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Homophobic Expression in K–12 Public Schools: Legal and Policy Considerations Involving Speech that Denigrates Others

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Abstract

This article examines an education policy matter that involves homophobic speech in public schools. Using legal research methods, two federal circuit court opinions that have examined the tension surrounding anti-LGBTQ student expression are analyzed. This legal analysis provides non-lawyers some insight into the current realities of student speech jurisprudence in public schools and offers school leaders guidance about how they might address speech that denigrates other students. It also proposes how courts might reconsider analyzing homophobic expression in public schools under existing precedent.

Keywords: LGBTQ, law, educational policy, speech, First Amendment

The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

—*Bethel Sch. Dist. No. 403 v. Fraser*, 1986, p. 681

The law continues to play “an increasingly significant role” (McCarthy, 2016, p. 565) in education policy. From Yale to Berkeley, universities are currently debating the limits of the First Amendment on campus (Fuller & Saul, 2017; Kristoff, 2015). At the same time, K–12 public schools continue to grapple with the scope of students’ First Amendment rights (Balakit, 2015). Complex questions often arise in courts and classrooms when student speech denigrates other students.² For example, imagine that a student wears a Confederate flag T-shirt with the slogan “White Pride” during a school-sponsored Black History Month celebration. What if a student wears a swastika button during a religious tolerance day or a homophobic T-shirt on the National Day of Silence?

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² For the purposes of this article, speech that denigrates has been defined as injurious speech that attacks members of a minority group who have been historically marginalized. This type of expression makes students feel inferior, intimidates them, and/or attacks their core being; it is speech that is wholly inconsistent with the school’s mission.

Would school officials be able to prohibit this expression? Students who wear such shirts might argue that they have the right, under the First Amendment's Free Speech Clause, to offer another viewpoint. They might also contend that they have the First Amendment right to express their sincerely held religious beliefs in public schools, even if that speech denigrates racial, religious, or sexual minorities. Courts across the country are deciding such cases and affecting education policy in K–12 public schools. As will be discussed, courts are bound by legal precedent, and these opinions do not always equate to good education policy (Chemerinsky, 2003; Superfine, 2009).

When examining these complicated legal and policy issues, K–12 public school officials must be careful to give students the ability to become thoughtful and politically active citizens; they must tread lightly on limiting students' right to free expression. As Justice Brennan observed in the U.S. Supreme Court decision *Tinker v. Des Moines* (1969), "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas" (p. 512; quoting *Keyishian v. Board of Regents*, 1967, p. 603). However, although the U.S. Supreme Court ruled that "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 1969, p. 506), First Amendment rights for public school students are not absolute. The Court has noted that speech involving K–12 students is different and, accordingly, has afforded more leeway to school officials when attending to students' developmental and psychological needs. As a result, courts have consistently held that students' constitutional rights are not as extensive as the rights afforded to adults in other settings (see *Bethel Sch. Dist. No. 403 v. Fraser*, 1986), as public schools are a unique sphere. For example, in the school context, "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner" (*Karp v. Becken*, 1973, p. 175). Thus, "expressions [that] are constitutionally permitted in newspapers, public parks, and on the street" might be controlled in a public school because "[p]ublic school students cannot simply decide not to go to school" (concurring opinion, *Defoe v. Spiva*, 2010, p. 338).

Significance

This article will examine the legal and policy considerations surrounding one particular speech issue: homophobic expression in K–12 public schools. The topic is especially timely, as the U.S. Supreme Court recently ruled that the U.S. Constitution guarantees a right to marriage equality under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment (*Obergefell v. Hodges*, 2015). Although the *Obergefell* decision addresses marriage, there are certainly some implications for public schools and lesbian, gay, bisexual, transgender, and queer (LGBTQ) students. A legal-affairs reporter from *Education Week* contended that the marriage equality opinion "holds various implications for the nation's schools, including in the areas of employee benefits, parental rights of access, and the effect on school atmosphere for gay youths" (Walsh, 2015, p. 1), and others have written about how the decision will likely impact school climate for LGBTQ students (Adams, 2015; Lewis, Walsh, & Eckes, 2016).

Further, there are renewed debates about the limits of speech that may stigmatize others on college campuses (Kristoff, 2015) and in K–12 schools (Embree, 2014). Likewise, state governments are examining issues (sometimes under the First

Amendment) regarding whether to exempt businesses from serving LGBTQ individuals. Public school students also continue to organize “anti-gay” days in public schools (see e.g., Middleton, 2015; “Students Stir Controversy,” 2014). For example, in 2016, students in California and Connecticut wore anti-gay stickers and shirts with rainbows with lines through them; school officials struggled with the appropriate response (Associated Press, 2016).

Although the legal literature has widely addressed issues involving offensive speech in K–12 public schools (e.g., Bowman, 2007; Conover, 2015; Curtis, 2009; Gilreath, 2009; Harvard Law Review, 2014; Houle, 2008; Lee, 2014; Macias, 2012; McCarthy, 2009a, 2009b; Taylor, 2009), education policy and leadership journals have not fully analyzed these issues. The education literature has clearly documented the high levels of harassment LGBTQ students experience in schools and the negative impact that this has on students’ emotional and academic well-being (Huebner, Rebchook, & Kegeles, 2004; Kosciw, Greytak, Bartkiewicz, Boesen, & Palmer, 2012; Lefebvre, Kelvin, & Grosskopf, 2013); the higher suicide rates involving gay teens (American Association of Suicidology, n.d; Kann et al., 2016); and the legal issues involving LGBTQ harassment and bullying (Biegel, 2010; Kimmel, 2016). However, fewer education articles focus on the legal parameters involving anti-LGBTQ speech in school. Similarly, only a limited number of education researchers have examined the role of courts in influencing education policy around students’ expression rights involving anti-LGBTQ speech (e.g., Biegel & Kuehl, 2010; Fetter-Harrott, 2014; McCarthy, 2009a, 2009b).

Questions

The U.S. Supreme Court has not addressed the specific issue of homophobic speech in the K–12 context, but two federal circuit courts have done so. These circuit court cases, from 2007 and 2011, are the focus of this study, and although they are not recent cases, the increased attention on LGBTQ rights, as mentioned above, makes this analysis particularly relevant. As will be discussed, one federal circuit court upheld school officials’ decision to prohibit anti-LGBTQ speech, while the other federal circuit court permitted such speech. This study seeks to address this gap in the education research by answering two questions: (a) How have the federal circuit courts analyzed anti-LGBTQ speech in K–12 public schools? and (b) What is the current status of the law for school officials who might be interested in adopting policies that prohibit anti-LGBTQ speech in public schools?

Several education law scholars argue that school personnel need to understand the law in order to create equitable environments in schools (e.g., Decker, 2014; Heubert, 1997; McCarthy, 2016). Decker (2014) observes that “as educators learn about the law and the legal system, they become empowered to influence education policy within and outside their classrooms, buildings, and districts” (p. 683). Accordingly, this analysis will provide non-lawyers, including school personnel, some insight into the current realities of student speech jurisprudence in public schools. I also discuss how courts might analyze

this issue through existing precedent while considering the special context of K–12 public schools.³

Organization of the Study

First, to set the legal context regarding speech that denigrates students, I discuss the four U.S. Supreme Court decisions that directly focus on K–12 student expression, relevant lower court opinions addressing speech that disparages students, and selected viewpoint discrimination⁴ cases. In legal research, scholars use court decisions to document the historical progression and current status of the law involving a specific area of jurisprudence. Thus, instead of a traditional literature review, I provide a case review to examine the four U.S. Supreme Court decisions that have directly involved K–12 student speech in public schools and the lower court decisions that have analyzed student speech that stigmatizes others. Because there are few court opinions that address anti-LGBTQ speech in schools, I examine lower court opinions focused on racially hostile and anti-religious speech in public schools in order to learn how speech that denigrates students on account of their sexual orientations might be curtailed. As McCarthy (2016) observed, “The Supreme Court’s decisions influence the contours of our rights and every aspect of the law, which school personnel need to comprehend” (p. 575).

Next, I use legal research methods to review and examine the federal circuit court decisions addressing homophobic or anti-LGBTQ speech in schools. I then analyze the findings of the cases reviewed, which suggest that there is both a conflict in the courts when addressing anti-LGBTQ speech in public schools and a lack of guidance for school officials. Next, I argue why, based on existing precedent, courts should permit public-school officials to craft policies that curtail denigrating and injurious commentary related to sexual orientation under existing precedent. Alternatively, courts might consider creating another exception within the existing case law that would grant school officials the ability to curtail speech that demeans students in public schools. Finally, I stress how it is possible to maintain important current protections for students’ political speech and speech related to critical social issues.

The Four U.S. Supreme Court Decisions Involving Student Speech

The U.S. Supreme Court has permitted four exceptions that limit students’ free expression rights in public schools. These four Court cases provide important context that applies specifically to K–12 student expression jurisprudence. Thus, the cases serve as guidance to school officials who are interested in creating policies that prohibit speech that denigrates students in public schools.

Tinker v. Des Moines Indep. Cmty. Sch. Dist.

In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969), the Court examined whether school officials violated the First Amendment rights of students who were suspended for wearing black armbands to school to protest the Vietnam War. The Court ruled that there

³ The information in this article is not legal advice.

⁴ Viewpoint discrimination occurs when the government favors one opinion or a particular controversy over another.

was no evidence that the armbands created a material and substantial disruption in the school. It also found that, when the students wore armbands, they were not interfering or colliding “with the rights of other students to be secure and to be let alone” (p. 508). As such, students’ private political speech is protected unless it creates a material and substantial disruption in the school (i.e., *Tinker*’s first prong) and/or if it collides with the rights of others (i.e., *Tinker*’s second prong). I examine *Tinker*’s first and second prongs throughout this article. It should be noted, however, that *Tinker*’s first prong concerning disruption is relied upon much more frequently than the second prong in cases involving student expression.

Bethel Sch. Dist. No. 403 v. Fraser

Over 15 years later, in *Bethel Sch. Dist. No. 403 v. Fraser* (1986), the Supreme Court analyzed whether school officials could curtail a student’s speech at a school-sponsored assembly. The case concerned a student who used an explicit sexual metaphor when speaking about a friend who was running for student council. The student was suspended for two days and sued the district under the First Amendment. Noting the difference between the political speech in *Tinker* and the sexual language in this speech, the Court ruled in favor of the school district, observing that “schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, offensive speech and conduct such as . . . Fraser’s . . . plainly offensive [speech]” (p. 683). Moreover, the Court stressed that

[p]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation. (p. 681)

Thus, according to the Court, school officials have the authority to decide “what manner of speech in the classroom or in school assembly is inappropriate” (p. 683) and teach “students the boundaries of socially appropriate behavior” (p. 681). And, although we must tolerate “divergent political and religious views . . . we must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students” (p. 681).

Hazelwood Sch. Dist. v. Kuhlmeier

Two years after *Fraser*, in *Hazelwood Sch. Dist. v. Kuhlmeier* (1988), students contended that their principal violated their First Amendment rights when he censored two pages of the school newspaper that included stories about teen pregnancy and the impact of divorce on students. The principal was concerned that students would be able to identify which pregnant students and divorced parents were discussed in the articles. The Supreme Court ruled in favor of the school district, finding “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” (p. 273). The Court also observed that students’ rights “must be applied in light of the special characteristics of the school

environment” and that school officials need not tolerate expression that is inconsistent with the school’s basic educational mission (p. 266). *Hazelwood* addressed school-sponsored speech, which is quite different from student-initiated speech, the focus of the *Tinker* and *Fraser* cases. However, as will be discussed below, some courts have relied on *Hazelwood* in prohibiting student-initiated speech.

Morse v. Frederick

Finally, *Morse v. Frederick* (2007) concerned a student who unfurled a banner at a school-sponsored event that said, “Bong Hits 4 Jesus.” When he refused to remove the banner, the principal took it and suspended him. The student then sued under the First Amendment, claiming there was no evidence that the banner caused a disruption, as required by *Tinker*’s first prong. In this ruling, the Supreme Court held that school officials may discipline student speech at school-sponsored events that they reasonably view as promoting illegal drug use. Moreover, the Court observed that school officials must sometimes take reasonable “steps to safeguard those entrusted to their care” (p. 397) and that “schools may regulate some speech even though the government could not censor similar speech outside of the school” (p. 406). The case distinguished political speech from speech that relates to physical safety. The Court also reiterated the special nature of the public school setting, where students’ constitutional rights are different from those of adults and where the Court “cannot disregard the schools’ custodial and tutelary responsibility of children” (p. 406). The concurring opinion argued that *Morse* was a narrow decision applying only to cases involving advocacy for illegal drug use, and that it should not be extended to speech related to social or political issues. This opinion thus raised questions about the meaning of *Fraser*. However, as will be discussed, not all lower courts have interpreted *Morse* so narrowly.

Applying the Precedent

School officials have attempted to navigate these four student expression cases when creating policies that impact student speech. In doing so, many districts have policies that prohibit speech that would likely cause a disruption in the school or speech that is considered highly offensive or lewd. These types of policies often target speech that could be considered racist, homophobic, or anti-religious. For example, one school district in Illinois prohibited “derogatory comments,” oral or written, “that refer to race, ethnicity, religion, gender, sexual orientation, or disability” (*Nuxoll v. Indiana Prairie Sch. Dist.*, 2008, p. 670). However, in some cases, such policies have been struck down in lower courts, which has led to inconsistent outcomes across jurisdictions.

Other Considerations

Other U.S. Supreme Court decisions are related to the issue of free speech in K–12 schools. For example, Waldron (2012) highlighted how the Supreme Court upheld prohibitions on speech that denigrates minority groups in a non-school case. In *Beauharnais v. Illinois* (1952), the Court upheld a state law that prohibited the White Circle League, a white supremacist group, from distributing false or malicious defamation against nondominant racial and religious groups in public places. As Waldron

suggested, courts might also consider *Beauharnais* in controversies involving K–12 speech that is deemed malicious against racial minorities, religious groups, and LGBTQ students. However, although decisions such as *Beauharnais* could be informative, the four U.S. Supreme Court cases on K–12 student speech discussed above remain the focus of this paper.

Relevant Lower Court Decisions Involving Speech that Denigrates Other Students

Several recent examples arising in schools (e.g., T-shirts that say “Build the Wall”) raise questions around the contours of students’ right to free speech in schools. This section discusses illustrative lower court cases that involve speech that might be considered to denigrate others in K–12 public schools. Most of the decisions involve racially hostile speech while a few include religiously hostile speech. The outcomes of these cases could inform school leaders examining the issue of anti-LGBTQ speech in public schools.

Racially Hostile Speech

From recent controversies in South Carolina about the Confederate flag to Confederate statues in New Orleans and Charlottesville, a national discussion about state symbols that many find offensive has been reignited. Although the Confederate flag may invoke pride over the Civil War or could signify honor for one’s ancestors who fought in the war, many students might find the symbol representative of racial hostility. Therefore, there has been much controversy in U.S. public schools involving apparel depicting the Confederate flag.

Several lower courts have examined student expression with regard to Confederate flags, and these decisions provide some insight about how schools might address homophobic expression. To illustrate, the Eleventh Circuit (Alabama, Florida, and Georgia) Court of Appeals compared the flag to slogans such as “Blacks should be slaves” or “Blacks are inferior” (*Scott v. Sch. Bd of Alachua Cnty.*, 2003, pp. 1248–1249). Further, in a recent Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) Court of Appeals case, a middle school student wore various Confederate flag shirts to school depicting messages such as “Honorary Member of the FBI: Federal Bigot Institutions” and “Jesus and the Confederate Battle Flag: Banned from Our Schools but Forever in Our Hearts” (*Hardwick v. Heyward*, 2013). Another shirt depicted an American flag and the words, “[f]lew over legalized slavery for 90 years!” School personnel asked the student to change her shirt, and when she refused, she was suspended for one day.

The student filed a lawsuit alleging that she had a First Amendment right to wear the shirts because they expressed her heritage and religious faith. In a unanimous decision, relying on *Tinker*, the circuit court upheld the district court’s opinion that a student’s right to free speech can be curtailed as long as school officials have evidence allowing them to reasonably forecast a substantial disruption. The court posited that the history of racial tension in the school district provided adequate evidence, even though much of the racial tension in the district had subsided by the time of this case (Eckes & Minear, 2014). For example, in the 1980s, in response to an interracial couple who attended prom

together, several white students wore Confederate flags and Black students wore clothing depicting Malcolm X. Furthermore, in the 1990s, two students set a historic Black church on fire and another student drove his truck, which sported a Confederate flag, through the school parking lot. Thus, according to the Fourth Circuit, the history of racial tension in the district justified school officials' actions, as the shirts could cause a substantial disruption under *Tinker*. With regard to viewpoint discrimination, the Fourth Circuit reasoned that the school's policy did not specifically target a Confederate flag or any other viewpoint. The school's policy was therefore found to be viewpoint-neutral. According to the court,

[a]lthough students' expression of their views and opinions is an important part of the educational process and receives some First Amendment protection, the right of students to speak in school is limited by the need for school officials to ensure order, protect the rights of other students, and promote the school's educational mission. (p. 444)

In a more recent decision, another circuit court also prohibited a T-shirt based on school officials' ability to reasonably forecast a disruption. In 2014, the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) upheld a California high school's decision to ban students from wearing American flag shirts on Cinco de Mayo because the shirts reasonably led school officials to forecast a substantial disruption and possible race-related violence (see *Dariano v. Morgan Hill Unified Sch. Dist.*, 2014). To illustrate, within the past six years, the principal witnessed 30 fights between gangs and between white and Hispanic students. The students' First Amendment claims failed because, as permitted by *Tinker*, school officials based their decisions on the possibility of violence, and, therefore, they were acting to protect students. Relatedly, the court recognized that speech that collides with the rights of other students can also be prohibited under *Tinker's* second prong.

Not all courts have taken the same approach. For example, in 2001, the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) did not find any evidence of disruption as a result of a T-shirt featuring a country singer on the front and a Confederate flag on the back. The court also stressed that school officials may have engaged in viewpoint discrimination by banning the Confederate flag and not simultaneously prohibiting clothing depicting other racially charged images (e.g., Malcolm X T-shirts; *Castorina v. Madison Cnty. Sch. Bd.*, 2001). A few other federal district courts have also struck down bans on Confederate flags when no disruption was present (see e.g., *Bragg v. Swanson*, 2005; *Glowacki v. Howell Pub. Sch. Dist.*, 2013).

However, more recent Sixth Circuit decisions upheld school officials' decisions to prohibit the Confederate flag symbol on clothing. In a 2008 opinion, students who wanted to express their Southern heritage were prohibited from wearing Confederate flag apparel. The court held that school officials, under *Tinker*, could reasonably forecast that the racially charged symbol would create a substantial or material disruption in this school. Interestingly, the court also recognized that school officials could still prohibit the symbol without needing to forecast disruption (*Barr v. Lafon*, 2008). In this case, the principal told two students to remove their Confederate flag T-shirts or face suspension. The principal based his decision on conversations with students and parents who

indicated that they felt taunted by the flag and were fearful for their safety. In making its determination, the court relied upon *Tinker*, finding that school officials can regulate speech that materially interferes with “school work” and “discipline” (pp. 563–564).

Likewise, in 2010, the Sixth Circuit again permitted school officials, under *Tinker*, to suspend a student for wearing a Confederate flag T-shirt in violation of the school’s dress-code policy (*Defoe v. Spiva*, 2010). The court also posited that *Tinker*’s second prong allows a limitation on free speech when such speech interferes with the work of the school or would “impinge upon the rights of other students” or the right “to be secure and let alone” (p. 334). The court argued that school officials could reasonably forecast a substantial disruption, but two judges, in a concurring opinion, held that it was not necessary for school officials to reasonably forecast disruption in cases involving racially hostile speech. The concurring opinion stated that “[e]xpressions of racial hostility can be controlled in public schools even if students in the attacked racial group happen to be mature, good-natured, or slow to react. Schools are places of learning and not cauldrons for racial conflict” (p. 338). Further, the court found no viewpoint-discrimination problem because the school banned all racial or ethnic slurs and symbols, not only Confederate flags. The Fifth and Eighth Circuits have also upheld bans involving the Confederate flag if past incidents involving race could reasonably lead school officials to predict that it would cause a substantial disruption (see e.g., *A.M. v. Cash*, 2009; *B.W.A. v. Farmington R-7 Sch. Dist.*, 2009).

Although most courts have applied the *Tinker* case in Confederate flag cases, an Eleventh Circuit opinion relied on the U.S. Supreme Court decision from *Bethel v. Fraser* (1986). *Denno v. Sch. Bd. of Volusia Cnty.* (2000) concerned a high school student who was suspended for showing a small Confederate flag to friends at school. The student, who had developed a keen interest in the Civil War and participated in Civil War enactments, was suspended for nine days and sued school officials under the First Amendment. This court reasoned that *Fraser* allowed school officials to prohibit highly offensive speech even without evidence of disruption. In addition, the court found that the flag symbol is perceived by some as offensive and constituting a racist message, and held that *Fraser* permits “teaching students the boundaries of socially appropriate behavior” (*Denno*, 2000, p. 1271, citing *Fraser*, p. 681). The court also posited that the “cultivation of the ‘habits and manners of civility’” that *Fraser* held “essential to a democratic society” may call for a level of parent-like guidance in a school setting that ordinarily “has no place in a public forum” (*Denno*, 2000, p. 1272, citing *Fraser*, p. 681). Three years later, the Eleventh Circuit again relied on both *Tinker* (disruption) and *Fraser* (inculcating habits and manners of civility) in upholding the right of school officials to ban students from wearing Confederate flags (*Scott v. Sch. Bd of Alachua Cnty.*, 2003). In fact, the court observed that even if disruption is not immediately likely, school officials can still discipline the speech under *Fraser* if the speech is highly offensive to others.

The Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) similarly relied on elements of *Tinker*, *Fraser*, and *Hazelwood* when it found that a student’s First Amendment rights had not been violated. The middle school student in this case was disciplined for drawing a Confederate flag during math class (*West v. Derby Unified Sch. Dist. No. 260*, 2000). In addition to applying *Tinker*’s substantial disruption

test, the Tenth Circuit recognized that *Tinker*'s second prong (i.e., the rights of students to be secure and let alone) is also applicable in student speech cases. Citing *Tinker*, the court explained that school authorities can limit student expression that might "substantially interfere with the work of the school or impinge upon the rights of other students" (p. 1366). In referencing both *Fraser* and *Hazelwood*, the court also pointed out that students' speech rights in public school are not as extensive as those of adults in other settings.

Based on the Confederate flag discussion above, it is clear that sometimes courts take different approaches (e.g., employing *Tinker* instead of *Fraser*) to reach similar outcomes (e.g., finding that the school district did not violate students' First Amendment rights). Most courts rely on *Tinker* and permit school officials to ban racially hostile speech if it creates a substantial disruption or when school officials can reasonably forecast the disruption (*Barr v. Lafon*, 2008; *Dariano v. Morgan Hill Unified Sch. Dist.*, 2014; *Hardwick v. Heyward*, 2013), and districts with a history of racial tension will generally have an easier case (*Barr v. LaFon*, 2008; *Dariano v. Morgan Hill Unified Sch. Dist.*, 2014; *Hardwick v. Heyward*, 2013). However, whereas some circuits applied *Tinker*'s first prong, others recognized *Tinker*'s second prong: the Sixth Circuit (*Barr* and concurring opinion in *Defoe*), the Ninth Circuit (*Dariano*), and the Tenth Circuit (*West*, 2000). Although not discussed above, the Fourth Circuit also relied on *Tinker*'s second prong in a student internet speech case involving a student severely ridiculing another (see *Kowalski v. Berkley Cnty. Schs.*, 2011). Finally, although most circuits relied on *Tinker*, the Eleventh Circuit cited *Fraser* in the *Denno* and *Scott* decisions, ruling that student speech that is considered highly offensive could also be limited, even if no disruption was present.

Anti-Religious Speech

Around the country, anti-religious speech in public schools has been an issue, but there is not a lot of case law (Hensker, 2009). Similar to racially hostile speech, court opinions related to anti-religious speech provide some insight into how anti-LGBTQ speech in public schools could be analyzed. For example, in Florida, which falls within the Eleventh Circuit, a student was prohibited from wearing a T-shirt that said "Islam is of the Devil" to his public school. The American Civil Liberties Union (ACLU) defended the student, arguing that the student's expression should be protected. The federal court denied the student's motion for a preliminary injunction for mootness, finding that the school's revised policy was consistent with other anti-discrimination policies in workplaces. The school's revised policy prohibited "clothing or accessories that . . . denigrate or promote discrimination for or against an individual or group on the basis of age, color, disability, national origin, sexual orientation, race, religion, or gender" (p. 12). Citing the *Morse* decision, the court reasoned that the policy was consistent with furthering governmental and pedagogical interests (*Sapp v. Sch. Bd.*, 2010). In a later proceeding, which granted the school district's motion for summary judgment, the court again stressed that school officials may perform the traditional function of inculcating the habits and manners of civility (*Sapp v. Sch. Bd.*, 2011), and they need not wait for a disruption to occur. The federal district court reasoned:

“Islam is of the Devil” presents a highly confrontational message. It is akin to saying that the religion of Islam is evil and that all of its followers will go to hell. The message is not conducive to civil discourse on religious issues; nor is it appropriate for school generally. Part of a public school's mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in terms of debate highly offensive or highly threatening to others. (p. 10)

Consistent with some of the the racially hostile speech cases discussed earlier, this court did not require a disruption to occur before the speech could be limited.

Similarly, *Boroff v. Van Wert* (2000) concerned an Ohio student who, after wearing a Marilyn Manson T-shirt on five separate days, was told by school officials to refrain from doing so. According to the court record, Marilyn Manson is known as a Satan worshipper. One of the shirts worn depicted a three-face Jesus with the words “See No Truth. Hear No Truth. Speak No Truth.” The word “BELIEVE” was written on the back of the shirt with the letters “LIE” highlighted. The principal found all the shirts to be problematic, noting that the distorted Jesus figure was offensive and “mocking any religious figure is contrary to our educational mission which is to be respectful of others and others’ beliefs” (p. 472). The Sixth Circuit, relying on *Fraser*, held that school officials did not act unreasonably when prohibiting these shirts, stressing that school officials can prohibit shirts that include “symbols and words that promote values that are so patently contrary to the school’s educational mission” (p. 470).

However, in a subsequent decision, a federal district court in Ohio, which falls under the jurisdiction of the Sixth Circuit, granted a student’s motion for an injunction, which allowed him to wear a shirt that stated the following on the front: “INTOLERANT Jesus said . . . I am the way, the truth and the life. John 14:6.” The back of the shirt included the following statements: “Homosexuality is a sin!; Islam is a lie!; Abortion is murder!; Some issues are just black and white!” (*Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 2005, p. 967). The court found no evidence of disruption or a reasonable likelihood of disruption. According to the court, *Fraser* did not apply as it did in *Boroff* because the student’s shirt was not plainly offensive.

In analyzing anti-religious speech, the federal district court in Florida relied on *Morse*, the Sixth Circuit cited *Fraser*, and the federal district court in Ohio (within the jurisdiction of the Sixth Circuit) used *Tinker*. Interestingly, also within the Sixth Circuit, a picture of a three-headed Jesus (in *Boroff*) was found offensive, but a shirt reading “Islam is a lie!” (in *Nixon*, 2005) was not. As cases are very fact-specific, the Sixth Circuit’s lack of consistency when analyzing student speech cases is not new—there were also conflicting opinions about speech related to Confederate flags (*Castorina* permitted the flag, whereas *Barr* and *Defoe* did not). These inconsistent outcomes make creating education policies especially difficult.

Viewpoint Discrimination and Other Related Matters

If a school allows students to organize the National Day of Silence to promote awareness about LGBTQ bullying, must school officials permit students to wear anti-

LGBTQ shirts? If a school district permits students to organize a religious tolerance day, must it also allow students who are opposed to this day to wear swastikas? If a school sponsors an assembly focused on the Black Lives Matter movement, must school officials likewise allow students to wear “White Lives Matter” shirts to school that day? These questions raise concerns related to viewpoint discrimination.

Viewpoint Discrimination

By banning racially hostile, homophobic, or anti-religious speech in public schools, some courts have warned that school officials run the risk of engaging in viewpoint discrimination (see *Nuxoll v. Indian Prairie Sch. Dist.*, 2008). The U.S. Supreme Court has explained that a total ban on the use of “odious racial epithets” by “proponents of all views” (*R.A.V. v. City of St. Paul*, 1992, p. 391) equates to a mere content-based regulation, whereas a ban on the use of racial epithets by one group of speakers, but not those speakers’ opponents, equates to viewpoint discrimination. Specifically, viewpoint discrimination occurs when the government (e.g., a school policy) prohibits speech by particular speakers and, in so doing, suppresses a particular view. But avoiding viewpoint discrimination is complicated, and it is not clear from the case law whether viewpoint discrimination must always be prohibited in the K–12 setting. Thus, it is unclear whether school officials must permit students the right—oftentimes based on religious beliefs—to debate whether God condemns Black people, Buddhists, or gays in a public school.

The *Tinker* Court held that a public school cannot prohibit “expression of particular opinion” (*Tinker*, 1969, p. 511), unless it makes a specific showing of constitutionally valid reasons. According to *Tinker*, a particular viewpoint could be banned if it creates a substantial disruption, if school officials could reasonably forecast a disruption, or if it impinges on the rights of others. However, several court decisions suggest that questions remain about whether prohibitions on student expression must wait for a substantial disruption and whether expression must be viewpoint-neutral in K–12 public schools in order not to violate the First Amendment. For example, the Fourth Circuit observed that “[t]he Supreme Court has not expressly discussed the relationship between viewpoint discrimination and student speech” (*Hardwick v. Heyward*, 2013, p. 442). The Fifth, Eighth, and Ninth Circuits have raised similar concerns about the applicability of viewpoint discrimination in K–12 settings (*B.W.A. v. Farmington R-7 Sch. Dist.*, 2009; *Harper v. Poway*, 2006a; *Morgan v. Swanson*, 2011). Also, in a concurring opinion, a judge in the Seventh Circuit argued that *Tinker* was not even a viewpoint-discrimination case because it revealed “nothing about whether the school allowed symbols or other expressions of opinions favorable to U.S. involvement in the Vietnam War” (*Nuxoll v. Indian Prairie Sch. Dist.*, 2008, p. 677).

The issue of viewpoint discrimination has been directly addressed in a higher-education case, but it remains unclear how the case would apply in the K–12 context. To illustrate, in *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995), the U.S. Supreme Court held that the university discriminated on the basis of religious editorial viewpoints when it denied funding to assist with the printing costs of a student newspaper that had a religious perspective. The Court ruled that the government is generally prohibited from regulating speech “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction” (p. 829). *Rosenberger* invokes the notion

of viewpoint discrimination in highlighting that the government is forbidden from favoring one speaker over another. However, in his dissenting opinion, Justice Souter asserted that there was no viewpoint discrimination involved in *Rosenberger* because the university's policy discriminated against an entire class of viewpoints. Specifically, the university's policy excluded all speech that manifested a belief in one deity, which applied equally to every religion (including agnostics). As such, the university's policy did not skew the debate either for or against religion.

Although the *Rosenberger* decision is informative, student expression in K–12 public schools is not always subject to the same rules that apply in other circumstances. Indeed, student speech is more protected within higher education and within the public sphere because students are generally more sensitive to injurious remarks than adults are. Along these same lines, courts have also drawn a distinction between higher education and K–12 students because the latter are considered a captive audience with impressionable minds (see e.g., *Hardwick v. Heyward*, 2013; *Harper v. Poway*, 2006a). For example, the *Hazelwood* (1988) Court observed,

The First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school. (p. 266)

Similarly, Post (1996) wrote in the *Yale Law Journal* that the state is permitted to regulate speech in public schools for purposes of education.

Thus, it is not surprising that courts are split about how *Rosenberger* alters the analysis of *Tinker* (see *Hardwick v. Heyward*, 2013). The Fourth, Fifth, Eighth, and Ninth Circuits suggest that the public K–12 school setting is fundamentally different from a public-university setting when viewpoint discrimination is at issue (see *B.W.A. v. Farmington R-7 Sch. Dist.*, 2009; *Hardwick v. Heyward*, 2013; *Harper v. Poway*, 2006a; *Morgan v. Swanson*, 2011). The Sixth Circuit has sometimes taken another approach, holding that when public K–12 school officials regulate student speech, it must be consistent with both the *Tinker* standard and *Rosenberger*'s prohibition on viewpoint discrimination (see *Barr v. Lafon*, 2008; *Castorina v. Madison Cnty. Sch. Bd.*, 2001). Although *Rosenberger*'s reach remains unsettled, an increasing number of courts suggest that schools can promote dialogue related to democracy without providing equal time for students to espouse bigotry.

Other Related Matters

The Supreme Court has held that anti-discrimination laws “do not, as a general matter, violate the First . . . Amendment” (*Hurley v. Irish-American Gay*, 1995, p. 572). Kavey (2003) argues that these types of anti-discrimination policies regulate conduct and do not directly refer to any viewpoint. Extending this logic, when school officials, for example, ask a student to refrain from racist, homophobic, or anti-religious speech, they are not asking that student to change her religious viewpoint. Instead, school officials’

actions are addressing the student's conduct within a venue that seeks to promote a discrimination-free environment. This approach aligns with the holding in *Harper v. Poway* (2006a) when the Ninth Circuit ruled that injurious speech could be limited even when it reflected the speaker's religious views about sexual orientation. Indeed, the court found no evidence that school officials tried to change the student's religious views; rather, school officials sought to address the student's conduct.

To be certain, many of the cases discussed above involve the tension between a student's constitutional right to freely exercise his or her religion and other students' constitutional rights to be let alone. Yet, it is not without precedent that the Supreme Court—sometimes within different contexts—has prohibited someone from relying on a sincerely held religious belief when discriminating against others. For example, Bob Jones University excluded African American students from enrolling because of university officials' belief that the Bible forbids interracial dating and marriage. In the 1970s, the university began to allow African American students to enroll but maintained strict policies against interracial dating. In 1982, the U.S. Supreme Court addressed whether Bob Jones, as a private university (and a K–12 private school) that practiced racially discriminatory policies based on religious beliefs could still qualify as a tax-exempt organization (*Bob Jones Univ. v. U.S.*, 1982). The Court ruled that private schools needed to comply with law and public policy prohibiting racial discrimination and that tax exemption was a privilege. Finding a compelling governmental interest in eradicating racial discrimination, the majority reasoned that its ruling did not violate the Free Exercise Clause of the First Amendment. Although in a different context, this case demonstrated how public policy (i.e., eradicating racial discrimination in a school setting) trumped sincerely held religious beliefs.

In more contemporary cases involving K–12 public schools, students have argued that anti-discrimination policies that prohibit speech related to race, religion, or sexual orientation offend their religious beliefs (see e.g., *Hardwick v. Heyward*, 2013; *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 2005; *Zamecnik v. Indian Prairie Sch. Dist.*, 2007). While in the 1950s some students may have asserted their right to wear pro-segregation shirts to school based on political or religious beliefs, some students today assert their right to wear Confederate flags or anti-gay or anti-Muslim shirts. Thus, when school officials ban racially hostile, anti-religious, or anti-gay speech, they are sometimes accused of silencing another viewpoint in violation of the First Amendment's Free Speech Clause and/or the Free Exercise Clause. Students also argue that they have the right to oppose viewpoints related to race or sexual orientation on religious or moral grounds. For example, as discussed above, Bob Jones University, a private, tax-exempt organization, relied on Biblical arguments when banning the enrollment of African American students (see e.g., *Bob Jones Univ. v. U.S.*, 1983). Government policies that substantially burden a religious belief must be justified by a compelling state interest (*Korte v. Sebelius*, 2013). *Bob Jones* suggests that religious beliefs can be suppressed when it is contrary to national public policy. One federal court also stressed the difference between suppressing religious speech “solely because it is religious” and curtailing speech that is “religious and disruptive or hurtful” (*Muller by Muller v. Jefferson Lighthouse Sch.*, 1996, p. 1538). This is likely why some courts have upheld bans on Confederate flags despite the fact that doing so may constitute viewpoint

discrimination (see *Scott v. Sch. Bd of Alachua Cnty.*, 2003; *West v. Derby Unified Sch. Dist. No. 260*, 2000). However, not all courts have taken this approach (see *Nuxoll v. Indian Prairie Sch. Dist.*, 2008).

This article contends that school officials have a compelling interest in eradicating speech in public schools that denigrates another student. Deciding which messages can be curtailed is a highly complex issue for both courts and school personnel. The court decisions discussed in this case review provide a necessary context for understanding the legal parameters of school officials' ability to prohibit speech that disparages others in K–12 public schools.

Method

Court opinions influence education policy (Chemerinsky, 2003; Superfine, 2009), and the “law is a powerful tool that educators can use to advance their most important aims” (Heubert, 1997, pp. 574–575). In this case analysis of anti-LGBTQ speech, I used legal research methods (see First, Vines, Elue, & Pindar, 2015; McCarthy, 2010; Russo, 2006; Schimmel, 1996) to examine two federal circuit courts' decisions related to anti-LGBTQ speech. I selected these two federal circuit courts, the Seventh Circuit and the Ninth Circuit, because they are the only two circuit courts that have addressed the complex issue of balancing LGBTQ students' rights to be free from harassment and other students' rights to express their views about homosexuality. Although federal district courts in Michigan, Minnesota, Florida, Tennessee, and Ohio have examined related issues (see *Chambers v. Babbitt*, 2001; *Gillman ex rel. Gillman v. Sch. Bd.*, 2008; *Hansen v. Ann Arbor Public Schs.*, 2003; *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 2005; *Young v. Giles Cnty. Bd. of Educ.*, 2015), I excluded these decisions from this dataset because the issue of anti-LGBTQ speech was never argued at the circuit court level; therefore, these cases have limited precedential value. I excluded other federal circuit decisions involving anti-LGBTQ speech if the merits of the case were never fully addressed in court (see *Morrison v. Bd. of Educ.*, 2006, 2008) or if the main focus was on the overbreadth of an anti-discrimination policy (see e.g., *Saxe v. State College Area Sch. Dist.*, 2001; *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 2002).

Legal research methods are similar to historical research in that they often involve identifying trends in the law through the examination of past actions or, in this case, decisions. As noted by education law scholars Beckham, Leas, Melear, and Mooney (2005), these methods combine elements of legal reasoning with an evolutionary perspective on the genesis and development of particular judicial issues relevant to education. Beckham and his colleagues contend that our understanding of the law is perpetually transformed through the adjudication of new cases. Russo (2006) similarly notes that legal research methodology is “a form of historical-legal research that is neither qualitative nor quantitative . . . it is a systemic investigation involving the interpretation and explanation of the law” (p. 6).

Employing legal research methods, I used a major legal database, LexisNexis, to retrieve multiple primary data sources. The primary sources of data analyzed for this inquiry include the following:

1. Four federal district court opinions from Illinois (*Zamecnik*)
2. A federal district court opinion from California (*Harper*)
3. Two Seventh Circuit Court of Appeals decisions (*Nuxoll, Zamecnik*)⁵
4. A Ninth Circuit Court of Appeals decision (*Harper*)
5. Eight briefs, pleadings, and motions filed in a Seventh Circuit case
6. Eleven briefs, pleadings, and motions filed in a Ninth Circuit case

Although the focus of this article are the two federal circuit court cases, it was also necessary to examine the procedural history of each of the two cases. Thus, I also examined several documents directly related to the two circuit court cases. In addition, I used LexisNexis to search for secondary sources, including legal treatises and restatements of the law that address at least one of the two cases at issue in this study. However, only the student's First Amendment claims in these cases were examined.

The eight court opinions (five district court and three circuit court) in the dataset were briefed and coded for the legal claims made, the precedent relied upon in the rulings, and the outcome. The briefs, pleadings, and motions filed with the two federal courts ($n = 20$), the treatises ($n = 3$), and restatements of the law ($n = 2$) were also coded to identify the major legal theories relied upon by all parties in the litigation. I followed Russo's (2006) suggestions about how to dissect or analyze a legal opinion and employed a coding method that analyzes the claim, outcome, and relied-upon precedent. Using an Excel spreadsheet, I identified the legal claims under the First Amendment (i.e., freedom of speech and/or free exercise), listed the Plaintiff's and the Defendant's arguments, and included the case outcomes. In addition to coding whether the Plaintiff won or lost, I coded the relied-upon legal precedent (e.g., *Tinker*, *Fraser*, *Hazelwood*, *Morse*, or other federal circuit court opinions). Analyzing the documents (see Yin, 2014), court decisions, complaints, briefs, treatises, and restatements revealed encounters that allowed investigation of the interactions and discussions within and among the various case outcomes (Schank & Abelson, 1977). Overall, I analyzed over 1,800 pages of legal sources regarding LGBTQ speech.

Analysis of Case Findings

The case history and legal outcomes from the Seventh and Ninth Circuits revealed how two federal circuit courts examined homophobic speech in K–12 public schools, thus answering the first research question regarding the court's view of anti-LGBTQ speech. In *Harper v. Poway* (2004, 2006a, 2006b, 2007a, 2007b), which involved a student wearing a "Homosexuality is Shameful" T-shirt, the Ninth Circuit ultimately prohibited the student's speech by applying *Tinker*'s second prong, as the shirt impinged on the rights of other students or interfered with their right to be let alone. In *Nuxoll v. Indian Prairie Sch. Dist. #204* (2008) and *Zamecnik v. Indian Prairie Sch. Dist.* (2007, 2009, 2010, 2011), the Seventh Circuit ruled in favor of a student who wanted to wear a "Be Happy, Not Gay" T-shirt in opposition to a LGBTQ rights event, applying the first prong of *Tinker* and finding that the shirt did not cause a disruption. The two rulings,

⁵ Nuxoll and Zamecnik are part of the same ongoing litigation within the Seventh Circuit.

each discussed in greater detail below, thus create a conflict between two circuit courts, despite the fact that the cases have relatively similar legal issues involved.

Ninth Circuit Case: Anti-LGBTQ Speech Prohibited

In *Harper v. Poway* (2006a), the Ninth Circuit examined an issue involving a T-shirt worn by a student to protest the National Day of Silence. During a “Straight Pride” counter-protest, the student, Harper, wore a T-shirt that said, citing a Bible passage, “I will not accept what God has condemned” and “Homosexuality is shameful” (*Harper v. Poway*, 2004, p. 1100). School officials argued that the shirt was inflammatory and created a hostile environment for others. Although there was much disruption at the school, and students were suspended, Harper was not disciplined for his shirt. However, he filed a motion for a preliminary injunction⁶ against the administration so that he might be permitted to wear the shirt that school officials found inflammatory. He argued that the school’s actions amounted to viewpoint discrimination under *Rosenberger*. The federal district court denied Harper’s motion for a preliminary injunction because he failed to demonstrate that there was a likelihood of success on the merits of his First Amendment free-speech claim. Specifically, under *Tinker*’s first prong, the district court found evidence in the record to demonstrate that school personnel could reasonably forecast a substantial disruption or a material interference with school activities.

In affirming the district court’s decision to deny the motion for a preliminary injunction, the Ninth Circuit Court of Appeals did not apply *Tinker*’s substantial disruption standard, or first prong, but instead used *Tinker*’s second prong, which refers to the “rights of other students . . . to be secure and to be let alone” (p. 1177, citing *Tinker* p. 508). The court found that the shirt impinged upon the rights of other students. In permitting the school district to prohibit the shirt, the Ninth Circuit observed that

his T-shirt “collides with the rights of other students” in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic, such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to “be secure and to be let alone.” Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society. (p. 1178)

The court relied on social science research in reaching this conclusion. Much of this research speaks to the harassment gay students experience in schools as a result of their sexual orientation. With regard to viewpoint discrimination, the court relied on earlier cases where the issue at hand was race, highlighting that “[w]hile the Confederate flag may express a particular viewpoint, [i]t is not only constitutionally allowable for school officials to limit the expression of racially explosive views, it is their duty to do so” (pp. 1184–1185).

⁶ A preliminary injunction stops a party from moving ahead with a policy, or it can compel a party to continue with a course of conduct until the case has been decided.

The dissenting judge in *Harper*, Judge Kozinski, believed that the majority misapplied *Tinker* and emphasized the importance of free debate on important social issues. He argued that tolerance for, or denunciation of, homosexuality is political, and that when the school district asked Harper to remove his shirt, it was promoting one political or religious viewpoint over another. The majority responded to the dissent and argued that although debate on social and political issues is often justified, such discussion does not “justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling Black students inferior, or by wearing T-shirts saying that Jews are doomed to Hell” (p. 1181).

The Ninth Circuit denied a request for an *en banc*⁷ hearing. Concurring with the denial of the *en banc* request, one judge criticized the dissent in *Harper*:

The dissenters still don’t get the message—or *Tinker*! Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply “unpleasant and offensive.” It strikes at the very core of the young student’s dignity and self-worth. Similarly, the example Judge Kozinski offers, a T-shirt bearing the message, “Hitler Had the Right Idea” on one side and “Let’s Finish the Job!” on the other, serves to intimidate and injure young Jewish students in the same way, as would T-shirts worn by groups of white students bearing the message “Hide Your Sisters—The Blacks Are Coming.” Under the dissent’s view, large numbers of majority students could wear such shirts to class on a daily basis, at least until the time minority members chose to fight back physically and disrupt the school’s normal educational process.

Perhaps some of us are unaware of, or have forgotten, what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school, or perhaps some are simply insensitive to the injury that public scorn and ridicule can cause young minority students. Or maybe some simply find it difficult to comprehend the extent of the injury attacks such as Harper’s cause gay students. Whatever the reason for the dissenters’ blindness, it is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution, and the exercise of that authority by school boards is surely consistent with *Tinker*’s protection of the right of individual students “to be secure and to be let alone.” (2006b, p. 1053)

The Supreme Court granted the petition for *writ of certiorari*.⁸ The Court vacated the judgment and remanded to the Ninth Circuit to dismiss the appeal as moot, noting that the district court had already entered final judgment and Harper, by that time, had already

⁷ An *en banc* session is one in which all members of a court rehear a case. Thus, in this case, every appellate judge on the court was asked to rehear the case.

⁸ A *writ of certiorari* is issued when a higher court orders a lower court that it will judicially review the lower court’s judgment.

graduated and was therefore no longer a student (*Harper v. Poway Unified Sch. Dist.*, 2007b). As a result, the final decision has limited precedential value, although the court's rationale was later considered by the Seventh Circuit (see *Zamecnik v. Indian Prairie Sch. Dist.*, 2011).

Seventh Circuit Case: Anti-LGBTQ Speech Permitted

In *Nuxoll v. Indian Prairie Sch. Dist. #204* (2008) and *Zamecnik v. Indian Prairie Sch. Dist.* (2007, 2009, 2010, 2011),⁹ two high school students in Illinois alleged that their constitutional rights under the First Amendment were violated when school officials disciplined the older of the two students for wearing a T-shirt that said “Be Happy, Not Gay” on the day after the National Day of Silence and for censuring the students’ speech related to homosexuality. The purpose of the Day of Silence is to serve as a day of action to protest the bullying of LGBTQ students. School officials asked the student wearing the shirt to cross out the words “not gay” because they believed these words could create disruption. In a request for a preliminary injunction against the school district, the plaintiffs argued that school officials violated their First Amendment rights when school policy prohibited them from making “derogatory comments” that referred to race, ethnicity, religion, gender, sexual orientation, or disability. The students argued that the First Amendment permitted them to make negative comments about any of the groups listed in the policy as long as they did not use inflammatory language or “fighting words.”

A federal district court in Illinois denied the student’s request for the injunction, finding that this expression was contrary to the school’s legitimate educational mission under *Hazelwood* (see *Zamecnik v. Indian Prairie Sch. Dist.*, 2007). Moreover, the court determined that the policy’s purpose was to maintain a civilized educational environment and that the school had enforced the policy in an evenhanded manner. The court stressed that the students had not demonstrated a reasonable probability that their free speech rights had been violated.

The Seventh Circuit Court of Appeals (Illinois, Indiana, and Wisconsin) subsequently reversed the district court’s decision. Applying *Tinker*’s first prong, the court found no evidence of disruption. The court held that *Tinker* was the correct standard because the language on the T-shirt did not equate to fighting words. The court also reasoned that by allowing the shirt, the school would be viewpoint neutral on the National Day of Silence. Judge Posner wrote that although it is true that “[p]eople are easily upset by comments about their race, sex, etc., including their sexual orientation . . . because for most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm” (p. 671) and such “comments can strike a person at the core of his being” (p. 671), at the same time, “sexuality is not one of the nation’s pressing problems, [n]or a problem that can be solved by aggressive federal judicial intervention” (p. 672). This reasoning was made despite the judge noting that when adolescents hear derogatory comments about their sexuality, it can have a negative

⁹ As noted, *Nuxoll* and *Zamecnik* are part of the same ongoing litigation within the Seventh Circuit.

impact on their academic performance. Judge Posner then reasoned that a “far more urgent problem, the high dropout rates in many public schools” (p. 672), deserves more attention. He stressed that he believed the slogan “Be Happy, Not Gay” was only “tepidly negative” (p. 676). Moreover, the Seventh Circuit found that there was no indication that the derogatory comments were directed at a particular individual. The court also observed that, although there had been incidents of harassment involving gay students, there was not enough evidence indicating that this specific speech would cause a substantial disruption. The Seventh Circuit therefore remanded the case to the lower court with instructions for it to grant the preliminary injunction requested by the students.

In a concurring opinion, Judge Rovner agreed with the outcome of the case, but for somewhat different reasons. In particular, she did not find this to be a case about viewpoint discrimination. She posited that *Tinker* did not focus on whether the school allowed expression of opinion that was favorable to U.S. involvement in the Vietnam War. She also disagreed with the other judges’ assessment that the slogan “Be Happy, Not Gay” was “tepid.” Judge Rovner pointed out that the plaintiff’s brief stated that he intended this slogan to convey the message that “homosexual behavior is contrary to the teachings of the Bible, damaging to the participants and society at large, and does not lead to happiness” (pp. 678–679). As such, the judge believed that although this statement was specifically intended to derogate LGBTQ students who would find the slogan offensive, her overriding concern was permitting students to debate these controversial topics until it became a disruption.

When the lower court issued a permanent injunction allowing the students to continue wearing clothing with the slogan, a summary judgment¹⁰ in favor of the students, and an award of \$25 in damages to each student, the school appealed. In this case, the Seventh Circuit upheld the district court’s decision to grant a summary judgment in favor of the students. The court did not find the language on the shirt to be fighting words and noted that 18-year-old students should not be raised in intellectual bubbles (*Zamecnik v. Indian Prairie Sch. Dist.*, 2011). The court also found that the First Amendment does not establish a “hurt feelings” defense. However, the Seventh Circuit did explain in *Zamecnik* that “[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission” (pp. 877–878).

These two circuit courts—the Ninth and the Seventh—are the only two federal circuit courts that have addressed anti-LGBTQ speech in K–12 public schools to this extent, and given their inconsistent conclusions, the legal parameters around homophobic speech are still in a state of flux. Nevertheless, these contradictory decisions outline the legal and policy issues involved for school personnel. Below, I discuss the current status of the law in order to inform school officials who might be interested in adopting policies that prohibit anti-LGBTQ speech in public schools.

With regard to homophobic speech, although the Seventh Circuit in *Nuxoll/Zamecnik* requires students to wait until such speech creates a substantial disruption, the Ninth Circuit in *Harper* appears willing to allow school officials to curtail anti-LGBTQ speech

¹⁰ A summary judgment occurs when a court enters a judgment for one party against another party without a full trial on the merits.

because it interferes with the rights of others to be let alone under *Tinker*'s second prong. *Zamecnik* and *Harper* demonstrate a potential split among the federal circuit courts that could lead to confusion in other parts of the country. Although those public schools within the jurisdiction of the Seventh Circuit will likely allow homophobic speech unless it creates a substantial disruption, the school districts under the jurisdiction of the Ninth Circuit have received a message from the circuit court that such speech can be curtailed.¹¹

In addition to the two circuit court decisions discussed here that explicitly address homophobic speech, school leaders might also look to other circuits that have addressed racially hostile speech or anti-religious speech for guidance. As discussed, the Eleventh Circuit (see *Denno*, 2000; *Scott*, 2003) and the Sixth Circuit (see *Boroff*, 2000) would appear to allow school officials to regulate speech that denigrates, even without any disruption present under *Fraser*. In addition to the Ninth Circuit, the Fourth, Sixth, and Tenth Circuits recognized *Tinker*'s second prong in cases involving racially hostile speech. Because the current status of the law is undecided within some jurisdictions, school officials in these states—where there are no decisions involving racist, homophobic, or anti-religious speech—may struggle more when adopting policies that prohibit anti-LGBTQ speech in K–12 public schools.

Discussion

Despite the limited number of rulings and lack of explicit legal guidance from the courts on homophobic speech in K–12 public schools, the lower court opinions on racially hostile and anti-religious speech, and the U.S. Supreme Court cases involving student expression, may provide some guidance for school officials. This section extrapolates from existing case law and suggests three ways in which speech that denigrates others might be analyzed. Any of these analytic approaches would lead to better education policy in K–12 public schools and provide much-needed clarity to school leaders.¹²

First, homophobic speech is not political speech and thus should not be protected in this context. Instead, *Tinker*'s second prong is the more appropriate standard to use when speech denigrates a student in a public school context. There is legal precedent in some circuits for taking this approach and doing so would undoubtedly give school leaders more leeway in prohibiting injurious speech that disparages students in public schools. Second, arguably, *Fraser* (i.e., speech is curtailed if it exceeds the boundaries of socially appropriate behavior), *Morse* (i.e., speech is restricted to promote safety), and *Hazelwood* (i.e., speech is limited if contrary to the school's legitimate mission) already permit school leaders and courts to prohibit speech that denigrates without violating the First Amendment. If the existing precedent does not allow prohibiting speech that denigrates, courts should create a new standard to address this issue.

¹¹ Of course, school leaders would need to consult with their attorneys for district-specific guidance.

¹² Nothing in this article constitutes legal advice.

***Tinker's* Second Prong Should Apply**

As the analysis of case findings suggest, and as other education law scholars have observed (Fetter-Harrott, 2014; Macias, 2008, 2012; McCarthy, 2009b), many courts apply *Tinker's* first prong (substantial disruption) and often overlook the second prong (speech that impinges on the rights of others). As noted, however, the Fourth, Sixth, Ninth, and Tenth Circuit rulings suggest that the second prong could be an option. Indeed, ignoring the second prong is problematic because the question confronted in the *Tinker* decision is different from speech that attacks or denigrates another student (see McCarthy, 2009b). Specifically, *Tinker* did not focus on speech that intruded upon the rights of other students but instead centered on private, passive political speech (i.e., students wearing armbands to protest war). Wearing an armband criticizing a war is quite different from wearing a shirt that vilifies another student in a public school setting (see Houle, 2008).

Moreover, just as debating another student's race or religion is not a political issue, neither is another student's sexual orientation. Although some might still debate interracial marriage or same-sex marriage as a political issue, speech that specifically attacks and disparages a student's core being (e.g., Black people are criminals, Muslims are terrorists, gays are sinful) is not political speech but a socially hurtful, demoralizing, and psychologically damaging act that goes against the educational mission of public schooling. Such speech certainly does not contribute to the "marketplace of ideas" discussed in *Tinker* (p. 512, citing *Keyishian v. Board of Regents*, 1967, p. 603). Speech that denigrates or impinges on the rights of others should not be permitted in school under *Tinker's* second prong.

Along these same lines, there is an important distinction between identity speech and political expression (Calhoun, 1995; Hunter, 1993). Specifically, harassment based on gay self-worth is not "political speech in which public school students have any right to engage" (Macias, 2012, p. 794) and, further, it damages the dignity and educational success of a vulnerable population (Waldron, 2012). Macias (2012) suggests that when people disagree about one's sexual orientation, it is as problematic as disagreeing about one's race. When we allow political debate about whether or not sexual orientation (or race or religion) is acceptable in schools, it is really a debate about a student's worth (Macias, 2012), a conversation that is translated for the student into an appraisal of their self-worth. Gilreath (2009, 2011) similarly posits that these anti-gay T-shirts are a type of "anti-identity" (2009, p. 558; 2011, p. 112) that denies the victim existential status. The concurring judge in *Harper* correctly observed that such speech "strikes at the very core of the young student's dignity and self-worth" (p. 1053), a level of denigration that must not be permitted in the public-school setting.

Further, by employing the substantial disruption analysis within the public K–12 school context, courts are suggesting that school officials need to allow bullying to escalate before they can intervene. This form of self-advocacy by the victims is clearly problematic within public schools, where students should feel safe and welcome (see Biegel, 2010). Moreover, the Centers for Disease Control and Prevention (CDC) (Kann et al., 2016) found that there are 1.3 million high school students who identify as LGBTQ (8% of the high school population), and research suggests that gay teens are 8.4 times more likely to have attempted suicide (Parents and Friends of Lesbian and Gays NYC,

n.d.). Within this group, more than 40% said they have considered committing suicide in the last year and 30% have actually attempted suicide. In comparison, the CDC reported that 15% of straight students have considered suicide and 6% have actually attempted the act. These sobering statistics imply that anti-LGBTQ bullying, in schools and perhaps elsewhere, is disruptive to gay students' well-being and that anti-gay bullying creates a substantial disruption for the student whose identity is being denigrated.

When Judge Posner in *Nuxoll* (2008) observed that sexuality is not one of the nation's most "pressing problems" (p. 672), he must not have been aware of the high rates of suicide, and other types of self-harm, by LGBTQ students who are bullied and harassed in our nation's public schools (Biegel & Kuehl, 2010; Hatzenbuehler, Birkett, Van Wagenen, & Meyer, 2014; Huebner et al., 2004; Levasseur et al., 2013). Furthermore, the effect of speech that denigrates others has been shown to increase dropout rates, an issue Judge Posner did identify as critically important. To be certain, a hostile learning environment impacts a student's ability to perform well academically, and learning is disrupted when anti-gay bullying is not addressed.

Under these circumstances, substantial disruption should be understood as doing harm to the individual student (see *Kowalski v. Berkley Cnty. Schs.*, 2011). Further, a small minority population of LGBTQ students, a group that often hides in the closet for fear of bullying and harassment, should not be saddled with the onus of creating a substantial disruption of speaking out against denigrating speech. To be certain, speech that denigrates others, whether related to sexual orientation, race, or religion, has the potential to create psychological harm, which should be considered a disruption, even if only a few students experience the injurious speech. Thus, even if courts insist on using *Tinker's* first prong, it could certainly be argued that a substantial disruption is created when students miss school because they are fearful, feel unwelcomed, or attempt suicide or commit other self-harm as a result of speech that denigrates them or attacks their core being. Although *Tinker's* second prong clearly applies in this context, arguably, *Tinker's* first prong might also apply because this type of speech creates a learning environment that is hostile and disruptive to a student's academic growth and personal well-being.

To avoid this potential for quantifying a student's right to protection from denigrating speech, *Tinker's* second prong should be the applicable test. The Supreme Court has failed to elaborate on this prong, yet *Tinker's* second prong seems most applicable to cases that involve speech that denigrates another student, whereas the first prong might be more appropriate in scenarios where the speech is directed toward parties or issues that do not directly affect or attack another student (e.g., political speech). Although the precise scope of *Tinker's* second prong is unclear, as discussed, a few circuit courts have relied upon it or at least recognized it as a viable argument (see *Barr v. Lafon*, 2008; *Harper v. Poway*, 2006a; *Kowalski v. Berkley Cnty. Schs.*, 2011; *West v. Derby Unified Sch. Dist. No. 260*, 2000). Consistent with this recognition in the Fourth, Sixth, Ninth, and Tenth circuits, homophobic speech that denigrates could arguably be prohibited under *Tinker's* second prong.

***Fraser, Hazelwood, and Morse* Might Also Prohibit Speech that Denigrates Others**

Under other Supreme Court expression cases (*Fraser, Hazelwood, and Morse*), speech that denigrates another student could be limited using existing precedent as well. Indeed, *Fraser, Hazelwood, and Morse* suggest that a *Tinker* substantial-disruption approach is not always required. By prohibiting hateful speech that denigrates others, it is “teaching students the boundaries of socially appropriate behavior” (*Fraser, 1986, p. 681*). As suggested by the Eleventh Circuit (*Denno, 2000; Scott, 2003*), in cases addressing Confederate flags, at a minimum, we need a flexible *Fraser* standard for speech that entreats upon the responsibility of the school to inculcate in students manners and habits of civility. For example, *Fraser* states we “must also take into account consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students” (p. 681). Indeed, wearing a Confederate flag or a T-shirt that states “Homosexuality is shameful” or “Jesus is a Lie” can be as equally damaging to other students as *Fraser’s* speech was in the school gymnasium. When the Court upheld the school officials’ decision to suspend *Fraser*, it sent a clear message that school personnel may promote a lesson of civil conduct. This type of student expression is also contrary to the school’s legitimate educational mission under *Hazelwood*, where the Court found that there are special characteristics in the school environment that may require censorship.

Furthermore, the *Morse* Court did not review the school’s history about whether there were past disruptive events that related to drug advocacy. Instead, the Court gave school leaders the discretion to address speech associated with drug use, as it is clearly an important safety issue. Perhaps the Court should also give school leaders the discretion to address speech that denigrates others (i.e., another important safety issue when considering bullying and suicide rates). In other words, just as the Supreme Court recognized an “important, perhaps compelling” interest in deterring drug use in schools, the Court might also find it just as important to limit speech that denigrates others to deter bullying, self-harm, or suicide (*Morse, 2007, p. 407*). As discussed, the Sixth Circuit cited *Morse* when it restricted contemptuous and racially hostile speech in schools (e.g., *Defoe, 2010*).

Although courts should already be able to rely on existing precedent to curtail speech that denigrates students in public schools, there is also another option. Specifically, if the Supreme Court can carve out an exception in *Morse* for illegal drugs and in *Fraser* for highly offensive speech, why not a very narrow exception for speech that denigrates others? In other words, if we can ban the “Bong Hits” message in *Morse* or a student council speech that included a sexual metaphor in *Fraser*, schools should certainly be able to exclude speech that harms students. As noted earlier, speech that denigrates is speech that attacks members of a minority group who have been historically marginalized. This type of expression makes students feel inferior, intimidates them, and attacks their core being. In turn, it creates an impediment to learning. Waldron (2012) contends that such harms are not only individual, but also social harms that create a poisoned environment in schools.

Of course, any further limitations on student speech should be very narrowly drawn to only include speech that denigrates other students. The new standard regarding speech that denigrates should ask the following: (a) Does the injurious speech attack a minority member’s core being? and (b) Is the speech wholly inconsistent with the public school’s

mission? Critics will argue over the definition of what type of speech would fall under this new legal standard. Although it is a valid concern, courts frequently grapple with these types of definitions. For example, the substantial disruption standard in *Tinker* is no model of clarity. To be certain, it is not entirely clear when student speech constitutes a “substantial disruption” or what type of speech should be considered “lewd and vulgar.” This lack of clarity explains why courts struggle with and often issue conflicting opinions when examining student-speech cases. As noted earlier, circuit courts have taken different approaches to *Tinker*’s substantial-disruption standard when examining student speech involving Confederate flags. These definitions have been and will continue to be addressed in courtrooms for many years to come. This potential difficulty does not mean, however, that courts should not try to issue rulings that would create guidance to school personnel on anti-LGBTQ speech.

Of course, some will also contend that this type of line-drawing with regard to speech that denigrates another could lead to a slippery slope. For example, one might ask whether we should also extend these types of protections to students who are teased in public schools because they are overweight. Although such speech certainly could be considered inappropriate and hurtful, it does not fall under the definition of speech that denigrates, as described above. Such questions are fair but not difficult because these other types of commentary (e.g., speech related to a student’s weight), can already be limited under many states’ anti-bullying laws and likely do not involve the issues related to viewpoint discrimination and religion under the First Amendment.

Addressing Viewpoint Discrimination

The issue of viewpoint discrimination is a hurdle but, as several circuit courts suggest, the question of viewpoint should not be so stringently applied in the K–12 public school setting. In *Harper*, the Ninth Circuit reasoned that “[w]hile the Confederate flag may express a particular viewpoint, [i]t is not only constitutionally allowable for school officials to limit the expression of racially explosive views, it is their duty to do so” (pp. 1184–1185). Moreover, the *Harper* court reasoned that schools can promote dialogue related to democracy “without being required to provide equal time for student or other speech espousing intolerance, bigotry, or hatred” (p. 1185). The court explained that

because a school sponsors a “Day of Religious Tolerance,” it need not permit its students to wear T-shirts reading, “Jews Are Christ-Killers” or “All Muslims Are Evil Doers.” Such expressions would be “wholly inconsistent with the ‘fundamental values’ of public school education.” Similarly, a school that permits a “Day of Racial Tolerance” may restrict a student from displaying a swastika or a Confederate flag. (pp. 1185–1186)

The dissent in *Harper* reasoned, though, that there is a political disagreement about LGBTQ issues in this country. However, as the majority suggested, there has also been political disagreement about racial equality. Although there may be debates related to race, religion, or sexual orientation, or issues such as same-sex marriage that pertain to a particular minority group and have political value, the “political” issue can be discussed in schools in a way that does not cross the line to denigrate students. Where to draw the

line will be a difficult determination, but courts and school officials have been required to struggle with other subjective standards in the past (e.g., what constitutes a *substantial* disruption). If administrators go too far in limiting protected speech, students can resort to the courts as they have for several decades.

It is indeed possible for students to have a forum in public schools to exchange conflicting ideas about race, sexual orientation, religion, climate change, politics, or any number of thorny topics without denigrating another student. As the Supreme Court stressed

We must take this risk; and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength and the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (*Tinker*, 1969, p. 508)

However, these discussions should allow for the exchange of diverse viewpoints and should be encouraged without disparaging students from a historically marginalized group. In making this distinction, student political speech and speech related to social issues should remain protected under *Tinker*'s first prong.

Similar to limitations that have already been placed on student speech through the four U.S. Supreme Court student speech cases discussed, viewpoint discrimination should not permit students free reign to engage in all forms of speech. To be certain, context matters, and allowing students to engage in speech that demeans another student—whether on Martin Luther King, Jr. Day, the National Day of Silence, or a religious tolerance day—should not be permitted. As noted in *Harper* (2006a), “a school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission” (pp. 1185–1186). At least three other circuits have taken similar approaches to viewpoint discrimination within the K–12 context (*B.W.A. v. Farmington R-7 Sch. Dist.*, 2009; *Hardwick v. Heyward*, 2013; *Morgan v. Swanson*, 2011).

With regard to protecting religious expression, school districts can provide a compelling reason to regulate such speech under these circumstances. The compelling reason is that students have a right to be let alone in school and not to be denigrated by other students who do not share their religious beliefs. Similar to the Court's past conclusions, despite religious interests, discrimination in schools is contrary to national public policy (*Bob Jones*, 1982), and malicious speech can be curtailed in public spaces (*Beauharnais*, 1952). Also, as stated in *Muller* (1996), religious speech should not be suppressed solely because it is religious, but because it is religious and hurtful. Finally, courts might ensure that one's individual religious liberty is protected, but, in doing so, should not regulate the liberty rights of others (Laycock, 2014).

Conclusion

Students are often at the forefront of social change, and schools should equip them with the ability to think critically and to express thoughtfully their opinions on issues of political and social importance. Learning the value of open debate is absolutely an essential part of public schooling. Yet it is possible to engage in such debates without

engaging in injurious assaults, verbal or otherwise, against students who are often marginalized in schools.

When student speech crosses the line and denigrates others, school officials should be able to rely on existing precedent to curtail such speech and expect that the courts will support these efforts. An important role of school leaders is to cultivate a culture of acceptance and a feeling of belonging for all students. Thus, to address disharmony at the schoolhouse gate, it is sometimes necessary to inculcate manners and civility. Students, asserting their First Amendment rights, could express their view that “all gays are sinners who are going to hell” or could call all Christians or Muslims “ignorant fools” in a public forum, where a minority student has the option of leaving. But these words should not be used with classmates in a public school setting, a place where students are required to be. Unwanted denigrating speech is especially problematic because the students who are targeted are often powerless to avoid it.

As previously discussed, the second prong of *Tinker* (i.e., the right of a student to be let alone) is the most applicable when analyzing student speech that denigrates. However, even under *Tinker*'s first prong, speech that denigrates can arguably be curtailed because it disrupts the student's personal well-being. Further, *Fraser*, *Hazelwood*, and *Morse* also grant schools the ability to limit speech that denigrates in order to teach civility or for safety purposes. Alternatively, the Supreme Court should create another exception to *Tinker* that ensures that all students will feel welcome, safe, and supported in public school. The new standard regarding speech that denigrates should ask the following: (a) Does the injurious speech attack another minority student's core being? and (b) Is the speech wholly inconsistent with the public school's mission? Such a framing of demeaning speech would allow school leaders to take a more ethical approach to this complex issue and would give them further guidance on this legal question.

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