Supreme Court reversed the decision of the Ninth District Court of Appeals. In reversing the decision, the Court established that the method of analysis in *Tinker* is not absolute. They also concluded that schools have the power to limit certain kinds of speech that might be inconsistent with the values of public school education

Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)

Facts and Procedural History

Hazelwood East High School published a school newspaper.[74] The paper was distributed to the school and in the community around the school. The board of education provided funding to cover the cost of publishing the newspaper: printing, textbooks, and portions of the journalism instructor's compensation.[75] The journalism teacher left his job late in the 1983-84 school year. A new teacher began work around the time the May issue of the school paper was circulated. [76] In question were two articles from the May publication; one dealt with pregnancy and students at the school, and the other dealt with effects of divorce on students.[77] The principal proofed the final pages of

[74] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*
[75] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*, p. 261
[76] Ibid., 263.
[77] Ibid.

the journal. Upon his review of the articles, he concluded that he should withhold the two.[78] His concern was over students involved with the articles, their confidentiality, and because a student made allegations about her father without the paper allowing him to respond. After consulting with his superiors at the school system central office administrators, it was agreed that the principal had made the right decision.[79] As one might imagine, students were upset because their articles were not going to be published. The students argued that the withheld articles violated their right to free speech.

At District Court, the justices determined that the principal acted within his authority to withhold the articles and found no First Amendment violation.[80] Seeking further relief to their First Amendment claim, the students moved to the Court of Appeals. This time, the Court disagreed that school officials had the authority to withhold publications and reversed the District Court's decision. School officials then appealed to the United States Supreme Court.[81]

Issue

Were students' First Amendment rights violated when the school principal withheld the publication of two articles from the school newspaper?

Reasoning and rule of law

Justice Byron White first determined within what context the Court had to rule and, in doing so, stated that school boards have the authority to establish what manner of speech is acceptable in the school environment.[82] White used board and school policy to

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[78] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*, p. 263
[79] Ibid., 264.
[80] Ibid., 265.
[81] Ibid., 266.
[82] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*, p. 268

establish that the school newspaper was within the adopted curriculum and its educational implications in regular classroom activities. The Journalism I course guide provided as evidence described the course as a laboratory setting where the students publish the school newspaper by applying skills they have learned in class.[83] Students were instructed by a faculty member during regular school hours and received grades and credit. The school adhered to its determination that the newspaper was part of the curriculum and regular classroom activity. Furthermore, White concluded that the school used this forum as a supervised learning experience.[84] As a result, school officials were within their authority to reasonably regulate the newspaper.

Additionally, schools have the authority to control school-sponsored items as long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[85] Furthermore, White concluded that schools have a great desire to ensure that learning occurs with school-sponsored activity. Additionally, White raised concerns about content and maturity levels, adding more cause for editorial oversight.

In summation, the decision made it clear that educators do not offend the First Amendment when they regulate editorial control over the style and content of student speech in school-sponsored expressive activities reasonably related to some legitimate pedagogical concern.[86]

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[83] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*, p. 268.
[84] Ibid., 270.
[85] Ibid., 271.
[86] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*, p. 273.

The principal reasonably believed that anonymity was an issue in the pregnancy article; therefore, providing him grounds to withhold publication.[87] The article about pregnancy could have easily been read by audiences not mature enough to comprehend its message, namely Hazelwood East students' younger brothers and sisters.[88] Regarding the article on divorce, he concluded that the report was unfair without allowing the father to respond.[89] Finally, the principal could have simply stated that students had not mastered the course curriculum and not allowing them to print the articles.[90]

Holding

Reversed.

These three United States Supreme Court cases made it clear that school officials have the authority to limit student speech rights when poor behavior, curriculum, and pedagogy are involved.

These cases would serve as the foundation for answering student speech cases until *Morse v. Frederick* in 2007.

Morse v. Frederick, 127 S. Ct. 2618 (2007)

Facts and Procedural History

In 2002 the Winter Olympic Torch Relay ran through the streets of Juneau, Alaska. Along the scheduled path was Juneau-Douglas High School, presenting an opportunity for students to observe a time-honored world sports moment.[91]

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[87] *Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988)*, p. 274.
[88] Ibid., 275.
[89] Ibid.
[90] Ibid., 276.
[90] Schauer, F. (2007). Abandoning the Guidance Function: Morse v Frederick. *The Supreme Court Review*, *2007*(1), 210.

On the morning of January 24, 2002, Joseph Frederick was running behind schedule because his car became stuck in the snow, and he arrived late. He went directly across the street to join in with peers.[92] Due to the significance of the event, school officials decided to allow students to attend. As the torch crossed in front of the school, across the street, a group of students unfurled a fourteen-foot banner reading "BONG HITS 4 JESUS."[93]

Observing the banner from across the street was school principal Deborah Morse. Initially, she asked the group of students to lower the banner. Frederick was the only student that did not comply. His actions resulted in Morse confiscating the banner and sending him to her office. Frederick was suspended for five days. While talking with Morse, he remarked that "speech limited is speech lost,"[94] and his suspension was doubled to ten days.

Juneau School Board Policy 5520 prohibits students from advocating substances that are illegal to minors. Board policy 5850 states that students participating in approved field trips and social events are subject to the same consequences as regular school activities. Principal Morse cited these local school board policies to justify Frederick's suspension.

Frederick administratively appealed the decision to the school district. The superintendent reasoned that Principal Morse could prohibit the banner under *Bethel* because the speech disrupted school activities, and it was questionable whether it was

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[91] Bathon, Justin M., and McCarthy, Martha M. "Student Expression: The Uncertain Future." *Educational Horizons* 86, no. 2 (2008): p. 77-78
[92] Ibid., p. 78
[94] Jr, David L. Hudson. "Morse v. Frederick." Morse v. Frederick. Accessed April 1, 2020. https://www.mtsu.edu/first-amendment/article/690/morse-v-frederick.

appropriate for a school audience. Also, Frederick could not articulate any political or religious meaning behind his speech. The superintendent and school board upheld the decision because Frederick failed to meet any legal speech standards. However, some argued his speech promoted illegal drugs.[95]

Frederick sued the school in the Federal District Court of Alaska, claiming the principal violated his right to free speech. Granting summary judgment, the District Court supported and sided with school officials, finding no violation of Frederick's speech.[96] In this instance, under *Bethel*, the Court noted that school officials could restrict Frederick's speech.[97]

Morse appealed to the Ninth Circuit Federal Court of Appeals. Upon review, the Court relied heavily on the *Tinker v. Des Moines* standard. They reversed the earlier decisions. The school officials could not demonstrate that the banner caused a substantial disruption and affirmed that Frederick's speech was constitutionally protected.[98] The Ninth Circuit Court also stated that Principal Morse did not have qualified immunity and could be held liable because Frederick did have an established First Amendment right.[99]

Morse and the school board filed a writ of certiorari with the United States Supreme Court. [100] The writ was granted to clarify two issues: whether Frederick had a

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[94] Jr, David L. Hudson. "Morse v. Frederick."
[95] Ibid.
[96] Ibid.
[97] Ibid.
[99] Jr, David L. Hudson. "Morse v. Frederick.".
[100] Writ of certiorari takes place when a party requests the U.S. Supreme Court to review a decision of a lower court. Four Supreme Court justices must agree for the writ to be granted.

First Amendment right to display his banner and whether that right was so explicit that Principal Morse could be held liable.

Issue

Does the First Amendment allow public schools to prohibit students from displaying messages promoting illegal drugs at school-supervised events?

Reasoning and rule of law

The United States Supreme Court reversed the Ninth Court decision[101]. The decision was a 5-4 split (Justices Roberts, Scalia, Kennedy, Thomas, and Alito – Justices Ginsburg, Stevens, Souter, and Breyer).[102] In the majority opinion, Chief Justice Roberts concluded that while the message could be cryptic, school officials and others could reasonably interpret the banner as promoting illegal drug use.[103] He further wrote that schools have a compelling interest in deterring drug use by students.[104] Concerning *Tinker*, the cornerstone for student speech cases, the Court stated, "the mode of analysis outlined in *Tinker* is not absolute."[105] Since the Court concluded that Frederick did not have a First Amendment right to display the banner, there was no need to discuss whether Morse had qualified immunity.

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[101] *Morse v. Frederick, 127 S. Ct. 2618 (2007)*, p. 212
[102] "Morse v. Frederick." Oyez. Accessed June 13, 2019. https://www.oyez.org/cases/2006/06-278.
[103] Ibid., 212.
[104] Ibid., 221.
[105] "Morse v. Frederick." Oyez. Accessed June 13, 2019. https://www.oyez.org/cases/2006/06-278.

Justices Alito and Justice Kennedy wrote a concurring opinion.[106] The concurring opinion is worth noting because Alito and Kennedy concluded that "illegal drug use presents a grave and in many ways unique threat to the physical safety of students." [107] However, Alito expressed concern that the ruling would allow administrators a new method to prohibit student speech, bypassing the standards set forth by *Tinker, Bethel,* and *Hazelwood.*

Holding

Reversed and remanded.

Significance of *Morse v. Frederick*

Compared to previous U.S. Supreme Court decisions – *Tinker v. Des Moines*, *Bethel v. Fraser*, and *Hazelwood v. Kuhlmeier* – *Morse* was rare in the Court's history – it was a decision that pleased just about no one.[108]

Scholars and researchers alike have discussed the confusing nature of the decision. David Schauer, a distinguished Virginia School of Law professor, drew attention to the decision by deriding it as an example of a disturbing trend in speech cases, with *Morse* among its most dramatic.[109] He contends that the decision was more irrelevant than incorrect and hardly unexpected when weighed against school administrative authority. The case was a further erosion of student speech rights, and

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[106] A concurring opinion is one that agrees with the majority but decides on the ruling for different reasons or a view of the case. https://www.dictionary.com/browse/concurring-opinion

[107] "Morse v. Frederick." Oyez. Accessed June 13, 2019. https://www.oyez.org/cases/2006/06-278.

[108] Driver, J. (2018). The schoolhouse gate: Public education, the Supreme Court, and the battle for the American mind. New York: Pantheon.

[109] Schauer, p. 208

because of the very specific events of the case, succeeding speech issues were unlikely to align with the conclusions.[110] Another researcher identified the decision as fractured, largely because of the 5-4 split among the justices and also because the majority opinion only carried with the enjoinment of the concurring opinion.[111] Going further, some literature suggest the decision further refined the parameters of students' right to free speech. It confirmed the authority of education officials to limit inappropriate student speech at school events likely to cause a reasonable forecast of material and substantial disruption.[112] Even still, some questions are still left unresolved: what constitutes a drug for *Morse's* analytical standard? What determines the promotion of an illegal substance? Is there variance between state and federal drug policies and, if so, could the courts reconcile the difference regarding student speech?[113]

Others would correctly assert that *Morse's* ultimate legacy will be how lower courts and school personnel interpret the Court's decision. The decision cited drug use as a concern and a reason to limit student speech. They predicted that school systems would use the ruling to prohibit speech where any safety or health issues arise.

Bryan Warnick, professor of educational studies at The Ohio State, concluded in his article for *Educational Researcher*:

> It set a precedent that weakened the perceived value of constitutional rights for students; it worked against the liberal purposes of American education concerned with teaching about human freedom; it weakened the bonds of trust and the sense of legitimate educational authority that should exist between students and

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[110] Schauer, p. 218
[111] Calvert, p. 1
[112] Russo, C. (2007). Supreme Court update: the free speech rights of students in the United States post-Morse v. Frederick. *Education and the Law*, *19*(3-4), 245–253. https://doi.org/10.1080/09539960701751543
[113] Bathon and McCarthy "Student Expression: The Uncertain Future." p. 81

> administrators, and it discouraged other potential efforts by individuals in a mandatory environment to seek authentic recognition from others.[114]

Knowledge and Application of Student Rights

Though this research study does not solely focus on school administrators' knowledge and public school law knowledge, it became essential to explore the body of literature on this topic. This section of the literature review sheds light on the topic of administrator knowledge and public school law. School administrators are generally the deciding authority at the school level regarding discipline. Also, as they are likely to have taken a course in their post-undergraduate work specifically on education law, they have a lesser claim to an ignorance plea.

Principals are responsible for knowing and respecting their students' rights as guaranteed by the United States Constitution.[115] Therefore, the secondary school principal is often at the heart of the student speech issues.[116] A progressive in advocating the need to study public education law, Griffith concluded that, as such, leaders should be confident in their legal knowledge. This conclusion was made in 1986. This summation occurred on the heels of *TLO v. New Jersey*[117] and *Bethel v. Fraser*. Given the activity of

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[114] Warnick, B. Student Speech Rights and the Special Characteristics of the School Environment. *Educational Researcher*, *38*(3), 200–215.

[115] Militello, M., Schimmel, D., & Eberwein, H. (2009). If They Knew, They Would Change: How Legal Knowledge Impacts Principals' Practice. *NASSP Bulletin*, *93*(1), 27–52. https://doi.org/10.1177/0192636509332691

[116] Griffiths, William E. "Student constitutional rights: The role of the principal." *The bulletin of the National Association of Secondary School Principals* 52, no. 329 (1968): 30-37.

[117] *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). United States Supreme Court case establishing that school administrators possess the authority to conduct reasonable student searches when certain criteria are established.

courts and schools since that time, it has remained true that as the courts made decisions affecting student rights, school administrators would benefit by staying informed and recognize how these rights were evolving.

In exploring legal literacy in 2008, several researchers found that principals had more knowledge than teachers concerning the law, but their knowledge was still inadequate.[118] Those findings were supported by a 57-question survey administered to 493 principals from all but two states. Similarly, a three-part survey was designed and given to principals to assess their legal literacy. One hundred and ninety-three practicing school administrators participated from the elementary and secondary levels from Saskatchewan schools. The findings concluded that principals might not provide the best legal information for their vice-principals and staff.[119] These two works do not disagree with Davies' work and his findings that relying on administrative peers may not be a recommended practice.[120]

Leschied, Lewis, and Dickinson determined that school administrators often turn to their peers when making routine, non-emergency decisions about legal matters.[121] Their research was intended to identify and assess principals' and teachers' informational

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[118] Eberwein, Howard, Militello, Matthew, Marx, Robert, Schimmel, David, and Wells, Craig. “Raising Legal Literacy in Public Schools, a Call for Principal Leadership: A National Study of Secondary School Principals’ Knowledge of Public School Law.”
[119] Findlay, Nora. “In-School Administrators’ Knowledge of Education Law.” Education Law Journal 17, no. 2 (November 1, 2007): 177–202. http://search.proquest.com/docview/212958424/.
[120] Davies, Troy Allen. "The worrisome state of legal literacy among teachers and administrators." Canadian Journal for New Scholars in Education/Revue canadienne des jeunes chercheures et chercheurs en éducation 2, no. 1 (2009).
[121] Leschied, Alan W., Wendy J. Lewis, and Gregory Dickinson. "Assessing educators' self-reported levels of legal knowledge, law-related areas of concern, and patterns of accessing legal information: implications for training and practice." *EAF Journal* 15, no. 1 (2000): 38.

needs concerning legal issues affecting school-aged children.[122] The results were derived from an anonymous questionnaire administered to a southwestern Ontario school district, encompassing urban and rural schools employing 8,000 staff and over 86,000 students enrolled.

Scholars agree that school administrators apply legal principles daily and should understand education law.[123] Knowing when and how to act is unarguably a useful skill, and it is likely a trait among successful leaders throughout countless organizations. Making a quick and accurate legal decision is no less important than making the right decision regarding a school budget or evaluating teachers. The literature demonstrates that administrators are unsure of correct legal knowledge and, as a result, act upon incorrect knowledge.[124] Staying abreast of education trends may allow school systems to stay relevant to trends important to teaching and learning. The literature recommends that educators possess a basic understanding of laws that impact them and concerns that frequently arise in education. This recommendation stems from an increased amount of legal action in education today.[125] Professional learning is a likely way for educators to keep informed of legal developments, just as it is used to teach new instructional practices or educational software technologies.

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[122] Leschied, Alan W., Wendy J. Lewis, and Gregory Dickinson. "Assessing educators' self-reported levels of legal knowledge, law-related areas of concern, and patterns of accessing legal information: implications for training and practice." *EAF Journal* 15, no. 1 (2000): 38.p. 4

[123] Tie, Fatt Hee. "A study on the legal literacy of urban public school administrators." *Education and Urban Society* 46, no. 2 (2014): 192-208.

[124] Ibid.

[125] Taylor, K.R. "Yesterday's Principal, Today's Legal Eagle" (2001) 1 *Principal Leadership* 6 at 2.

Summary

Chapter 2 discussed legal research from a theoretical perspective, aligning the need to conduct legal research with the specific need to answer questions around a problem of practice; in this case, *Morse v. Frederick's* chilling effect on K-12 student speech. Because education is a function of state governments but derives some funding from the federal government, the need to investigate what influence the federal government has on schools unfolded through research. According to the High Court's decisions, three landmark speech cases were discussed to help understand students' right to free speech: *Tinker v. Des Moines, Bethel v. Fraser,* and *Hazelwood v. Kuhlmeier*.

Presented last were the case brief of *Morse v. Frederick,* the significance of the decision, and knowledge and application of student rights. Chapter 3 discusses how the researcher gathered data to answer the research question: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

Chapter 3: Methodology

Legal Research for Public Education

Former federal appeals court judge, Richard Posner, suggests that law is not a field with a distinct methodology but an amalgam of applied logic, rhetoric, economics, and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions.[126] Taking things a step further, Hutchinson writes, "there seems to be no accepted and stable classification preference for the law discipline within the research schemes."[127]

A methodological framework in legal research is not often defined in the schemes of academic research. However, the theoretical framework discussed in Chapter 2 provides a framework for the methodological procedures contained here in Chapter 3. A need arose – the need to better understand *Morse's* unclear ramifications for educators who had functioned successfully for decades under the United States Supreme Court's guidance. Emerging student speech issues are evolving as lower courts interpret *Morse v. Frederick's* issues instead of *Tinker's* accepted guidelines. Therefore, research within this domain is critical in assisting school leaders and school systems in making quick and legally defensible student speech decisions.

This research utilized the case analysis approach where lower court opinions were analyzed to develop a richer understanding of student speech rights' overall landscape since *Morse v. Frederick*, leading to legally accepted policies and decisions.

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[126] Posner, Richard 'Internal and External Method in the Study of Law' (1992) 11(3) Law and Philosophy 179, 185.
[127] Hutchinson, Terry; Duncan, Nigel "Defining and Describing What We Do: Doctrinal Legal Research," Deakin Law Review 17, no. 1 (October 2012): 83-120

Research Purposes and Question

This research investigated *Morse v. Frederick's* effects on student speech and provides recommendations for school officials to use when assessing student speech and creating speech policies. Therefore, this study's research question is: What is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

Data Collection

Multiple sources were used to complete the data collection for this research. Through the Atkins Library at the Univ*e*rsity of North Carolina at Charlotte, the researcher accessed the following databases: Educational Resource Information Center (ERIC), Google Scholar, Westlaw, and LexisNexis. These databases provided numerous articles about student speech rights, administrator knowledge of student speech rights, and the evolution of student speech rights since *Tinker*. Along with the articles, the databases provided the researcher with pertinent student speech rights cases to review that were critical to answering the research question: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

LexisNexis was an incredible system and allowed me to quickly cross reference Morse with other cases at the federal level by Shepardizing. Shepardizing is the process of checking to see how and when another case has cited a case that is being researched, allowing one to check the status of a case or statute to ensure it is still good law.[128]

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[128] "Legal Research: Finding Cases, Legislation, and Other Legal Material: Shepardizing." LSC-North Harris Library Research Guides. Accessed April 14, 2021. https://nhresearch.lonestar.edu/law/shepardizing#:~:text=Shepardizing refers to checking a, it is still good law.

Cases were only selected from the federal level. State court-level cases were not within the scope of data sought to answer the research questions. Also, no speech case stemming from an elementary school met the criteria for answering the research question. All cases are results of speech occurring from middle school or high students.

No human subjects were needed for this research. The research was limited to cases, articles, and other written works; therefore, an Institutional Review Board (IRB) was not needed.

Data Analysis

In deciding a student speech issue, a court establishes a method of analysis aligned with one or more of the four landmark student speech cases: *Tinker, Bethel, Hazelwood,* or *Morse.* For this research, only cases directly aligned with those precedents were chosen. Directly aligned means that the deciding court case used *Morse* independently or in conjunction with *Tinker*, *Bethel*, or *Hazelwood* as the analytical method. In doing so, the researcher was able to answer the research question more effectively.

Many lower court opinions on student speech provide a brief overview of United States Supreme Court landmark student speech cases. While an overview is useful to establish a historical perspective, merely mentioning a case from a historical perspective does not equal an analytical method.

Sixty-six cases were read while completing the research for this work. The cases were selected via Shepardizing as described above. A reading of those cases yielded many interesting and engaging events. Though *Morse* was mentioned in all the cases, that was the extent, and but did not move beyond that characteristic, therefore, the case failed

to provide data for this research. The initial 66 cases were narrowed down to 28. Eighteen of those cases, again, mentioned *Morse,* but while they spent some time explaining that case, they failed to use its jurisprudence for their present case. Finally, 10 cases remained that provided the data and findings to answer the research question. In those 10, cases the opinions used *Morse* as guidance in rendering decisions.

An interesting discovery occurred during the research and reading of each speech case - the court opinions provided readers with short history lessons about student speech, and in no instance did they begin elsewhere other than *Tinker.*

Case Brief Method

The case brief is a systematic way of reviewing opinions and dissecting the case's details into clearly established parts. It is a concrete-sequential way of breaking down a case. Cases were dissected accordingly:

- Citation (level of Court)
- Facts and Procedural History
- Issue (what is the Constitutional question(s))
- Reasoning and Rule of Law
- Holding (result)

The case brief fits the methodological mold that is Standard Legal Analysis. As defined by Putnam and Albright, Standard Legal Analysis identifies the issue, followed by presenting the governing rule of law, the analysis and application of the rule of law, and the conclusion.[129]

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[129] Putman, William H., and Jennifer R. Albright. *Legal Research, Analysis, and Writing* Third edition. Clifton Park, NY: Delmar Cengage Learning, 2014.

Delimitations

As is often the case with legal research and examining case law, the most challenging and concerning issue is the unsettling of case law - evolution occurs, and things change. Noting this, future readers of this work should be aware that legal standards established in analyzed cases, suggestions, and recommendations could, after this work's publication, need adjusting or disregarding. To use an analogy, two plus two will always equal four; however, as noted earlier, *Tinker* may not be absolute.

Summary

Chapter 3 explored the methodological approach of the researcher, precisely, the process of Standard Legal Analysis. Chapter 4 is comprised of selected court cases and succeeding analyses using Standard Legal Analysis. Through a synthesis of the briefs, themes and patterns emerged that could provide school personnel with guiding legal principles and answer the research question: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public?

Chapter 4: Case Briefs

A review of cases was utilized to develop a comprehensive understanding of how lower federal courts have interpreted and ruled on school First Amendment cases since the Supreme Court's decision in *Morse*. Reading and analyzing court opinions often results in multiple judicial interpretations and reasoning that should be considered when determining the fundamental elements needed to report a case's history. For this chapter, cases were reviewed multiple times and summarized via the case brief to determine those critical aspects needed to answer the research question: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

The case that is the reason for this research was decided in 2007. In the 14 years since that decision, the U.S. Supreme Court has yet to hear another case involving a K-12 student speech issue. However, since that time, various federal appeals and district courts have decided on student speech issues where *Tinker* and *Morse* were the standards in rendering decisions.

This chapter discussed those cases at the lower federal levels essential for answering the research question and, later findings used to develop guidance for school officials to use when assessing student speech rights and creating school policy established by court decisions. The cases in this chapter were presented chronologically to show any evolutionary changes that occurred from case-to-case over time.

Case Briefs Methodolgy

As described in Chapter 3, the case brief is part of Standard Legal Analysis. The brief includes the case citation, the facts and procedural history, the issue or question to be answered, the reasoning and the rule of law, and the holding. In this method, the

details emerge that allow the researcher to see developing themes and patterns among cases.

Each brief for this chapter is displayed in bold-face type to allow clear separation between each case.

***Boim v. Fulton County School District,* 494 F. 3d 978 (2007)**

Facts and Procedural History

In October of 2003, student Rachel Boim attended Roswell High School, part of the Fulton County School District. While in art, Rachel allowed a male student seated beside her to use her notebook.[130] The art teacher noticed the male student writing in the notebook but was not aware that it belonged to Rachel. The male student was instructed to put the notebook away. A few minutes later, the male student was observed to have the notebook in his lap. At this point, the teacher asked for the notebook. The male student gave the notebook back to Rachel.[131] The teacher then asked Rachel for the notebook, but she did not give it to the teacher because he did not say please. She placed the notebook in her bookbag and produced another one, and gave the replacement to the teacher.[132] Having noticed the change, the art teacher kept asking for the original notebook, and Rachel eventually handed him the notebook.

Mr. Carr reviewed the notebook that belonged to Rachel after students left class. He noticed a section title "Dream." In "Dream," Rachel carried out a fictional shooting at Roswell High School. She included that she brought the gun to school and committed the

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[130] *Boim v. Fulton County School District,* 494 F. 3d 978 (2007), p. 980
[131] Ibid.
[132] Ibid.

act during math class.[133] Additionally, she remarked that she did not like her math teacher, and, in the story, she shoots him.

After school had been dismissed, Carr spoke with a school administrator about the notebook. He was asked to bring the notebook to Mr. Coen, who handled student discipline.[134] Upon reviewing the narrative, Mr. Coen was bothered that Rachel's writing could be an attempt to disguise a plan to carry out such an event. Due to his concern, Mr. Young, the school resource officer (SRO), was informed. At an administrative hearing held later, Mr. Young testified that Rachel's writing and actions were specific and factually correct about time, place, and victims described and how they aligned with her actual school schedule.[135]

The day after the notebook was discovered, Rachel was called to the administrative office to meet with SRO Young and Mr. Coen. Her parents were called and notified of the previous day's events. Rachel claimed that though the writing was her own, the events were merely creative writing.[136] In support of Rachel, her parents agreed and stated that her writing did not prove she intended to hurt anyone. The school principal, Mr. Spurka, was also in attendance for the meeting. After the meeting, the school's administration sent Rachel home.

Mr. Spurka was concerned about the threatening comments in Rachel's narrative. Given the shooting at Columbine, a shooting nearby in Conyers, Georgia at Heritage High School, and continued terrorism concerns following September 11, 2001, Rachel

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[133] *Boim v. Fulton County School District*, p. 981
[134] Ibid.
[135] Ibid.
[136] Ibid.

was suspended for ten days.[137] Furthermore, he recommended expulsion from Roswell following a disciplinary review by an independent arbiter. Ultimately, Rachel was recommended for expulsion by the arbiter. Still, the decision was overturned after school board review; however, her ten-day suspension stayed, but she could remain at Roswell after her suspension versus expulsion.[138]

Two years later, and on behalf of Rachel, her mother, Nancy Boim and filed a lawsuit claiming that the Fulton County School District violated her First Amendment speech rights contained in the First Amendment.[139] In federal district court, the defendant-school district's motion for summary judgment was granted and denied the Boims' partial summary judgment.[140]

Issue

Was Rachel's narrative, containing violent actions occurring at school, protected speech?

Reasoning and Rule of Law

The Appeals Court for the Eleventh District noted that increasing violence in schools has brought about an increase in government oversight.[141] As a result, schools have a compelling interest in quickly preventing violent acts. Compounding safety, the Appeals Court hypothesized that had the school not acted swiftly, the opposite could have

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[137] *Boim v. Fulton County School District*, p. 981
[138] Ibid, 982.
[139] Ibid.
[140] Summary Judgement. A court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. A summary judgment is based upon a motion by one of the parties that contends that all necessary factual issues are settled or so one-sided they need not be tried. https://dictionary.law.com/
[141] *Boim v. Fulton County School District*, p. 984

been tragic.[142] They reasoned that if school officials have a compelling interest in restricting speech advocating the use of illegal drugs, as allowed by *Morse,* that schools have the same responsibility to prevent student speech advocating violence. In doing so, officials do not offend the precedents established in *Tinker*.

Holding

The District Court's decision to grant summary judgment for defendants is affirmed.

***Ponce v. Socorro Independent School District,* 508 F.3d 765 (2007)**

Facts and Procedural History

E.P., a sophomore at Montwood High School, kept a first-person perspective notebook detailing the creation of a pseudo-Nazi group and their attack at Montwood High School Campus and other schools in the Socorro Independent School District. The notebook contained narratives of brutal and malicious actions occurring against marginalized groups.[143] Also contained within the notebook were violent narratives regarding another student and the pseudo-Nazi group's intention to commit violent, coordinated school attacks. These events were to be carried out in the same manner as those occurring at Columbine High School in April of 1999.

The author expressed in his journal that his "anger has the best of him" and that "it will get to the point where he will no longer have control."[144] Further, the author indicated a specific day for the events to occur, the day when his close friends were graduating.

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[142] *Boim v. Fulton County School District*, p. 984
[143] *Ponce v. Socorro Independent School District,* 508 F.3d 765 (2007), p. 766
[144] Ibid.

E.P. told another student about the notebook and reportedly showed them the contents. That student informed a teacher. One day later, the teacher notified an assistant principal. The assistant principal spoke with the informant and later spoke with E.P. When questioned, E.P. denied the accusations and claimed the writing was a work of fiction.[145] The assistant principal asked if he could search E.P.'s backpack, and the student consented. Upon searching the backpack, the notebook was discovered, and the assistant principal reviewed the contents.

E.P.'s mother was notified of the situation with a phone call. The assistant principal stated he would review the notebook thoroughly and notify her the next day with an administrative decision based on the student body's safety and security. At the conclusion of the phone call, E.P. returned to class.

Upon a more in-depth review, several lines were deemed to be "terroristic threats" to the safety and security of the students and campus.[146] E.P. was given a three-day suspension for violating behavior guidelines and was recommended for placement at an alternative school.

Attempting to prevent an alternative placement, E.P.'s parents appealed the decision to the principal of Montwood High School, the Assistant Superintendent for Instructional Services, and lastly, to the school board's designated committee. Because the appeal was denied, E.P.'s parents withdrew him from the school system and enrolled him in a private school. He completed his sophomore year without any incidents.[147]

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[145] *Ponce v. Socorro Independent School District,* p. 767
[146] Ibid.
[147] Ibid.

On his behalf, E.P.'s parents sued S.I.S.D. for violating his First Amendment rights and other alleged violations. In district court, his parents were granted a preliminary injunction on First Amendment grounds.[148] Citing *Tinker*, the court concluded the evidence was insufficient to prove that S.I.S.D. acted upon a reasonable belief that disruption would occur. As a result, the school district appealed to the United States Court of Appeals for the Fifth District.

Issue

Is student speech threatening a Columbine-style attack on a school protected by the First Amendment?

Reasoning and Rule of Law

The Fifth Circuit was guided by *Morse's* decision and focused on the concurring opinion of Justice Alito. They argued that his concurrence provided specificity to the rule announced by the majority opinion from *Morse.* Justice Alito decided that due to characteristics found within the school environment, there are more narrow limits to student speech rights. One such characteristic is the lack of student choice of whom students are grouped within a class and elsewhere.[149] As a result, students may be exposed to others that may harm them, making school a place of special danger to the students' physical safety.

In most cases, *Tinker* is appropriate in determining school officials' authority in prohibiting student speech but will not always allow an appropriate response from

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[148] Preliminary Injunction. A court order made in the early stages of a lawsuit or petition which prohibits the parties from doing an act which is in dispute, thereby maintaining the status quo until there is a final judgment after trial. https://dictionary.law.com/

[149] *Ponce v. Socorro Independent School District,* p. 771

school officials. The concurring opinion of Justice Alito suggested that which the majority did not explicitly state: speech advocating harm that is demonstrably grave and that derives that gravity from the "special danger" to the physical safety of students arising from the school environment is unprotected.[150] The justices on the Appeals Court argued that Tinker focused on the speech's result, while *Morse* focused on the speech's content, and reasonably falling within Justice Alito's concurrence. School attendance can create an essentially captive group of students only protected from individuals who might harm them by limited school personnel.

The frequency of shootings and other violence in public schools allows for equal treatment when student speech advocates illegal drug use or school violence, both of which are threats to school safety. School administrators must be allowed to act quickly and decisively when addressing threats of violence at school.

Holding

The Fifth Circuit Court vacated the injunction and remanded the case back to the District Court.

***Harper v Poway Unified School District*, 545 F. Supp. 2nd 1072 (2008)**

Facts and Procedural History

In April of 2004, Tyler Harper was detained for wearing a shirt containing the message, "Homosexuality is shameful. Romans 1:27" and "Be ashamed. Our school has embraced what God has condemned (2)."[151] Tyler believed the school's decision to forbid his shirt violated his First Amendment right to free speech.

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[150] *Ponce v. Socorro Independent School District*, p. 770
[151] *Harper v Poway Unified School District*, 545 F. Supp. 2nd 1072 (2008), p. 1075

The District Court for the Southern District of California ruled in 2004 on this matter. At that time, the court denied in part and granted in part the defendant-school-districts' motion to dismiss the complaint, while at the same time denying a motion for a preliminary injunction on behalf of Harper. The plaintiff then filed two amended complaints after the first decision. Keslie Harper, the younger sibling of Tyler Harper, was added as a plaintiff in November of 2005.[152]

In April of 2006, the Ninth Circuit Court of Appeals denied the plaintiff Harper's motion for a preliminary injunction. By this point, Tyler had graduated and was removed as a plaintiff, leaving his sister as the plaintiff for these proceedings. The Ninth Circuit denied summary judgment for the Harper in full. The school district's desire for summary judgment was granted in part and denied in part.[153]

In March 2007, the United States Supreme Court affirmed Harper's preliminary injunction motion denial because the court of original jurisdiction, the district court, had rendered the Ninth Circuit Court's decision moot.[154] Plaintiff Harper then requested the District Court reconsider the motion. The request for reconsideration was granted by the Ninth Circuit Court of Appeals and remanded to the district court to ultimately determine whether the plaintiff's First Amendment right to free speech was violated.

Issue

Can school officials prohibit students' religious speech on clothing if they perceive that the speech is directed toward particular groups' sexual orientation?

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[152] *Harper v Poway Unified School District*, p. 1075
[153] Ibid., p. 1076
[154] Ibid., p. 1096

Reasoning and Rule of Law

The District Court reconsidered the facts of the case for a second time. They used *Tinker* and *Morse* to explain how speech directed toward marginalized groups of students can be prohibited.[155] *Tinker* applied because the message on the shirt was invasive of the rights of others.

While court proceedings related to this case went back and forth, *Morse* was heard and ruled upon by the U.S. Supreme Court.[156] The District Court concluded that schools have the authority and obligation to protect vulnerable students from harmful speech. They deemed the Harpers' speech harmful to students, and that government could restrict certain viewpoints when they are harmful in specific settings, school being one of them. The district court used *Morse* to determine that, although this case was not about promoting illegal drug use, it was about degrading speech that promotes threats to students' physical, emotional, or psychological well-being and development.[157] An environment created by allowing such speech would likely have detrimental results limiting a schools' ability to educate children.[158]

Holding

Plaintiff's motion for reconsideration of her free speech claim was denied.

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[155] *Harper v Poway Unified School District*, p. 1101
[156] Ibid., 1099.
[157] Ibid., 1100.
[158] Ibid.

Johnson v. New Brighton Area School District, U.S. Dist. 72023 (2008)

Facts and Procedural History

On April 25, 2006, Plaintiff Johnson, a senior at New Brighton Area High School, attended a school-wide assembly featuring a basketball player from the Harlem Globetrotters.[159] The athlete gave a motivational speech on racial tolerance and diversity. The athlete requested audience participation and selected members of the student body. Johnson was called upon to participate and was given the nickname Osama bin Laden to be used in a skit.[160] Three additional students were selected and given nicknames: Brittany Spears, Sandra Bullock, and Chris Brown.

The following school day, some students referred to Johnson as Osama. When lunch concluded, Johnson went to the library and spoke with a friend sitting at a table. That student was sitting alone. Johnson and the other student engaged in a conversation. His friend greeted him by asking, "what's up, Osama?"[161] According to Johnson, he responded in a jovial manner stating, "If I were Osama, I would have already have pulled a Columbine."[162] School officials attested that they overheard another student address Johnson as Osama and instructed that student to return to class. At that point, the school official heard Johnson exclaim that he would commit a Columbine-type event if students continued calling him Osama.[163] The school official stated that Johnson's tone was one of anger. However, they remarked that his statement was not yelled out in the library. The teacher who overheard the remark about Columbine believed Johnson's

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[159] *Johnson v. New Brighton Area School District, U.S. Dist. L.E.X.I.S. 72023* (2008), p. 1
[160] Ibid., 2.
[161] Ibid.
[162] Ibid., 3.
[163] Ibid.

statement to be a threat and that punishment was necessary, even if he was joking, given the word Columbine's contextual meaning. After Johnson left the library, no one attempted to stop him, and he returned to his regular schedule.

Just after Johnson left, the observing teacher contacted school administration to report what she had witnessed. The school administration began their involvement by questioning two students in the library that observed the interactions. Neither student would state or give a written statement about what they overheard.[164] Upon the recommendation of the school principal, Johnson was called from class and questioned about his remarks. He admitted to making the comments and reiterated that he was merely joking.[165]

Johnson had previously had an issue involving law enforcement outside of school.[166] He was arrested for possession of a firearm and assault but had no record of any school offense. After speaking with the district superintendent, the principal recommended that Johnson receive a ten-day suspension for threatening comments.

Because Johnson believed his First Amendment speech rights were violated, he sought relief in federal court. John and the defendant-school district each sought summary judgment from the District Court of Western Pennsylvania.

Issue

Did the school district violate Johnson's First Amendment speech rights by punishing him for statements they perceived as threatening but he said were in jest?

Reasoning and Rule of Law

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[164] *Johnson v. New Brighton Area School District*, p. 5
[165] Ibid., 6.
[166] Ibid.

The Western District Court of Pennsylvania noted that in *Morse*, the court concluded that preventing student speech supporting the use of illegal and harmful drugs was within the bounds of prohibited speech, but not for the sake of avoiding controversy that often comes with unpopular viewpoints. The District Court concluded that protections for speech are not absolute in specific settings and situations.[167] In harkening to *Morse*, the school environment's special characteristics and governmental interests in protecting that environment deem Johnson's speech inappropriate.

Holding

Johnson's motion for summary judgment was denied, and the defendants' motion for summary judgment was granted.

***Miller v. Penn Manor School District*, 588 F. Supp. 2d 606 (2008)**

Facts and Procedural History

During the second week of school for the 2007-2008 school year, student plaintiff Donald Miller, a ninth-grade student at Penn Manor High School, wore a shirt reading "Volunteer Homeland Security" on the front portion of the shirt, while the back read "Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No Bag Limit."[168] The shirt had images of automatic handguns too. The shirt was given to him by his uncle - later stationed in Iraq while serving in the United States Army.[169]

While in math class, a female student informed her teacher of the shirt and asked her to speak with Donald. Ms. Baireuther asked Donald to step into the hallway to

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[167] *Johnson v. New Brighton Area School District*, p. 23
[168] *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606 (2008), p. 611
[169] Ibid., 611.

discuss his shirt and its message.[170] She told Donald that his shirt promoted the hunting and killing of other humans. Gun images were not appropriate given that students had previously brought guns to school and that gun violence had occurred at schools elsewhere. Donald explained to his teacher that he would never bring a gun to school or shoot another person. Ms. Baireuther did not believe that Donald would commit such an act.

Finally, she told Donald that she would check with the school administration about his shirt and school policy. Donald was concerned he would have to turn his shirt inside out, causing his mother to "freak out."[171] He returned to class after their conversation. After his teacher spoke with school leadership, it was determined that his shirt did violate the school district policy.[172]

A few days later, he wore the shirt again and was informed by Ms. Baireuther his shirt was inappropriate because it was against district policy.[173] She warned him that should he wear the shirt again, he would be required to report to the principal's office. On November 28, 2007, Donald entered his math class wearing the shirt. Ms. Baireuther noticed him coming in, and she spoke with him in the hallway. She reminded him of their previous conversations about the shirt. Donald stated that he believed there was nothing wrong with the shirt. She directed him to speak with school administration and sent him to the assistant principal, Mr. Mortizen.[174]

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[170] *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606 (2008), p. 611
[171] Ibid., 611.
[172] Ibid.
[173] Ibid., 612.
[174] Ibid.

Mr. Mortizen noted that Donald had worn the same T-Shirt at the end of the previous year while attending Penn Manor Middle School.[175] He was instructed to turn the shirt inside out by the principal from that school. Donald was reminded of student expectations regarding dress by Mr. Mortizen. Again, Donald reiterated that his parents would "freak out" if he was told to turn the shirt inside out or not wear it.[176] Donald stood up to leave, but while walking out, he said, "This is bullshit." For failing to follow instructions and the use of profanity, he was assigned two hours of detention.

The next day, Mr. and Mrs. Miller came to the school and met with Mr. Mortizen to discuss the situation. He explained to Donald's parents that his shirt violated the district dress code policy because it promoted violence.[177] He showed them relevant sections of the student handbook to explain the rationale. Additionally, he explained the shirt's message seemed to advocate human hunting, much akin to deer hunting. Mr. Miller became upset with this line of questioning and removed a piece of paper from his pocket and slammed it down on the table.[178] On the note was the address of a soldier serving in Iraq. Miller directed Mr. Mortizen to write a letter to that soldier, explaining how he failed to support the armed forces by not allowing Donald to wear the shirt. Mr. Mortizen explained that the situation had nothing to do with non-support of the military but the message it conveyed.[179] Mr. Miller was unsatisfied and asked for instructions on how to address his concern further. Mr. Mortizen told him he could speak with the superintendent, Dr. Mindish. Mr. Miller also stated he was calling his lawyer.

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[175] *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606 (2008), p. 612
[176] Ibid.
[177] Ibid.
[178] Ibid, 613.
[179] Ibid.

The Board of Directors for Penn Manor Area Schools convened and determined that Donald's shirt was not protected speech under district policy. Additionally, they chose to make no decisions regarding discipline until the matter was settled.[180] The solicitor for the school system, Mr. Frankhouser, Jr., notified the Miller family that the system was revising certain portions of the student expression policy. However, Donald's shirt was not to be worn at school.

Penn Manor School District Policy 220 addressed student expression and was enacted in April of 1999.[181] Policy 220 governed the incident with Donald's shirt. The policy prohibited student expression inciting violence, advocating for the use of force, or urging violations of the law or school rules. Students were provided a student handbook at the beginning of each year and were to sign and return it to school. Parents were also asked to sign.

Issue

Did Penn Manor Area School District violate Donald's First Amendment speech rights by prohibiting his shirt, which read: "Volunteer Homeland Security," on the front portion of the shirt, while the back read "Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No Bag Limit.?

Reasoning and Rule of Law

District Judge Gardner's opinion placed plaintiff Miller and the defendant-school district into two camps.[182] Miller contended his message was political and aligned with

[180] *Miller v. Penn Manor School District*, p. 613
[181] Ibid., 613.
[182] Ibid., 624.

Tinker standards. Defendants' contend Donald's speech was anything but political, aligned with violence, automatic weapons, and vigilante-type justice advocacy.

Justice Gardner noted that *Tinker* allows for student speech that did not materially and substantially disrupt school. In using caselaw from *Fraser,* he noted that the material and substantial disruption test does not always apply, dependent upon the student's actual language.[183] Hazelwood allowed schools to restrict student speech, which could be mistaken as carrying the school's imprimatur.

Gardner noted the defendant-school districts' reliance on *Morse.* Drawing from Alito's concurring opinion, Gardner used the prohibition allowed by way of the special characteristic of the school environment, in this case, the threat to the physical safety of students, and thus, the need for school officials to take quick action in such instances. Drawing upon this reasoning, Gardner concluded that speech promoting illegal behavior is also prohibited and that school safety and ensuring that students are free of violence is critically important to a school environment.

Donald claimed that his shirt contained a patriotic sentiment; however, the shirt failed to express that sentiment anywhere.[184] In *Morse v. Frederick,* student Morse could not explain the meaning of his "Bong Hits for Jesus" message and therefore failed to convince the Court that he deserved First Amendment protection. Similarly, Donald only described his actions and not his shirt's interpretation, promoting violence.[185]

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[183] *Miller v. Penn Manor School District*, p. 625
[184] Ibid., 625.
[185] Ibid.

Holding

The school district does not have to demonstrate a substantial and material disruption to prohibit the shirt.

***J.S. ex rel. Snyder v. Blue Mountain School District*, 593 F. 3d 286 (2011)**

Facts and Procedural History

J.S. was suspended from Blue Mountain Middle School after she created a Myspace.com profile of her school principal. The profile was vulgar and degrading toward the principal.[186] Another student, K.L., assisted in creating the profile. J.S. made the profile off-campus but made the profile viewable to the public. The profile did not contain the principal's name but had a photo of him. The page was later changed to private, which only allowed individuals she added as friends to view the page.[187] Students could not view the page at school due to filtering.[188]

Mr. McGonigle, the target of the profile, learned of this from another student. They informed him J.S. created it, and he was brought a copy of the profile. After meeting with the superintendent and director of technology, it was decided that the creation of the profile violated the district's Acceptable Use Policy (AUP). By copying the principal's image from the district web page, school officials claimed that J.S. was on-campus, though she was off-campus when accessing the site.[189] Given these facts and the school district's interpretation of them, J.S. and K.L. were subsequently suspended ten days each.

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[186] *J.S. ex rel. Snyder v. Blue Mountain School District*, 593 F. 3d 286 (2011), p. 920
[187] Ibid., 921.
[188] Ibid.
[189] Ibid.

The superintendent sent letters to both parents to inform them of the suspension. Neither student appealed the suspension.

The school system claimed that the creation of the profile disrupted the school through the circulation of rumors and talk amongst students during class that disrupted the learning environment.[190] Attempting to explain further disruption, a school counselor sat in on the meeting with the principal and J.S.'s mother. Because of this, counseling sessions had to be covered by another counselor.

Mr. McGonigle did contact local law enforcement about harassment.[191] Though no charges were filed, the state police were contacted and spoke with the two students and their mothers at the state police station to discuss the events' seriousness.

On behalf of their daughter, J.S.'s parents filed a suit in District Court for the Middle District of Pennsylvania. They claimed, among other violations, that their daughter's right to free speech was violated when she was punished for the creation of the MySpace profile.[192]

Considering the First Amendment claim, the District Court concluded under *Tinker* there was no disruption to school; however, using *Bethel* and *Morse,* the court ruled that the profile was lewd and vulgar, and the school could punish J.S. because it did affect the school.[193] As a result, the school district was awarded summary judgment. Unsatisfied with the decision regarding a violation of her speech rights, J.S.'s parents appealed to the Third Circuit Court of Appeals.

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[190] *J.S. ex rel. Snyder v. Blue Mountain School District*, p. 923
[191] Ibid., 922.
[192] Ibid., 923.
[193] Ibid.

Issue

Can a student be disciplined for off-campus speech that did not occur during a school function?

Reasoning and Rule of Law

Upon review, the Appeals Court determined that the school wrongfully punished J.S. for speech that occurred off-campus.[194] Rejecting the school district's reasoning, the Appeals decided that *Tinker* did not apply as J.S. had attempted to prevent public access to the profile. It was only natural for those with permission to view the profile to discuss the page while attending the same school. Finally, concluding that the principal's actions only served to bring the matter to the school community's heightened attention.

While the district court used *Bethel* and *Morse* to support summary judgment in favor of the school district, the Appeals court rejected that notion.[195] The school district wanted to punish J.S. for foul language that affected the school and district's mission. It was determined that *Bethel* only applied to on-campus speech, as clarified by Chief Justice Roberts's majority opinion in *Morse*.[196] In Roberts' opinion, he emphasized that lewd speech outside of school is afforded more protection. Had the same speech been delivered at school, it would have been inappropriate. By and through this clarification of the *Bethel* via *Morse,* the school district also erred in punishing J.S. for speech occurring off-campus.

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[194] *J.S. ex rel. Snyder v. Blue Mountain School District*, p. 933
[195] Ibid., 927.
[196] Ibid., 933.

Holding

Reversed and remanded to the District Court for proceedings not inconsistent with the Appeals Court ruling.

***B.H. ex rel. Hawk v. Easton Areas School District,* 725 F.3d 293 (2013)**

Facts and Procedural History

During the 2010-2011 school year, five students purchased and wore bracelets with the phrase "I ♥ boobies" to support Breast Cancer awareness.[197] All five of the students attended Easton Area Middle School. Some teachers noticed that students wore the bracelets over several weeks and pondered whether a response was warranted.[198] Some teachers saw the bracelets as not authentic to the cause.[199] Others believed it might lead to inappropriate sexual talk or actions among students. In mid-to-late September, it was decided that students would be asked to remove the bracelet should they wear them.[200] The record did not indicate they caused any disruptions.[201]

In anticipation of Breast Cancer Awareness month occurring in October, the principal announced that bracelets containing the word "boobies" would be banned, while other forms of support would be allowed, such as the wearing of pink signifying support and awareness.[202] B.H. was observed wearing a banned bracelet. She was taken to the assistant principal's office, asked to remove the bracelet, to which she did, and returned to her regular activities.[203] No disruption was noted to have occurred that day.

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[197] *B.H. ex rel. Hawk v. Easton Areas School District,* 725 F.3d 293 (2013), p. 298
[198] Ibid., 299.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid., 300.

On the appointed day for students to participate in Breast Cancer Awareness Day, B.H. and K.M. wore the banned bracelets. Until lunchtime, the day was noted to have been routine. While at lunch, school security noticed the two students and instructed them to remove the items, but they refused. Another student, R.T., was wearing a bracelet too and stood to support the other girls. The security officer allowed the girls to finish their lunch before escorting them to speak with administration. Outside of one immature remark made by a male student, no issues occurred.[204]

R.T. removed her bracelet after speaking with school officials in the office, but B.H. and K.M. refused, and both claimed they have a right to free speech. As a result, they were given an in-school suspension and banned from attending Winter Ball for defiance, disrespect, and disruption. Their parents were notified of their actions and punishment.

The school district later banned the bracelets containing the offending phrase.[205] Months later, an incident did occur where a male student made an inappropriate remark to female students wearing the bracelet. The male student was punished for his crude comments. The school district did have a policy that forbids wearing clothing that had nudity, vulgar language, or double entendre.[206]

The mothers of B.H. and K.M. sued the school district in federal district court and sought a preliminary injunction against the bracelet ban.[207] In district court, the school adjusted their reasoning for punishment because, in addition to disrespect, defiance, and

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[204] *B.H. ex rel. Hawk v. Easton Areas School District*, p. 300
[205] Ibid.
[206] Ibid.
[207] Ibid., 301.

disruption, the bracelets violated policy relating to sexual innuendo and entendre.[208] In support of the students, the Keep a Breast Foundation testified that the slogan was not meant to be sexy, as it had been denied to many groups attempting to sell them, such as truck stops and pornographers. The district court sided with the students, concluding students would likely succeed on their claims, and prevented the school district's request for an injunction to prohibit the bracelet. Seeking to resolve any questions regarding speech and seeking injunctive relief, the case proceeded to the district appeals court.

Issue

Did a school violate students' rights to wear "I ❤ boobies" bracelets supporting breast cancer awareness by banning them?

Reasoning and Rule of Law

Applying *Bethel* as modified via *Morse,* the Appeals Court concluded that the bracelets were not plainly lewd and commented on a social issue.[209] Moving forward to evaluate the district's claim on *Tinker's* standards, the court noted that the school district failed to demonstrate how the bracelets constituted a substantial disruption.

The Appeals Court first addressed the school district's use of *Bethel* as a means for prohibition. In *Morse*, the U.S. Supreme Court noted that *Bethel's* analytical method may not always appear evident. The bracelet's slogan was not plainly lewd, and it also supported a very well-known national issue – breast cancer. Therefore, it cannot be categorically stricken under *Bethel*, holding that schools have authority over plainly lewd, not speech viewed by a reasonable person as lewd or non-lewd.[210] For further

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[208] *B.H. ex rel. Hawk v. Easton Areas School District*, p. 301
[209] Ibid., 320.
[210] Ibid., 307.

clarification, the Appeals noted that *Morse* did not stretch *Bethel* to allow any speech that might fit under any form of offensive language.[211] *Bethel* was about plainly lewd, non-political, or social speech.

The Appeals Court also noted that *Morse* added further guidance. The concurring opinion of Justice Alito, joined by Justice Kennedy, provided further protections of speech that commented on social or political issues. Alito stressed in his concurrence that political speech protections would continue in the school setting, notwithstanding any disagreements with the *Tinker* standard.

Morse provided greater protection of ambiguously lewd speech. The concurring opinion did not support any speech restriction that can plausibly be interpreted as commenting on any political or social issue.[212] The student speech, expressed on their bracelets, was protected from categorical regulation. They could plausibly be interpreted as political or social commentary, making that limitation a crucial part of *Morse*. A pro-illegal drug message and advocation of the use of an illegal drug – versus the message supporting breast cancer awareness on the students' bracelets are not the same. While the message on their bracelets could potentially offend, it is undeniable the message concerns a current political or social issue. If schools can categorically regulate terms like "boobies" even when the message comments on a social or political issue, schools could eliminate all student speech fringing upon sex or others that can offend.[213]

Holding

Affirmed.

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[211] *B.H. ex rel. Hawk v. Easton Areas School District*, p. 310
[212] Ibid., 313.
[213] Ibid., 317.

***DeCossas v. Tammany Parrish School Board*, U.S. Dist. LEXIS 145617 (2017)**

Facts and Procedural History

On January 8, 2016, M.D., a minor student attending high school in Tammany Parrish, Louisiana, was questioned by school officials regarding drug allegations.[214] In the office, M.D. was questioned and searched by school officials. A deputy was present while this occurred. M.D. possessed a cell phone, and a school official confiscated it, and M.D. was requested to enter the passcode to unlock the phone. At that point, the phone was searched by school officials and outside law enforcement that was present. Upon reviewing the phone's contacts, a number on the phone was recognized as belonging to another student also involved in a drug investigation. Additionally, text messages were viewed discussing the purchasing and possession of drugs.

The plaintiffs for M.D. claim he was forced to sign an untrue statement and was even threatened with arrest even if he did admit to the offense. M.D. admitted to and gave a written statement that he purchased and possessed the Vyvance, a controlled substance, in December 2015 and January 2016. Defendant-school district denied there was any coercion or threats. As a result of the investigation into possession and purchase of illegal drugs on school property, M.D. was expelled under the applicable local policy and state law.[215]

M.D.'s parents, serving as plaintiffs, amended an earlier claim, that among other civil rights violations, M.D.'s First Amendment right to free speech was violated when the cell phone's text messages were searched.

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[214] *DeCossas v. Tammany Parrish School Board*, U.S. Dist. LEXIS 145617 (2017), p. 3
[215] Ibid.

Issue

Was the search of a student's cell phone a violation of their First Amendment right to free speech?

Reasoning and Rule of Law

The District Court for the Eastern District of Louisiana granted summary judgment for the defendants. The District Court noted that United States Supreme Court decisions regarding student speech afforded them the right to freedom of speech at school but did not allow limitless freedoms. Specifically, they mentioned that *Morse* held prohibiting speech advocating illegal drug use was an area that students had limited speech rights.[216]

The plaintiffs could not articulate what manner or extent M.D.'s speech rights were violated, thus failing to make an actual claim on how his speech rights were violated.[217] Local board policy did not allow students to possess cell phones at school. M.D. had no First Amendment right to possess a phone at school or that messages on the phone were protected speech. Additionally, a school official received word from another student that M.D. was involved in purchasing or selling an illegal substance. These facts provided school officials with reasonable suspension to question and search M.D.

Even assuming a speech right had been violated, there was no clearly established expectation that viewing the contents of his cell phone while under investigation for suspected illegal drug sale or possession is a violation of the First Amendment. Citing

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[216] *DeCossas v. Tammany Parrish School Board*, p. 45
[217] Ibid., 46.

Morse, the ruling noted that school officials may regulate student speech reasonably regarded as promoting illegal drug use.

Holding

First Amendment claims against the defendant-school district were dismissed.

***J.R. v. Penns Manor Area School District,* 373 F Supp. 3d 550 (2019)**

Facts and Procedural History

In February of 2018, J.R., a student at Penns Manor Junior High in Pennsylvania, was expelled for discussing whom he would shoot if he were to do a school shooting.[218] The conversation was among peers. Another student, not part of the conversation, overheard J.R. discussing a teacher he would shoot. The conversation was reported to school administration.[219]

A school counselor spoke with J.R. about the comments, and J.R. admitted making them.[220] After speaking with the counselor, he was allowed to resume his regular class schedule, including returning to the teacher's room he stated he would shoot. His behavior was not documented as disruptive for the remainder of the day.[221] However, he continued his conversation about a school shooting and discussed shooting the same teacher.[222] Later in the day, the principal contacted J.R.'s parents. As a result of his statements, he was suspended, pending an expulsion hearing before the school board, for communicating a terroristic threat.[223]

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[218] *J.R. v. Penns Manor Area School District,* 373 F Supp. 3d 550 (2019), p. 554
[219] Ibid.
[220] Ibid.
[221] Ibid., 555.
[222] Ibid.
[223] Ibid.

At the hearing, the principal stated he did not feel that J.R. was an immediate threat but that the student had knowledge of guns because J.R. and his father hunted.[224] Later testimony at the hearing showed that no weapons were at J.R.'s house.[225] The teacher that J.R. included in his conversations testified that she was upset and sad that someone would want to kill her.[226]

J.R. requested that should he be expelled, he desired to continue learning in a virtual setting versus the district's recommended placement at an alternative setting. The school board rendered their decision and placed J.R. in the alternative setting for one year.

On May 1, 2018, J.R., by way of his parents, filed a motion alleging that his First Amendment right to free speech had been violated by way of his parents. On May 31, 2018, the school district filed a motion to dismiss.

Issue

Did the school district violate J.R.'s First Amendment right to free speech by expelling him for making threatening comments?

Reasoning and Rule of Law

The opinion noted that a delicate balance must be struck between student expression and society's countervailing interest in teaching students the boundaries of socially appropriate behavior.[227] Therefore, providing school officials significant discretionary decision-making ability to maintain a safe learning environment.[228]

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[224] *J.R. v. Penns Manor Area School District*, p. 555
[225] Ibid., 555.
[226] Ibid.
[227] Ibid., 558.
[228] Ibid.

Using *Morse*, the opinion noted that the precedents established by *Tinker* are not entirely clear. As such, lower courts are left to determine how a given scenario aligns with Supreme Court jurisprudence. The facts of the present case presented such an occurrence: threatening remarks against students and teachers. Though students have argued that threatening comments uttered at school were only jokes, the federal courts have uniformly agreed that language perceived as threatening school violence is not constitutionally protected – written, spoken, or occurring on or off-campus.[229]

Given the vital government interest in students' and teachers' safety in the school environment, school officials had cause to discipline speech that was reasonably perceived as a threat. Given the frequent occurrence of school violence, school officials must be given wide latitude and discretion to discipline students that make threatening and violent remarks aimed at the school environment.[230] The District Court concluded that J.R.'s constitutional rights were not violated.

The District Court noted that courts had used *Tinker* when discussing threatening comments made by students but noted Justice Alito's concurring opinion from *Morse* as relevant to the present case.[231] Alito's concurring opinion supported the altering of traditional student speech outside of established standards that some aspects of the special characteristic of school must apply.

In *Morse*, Alito stated that a special characteristic such as a threat to students' safety could alter speech rights.[232] While at school, students have less choice as to who

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[229] J.*R. v. Penns Manor Area School District*, p. 559
[230] Ibid., 558.
[231] Ibid., 559.
[232] Ibid., 559.

they are around in classes and elsewhere, and some students may choose to do others harm. Because of this fact, Alito concluded that schools could be places of special danger.

Applying this analytical method, the court relied on *Morse* claiming that speech relating to illegal drug use and school violence are of equal seriousness, therefore, not protected by the First Amendment.[233] School officials were well within their rights to discipline J.R. under the substantial disruption test established in *Tinker*.

Holding

The motion to dismiss was granted in favor of the defendants.

***Norris v Cape Elizabeth Sch. District (in re A.M.),* 422 F. Supp. 3d 353 (2019)**

Facts and Procedural History

On September 19, 2019, a student at Cape Elizabeth High School in Maine, identified by the court as A.M., placed a sticky note on the mirror of a girls' restroom reading, "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS."[234] Directly afterward, a student informed the school administration of the note. Later in the day, in another restroom, a note containing the same message was discovered.

The principal and vice-principal began an investigation to determine the note's author and the alleged offender.[235] Using video cameras and deductive reasoning, they determined that A.M. was the author of the first note. Over 40 students were interviewed

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[233] J.*R. v. Penns Manor Area School District*, p. 560
[234] *Norris v Cape Elizabeth Sch. District (in re A.M.),* 422 F. Supp. 3d 353 (2019), p. 358
[235] Ibid., 59.

concerning the note. On September 20, Principal Shedd communicated an incident that occurred at school. This communication was carried out via email.[236]

Rumors about the note and investigation began to spread throughout the school.[237] A male student that many believed to be the offender was ostracized by his peer group and missed several school days. The male student's parents spoke with school administration and explained they felt this was bullying. The school administration agreed with the summation of the events by the parents.[238]

On October 4, A.M. spoke with the local press about her written statement and her thoughts regarding how the school handled sexual assault allegations.[239] On the same day, Principal Shedd and Vice-Principal Carpenter informed A.M.'s parents via letter that A.M. had admitted and accepted responsibility for her actions. In the letter, the school officials concluded that she had bullied the male student by posting the note in the bathroom and gave her a three-day suspension from school. They also stated that further incidents could result in more substantial consequences, such as suspensions or expulsions. Another student that participated in the copycat note was given shorter suspensions.[240] It was undetermined whether the other female students spoke with the press. School officials denied this played into decisions regarding punishments.[241]

On October 9, Principal Shedd sent another communication via email about the investigation to the school communicating. He stated that students involved with placing

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[236] *Norris v Cape Elizabeth Sch. District (in re A.M)*, p. 359
[237] Ibid.
[238] Ibid., 360.
[239] Ibid.
[240] Ibid.
[241] Ibid.

the note were good but misguided. He decried the national attention the school received and blamed the media.[242] Lastly, he said students involved would have their records expunged if they maintained good records henceforward.

On October 11, Superintendent Wolfrom sustained the suspension. She also dismissed A.M.'s claim that the First Amendment protected her speech and stated that A.M. would begin her suspension on October 15. On October 13, A.M.'s mother filed for a preliminary injunction. Defendants agreed to withhold commencing the suspension order pending a hearing motion.

Issue

Is A.M.'s note alleging rape by an unnamed suspect at her school protected speech?

Reasoning and Rule of Law

Justice Walker began by discussing whether the note was defamatory toward the male student but noted that school officials failed to demonstrate such.[243] However, Walker did conclude that A.M.'s speech recorded on the sticky note was political.[244] Comparing this case to *Morse*, Walker insinuated that where "Bong Hits 4 Jesus" had no political or social meaning, therefore, no speech protections, the sticky note was about a political or social issue.[245] Walker looked at the note objectively when examining speech, with reasonable interpretations, not the speaker's motive.[246] In her actions, A.M.

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[242] *Norris v Cape Elizabeth Sch. District (in re A.M)*, p. 360
[243] Ibid., 363.
[244] Ibid.
[245] Ibid., 364
[246] Ibid.

was serving as an advocate, addressing an alleged rapist in the school and its leadership knowledge of their presence.

Further, the plaintiff articulated that she was speaking to "the crisis of sexual assault in public schools and the importance of appropriate school procedures to address it."[247] Her comments were within the speech protections afforded her via the *Morse* ruling. Because her comments were genuine, she has exposed a safety concern to Cape Elizabeth.[248]

Walker also ruled that A.M.'s note did not violate the rules of *Tinker*. Justice Walker expressed that such a note should give school officials great cause to disrupt the school to investigate such an allegation. Though defendants claim that copious amounts of time were spent investigating, such should be expected given the claim's nature. Due to this fact, they fail to meet a material and substantial disruption claim.

Holding

The First Amendment likely protected A.M.'s speech.[249]

Summary

A comprehensive search resulted in 10 cases where *Morse* was used as the sole legal standard or use in conjunction with *Tinker* or *Bethel*. No cases were discovered where *Morse* and *Hazelwood* were used in conjunction. Of the 10 cases briefed above,

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[247] *Norris v Cape Elizabeth Sch. District (in re A.M)*, p. 364
[248] Ibid.
[249] In *Norris v. CAPE ELIZABETH SCHOOL DISTRICT*, 969 F.3d 12 (1st Cir. 2020), the school district challenged the District Court's decision for abuse of discretion in their ruling. On appeal, the Circuit Court did not reverse the earlier decision or claim the District's analytical method incorrect. They offered their analysis under *Tinker*, while not disallowing the District Court's *Morse* analysis. They did determine the District Court did not abuse their discretionary power.

five centered around issues concerning threats to student safety. Three dealt with political or social commentary. One case addressed drug use and text messages. Lastly, one decided whether accepted student codes of conduct governed an insulting social media page created off-campus. The school district prevailed in seven of ten cases.

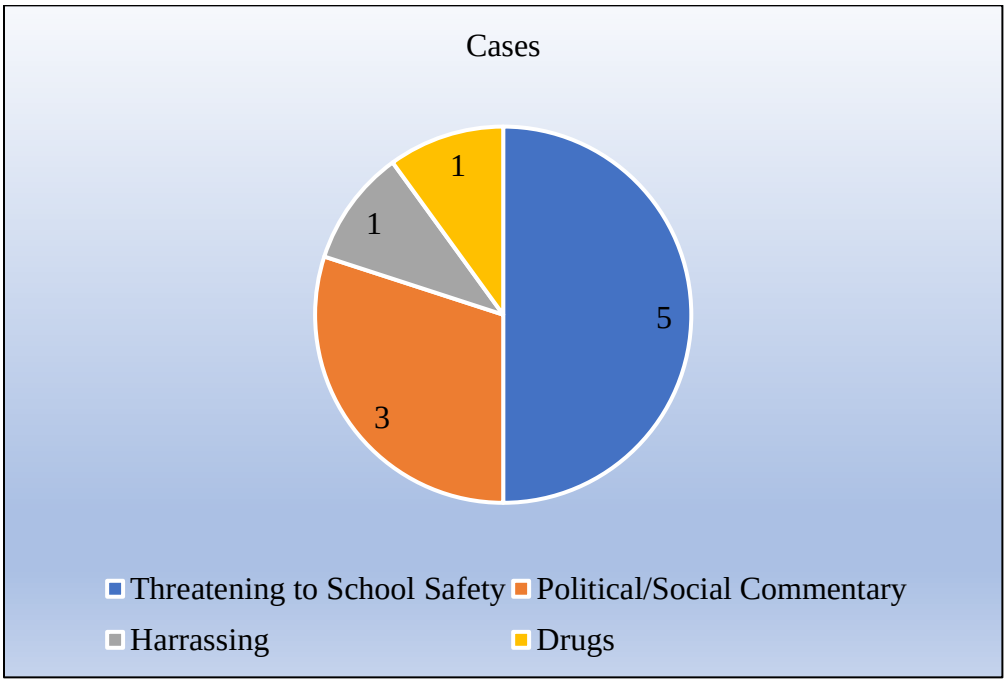

*Figure 4.1 Graphical breakdown of cases by category

Four cases made it to their respective Federal Appeals Court. The remaining six ended in federal district court. One federal district (3rd) represented half of the cases. Four federal districts (4th, 6th, 7th, and 10th) are yet to rule on a speech case applicable to answer the research question.

Lastly, six cases would specifically cite, discuss, and explain the concurring opinion from *Morse* as part of the analytical method in the cases before them.

Chapter five drew upon the case briefs to answer the research question: what is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education?

Table 4.1 – Chronological Order of Cases

Case	Court & District	Date of Decision	School Level	Drugs
Boim	US Ct. of Appeals – 11th	7/31/07	H.S.	No
Ponce	US Ct. of Appeals – 5th	11/20/07	H.S.	No
Harper	US District Ct. Southern District of C.A. – 9th	2/11/08	H.S.	No
Johnson	US District Ct. Western District of P.E. – 3rd	9/11/08	H.S.	No
Miller	US District Ct. Eastern District of P.E. – 3rd	9/30/08	Jr./Middle	No
J.S.	U.S. Ct. of Appeals - 3rd	6/13/11	H.S.	No
B.H.	U.S. Ct. of Appeals – 3rd	8/5/13	Middle	No
DeCossas	US District Ct. Eastern District of L.A. – 5th	9/8/17	H.S.	Yes/Indirect
J.R.	U.S. District Ct. Western District of P.E. – 3rd	6/2/19	Jr./Middle	No
Norris	US District Ct. Maine – 1st	10/24/19	H.S.	No

Chapter 5: Findings

This research study sought to answer the following question: what is the legal standard created by *Morse v. Frederick* for student speech in K-12 public education? Having completed a detailed account of pertinent cases, the findings that answer the research question began to emerge. The researcher grouped the cases by category based on similarities that resulted in the following groups: (1) the concurring opinion's support for school safety, (2) political and social commentary, (3) harassment of school officials, and (4) speech concerning possession, distribution, and use of illegal drugs while at school. While the final two categories provided limited extrapolation, the first two categories and supporting cases provide more substantial legal standards to guide decision-making.

It is critical to note majority opinions from respective federal districts establish case law only in their respective district. One should be cautious in making policy without first consulting with legal counsel until case law extends to a school district's respective federal district.

Significance of Concurring Opinion

In all but four cases, the jurisprudence for their rulings was established using Justice Alito's concurring opinion in *Morse*. As noted in an earlier footnote, the concurrence exists when another judge agrees with the majority but comes to the conclusion differently. Three of the five cases concerning student safety cite the concurring opinion as guidance in decisions. The findings present an appropriate opportunity to explore that part of the decision in greater detail and what it means for school systems and policymakers.

At the outset, Alito supports Chief Justice Roberts' majority opinion on two conditions: (1) it 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 (2) it provides no support for an interpretation that allows for restrictions on comments about political or social issues, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[250] Additionally, he offers no support for any further extensions of the limits on student speech outside of the landmark cases addressed in Chapter 2. Going no further than reaffirming the precedents they established, and that, besides the present case, *Tinker* could likely prohibit student speech advocating the use of illegal drugs.[251] Offering one last explanation for his support, Alito stakes his support of the Court's opinion on the understanding that the special characteristics of the public school do not necessarily justify any other speech restrictions.[252]

Alito commits two paragraphs of his concurrence to explain that while schools have an essential role in educating students, using the adage educational mission could likely be inconsistent over time and subject to outside and subjective influences. For example, during the Vietnam era, a public school could have had a mission to promote solidarity with soldiers and their families, and as a result, banned Tinker-type armbands for striking a blow to their "education mission."[253] Conversely, a school promoting world peace could have outlawed buttons supporting troops because they viewed the buttons as supporting the war.[254] The education mission claim fails because it would afford school

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[250] *Morse v. Frederick,* 551 US 393, pg. 2636
[251] Ibid., 2637.
[252] Ibid.
[253] Ibid.
[254] Ibid.

officials the authority to limit student expression on political or social issues, which would most likely stem from contrasting viewpoints – school versus student – and serve as the sole reason for speech prohibition. *Tinker* forbids viewpoint discrimination in the school setting. While not offering new guidance on viewpoint discrimination, Alito offers schools a warning. He recommends that they avoid describing their vision's merits.

Assessing a school's educational mission stance often occurs when determining the legality of student speech. A well-crafted statement codifying a schools' educational mission is needed to avoid going awry of Alito's opinion. Incongruously, no student or their proxy sought to expound upon this point in the cases. Without careful consideration, the use of educational mission as a broad stroke to prohibit speech could become subject to broader interpretation and might not provide school districts with as much leeway in evaluating student speech.

Alito provided an objective measure to guide decision-making when assessing student speech versus the school setting's special characteristics – threats to students' physical safety.[255] Parents entrust their children to the faculty and staff for safety at school but have little control. Likewise, parents are responsible for their child's safety while at home, but while at home, parents exercise greater parental control over most situations. At school, students may not be free of individuals that might do them harm – they are relatively captive during the day to a schedule and classes assigned to them, with little choice to leave a situation should they feel unsafe.[256] Because of this, schools must act before speech leads to violence; therefore, school officials need greater discretion,

[255] *Morse v. Frederick,* 551 US 393, p. 2638
[256] Ibid.

which in most cases meets the *Tinker* standard of "substantial disruption," but is extended, now, under *Morse.*[257]

Finally, Alito specifically addresses drug use as a slow and not always an "immediately obvious threat," but no less dangerous or severe.[258] They were again stressing that dangers posed to students, gun or drug-related, are cause for school interference. However, he provides a caveat that *Morse's* decision and regulations are at the First Amendment's far reaches.[259] Schools can proceed with prohibitions on such speech but should walk softly.

Though none of the five cases surrounding threats to school safety are about drugs, drug use, the manufacture or distribution of drugs, the justices in those cases liken the dangers of school violence to drug use. In three of those five, the concurring opinion from *Morse* provided guidance. Justice Alito's concurring opinion persuasively suggests that drugs and school violence are one-in-the-same and that schools are well within their authority to prohibit student speech and provide consequences in both cases.

Threats to the Physical Safety of Students

National studies show that schools remain one of the safest places a child can be, and statistically, violent crimes that result in death or severe injury are unlikely to happen in schools.[260] Intruders accounted for less than one percent of all discipline or criminal incidents schools reported in Georgia in 2012. Those incidents totaled 178,000. Further,

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[257] *Morse v. Frederick*, 551 US 393, p. 2638
[258] Ibid.
[259] Ibid.
[260] Burnette II, Daarel. The Atlanta Journal-Constitution 7:44 a.m. Sunday, Feb. 24, 2013 Atlanta News. (2013, February 24). Schools spend heavily on security, but gaps remain. Retrieved January 30, 2018, from http://www.ajc.com/news/schools-spend-heavily-security-but-gaps-remain/7dlLCW9Dg7YB23fujjimgK/

those individuals were usually irate parents or expelled students attempting to see their friends.[261] Additionally, other research concluded that students are fifty times safer in school than society.[262] In contrast to how safe some argue schools are, one might question this when discovering that fifty school shootings occurred on school properties between August 2017 and January 01, 2018.[263] Perhaps one of the lengthiest gaps in time between acts of violence resulting in significant injury or death to students in American public schools is the recent public school closure stemming from the COVID-19 pandemic.

Considering the frequency of violent acts in schools, coupled with well-known past shootings and, more recently, in Parkland, Florida, at Douglas High School in February 2018, protecting children in American schools is objectively considered by courts when rendering opinions on matters of student speech and school safety. The findings in this research indicate that federal courts consider speech that threatens students' physical safety to be grounds to extend speech limitations.

On the next page, Table 5.1 lists each federal district by total population, from most to least. Next, Table 5.2 ranks each district by the number of school shooting incidents from 1970 to the present. The 3rd district, which has roughly a third of the 9th district's population, represents three of the five cases concerning student safety threats. Interestingly, they only rank eight out of 11 in terms of population when examining the

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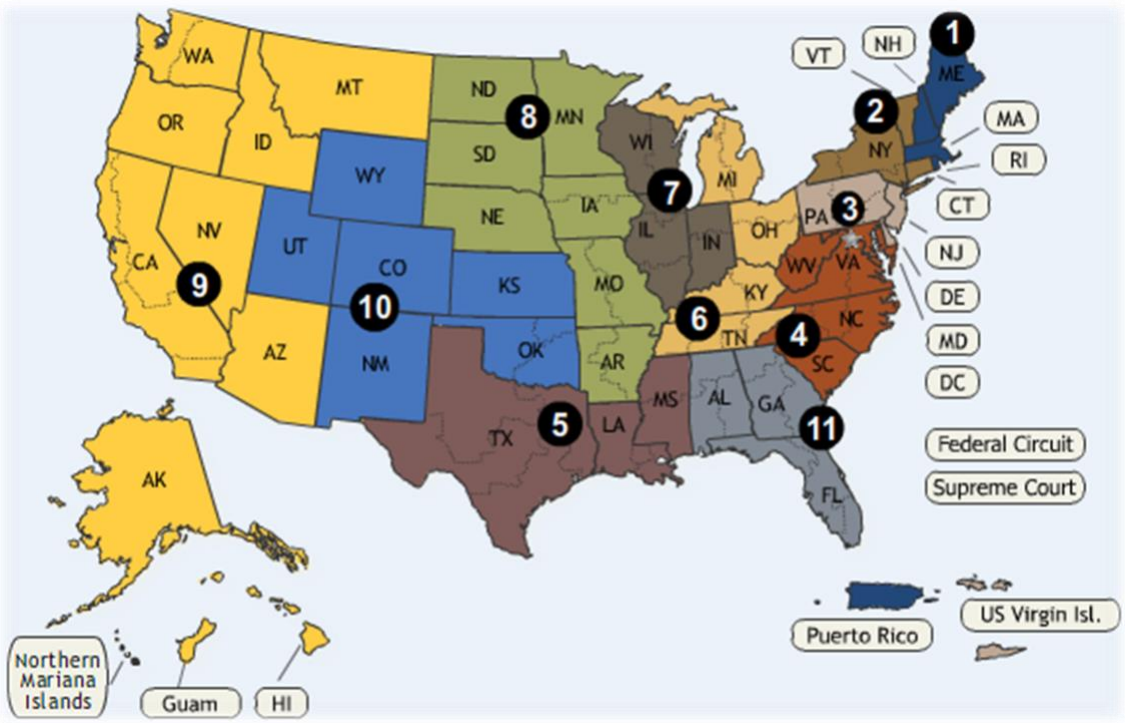
[261]Burnette II, Daarel. The Atlanta Journal-Constitution 7:44 a.m. Sunday, Feb. 24, 2013 Atlanta News. (2013, February 24). Schools spend heavily on security, but gaps remain. Retrieved January 30, 2018, from http://www.ajc.com/news/schools-spend-heavily-security-but-gaps-remain/7dlLCW9Dg7YB23fujjimgK/

[262] Abramsky, Sasha. "The Fear Industry Goes Back to School." *NATION* 303, no. 9-10 (2016): 18-21.

[263] Victor, D. (2018, January 23). Kentucky School Shooting Leaves 2 Dead and 17 Others Injured. Retrieved February 05, 2018, from https://www.nytimes.com/2018/01/23/us/kentucky-school-shooting.html

number of school shooting incidents since 1970.[264] In the three cases arising from Pennsylvania (3rd district), the opinions specifically mention Columbine. Whether explicit in writing or implied, Columbine is on the justices' minds when writing for the majority. Columbine has a pariah-like reputation, and student speech using that word in any context that might be construed as relating to threats or violence will be unequivocally prohibited.

*Figure 5.1 Map of United States Federal Districts[265]



[264] https://worldpopulationreview.com/state-rankings/school-shootings-by-state. South Carolina is listed as zero, but an update from January 12, 2021 corrected this to 27.
[265] https://www.msnd.uscourts.gov/

*Table 5.1 District Rank by Population[266]

Federal District	# of States	Population
9th	9	66,706,986
11th	**3**	**36,998,345**
5th	**3**	**36,010,144**
4th	5	32,010,144
7th	3	25,226,474
2nd	3	23,642,837
3rd	**3**	**22,657,837**
8th	7	21,531,063
10th	6	18,510,567
1st	4	10,655,787

*Table 5.2 School Shootings 1970 to present

Federal District	# School Shootings	# of States	Population
9th	248	9	66,706,986
5th	**196**	**3**	**36,010,144**
11th	**178**	**3**	**36,998,345**
6th	185	5	32,010,144
4th	145	4	32,972,804
7th	104	3	25,226,474
8th	93	7	21,531,063
3rd	**74**	**3**	**22,657,837**
2nd	69	3	23,642,837
10th	66	6	18,510,567
1st	26	4	10,655,787

[266] Tables 5.1 and 5.2 were compiled with census data from https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html

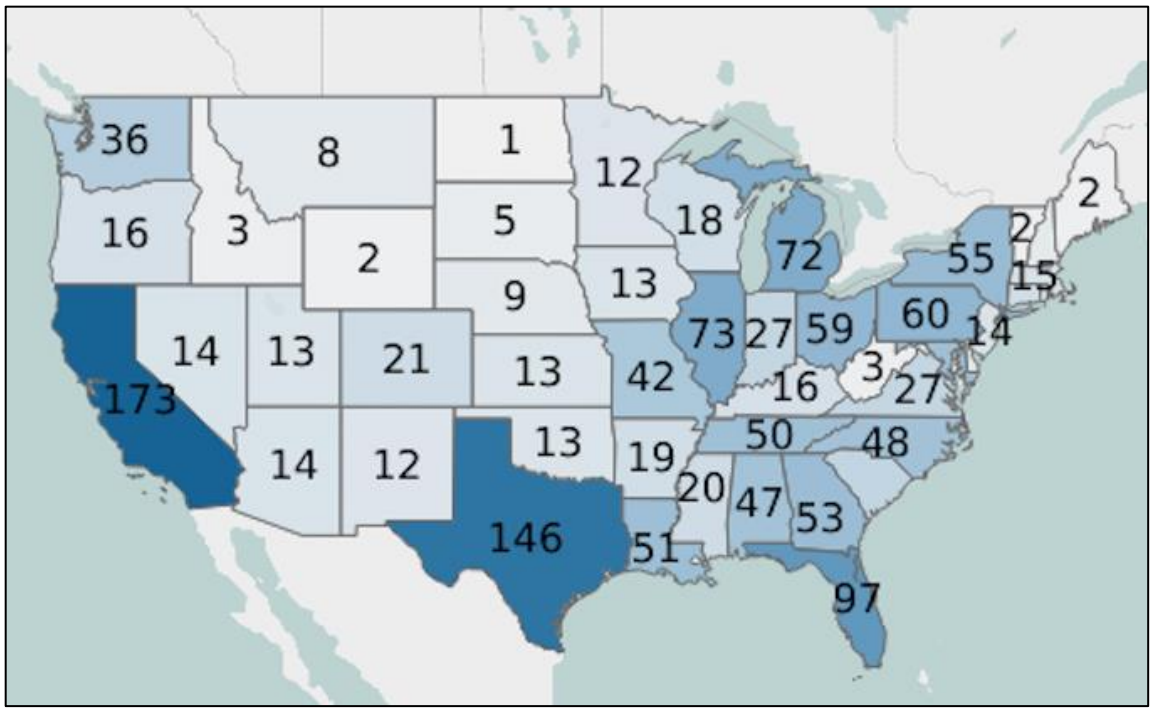


*Figure 5.2 School shooting incidents by state 1970 to present[267]

Given the 11th and 5th federal districts rank two and three respectively in population, it is not unsurprising that they flipped positions from Table 5.1 to 5.2 for the number of school shooting incidents since 1970. Given the number of threatening comments made by public school students in the largest districts, it is interesting that more cases were not found in this research from the 9th, 11th, and 5th districts to answer the research question.

[267] https://worldpopulationreview.com/state-rankings/school-shootings-by-state. South Carolina is listed as zero, but an update from January 12, 2021 corrected this to 27.

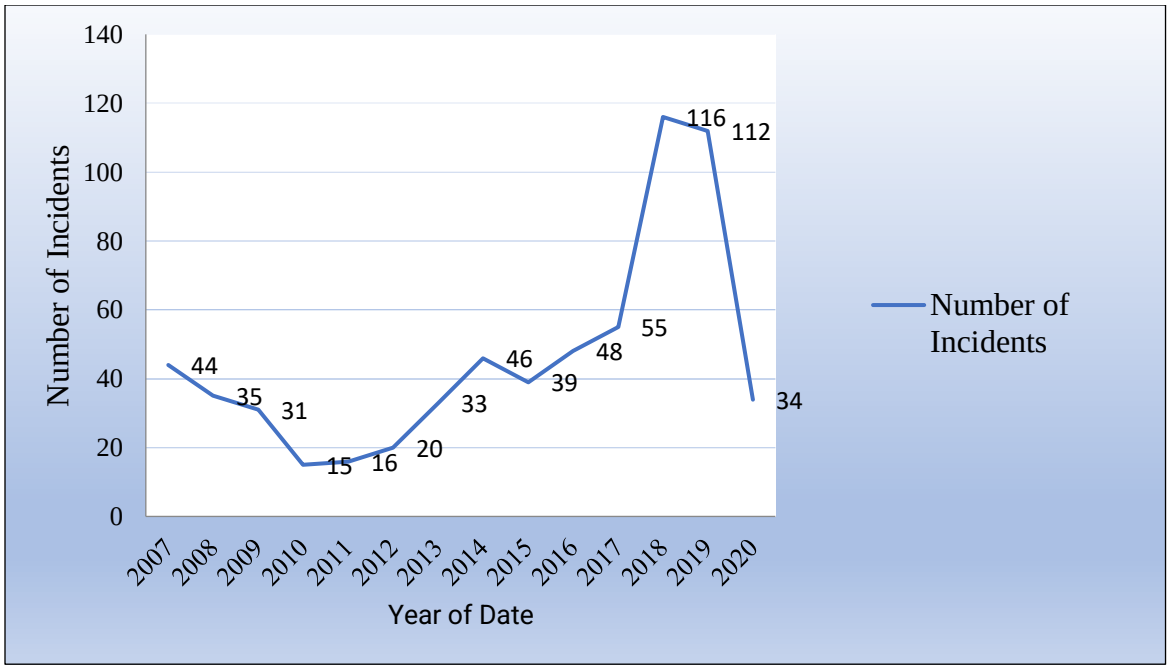


*Figure 5.3 School shooting incidents since *Morse v. Frederick*[268]

Since *Morse*, a span of roughly 14 years, a total of 816 school shooting incidents have taken place. From 1970 to 2006, a total of 733 school shooting incidents occurred. The data from 2018 and 2019 stand out as outliers and skew the overall number. An exploration of the data from 2019 and 2020 is needed to determine why the numbers were unusually high. However, the chart still illustrates that gun issues in public schools, whether active or non-active shooting incidents, should remain of great concern with the courts.

Figures 5.4 and 5.5 provide data on school shootings by state since 1970 and by current state populations. Pennsylvania is ranked seventh for the number of school shootings. Pennsylvania is the fifth most populous state in the nation. Given these facts, some might argue it is not surprising that judges from the Third Federal District have

[268] https://www.chds.us/ssdb/charts-graphs/. Chart represents active and non-active shooting incidents per year.

relied on *Morse*. When examining data, state by state, it is more compelling. Further data might well support these findings.

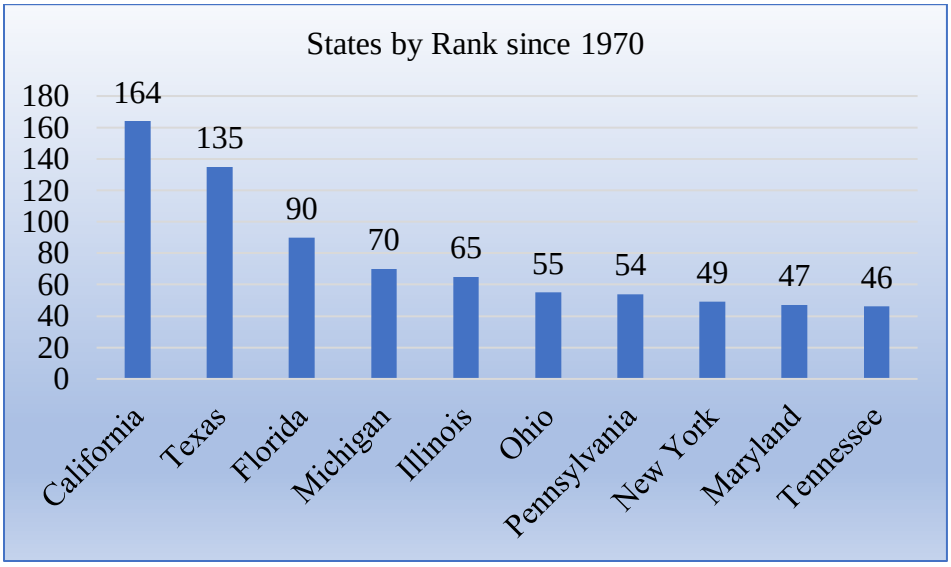


*Figure 5.4 Shooting by State since 1970 – Top 10[269]

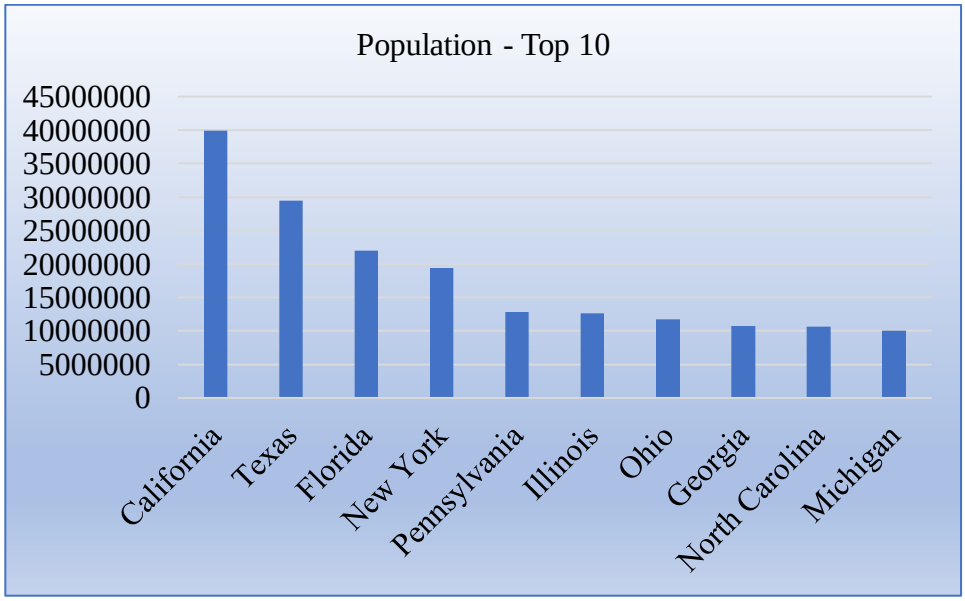


*Figure 5.5 Ten Most Populous - 2020[270]

[269] https://worldpopulationreview.com/state-rankings/school-shootings-by-state
[270] Ibid.

Political and Social Commentary

Three cases involve incidents where student actions represent pure speech. According to Merriam-Webster.com, pure speech is the communication of ideas through spoken or written words or through conduct limited in form to that necessary to convey an idea; pure speech deserves the highest degree of protection under the First Amendment to the United States Constitution.[271] The following figure helps to illustrate that among types of speech, pure speech is the most protected, followed by symbolic speech, which is passive, such as the wearing of armbands by the Tinker children, and lastly, speech-plus, which is words coupled with actions – protesting and picketing, for example. Speech-plus is more active than passive. As such, it warrants less protection and is often scrutinized to much higher degrees.

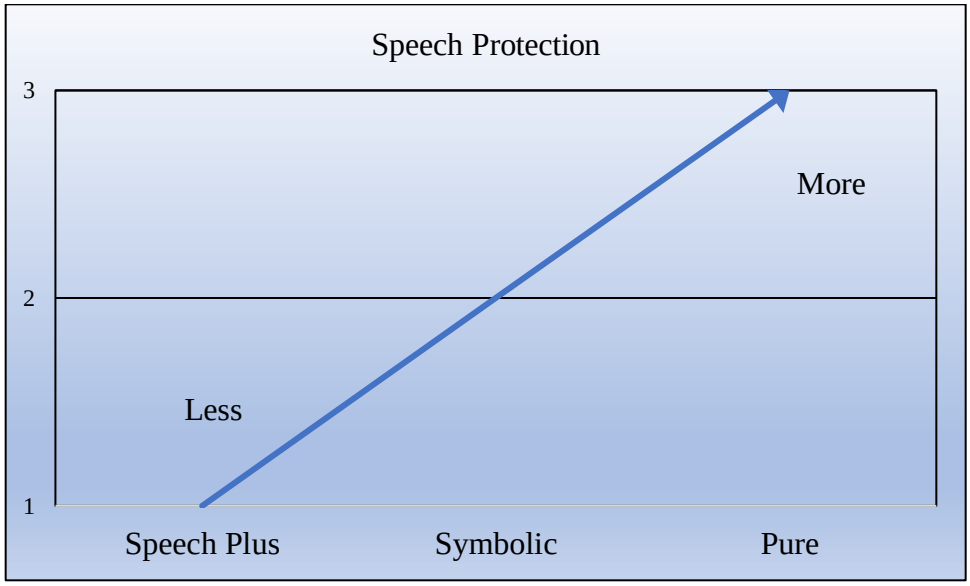


*Figure 5.6 Variance in Speech Protections by Type

[271] "Pure Speech Legal Definition." Merriam-Webster. Merriam-Webster. Accessed August 28, 2020. https://www.merriam-webster.com/legal/pure speech.

In *Harper v Poway Unified School District*, 545 F. Supp. 2nd 1072 (2008), a student wore a shirt to school, condemning the lifestyle of gay students - the statements on the shirt aligned with Harper's religious beliefs. However, the comments failed to earn protection because they infringed upon others' rights. A basic tenet of *Tinker* is that students "be secure and be let alone."[272] The courts have long held this as a valued and comprehensive right, and speech targeting individuals because of their lifestyle aligns with this precedent. As a result, the speech was prohibited by *Tinker*.

Besides conflicting with *Tinker*, the case also ran afoul of *Morse*. Because the speech targeted a marginalized group, school officials rightly concluded that the targeted group would likely face detrimental effects on their well-being – emotional, educationally, or physically. Students are unlikely to prevail when their speech, even pure speech, infringes upon others' rights and presents student safety concerns.

Next, in *B.H. ex rel. Hawk v. Easton Areas School District,* 725 F.3d 293 (2013) students donned bracelets desiring to raise awareness of breast cancer. However, the bracelets contained the word "boobies." The facts demonstrated that the bracelets presented minimal school disruption and were not plainly lewd. The school attempted to use *Bethel's* guidance on plainly lewd speech but failed to meet that standard because *Morse* could support ambiguity. While the word in question might earn a few laughs amongst middle school students, it is irrefutable that breast cancer is a serious national health concern. Whereas politicizing the debate around medicinal uses of marijuana might be a concern for schools should students desire to carry on such a debate, raising

[272] *Tinker v. Des Moines, 393 US 503 (1969)*, 508

breast cancer awareness with a questionably offensive word, yet not plainly lewd, is permissible via *Morse.*

Finally, in *Norris v Cape Elizabeth Sch. District (in re A.M.)*, 422 F. Supp. 3d 353 (2019), a female student desired to draw attention to alleged criminal activities. Student Norris placed a sticky note alerting the school of a rapist in their midst. The school administration did investigate the situation but decided Norris disrupted school with her note and provided her with disciplinary consequences.

In District Court for Maine, it was determined that her note had a point – to alert those vested with protecting students' safety and health – to an alleged rapist in their school. The facts of the case bear out that the female student in *Norris,* A.M., did articulate her point in court. In *Morse*, the offending student did not. Whereas in *Morse*, the student desired to make the local news, A.M. acted and brought awareness to alleged sexual assault and school officials' role in addressing such allegations. The comments stemmed from concern about the physical harm of students and a genuine outcry for help. The opinion reasonably interpreted the female student's comments as authentic, alerting authorities and warranting investigation. She did so to highlight a growing concern about her safety and others at school. It is possible to make connections to the previous category of school safety in this instance. However, the opinion denoted in their reasoning her speech more closely aligned with political or social commentary on sexual violence.

The interruption to the school day was necessary because of the seriousness of the allegation. The investigation was not an overburden upon the school but a needed task given the rape accusation. *Tinker's* material and substantial disruption was not met.

Courts have ruled that schools have considerable discretion when evaluating student speech on social or political issues. However, schools are not allowed broad categorical speech regulations to use a guise of a lengthy investigation to suppress student speech. The dangers of categorical regulation exist when schools reach too far on language. While “boobies” certainly conjures up sexual connotations, it is easily dismissed as sophomoric humor. Whereas accusing a classmate of rape would reasonably cause an overt response by school administrators. To the bane of school administrators, however, in the context of political or social commentary at school, some words prohibited in one context are reasonably allowable in another.

Joseph Morse provided no context to his banner other than his intent of drawing attention from the local news. He sought attention through his actions, not his speech. Ultimately, if a student’s exercise of pure speech infringes upon others' rights, it fails to receive protection. In *Morse,* the student was undoubtedly not engaging in any form of pure speech. On the contrary, a student taking part in pure speech that is ambiguous, not infringing upon the rights of others, and can articulate a viewpoint to a social or political cause or concern, will likely enjoy speech protections under the First Amendment.

After the district court’s decision, an appeal was made to the First Circuit Appeals Court. However, the higher court failed to dismiss the earlier application of *Morse.* In allowing the ruling to stand, the application of *Morse* is still viable within the First Federal District. In essence, the appeals court offered their guidance of how they would have determined that student Norris was afforded protected speech.

Harassing of School Officials

In *J.S. ex rel. Snyder v. Blue Mountain School District*, 593 F. 3d 286 (2011), a student was disciplined for creating an offensive and obscene social media page mocking his principal. The school district used *Bethel* and *Morse* to justify their authority over the speech. However, the 3rd Circuit Federal Appeals Court found in favor of the student petitioner because his speech occurred off-campus. The court agreed that the MySpace page was offensive; however, it was created off-campus during a non-school-sponsored activity. The defendant school district failed to show a disruption to school in the case's facts. Speech that would likely be prohibited at school, even speech mocking school officials, is afforded greater protection outside of school. The ruling determined that school officials wrongly punished the student for offensive speech that occurred during non-school-related activities and off-campus. Schools are not afforded such far-reaching authority.

J.S. failed to create new guidance for courts and schools. However, it did clarify that *Morse* updated *Bethel*-off-campus student speech not attached to an official school activity. Failure to create any substantial disruption does not fall under the scope of school authority to censor.

Speech Related to Drugs

The only case dealing with speech concerning drugs related to *Morse* was *DeCossas v. Tammany Parrish School Board*, U.S. Dist. LEXIS 145617 (2017), a student was questioned concerning his knowledge of drugs on campus and his role as a party to this situation. While being questioned by school officials, his cell phone was confiscated, and he was asked to unlock the phone. While searching through his text messages, school

officials discovered that he did bring controlled substances to school. Ultimately, his parents claimed his First Amendment right to free speech was violated when school officials punished him for incriminating text messages.

It was determined via *Morse* that his speech, contained in the text messages, was not protected speech. The discussion of purchasing drugs and possessing drugs strikes at the heart of what *Morris* was addressing - a growing drug crisis in schools. His speech was reasonably regarded as promoting illegal drug use.

DeCossas v. Tammany Parrish School Board was the only instance where the researcher found a court opinion aligned with *Morse* centered around drug speech had more substantial implications for search and seizure violations than speech violations. This finding affirmed what the literature review included that student expression advocating illegal drug use is infrequent and nuanced but likely allows for a search to occur of a student's electronic device. In this case, a cell phone, when a policy does not allow for possession of a cell phone while at school, and when school officials have reasonable suspicion that speech on the electronic device is related to possessing, using, or selling drugs at school or school-sponsored activities.

Summary

The findings of this research were developed from an analysis of ten cases. Cases concerning drug-related speech similar to *Morse* proved challenging to find, with *DeCossas* as the only case in this category. Additionally, cases involving harassing speech related to student and school safety were equally difficult to find, as most cases chose a different legal precedent to support a ruling. Speech-related issues with similar factual backgrounds discussed in *DeCossas* and *J.S.* could be prohibited by precedents

established from *Morse*. However, their use will be limited until more case law is developed.

Notwithstanding those limits, the other findings concerning school safety and pure speech are likely to be supported by case law established by *Morse.* Those findings enjoy more support for the prohibition of student speech under this research's relevant court guidance.

Chapter Six offers guidance to school officials and policymakers based upon the findings. The guidance is presented as recommendations to consider when determining how to mitigate student expression issues. Finally, the reader is provided with concluding opinions on student speech issues in K-12 public schools.

*Table 5.3 Speech by Category

Case	Court & District	Speech	Guidance	Decision
Boim	US Ct. of Appeals – 11th	Threat to school safety	Majority Opinion	School
Ponce	US Ct. of Appeals – 5th	Threat to school safety	Concurring Opinion	School
Johnson	US District Ct. Western District of P.E. – 3rd	Threat to school safety	Majority Opinion	School
Miller	US District Ct. Eastern District of P.E. – 3rd	Threat to school safety	Concurring Opinion	School
JR	US District Ct. Western District of P.E. – 3rd	Threat to school safety	Concurring Opinion	School
Harper	US District Ct. Southern District of C.A. – 9th	Political/Social Commentary	Concurring Opinion	School
B.H.	U.S. Ct. of Appeals – 3rd	Political/Social Commentary	Concurring Opinion	School
Norris	US District Ct. Maine – 1st	Political/Social Commentary	Concurring Opinion	Student
J.S.	U.S. Ct. of Appeals - 3rd	Harassing	Majority Opinion	Student
DeCossas	US District Ct. Eastern District of L.A. – 5th	Cell Phone/Drug Investigation	Majority Opinion	School

Chapter 6: Conclusions and Recommendations

Morse and *Tinker* Compared and Contrasted

The focus of this research was *Morse's* impact on student speech. Chapter 5 provided readers with findings answering the research question and guidance for school officials. *Morse has* extended school authority over student expression by adding a *safety standard*. While *Morse* centered around drug-related speech in public schools, some courts have interpreted this to include speech threatening violence. According to conclusions reached in this study, when threatening, harassing, or intimidating statements are a reasonable threat to school safety, schools have jurisdiction to prohibit speech.

Most conversations about student speech begin and end with *Tinker*. All other student speech cases are compared to it, and *Morse* has been no different. In comparing the two cases, *Tinker* has had and will continue to have an extremely long reach. *Tinker* was decided in 1969, at the time of this writing, going on 52 years. History has shown that time can either diminish or strengthen impact. *Morse* is an adolescent, and *Tinker*, the wise old owl. Given time and an ever-evolving world of student speech issues, cases and rulings, *Morse* may have the far-reaching effect that *Tinker* continues to have today. With that said, *Tinker's* material and substantial disruption rule stands as the vanguard for First Amendment student speech rights. Since 1969, it has and continues to be the beginning point to consider when evaluating student speech and developing school system policies related to student speech.

When faced with a K-12 student speech issue, cases always begin with a comparison to *Tinker*. Should the material and substantial disruption standard be met, proceeding further is likely not needed. If, on the other hand, the standard is not met, one

can proceed through *Bethel*, *Hazelwood*, and *Morse.* Past *Morse*, the speech is likely prohibited.

Throughout the research and writing for Chapter 4, many cases presented similar situations, but this research's scope did not allow for their use because they failed to use *Morse* as guidance. The following list contains examples of some cases with similar facts, aligning them with speech threatening violence, but the opinions were not guided by *Morse*: *Brown ex rel. Brown v. Cabell County Bd. of Educ., 714 F. Supp. 2d 587* (2010), *Cox v. Warwick Valley Central School District, 654 F. 3rd 267* (2010), *Cuff v. Valley Central School District, No. 10-2282-cv* (2012).

For comparison, when deciding the limits of student speech, failing one prong of the four-part test does not automatically qualify as a win for students or a loss for school officials. This chapter's final page contains Table 6.1 and provides a visual of the Four Prong Speech Progression Test.

Morse and Drugs

Because of Alito's concurrence and succeeding court interpretations, *Morse* is less about drugs than meets the eye. However, it does reinforce that drugs have no place in school. Further, it provides schools with more authority in student incidents involving drugs. In *Mac Ineirghe v. Board of Education,* U.S. Dist. LEXIS 64841 (2007), questions arose regarding a student's Fourth Amendment protection to unreasonable search and seizure. Though not used in determining a First Amendment issue, the opinion mentioned drug use in schools and the compelling interests schools' have in preventing drugs and drug use within their capacities.[273] The searches by school officials were determined

[273] *Mac Ineirghe v. Board of Education,* U.S. Dist. LEXIS 64841 (2007)

constitutional. Because this case was not about a speech issue, it was not included in Chapter 4. However, the following question deserves to be studied further: does student speech concerning drugs afford school officials more authority to conduct searches via *T.L.O*?[274]

In Chapter Two, it was suggested that the speech in question was simply too nuanced, and as such, unlikely to be a recurring theme for school systems to address through the court system. The suggestion is feasible. It is equally likely that *Tinker* provided enough guidance to prohibit student speech advocating illegal drug use.

Building upon *Morse's* nuanced nature and its relation to drugs, a word of caution is warranted. In reading cases for this study, there were many instances where courts outright refused to extend the concurring opinion's general applicability for safety to anything outside the promotion of drugs. Therefore, knowing how one's federal district has historically interpreted *Morse* is crucial.

Student codes of conduct typically call for severe consequences for a drug-related offense. They will generally involve outside law enforcement in addition to school penalties because not only will school rules be violated, but possibly state and federal laws also.

Chief Justice Roberts may have viewed his opinion as a continuation of the war on drugs. However, Alito's' concurrence made what was passive in the majority opinion more active – threats to school safety will continue to be evaluated under the most stringent filters. Again, in over 60 cases read for this research, only one case involving

[274] *New Jersey v. TLO*, 469 U.S. 325, (1985)

drugs used *Morse* in any analytical method. In contrast, other cases, citing concerns for school safety, specifically violent acts involving weapons and potentially resulting in death (which did not occur), used *Morse* throughout their analysis. One can reasonably conclude that lower federal courts have morphed Alito's opinion toward a more visual and tangible enemy – violence in school.

Education Law as Part of Pre-Service Teacher Preparation

The study of school law is a critical skill for practicing educators; therefore, it should be included as a pre-service student requirement. Avoiding routine but complicated legal issues can be met by studying K-12 public school law.[275] What started as research to explore *Morse v. Frederick* developed into an affirmation of what research began to communicate, a lack of legal knowledge necessitates action. The ideas for this recommendation emerged while completing the literature review. This analysis of the selected court cases and findings did not extinguish those early thoughts concerning educators' knowledge of public school law, but rather strengthened them. This was unexpected consequence of the research. Most often, teachers involved in these cases were unconsciously competent – they knew something was not right, acted appropriately most of the time, but did not know why – a dangerous condition for any professional.

Schimmel noted in his article "Democracy in Education," published in *American Teacher* that educators need more understanding of student rights.[276] His research conducted forty-one years ago is still relevant today, not because of changes in the law,

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[275] Delaney, J. (2009). The Value of Educational Law to Practising Educators. *Education Law Journal*, *19*(2), 119–137. Retrieved from http://search.proquest.com/docview/212965482/

[276] Schimmel, David. Democracy in education. *American Teacher*, 59(6), 10-11. 1975. Walton, M. (1988). *The Deming management method*. Penguin.

but because the study of public school law by educators continues to be ignored. If, as literature in Chapter 2 suggest, public schools are influential in the proliferation of democratic ideals, then governing bodies should lead the way in preparing their teachers to do so. Those pursuing degrees in school administration will likely have at least one course in public school law. However, those earning an undergraduate teacher certificate are often given short lessons on an extensive topic. Patterson and Row published research in 1996, indicating that 18 out of 700 teacher preparation programs had required school law courses as part of their pathway.[277]

Undergraduate teacher service programs that include a school law course is a largely unexplored field and is an area where future research is needed. The research could explore educator knowledge concerning school law and what gaps exist, and how to close those gaps. Another potential study could examine the design of school public school law courses currently included in education programs and their graduates' application of school law since beginning a career in public education.

As Reglin suggests, courts often decide educational policy matters, curriculum issues, teacher rights, and student rights.[278] Therefore, it is incumbent that professionals be able to comprehend and apply these court decisions. Compounding the seriousness of his findings, teachers with no working knowledge of public school law and its impact on daily school operations limit their own effectiveness. Additionally, another study

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[277] Patterson, F., & Rossow, L. (1996). Preventive law by the ounce or by the pound: Education law courses in undergraduate teacher education programs. National Forum of Applied Educational Research Journal, 9(2), 38-43.

[278] Reglin, G. L. (1992). Public school educators' knowledge of selected Supreme Court decisions affecting daily public school operations. *Journal of Educational Administration, 30*(2).

concluded that most teachers are legally illiterate about school law but through no fault of their own.[279] Why is legal literacy essential to teachers? Gullatt and Tollett citing Sametz propose teachers be more responsive to society and better serve students' interests. To do so, a firm understanding of law as it relates to children is critical.[280]

A dissertation as recent as 2016 explored this topic and spoke to the lack of teacher understanding of school law, the lack of designed courses for pre-service teachers, and the need for such courses in preparation programs.[281] The cost of failing to address this issue is not just deducted in the court of public opinion but also from the savings of school systems and taxpayers. What is the multiplying effect of bad press when mistakes are preventable? The National School Boards Association reported in 1989 that average attorney fees for school districts were $13,500, given there were roughly 15,000 school districts across the country at that point, the total equals more than 200 million dollars.[282] Lawsuits will occur regardless of how right a system is behaving; by mitigating avoidable ones, money is saved.

The need for pre-service law instruction is evident, and the means to accomplish it is found in the process of every undergraduate teacher education program.

North Carolina and Pre-Service Programs

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[279] Schimmel, D., & Militello, M. (2007). Legal literacy for teachers: A neglected responsibility. *Harvard Educational Review*, *77*(3), 257-284.
[280] Gullatt, D. E., & Tollett, J. R. (1997). Educational law: A requisite course for preservice and in-service teacher education programs. *Journal of Teacher Education*, *48*(2), 129-136.
[281] Keeling, J. D. (2016). *THE EFFECTS OF VIDEO-BASED EMBEDDED SUPPLEMENTAL INSTRUCTION UPON PRESERVICE TEACHERS' SCHOOL LAW COMPETENCY* (Doctoral dissertation, Liberty University).
[282] Gullatt, D. E., & Tollett, J. R. (1997). Study of legal issues recommended for teacher education programs. *The Teacher Educator*, *33*(1), 17-34.

North Carolina's' teacher preparation programs largely ignore the need for school law instruction. Currently, forty-seven teacher licensure programs are approved and posted on the North Carolina Department of Public Instruction website.[283] Reviewing the programs from that page will lead individuals to coursework information. Classes designed explicitly on school law are lacking. Generally, unless a candidate is seeking licensure in special needs instruction, are there any law classes. The programs are not adequate to prepare future educators in a litigious society.

Pre-Service Course Design and Curriculum

There is an undeniable need for a school law course designed to provide educators with substantial applicable knowledge of public school law. The course and where it best fits on a program pathway should be determined through a collaborative effort involving public and private agencies and organizations.

The course should also include data collected from all 115 LEAs in NC. The data would include the most common legal issues that beginning teachers encounter during their first three years in the profession and legal issues that occur most commonly regardless of years of experience.

Gajda writes that despite scholarly research and recommendations, it is wishful thinking that incorporating legal issues into the existing course content of teacher education programs will somehow translate into a sound curriculum in school law.[284] Students deserve equitable treatment concerning the law, and teachers deserve the same

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[283] https://www.dpi.nc.gov/approved-programs

[284] Gajda, R. (September 06, 2008). States' Expectations for Teachers' Knowledge about School Law. *Action in Teacher Education, 30,* 2, 15-24.

treatment too. Part of guaranteeing that treatment will be providing teachers trained and licensed in North Carolina with practical and applicable knowledge of state and federal school law afforded them through the addition of an educational law course in all teacher pre-service training programs.

This researcher recommends, that the North Carolina State Board of Education recommend to the North Carolina University System that all state universities add an educational law class to their undergraduate teacher preparation programs. State private universities should be encouraged to do the same.

Example curriculum design for a North Carolina teacher preparation law course

- The Government in Education
  - Federal and State Governance

- US Constitutional Rights
  - Education and the United States Supreme Court
  - Federal Courts - Appeals and District
  - Students - Speech, Religion, Due Process, Search and Seizure
  - Teacher Rights - Due Process, Speech, Religion, Wages & Compensation

- Federal Role in Education and Policy
  - Elementary and Secondary Education Act
    - Title I & Title IX
  - Reauthorizations
    - No Child Left Behind
    - Race to the Top
    - Every Student Succeeds Act

- The State of North Carolina School Law and Policy
  - North Carolina Constitution and "A sound, basic education"[285]
  - General Statutes
    - Chapter 115C – Elementary and Secondary Education
  - *Leandro* & *Hoke* – North Carolina State Court in Education
  - Teacher Evaluation and Professional Growth Plans
  - Statutory Regulations
    - Contracts/Tenure/Probationary/Non-Renewal/Lateral Entry

[285] *Leandro v. State*, 488 S.E.2d 249, 346 N.C. 336 (1997)

- Action Plans
- School Improvement Plans

School Systems

Given the effects of the COVID-19 pandemic on schools, and the contested 2020 elections, school systems should, more than ever, embrace their unique role in American democracy. To that end, they should consider how best to carry on with their jobs while also upholding their share of democratic promise and ideals. This responsibility can and should be accomplished through strategic planning involving district, school, and teacher leadership. The following is a list of recommendations school systems might consider when planning training for faculty, staff, and students concerning student speech rights.

- School system executives should review school board policies to avoid any misalignment between policy and the law.
- School board policy should pay attention to rulings from the school system's federal district and update applicable policies and student codes of conduct as opinions are issued impacting current policy.
- Curriculum directors should plan professional development for social studies teachers where the curriculum aligns with the teaching of student free speech and other Constitutional issues, especially at the secondary level.
- School and district procedures for evaluating student speech should be created. Table 6.1, on the final page of this chapter, provides school systems with some assistance in assessing student speech per United States Supreme Court jurisprudence.

- Schedule legal updates with school system attorneys for all executive staff and school administrators. Updates should include emerging areas of student speech and how to assess issues and apply the law correctly.
- School administrators should inform faculty and staff of speech updates regularly.
- School administrators should regularly review school policy to avoid any misalignment between school policy, board policy, and the law.

Final Opinions

What is the legal standard created by *Morse v. Frederick* on student speech in K-12 public education? By and large, the federal courts have used *Morse* to further how schools could choose to prohibit speech viewed by an observer as threatening. However, the special characteristics of schools do not automatically provide school officials with unlimited authority. It may be more defensible than leaning on the educational mission alone, therefore, likely broad enough to extend jurisdiction over some forms and kinds of speech. As stated previously, Alito joined the majority opinion and cautiously expressed personal views in his concurrence.

Concerns for school safety are at the forefront of the mind of every person that sends a child to school. Eliciting mental images of Columbine, Sandy Hook, and Virginia Tech and discussing the frequency of violent acts in public school tug on the heartstrings. To a significant degree, the findings support a specific nexus between *Morse* and school safety concerns.

The data did bear out that district population and the number of school shootings could be an important finding and might also explain why certain courts have ruled on

student speech and safety. It is reasonable that opinions from larger federal districts could indirectly influence smaller districts to align with their opinions. Third District Court judges have weighed recent events from their district while also discussing well-known past school shootings in their opinions. It is also reasonable that other judges consider the gravity of potentially violent, planned attacks when assessing student speech threatening safety. Should this occur, *Morse's* influence may expand and create further case law.

Each day, parents and guardians expect their children to return home just the way they left in the morning. Too often, violent acts occur in schools to the point of being routine, and afterward, educators are left wondering why they happened and how to prevent future incidents. There are ways to reduce their likelihood and prohibiting certain kinds of speech that might lead to violence is one way. Moreover, *Morse* leads the way in defining these prohibitions.

None of the cases briefed for this research involved violence that befell anyone at school. While initial reactions to statements made by students in cases that dealt with safety may be dismissed as harmless and not credible to some individuals, however, school officials and courts determined otherwise. Whether each situation warranted severe school consequences was not within the scope of this research. However, *Tinker* and now *Morse* offers well-established guidance in decision making regarding student speech and school safety.

The United States Supreme Court has yet to hear a case stemming from a public school concerning internet speech or comments threatening harm stemming from violence. Until then, educators must apply the law as the courts have written it and be unwavering in executing what the law deems legal.

As a practicing educator, it is difficult not to speculate about the meetings and conversations between school officials, parents or guardians, and students in these cases. Were the participants cordial? Were the meetings contentious but opportunistic? Ultimately, one must ask whether these legal battles were avoidable?

Students will make mistakes, and it should be expected among educators to provide students with reasonable consequences whatever the situation may be. Working with families and being empathetic will demonstrate that, in difficult positions, we respect their rights and value every student.

*Table 6.1 – Four-Prong Speech Progression Test

Case	**Standard Created for Limiting Student Speech**	**Off-Campus Limits**	**If No…**
Tinker	- Material and Substantial Disruption - Infringing upon the rights of other	- Some applicability must meet objective measures	- Apply *Bethel…*
Bethel	- On-campus lewd and offensive speech	- Unlikely, as off-campus speech has more protections	- Apply *Hazelwood…*
Hazelwood	- Speech viewed as bearing the imprimatur of the school	- Unlikely, as decisions focused on curriculum/class related speech	- Apply *Morse…*
*Morse***	- Speech advocating illegal drug use - Threats to student safety	- Must meet objective measures related to drugs or school safety	- Speech is likely protected

**Schools maintain authority over students and student speech in official school activities – on and off-campus.

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