FROM THE COURTHOUSE TO THE SCHOOLHOUSE GATE: HOW COURTS’ RESTRICTIONS OF STUDENTS’ RIGHT TO FREE SPEECH AFFECT CIVIC EDUCATION, YOUNG VOTER TURNOUT, AND SOCIETY

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ABSTRACT

The purpose of this study is to determine if there is a relationship between the restrictions placed on students’ First Amendment right to free speech while in school and voter turnout rate for Young Voters in the 2016 Presidential Election. States were divided based on the Federal Circuit Court of Appeals jurisdiction they reside in. Student free speech case law from each jurisdiction was analyzed and each circuit was assigned a “Free Speech Ranking.” This Free Speech Ranking was then compared to Young Voter turnout data from the 2016 election. The hypothesis for this study was circuits with the least restrictions on student free speech would have a higher Young Voter turnout in the 2016 election because, according to prior research, the ability to exercise free speech in school is vital to receiving an effective civic education, or an education that prepares students to participate in government and society through activities like voting. After analyzing the data, no relationship between the Free Speech Rankings and Young Voter Turnout data was found.
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Introduction

What is the purpose of education in America? In a time where compulsory education forces all children to attend school until they reach age 18 and post-secondary enrollment is at an all-time high, Americans are receiving more education than at any other time in history; but to what end? Dwight D. Eisenhower, the 34th President of the United States, answered this question while speaking at the College of William and Mary in saying: “the true purpose of education is to prepare young men and women for effective citizenship in a free form of government.”

President Eisenhower obviously understood the relationship between schools, students, and society in noting that it was the schools’ responsibility to prepare students for citizenship, also known as civic education, and he understood that when those students reached voting age, they would be the ones making critical decisions for the country.

This sentiment presented by President Eisenhower has been shared by many education scholars both before and after his time in office. The need for schools to prepare its students to be effective citizens seemingly increased in the decade after Eisenhower left office as the minimum voting age changed from 21 to 18, the typical age of a high school senior. Also during that time, the Supreme Court decided the landmark case Tinker v. Des Moines Independent School District, where the Supreme Court, citing the school’s responsibility to prepare students to be effective citizens and the importance that the right to free speech plays in performing the duties of an American citizen, held that students do enjoy the protection of the First Amendment as it applies to free speech while in school.

1 Address at the Inauguration of the 22nd President of the College of William and Mary at Williamsburg. The American Presidency Project (Mar. 24, 2020, 4:23 PM), https://www.presidency.ucsb.edu/documents/address-the-inauguration-the-22d-president-the-college-william-and-mary-williamsburg
In the time since this landmark Supreme Court case, the Supreme Court and Federal Circuit Courts have reaffirmed the protections *Tinker* provides students and created exceptions to those protections. Although the Supreme Court has heard three additional student free speech cases since *Tinker* in 1969, the Federal Circuit Courts have had the primary responsibility of hearing and deciding numerous student free speech cases. Even though all the Federal Circuit Courts are working with the same guidance from the Supreme Court, each has developed different precedent and standards, which has resulted in student speech being more protected in some jurisdictions and more restricted in others.

The purpose of this study is to identify this difference in precedent among the Federal Circuit Courts to determine if students in jurisdictions with the most protections for student speech receive higher quality civic educations, and are thus better positioned to become effective citizens. For this study, the quality of civic education will be determined by the turnout rate of voters between the ages of 18-24, or Young Voters. The research question for this study is:

**RQ:** Do Federal Circuit Courts with stricter limitations on students’ First Amendment right to free speech in school have lower voter turnout rates in the 18-24 age bracket for the 2016 Presidential Election?

I hypothesize that the answer to the research question above is yes, or, stated in the inverse, students from jurisdictions with the most protections for student speech will have the highest turnout rates in the 18-24 age bracket for the 2016 Presidential Election.

**Literature Review**

In 1969, the Supreme Court expanded the responsibilities of public K-12 schools in America when it announced “It can hardly be argued that either students or teachers shed their
constitutional rights to freedom of speech or expression at the schoolhouse gate.” Schools were now tasked with teaching students the curriculum and preparing them to be productive members of society while respecting their students’ rights to free speech, religion, peaceful protest, and all other rights guaranteed to American citizens under the United States Constitution. Not only did this change the relationship between schools and students, but also between the judicial system and the schools. Since students had constitutional rights in school, school policy had to conform with constitutional principles, and could be challenged in federal court if a student believed their constitutional rights were being violated. This made the federal courts, headed by the United States Supreme Court, the ultimate arbitrator on what was constitutional or not in schools. This study will examine the relationship between the courts, schools, students, and society by comparing public K-12 free speech jurisprudence with Young Voter turnout in the 2016 presidential election in order to determine whether there is a relationship between a federal circuits limitations on student speech in school, schools’ ability to give their students an effective civic education, and the rate at which those students vote once they turn 18.

“Old enough to fight, old enough to vote,” was the battle cry of American teenagers during the Vietnam War who protested the fact that young Americans could be drafted into war at age 18, but not vote in federal elections until age 21. This protest was so successful that in 1971 the 26th Amendment to the United States Constitution was ratified. The 26th Amendment states:

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3 For the purpose of this study, “Young Voter” will be defined as voters between the ages of 18-24.
“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

In the ensuing 1972 presidential election, the Young Voters flexed their newfound political muscles, with 55% of 18-24-year-old voters casting a ballot.

In the 11 presidential elections since 1972, Young Voters have not been able to match their original 55% voting rate. In the 1996 Presidential election, Young Voter turnout was at its lowest in history with only 39.6% of voters ages 18-24 showing up to vote. In the typical presidential election since 1972, voter turnout amongst Young Voters is between 42 and 50%. The turnout of Young Voters is even lower for midterm elections. In 2018, 31% of Young Voters voted in the midterm election, by far the highest percentage in the last 25 years. (See Table 1-1, below). Even though Young Voters vote at a rate lower than other age groups in federal elections, their vote can decide an election. In 2012, 80 electoral votes, coming from Virginia, Ohio, Pennsylvania, and Florida, were decided by Young Voters. The Center for Information and Research on Civic Learning and Engagement found that “if Governor Romney had won half of the youth vote [in Virginia, Ohio, Pennsylvania, and Florida], or if young voters had stayed

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6 Peter Levine; Mark Hugo Lopez, Youth Voter Turnout has Declined, by Any Measure, The Center for Information and Research on Civil Learning and Engagement (2002).
7 CIRCLE Staff, Young Voters in the 2016 General Election, Center for Information and Research on Civil Learning and Engagement (2016).
8 CIRCLE Staff, Young People Dramatically Increase their Turnout to 31%, Shape 2018 Midterm Elections, Center for Information and Research on Civil Learning and Engagement (2018).
9 Id.
home entirely, then Romney would have won instead of Obama. Those states represent 80 electoral votes, sufficient to have made Romney the next president.”

Given the impact Young Voters can have on the outcomes of an election, a great deal of prior research has attempted to identify what factors lead Young Voters to, or not to, vote. In research, the likelihood of an individual or group voting is measured using “political efficacy.” Political efficacy “is defined as a person’s belief that he or she can influence political and social events.” “Political efficacy,” leading scholars in the field almost unanimously agree, “predicts future voting intent.” Previous studies of voters have found “people with higher levels of political efficacy report that they are more likely to vote in future elections than those with low efficacy.” Research shows that Young Voters today not only have the lowest voter efficacy when compared to other age groups, but voter efficacy among Young Voters is at an all-time

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10 CIRCLE Staff, At Least 80 Electoral Votes Depended on Youth, Center for Information and Research on Civil Learning and Engagement (2012).
11 CIRCLE Staff, At Least 80 Electoral Votes Depended on Youth, Center for Information and Research on Civil Learning and Engagement (2012).
12 Andrew L. Forrest; Allyson J. Weseley, To Vote or Not to Vote? An Exploration of the Factors Contributing to the Political Efficacy and Intent to Vote of High School Students, Journal of Social Students Research, Vol. 31, No. 1 (2007).
low.\textsuperscript{14} For Young Voters, the factors that affect their political efficacy can be divided into two categories: non-school factors and school factors.

Non-school factors include societal factors or facts about a specific group of voters that increases or decreases their political efficacy. Previous research has identified numerous non-school factors that affect the voter efficacy of Young Voters. One study found that Young Voters today, when compared to voters in other age groups, are less trusting of their fellow citizens.\textsuperscript{15} This lack of trust in their fellow citizens causes Young Voters to be more likely to lookout for themselves as opposed to trying to help out each other and try to solve societal problems through voting. Not only are Young Voters today less trusting of their fellow citizens, but voters in general are also less trusting of the federal government. A 2003 Gallup poll found “[t]he proportion of Americans who felt that the government is ‘run by a few big interests looking out only for themselves’ more than doubled from 29 percent in 1964 to 76 percent in 1994 before declining to 50 percent in 2002 following the 9/11 attacks.”\textsuperscript{16}

Other studies have shown that today’s Young Voters are less interested in political or public affairs and are less likely to read the newspaper or watch the news. In 1997, only 27\% of college freshmen believed that keeping up with political and public affairs was “very important,” which was down from 59\% of college freshmen in 1966.\textsuperscript{17} That same year, only 19\% of voters ages 18-29 said they followed politics and government “most of the time,” as compared to 51\%.

of voters over the age of 50.\textsuperscript{18} Likewise, Young Voters are less likely to consume political news through traditional media such as newspapers or television news broadcasts. Only 36\% of voters ages 18-29 reported following the news everyday through traditional media, compared to 55\% of voters ages 30-50 and 65\% of voters over 50.\textsuperscript{19}

Current Young Voters are less likely than ever to consume news through traditional media, but they are more likely than ever to consume political news on social media. Pew Research has found that in 2016, 62\% of U.S. citizens received their political news from social media. Studies involving social media show while reading the newspaper still has the strongest effect on voter efficacy, participating in the political process over social media does have a positive effect on voter efficacy, especially amongst Young Voters.\textsuperscript{20} Other studies have found that “active media use to learn about politics” had a positive effect on voter efficacy in Young Voters.\textsuperscript{21} Before the 2016 presidential election, social media had been found to get Young Voters involved in the political process and increase their political efficacy, but the prominent rise of “fake news” on social media could decrease or eliminate altogether the positive effect social media has had on the efficacy of Young Voters.

“Fake news” is a term that “represents an array of misleading news style stories that were fabricated and promoted on social media to deceive the public for ideological and/or financial gain.”\textsuperscript{22} Due to the newness of fake news, “the real-world consequences of fake news have not

\textsuperscript{19} Id.
\textsuperscript{20} Judith Moeller; Claes de Vreese; Frank Esser; Ruth Kunz, \textit{Pathway to Political Participation: The Influence of Online and Offline News Media on Internal Efficacy and Turnout of First-Time Voters}, American Behavioral Scientist, Vol. 58, No. 5 (2014).
\textsuperscript{21} Andrew L. Forrest; Allyson J. Weseley, \textit{To Vote or Not to Vote? An Exploration of the Factors Contributing to the Political Efficacy and Intent to Vote of High School Students}, Journal of Social Students Research, Vol. 31, No. 1 (2007).
yet been fully parsed, public concern regarding the effects of fake news prevails.”23 Many believe that fake news poses a serious threat to American’s democracy, with studies finding “a growing concern is that fake news may cause confusion in the fact-checking process and eventually undermine an informed citizenry.”24 While the full effect of fake news is not currently known, previous research into Young Voter efficacy can predict the negative effect it could have. Rahn (1998) shows that voter efficacy is lower among Young Voters because they are less trusting of their fellow citizens, a trend that is likely to be exacerbated by fake news.25

Also related to media, the type of advertisements Young Voters are exposed to can affect their political efficacy. One study exposed students to either a political attack advertisement, where a candidate’s policies were negatively attacked, or a personal attack advertisement, where the candidate’s character was attacked. This study found that “students exposed to the personal attack advertisements reported slight reductions in their intent to vote.”26 The researcher then gave one possible explanation for this finding in saying “personal attack advertisements are offensive and bring down the level of political discourse to the point that they become apathetic about the election and the system.”27

Political efficacy is also strongly affected by family income level and race. Research has shown that since all Americans gained the right to vote during the Civil Rights era of the 1960’s, “low-income citizens, those who are less educated, and citizens of color are under-represented in

24 Id.
26 Andrew L. Forrest; Allyson J. Weseley, To Vote or Not to Vote? An Exploration of the Factors Contributing to the Political Efficacy and Intent to Vote of High School Students, Journal of Social Students Research, Vol. 31, No. 1 (2007).
27 Id.
the political process.” In 2004, the American Political Science Task Force on Inequality and American Democracy found that the extent to which there is inequality in the American political process is “disturbing.” That task force concluded their study in stating:

“We find disturbing inequalities in the political voice expressed through elections and other avenues of participation. We find that our governing institutions are much more responsive to the privileged than to other Americans. And we find that the policies fashioned by our government today may be doing less than celebrated programs of the past to promote equal opportunity and security, and to enhance citizen dignity and participation.”

This inequality has a direct impact on voting behavior, with 9 out of 10 families whose income was over $75,000 reported voting in the 1990 election, compared to less than half of all families with an income under $15,000. This inequality extends outside voting, with higher income families being “four times as likely to be part of campaign work, three times as likely to do informal community work, twice as likely to contact elected officials, twice as likely to protest, [and] six times as likely to sit on a board.” While voting is supposed to give a voice to all citizens in a democracy, “citizens with low or moderate incomes speak with a whisper that is lost on the ears of inattentive government, while the advantaged roar with the clarity and consistency that policymakers readily hear.”

All the factors above impact the voter efficacy of Young Voters to some extent, but “lack of knowledge was cited by 18- to 24-year-olds as one of the two most important reasons why young people do not vote.” Kaid et. al. (2007) has “found a strong relationship between young

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30 Id.
32 Id.
voters’ perceptions or confidence in their political knowledge and the likelihood that they will exercise their right to vote.”

Galston (2001) found seven links between basic civic information and civic attributes, finding that civic knowledge: “promotes support for democratic values,” “promotes political participation,” “helps citizens understand their interest as individuals and as members of groups,” “helps citizens learn more about civic affairs,” “improves the consistency of citizens’ views,” “alters our opinions on specific civic issues,” and lessens the generalized mistrust of public life. Political knowledge, or lack thereof, is the biggest barrier to political participation, especially for Young Voters.

Civic education is the solution to Young Voters’ political knowledge barrier. Civic education is defined as the explicit teaching of the knowledge, skills, and values believed to be necessary for democratic citizenship. In our American democracy, the responsibility of civic education has fallen on American public schools, with a particular focus on high schools. There is a focus on high schools because it is the “last period when young people in America are guaranteed access to free education, and to civic education, but it is a time when many are making important decisions about their future and their relationship to the world.”

Corresponding with the steep decline in Young Voter turnout has been a growing sense of neglect towards civic education in public high schools.

Today, the typical civic education in high schools consists of one semester long course on American government and a certain number of hours of out of school volunteerism, typically required for graduation or for membership of an honor’s society or other extracurricular activity.

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34 Linda L. Kaid; Mitchell S. McKinney; John C. Tedesco, Political Information Efficacy and Young Voters, American Behavioral Scientists, Vol. 50, No. 9 (2007).
37 Id.
In the 1960’s, the typical in school civic education consisted of multiple courses covering the structure of American government, the role of its citizens, and the current issues the government and its citizens face.\textsuperscript{38}

Since \textit{A Nation at Risk} in 1983 and the No Child Left Behind Act of 2002, less instructional time is going towards civic education and instead is going towards math, science, and reading. The national focus on math, science, and reading, along with studies finding little to no relationship between high school government classes and youth political orientations, have led to policymakers and school leaders to question the overall effectiveness of civic education, which has led to conversations about removing civic education from the curriculum.\textsuperscript{39} Kahne and Middaugh (2008), along with other civic education scholars, suggest that the focus should not be on the quantity of civil education, but on the quality of civic education. In their study, Kahne and Middaugh conclude “when schools provide the kinds of opportunities that allow students to learn and practice a variety of civic skills, learn about how government works, see how others engage civically and politically, and grapple with their own roles as future citizens, then we see increases in both students’ commitment to and capacity for future participation.”\textsuperscript{40} This conclusion was supported in Kahne and Sporte (2009) which “found that classroom based civil learning opportunities had a meaningful impact on Chicago high school students’ commitment to civic participation and desire to vote.”\textsuperscript{41}

With the focus shifting to quality civic education, scholars have attempted to identify what factors a civic education consist of. Gibson and Levine (2003) identified “six promising

\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
practices research has found to be related to higher levels of students’ civic or political commitment, knowledge, skills, and activities."\(^{42}\) These six practices included: “information about the local, state, and national governments; opportunities to debate and discuss current events and other issues that matter to students; service-learning opportunities; experiences with extracurricular activities; opportunities for youth decision making; and engaging in simulations of civic processes.”\(^{43}\) Other scholars have also identified open classroom discussions and controversial issue discussions as factors of a quality civic education. In 2008, CIRCLE synthesized current research on quality civic education and created a list of best practices that fostered desired civic outcomes. This list of best practices mirrored the factors discussed above, but added interacting with civic role models and learning about community problems and ways to respond.\(^{44}\)

In addition to the in classroom civic education curriculum, most high school students participate in community service as part of an extracurricular activity. Some schools mandated students perform community service as seniors and a graduation requirement, while others had extracurricular activities that required or were centered around community service. Hart et al. (2007) studied the effect doing high school community service had on adulthood civic participation, and found “high school community service predicted adult voting and volunteering, after controlling for other relevant predictors and demographic variables.”\(^{45}\) Hart et al. (2007) fell in line with Metz and Youniss (2003) which found that performing community

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\(^{43}\) Id.


service had the same positive effect on future civic participation regardless of whether it was mandatory or voluntary.\textsuperscript{46}

At the most basic level, a meaningful civic education includes both factual knowledge about how the government works and the opportunity for students to openly and freely voice and debate their opinions on political topics and controversies. Previous research suggests that no school in America currently has a curriculum that includes a truly meaningful civic education, like the ones described by Gibson and Levine (2003) or CIRCLE (2008); however, most schools do have available “civic learning opportunities that promote voting and broader forms of civic engagement.”\textsuperscript{47} These opportunities include civic-oriented government classes, including AP-level courses that are the most likely to include simulations, after school activities, including ones including community service, and open classroom environments that encourage discussions and debates on current events and other political topics.\textsuperscript{48}

Unfortunately, these classroom-based civic education opportunities are not equally available to all students. Just as there are inequalities in political efficacy based on Young Voters’ family income and race, there is an inequity in school based civic learning opportunities based on race, socioeconomic class, and academic success. CIRCLE (2008) found that “schools appear to be exacerbating inequality by not providing equal civic preparation to students in most need of civic skills and resources.”\textsuperscript{49} CIRCLE conducted three separate studies on the inequality of classroom based civic learning opportunities. The first examined the role race and ethnicity play in determining what high school civic opportunities will have; the second examined the

\textsuperscript{46} E. Metz; J. J. Youniss, \textit{A Demonstration that School-based Required Service Does Not Deter but Heightens Volunteerism}, PS: Political Science and Politics, Vol. 36 (2003).
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
difference between civic opportunities provided to students in AP government classes versus College Prep government classes in California; and the third examined civic learning opportunities compared to a nationally representative set of classrooms from 124 different schools throughout the country. All three studies had a consistent conclusion: “students who are more academically successful or white and those with parents of higher socioeconomic status receive more classroom-based civic learning opportunities.”

**Methodology**

This is a qualitative study with the primary data collection and analysis method being document analysis. More specifically, K-12 public school free speech cases from 11 Federal Circuit Courts will be identified and analyzed. The D.C. Circuit Court and US Court of Appeals for the Federal Circuit will not be considered for this study, nor will court cases involving religious speech in school, because they invoke constitutional principles outside the scope of this study. Once analyzed, the federal circuits will be ranked from 1-11, with 1 being the least restrictions on students’ free speech and 11 being the most restrictive of students’ free speech. This will result in the “Free Speech Ranking.” Young Voter turnout for the 2016 presidential election will then be calculated for each circuit using voter turnout data from the United States Census Bureau. Voter turnout for each circuit will be determined by adding together the “Total Voted” for the 18-24 age group of all the states in a particular circuit, and then dividing that number by the sum of the “Total Population” ages 18-24 for each state in that circuit. That calculation will result in the “Young Voter Turnout Ranking” for each Federal Circuit. The Young Voter Turnout Ranking for each circuit will be ranked from 1-11, with 1 being the highest turnout and 11 being the lowest turnout. Finally, the Free Speech Ranking will be

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50 *Id.*
compared to the Young Voter Turnout Ranking to determine if there is a relationship between the two variables.

Data

United States Supreme Court

Under the American federal judicial system, the United State Supreme Court can hear federal cases originating in any Federal Circuit Court, and their judicial decisions will create legal rules and precedent that all other courts must adhere to. Therefore, the Supreme Court precedent in cases involving free speech in K-12 public schools must be discussed before discussing case law from each circuit individually because the Supreme Court creates a test and sets the standard for how each circuit should analyze these K-12 public school free speech cases. The Supreme Court first heard a case involving the free speech rights of students at the height of the Vietnam War in 1969 with the landmark case *Tinker v. Des Moines Independent Community School District*.51

In *Tinker*, a handful of high school students planned to wear black armbands to school as part of a protest of the Vietnam War. When school officials heard of this plan to protest, they adopted a policy which banned students from wearing black armbands to school, and if a student was found to be wearing an armband, they would be suspended until they agreed comply with the policy. Despite this policy, the students wore the armbands to school, and were suspended. This policy was then challenged by the students in court, and eventually was argued in front of the Supreme Court. The Supreme Court found that this type of symbolic speech was the exact type of speech the First Amendment was meant to protect, and just because these students were in school did not mean their speech was not protected under the First Amendment. In deciding

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for the students in *Tinker*, the Supreme Court announced one of its most famous lines in stating “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

In addition, the Supreme Court created the test under which the constitutionality of future public school free speech cases should be analyzed. *Tinker’s* ‘substantial interference’ test states that a school can limit its students’ right to free speech only when the speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”

While *Tinker* was undoubtedly an important victory for students and their right to free speech in schools, the Supreme Court would hear three more cases involving student speech in schools in the decades after *Tinker*, and each would be decided in favor of the schools. The first such case was *Bethel School District v. Fraser*, which was decided in 1986. In *Fraser*, a high school student was suspended after giving a speech during a high school assembly that was filled with sexual innuendos and indecent language. The school suspended him for violating the policy governing obscene language, which mirrors the Supreme Court’s *Tinker* decision in stating “conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” While the policy in *Fraser* mirrored the language from *Tinker*, the Supreme Court did not apply *Tinker’s* substantial interference test in holding that the school’s policy and decision to punish Fraser were constitutional. Alternatively, the Supreme Court stated that schools have the responsibility to protect its students from being exposed to this type of language, and thus it was within the school’s authority to punish Fraser in this situation.

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52 Id. at 507.
53 Id.
55 Id. at 678.
Two years after Fraser, the Supreme Court once again took up the issue of students’ free speech rights in school with Hazelwood School District v. Kuhlmeier. In Hazelwood, three high school journalism students brought a lawsuit against the school after the principal did not allow articles on teenaged pregnancy or divorce to be printed as part of the school’s newspaper. Once again, the Supreme Court ruled in favor of the school without using the substantial interference test. The court did not use the substantial interference test because the newspaper was school sponsored and part of the journalism curriculum; therefore, the standard is whether the principal’s actions were “reasonably related to legitimate pedagogical concerns.” In this case, the Supreme Court believed that the pedagogical concerns behind refusing to publish these articles were legitimate, and ruled in favor of the school.

In 2007 the Supreme Court decided Morse v. Frederick, which is the fourth and final time the Supreme Court has ruled on the free speech rights of students in schools. In Morse, a high school allowed for its students, as an approved class trip, to watch the part of the 2002 Olympic Torch Relay ceremony that passed by the street in front of the school. While the ceremony was occurring, a group of students held up a banner that said “BONG HiTS 4 JESUS,” a message both the school and court regarded as encouraging illegal drug use. The principal confiscated the banner and suspended Frederick for ten days. Frederick believed that this violated his First Amendment rights, but the Supreme Court disagreed. In analyzing this case, like in Fraser and Hazelwood, the court did not use the substantial interference test; instead it relied on this precedent set in Fraser. The Supreme Court likened the promotions of illegal drug use to the explicit and sexual language in Fraser, and held that schools have a responsibility to

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57 Id. at 273.
58 Morse v. Frederick, 551 U.S. 393 (2007).
protect the students in their care from speech that encourages illegal drug use. Therefore, the punishment of Frederick in this case did not violate his First Amendment right to free speech.

In 1969, the Supreme Court made the proclamation that students do not shed their constitutional rights at the schoolhouse gate, but their decisions since have made nuanced caveats to that proclamation. Despite these caveats, it is still clear that students in school still have the constitutional right to free speech, and although the Supreme Court has not used Tinker’s substantial interference test since 1969, it is still the test used by lower federal courts to analyze and decide student free speech cases. While all 11 Federal Circuit Courts use the same test and precedent case law to decide student free speech cases, they do not all interpret and apply the Supreme Court’s precedent in the same manner. Below, the student free speech case law from each Federal Circuit Court will be discussed.

First Circuit

Of the eleven federal circuit courts considered for this study, the First Circuit has considered the issue of students’ right to free speech the least. In 1971, shortly after the Supreme Court’s decision in Tinker, the First Circuit decided *Risman v. School Committee of Quincy*, the court’s only major student speech case. In *Risman*, school officials told a student that he was not allowed to pass out an “anti-war leaflet and ‘A High School Bill of Rights’” to his fellow classmates. The school had a policy that required any non-school materials sought to be distributed to members of the school committee must first be approved by the School Committee. The student submitted the anti-war leaflet and High School Bill of Rights to the committee, but permission to distribute them was denied. The First Circuit, recognizing the Supreme Court’s substantial interference standard set in *Tinker*, found that the school’s attempt

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59 *Risman v. School Committee of Quincy*, 439 F.2d 148 (1st Cir. 1971).
to regulate student conduct by requiring prior approval of the School Committee was not constitutionally permissible.

A second, and less broadly reaching case involving a student’s First Amendment right to free speech came out of the First Circuit during the 1970’s. In the late 1960’s and early 1970’s, due to the rise of ‘hippy culture’ and anti-war demonstrations, many Federal Circuit Courts were faced with the question of whether a student’s hair length was of a sufficiently communicative character to warrant First Amendment protections. By the time the First Circuit answered this question in 1970 with Richards v. Thurston, 60 multiple circuits had already ruled on similar cases both in the affirmative and negative, causing a circuit split. The First Circuit joined the coalition of ‘pro-hair’ courts and held that a student’s hair is considered speech under the First Amendment, and thus is protected. Therefore, a male high school student could not be suspended from school for refusing to cut his ‘unusually long’ hair.

Second Circuit

Similar to the First Circuit, the Second Circuit’s student free speech jurisprudence began in the early 1970’s with a case involving a school’s policy that prohibited the distribution of written materials in school without prior approval of the school’s administration. The Second Circuit, in Eisner v. Stamford Board of Education, 61 found unconstitutional a policy that required all written materials be approved prior to being distributed in school because it gives school administrators “greater power to restrain the distribution of disruptive matter than Tinker allows, or . . . otherwise unreasonably burdens students’ first amendment activity.” 62 Just as the Second Circuit in Eisner prevented school administrators from exercising more power than given to

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60 Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).
62 Id. at 808.
them under *Tinker*, in *Thomas v. Board of Education*\(^6^3\) the Second Circuit ensured the scope of *Tinker* did not extend beyond the schoolhouse gate. In *Thomas*, the Second Circuit held the *Tinker* test did not apply to a student-created newspaper that was created and distributed off school grounds, although copies of the newspaper eventually made their way onto school grounds. The court believed this situation exceeded the limits of *Tinker*, and stated the proper standard to apply to this newspaper was the higher standard that applies whenever government officials attempt to limit a citizens First Amendment rights outside of a special situation such as a school.

In 2006, the Second Circuit had to decide whether *Tinker* or *Fraser* applied to a case where a 13-year-old student was wearing a shirt that displayed a political message but also displayed images of alcohol and cocaine. In *Guiles v. Marineau*,\(^6^4\) a student wore the following shirt, which criticized then-President George Bush and portrayed him as being an alcoholic and cocaine abuser, to school at least once a week over the course of multiple months:

![Image of the shirt](image)

The shirt caused no disruptions or fights when it was previously worn in the school, and the school seemingly had no issue with the shirt until a parent, who was chaperoning the student’s class on a field trip, complained to the administration. The administration then forced the student to either change his shirt or wear the shirt with duct tape covering the images of drugs and


alcohol. The Second Circuit believed that this censoring of the student’s political message being made by wearing the shirt was unconstitutional because the shirt was not plainly offensive speech; therefore, Fraser did not apply, and the court had to apply the Tinker substantial interference standard. Under the Tinker standard, the school could not prevent the student from wearing the shirt.

Through the Guiles decision in 2006, the Second Circuit was very protective of student’s free speech rights; however, since 2006 the court has been substantially less protective. Although the Second Circuit held in Thomas that a newspaper created and distributed off school groups was not within the scope of Tinker, the court has twice held that the same distinction does not apply to internet posts created and distributed off school grounds. In Wisniewski ex rel. Wisniewski v. Board of Education, an eighth-grade student created an internet drawing depicting a teacher, who was named on the image, being shot and killed, and sent it to fifteen of his friends via instant messenger. Similarly, in Doninger v. Niehoff, a high school student created a blog post which was vulgarly critical of the school’s administration and called for people in the community to call the central office to voice their discontent surrounding the possible cancellation of an annual school event. In both cases, the court held that Tinker applied and the schools were justified in punishing the students even though the posts were created and distributed off school grounds because it was reasonably foreseeable that the communications would cause a disruption within the school environment.

In addition to cases involving speech over the internet, the Second Circuit has also held that school administrators did not act unconstitutionally when they suspended a fifth grader in

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response to a crayon drawing that depicted an astronaut and a missile that was blowing up the school with the teachers inside of it.\textsuperscript{67}

\textit{Third Circuit}

Unlike the First and Second Circuits, the Third Circuit did not consider the issue of students’ free speech rights until 2001. However, in the just under two decades since deciding its first student free speech case, the Third Circuit has been protective of students’ rights, with the exception of young, elementary school-aged students. In the circuit’s first case, \textit{Saxe v. State College Area School District},\textsuperscript{68} the court invalidated an anti-harassment policy that prohibited “verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation disability or other personal characteristics.” The court invalidated this policy on the premise that it was overbroad, meaning that it banned not only truly harassing speech but also other speech that is protected by the First Amendment, such as speech or demonstrations that expressed a political viewpoint in opposition of homosexuality.

After \textit{Saxe}, the Third Circuit protected students’ free speech rights limiting the application of the Supreme Court’s student free speech jurisprudence in two important ways. First, the Third Circuit decided that the First Amendment prevented the school from extending its reach beyond the schoolyard and punishing students for posts made on social media, unless there was a ‘sufficient nexus’ between the social media posts and a substantial disruption in school. Therefore, the Third Circuit twice found that schools could not punish students who created crude and vulgar Myspace profiles meant to make fun of their principals.\textsuperscript{69} Second, the Third Circuit limited the ability of schools to restrict vulgar or plainly offensive speech under

\textsuperscript{68} \textit{Saxe v. State College Area Sch. Dist.}, 240 F.3d 200 (2001).
\textsuperscript{69} \textit{Layshock v. Hermitage Sch. Dist.}, 650 F.3d 205 (2011); \textit{J.S. v. Blue Mt. Sch. Dist.}, 650 F.3d 915 (2011).
Fraser. In *B.H. ex rel. Hawk v. Easton Area School District*, the school districted banned wearing bracelets that said “I ♥ Boobies,” which were part of a nation-wide breast cancer awareness campaign. The court held that Fraser did not apply to speech that could be interpreted as either vulgar or offensive or as speech on a political or social issue. Therefore, the speech had to be analyzed under the higher *Tinker* standard, which did not justify banning the bracelets in this case.

While the Third Circuit has been protective of middle and high school-aged students’ rights, it has declined to extend those same protections to elementary school students. In *Walker-Serrano v. Leonard*, the Third Circuit announced that elementary school students did not enjoy the same protections under *Tinker* as older students due to their age. Under this ‘qualified’ *Tinker* standard, the school was allowed to prevent a student from circulating a petition that protested the class’s field trip to the circus and punish a kindergarten student for telling another student “I’m going to shoot you,” while playing a game of cops and robbers on the playground.

*Fourth Circuit*

In the beginning of the 1970’s, the Fourth Circuit thrice held that school policies requiring the preapproval of non-school related printed or written materials violated students’ right to free speech, and thus were invalidated. While the Fourth Circuit did not agree that all prior restraint was unconstitutional, in order for a policy requiring the preapproval of printed or written material to be constitutional, it must contain the following: “1. A definition of ‘Distribution’ and its application to different kinds of materials; 2. Prompt approval or

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72 *Id.*
disapproval of what is submitted; 3. Specification of the effect of failure to act promptly; and 4. An adequate and prompt appeals procedure.\textsuperscript{76} In \textit{Williams v. Spencer},\textsuperscript{77} the court used that standard to uphold a policy which required advanced approval of school administrators before distribution of an underground student newspaper, and the preapproval was granted without preapproving the contents of the publication. It was only after the students began distributing the publication that the school administrators discovered content in the publication that violated school policy, an advertisement from a local business promoting drug paraphernalia, and forbid the students from any further distribution of the newspaper. The policy provided for multiple appeals, which the students took advantage of, but to no avail. The court held that the policy itself was constitutional and preventing the distribution of this particular student newspaper containing the drug advertisement was within the school’s power to protect their students from potentially harmful activities.

Over thirty years later, the Fourth Circuit used the \textit{Tinker} test twice to uphold the restrictions of students’ free speech rights in \textit{Kowalski v. Berkeley County School}\textsuperscript{78} and \textit{Hardwick v. Heyward}.	extsuperscript{79} In \textit{Kowalski}, a high school student created a social media page that singled out another student and subjected her to harassment, bullying, and intimidation. Although this social media page was created off school grounds, the court held that the school acted constitutionally when it punished the student because it was reasonably foreseeable that the off-campus conduct would reach the school, and it created a substantial disruption, as required under \textit{Tinker}, when the subject of the post told school administrators that she no longer felt comfortable attending school with the individuals who participated in the page. In \textit{Hardwick}, a

\textsuperscript{76} \textit{Id.} at 1351.

\textsuperscript{77} \textit{Williams v. Spencer}, 622 F.2d 1200 (1980).

\textsuperscript{78} \textit{Kowalski v. Berkeley County Sch.}, 652 F.3d 565 (2011).

\textsuperscript{79} \textit{Hardwick v. Heyward}, 711 F.3d 426 (2013).
student was prohibited by a school policy from wearing clothing depicting the Confederate Flag, which the student argued was a censoring of her political viewpoint. The court held that the school administrators could predict a substantial disruption might occur given the long history of racial tension both in the school and in the town, along with specific instances in the past where the confederate flag has caused disruptions in the school.

Fifth Circuit

The Fifth Circuit is one of the only circuits to consider the issue of students’ free speech rights in school before the Supreme Court decided Tinker in 1969. Three years prior to the Tinker decision, the Fifth Circuit decided Burnside v. Byars, where it held that the school could not prevent students from wearing political ‘freedom buttons’ while attending school because the wearing of these buttons did not cause a disturbance in the school. Decided the same year as Burnside, the Fifth Circuit held in Blackwell v. Issaquena County Board of Education that prohibiting students from wearing freedom-buttons in school was reasonable when the school could show evidence of a disruption in classes or the school’s routine. The Burnside decision was very influential to the Supreme Court, who relied upon its reasoning in formulating the Tinker decision and create the substantial interference test that would be used to judge all subsequent student free speech cases.

In Ferrell v. Dallas Independent School District, another pre-Tinker case decided by the Fifth Circuit, the court decided against the First Circuit and the coalition of ‘pro-hair’ courts in holding that even if hair length was a constitutionally protected form of expression, the rule

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against long hair was “not unreasonable or arbitrary in that the regulation was reasonably calculated to maintain school discipline.”  

In the decades after Burnside and Tinker, the Fifth Circuit has attempted to define the scope of Tinker, particularly how it applies to speech that originates off school grounds. Through its case law, the Fifth Circuit has decided that Tinker applies to any speech that originates off school grounds if it was intended to reach school grounds and substantially and materially disrupts school activities. Applying this standard, the Fifth Circuit twice found that schools could not punish students for distributing ‘underground’ student newspapers under vague policies that required prior approval of all non-school sponsored written materials distributed in the school unless the newspaper caused a substantial and material disruption. Focusing on whether the speech was intended to reach the school aspect of the test, the Fifth Circuit held that Tinker did not apply to a drawing made at the student’s house depicting a violent siege of the high school created two years prior to the student’s younger brother unknowingly bringing it onto school grounds. Since the student did not intend for the drawing to reach the school, Tinker did not apply and the school could not punish the student for the drawing.

The Fifth Circuit continued to use the same test to determine whether students can be punished for online speech. In Bell v. Itawamba County School Board, a student was punished after posting a vulgar rap song on Facebook that threatened two teachers. The song was posted on the student’s public Facebook page, meaning anyone could view it, and the student stated that the purpose of posting it there was so people from the school saw it. Since the song was intended

83 Id. at 703.
85 Shanley v. Northeast Independent School Dist., 462 F.2d 960 (1972); Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (1973)(although student could not be punished for distributing the newspaper, punishment was proper in regards to how the student responded to administrators, mainly his “open and repeated defiance of the principal’s request, and his resort to profane epithet.”)
to reach the school and caused a substantial and material disruption, the school acted properly in punishing the student under *Tinker*.

The Fifth Circuit has also has considered when schools can restrict or punish students for in-school speech. In *Ponce v. Socorro Independent School District*, a student brought a notebook to school which contained writings that detailed the creation of a pseudo-Nazi group at the high school, along with various planned attacks on the school, including one Columbine-style shooting. Although the student attempted to explain this notebook by saying it was a fictional work of creative writing, the court expanded the Supreme Court’s *Tinker* exception articulated in *Morse* to include direct threats to the physical safety of the school. The Fifth Circuit has also addressed the issue of freedom of expression through clothing twice, holding that a dress code that contained content-neutral regulations was constitutionally permissible, and the banning of clothing portraying the Confederate Flag was also permissible because the school’s history of racial tension and prior incidents involving the Confederate Flag made it reasonably foreseeable that wearing the flag would cause a disruption.

**Sixth Circuit**

The majority of the Sixth Circuit’s student free speech cases center around dress codes and students’ ability to express themselves through their clothing while in school. While the Sixth Circuit held that the existence of a dress code in itself does not violate students’ First Amendment rights, there are certain situations where prohibiting students from wearing clothing portraying a particular message may. In one highly contested topic of freedom of expression through clothing, the court has decided four cases involving schools’ ability to ban

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students from wearing images of the Confederate Flag. In three of those cases, the court upheld the ban on Confederate Flag imagery because the school was able to show racial tension in the school and prior instances of race-based disruptions in the school; therefore, it was reasonably foreseeable that students wearing the flag would cause a substantial disruption, thus satisfying the Tinker test. However, the court held in Castorina v. Madison County School Board that absent a history of race-based violence or tension in the school, the school could not ban students from wearing the Confederate Flag because there is no reason for the administration to believe that wearing the flag would cause a disruption. In Boroff v. Van Wert City Board of Education, the court expanded the holding from Fraser, which allows schools to prohibit speech that is plainly obscene or offensive, to allow schools to ban the wearing of a Marilyn Manson T-shirt not because the shirt itself was obscene or offensive, but because “the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school.”

The Sixth Circuit has also considered cases not involving school dress codes. In M.A.L. v. Kinsland, a student wanted to participate in the nationwide Annual Pro-Life Day of Silent Solidarity by wearing red armbands, distributing pro-life literature, wearing a t-shirt stating “Pray to End Abortion,” and wearing red tape over his mouth and not speaking for the entire day. The school made the student remove the red tape from his mouth, turn his shirt inside out to hide the message, and told him that he was not allowed to distribute his literature because he failed to be pre-approval form the principal. After filing the lawsuit, the school and the student agreed that the student could not wear the tape on his mouth in school but he would be allowed to wear the

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94 Id. at 469.
red armbands and the “Pray to End Abortion” shirt. However, the parties could not agree on when and where the student was allowed to distribute his pro-abortion literature. The student wanted to be able to pass it out in the halls throughout the day while the school wanted to limit him to posting the literature on the bulletin board and distributing it only during lunch. The Sixth Circuit ruled in favor of the school, stating that Tinker did not apply because the school was not trying to silence the student’s speech, it was just reasonably restricting the time, place, and manner of the speech, which is constitutionally permittable.

Just as the Sixth Circuit expanded the holding of Fraser in Boroff, it also widely expanded the holding of Hazelwood School District in Poling v. Murphy.96 In Poling, a student was giving a speech as part of running for student government, and made comments about a school official that were “discourteous and rude,” but not obscene or vulgar. In Hazelwood School District, the Supreme Court held that the school could restrict school-sponsored student speech advocating for the use of illegal drugs because it was in furtherance of a legitimate pedagogical concern. The Sixth Circuit held that like preventing students from using illegal drugs, “civility” is also a legitimate pedagogical concern that justifies the limiting of school-sponsored student speech whenever it is not sufficiently civil. The Sixth Circuit has also held that a high school football coach was proper under Tinker in dismissing players from the team who signed a petition protesting him as the head coach.97 The substantial disruption that the court found sufficient to satisfy the Tinker test was ‘team unity,’ and the court held that it was reasonably foreseeable that the petition would divide and negatively affect the team.

96 Poling v. Murphy, 872 F.2d 757 (1989).
97 Lowery v. Euverard, 497 F.3d 584 (2007).
Seventh Circuit

The Seventh Circuit joined the coalition of ‘pro-hair’ courts in 1969 with *Breen v. Kahl*.98 Applying the newly minted *Tinker* test created by the Supreme Court that same year, the court held that the school could not suspend or expel a student for having long hair unless they could show a substantial justification for the policy. During the 1970’s, much of the Seventh Circuit’s student free speech rulings centered around the operation of underground student newspapers. In *Scoville v. Board of Education*,99 a group of high school students wrote an off-campus newspaper containing criticism of the school’s policies and administrators and distributed it to other students in school. The school subsequently expelled the students, an action the Seventh Circuit said violated the students constitutional rights because the newspaper did not cause a distribution in the school, and the court held that “mere expressions of the students’ feelings with which school officials do not wish to contend is not the showing required by the *Tinker* test to justify expulsion.”100 Two years later, the court once again held unconstitutional a suspension over an underground student newspaper in *Fujishima v. Board of Education*.101 In *Fujishima*, students were suspended for violating a school policy requiring students to get preapproval of materials intended to be distributed in the school. The Seventh Circuit held that *Tinker* did not allow prior restraint of student publications to be used as a tool for school authorities to forecast substantial disruptions in school activities; therefore, the policy was unconstitutional.

It wasn’t until 1998 that the Seventh Circuit found that a school properly punished a student for distributing an underground student newspaper in school. In *Boucher v. School*

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100 *Id.* at 15.
Board, a student published and distributed an underground newspaper that contained an article that explained how to hack the school computers so that students could see all the files on the computer and potentially change grades and disciplinary records. The author of this article was expelled from the school, a punishment that the court found constitutionally permissible because the article posed a serious threat to school property, which satisfies the substantial disruption requirement of the *Tinker* test.

Outside of the student underground newspaper context, the Seventh Circuit has also decided multiple cases regarding students wearing shirts containing a specific message as part of a protest. In *Baxter by Baxter v. Vigo County School Corporation*, the parents of an elementary school student wanted to protest the unfair grading and racism at the school by having their daughter wear shirts that said “Unfair Grading,” “Racism,” and “I Hate Lost Creek.” The school did not allow the student to wear these shirts, and the court ruled that this prohibition was constitutional. While the Seventh Circuit held that the student’s self-expression was blocked in this case, the school did not violate a clearly established constitutional right because *Tinker* did not fully apply to elementary-aged students; instead, the student’s free speech rights in school had to be assessed in light of their age.

While *Tinker* did not fully apply in *Baxter*, it did apply to middle school students in *Brandt v. Board of Education of Chicago* and high school students in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District #204*. In *Brandt*, the middle school held a contest where eighth grade students could submit designs for the official class shirt, and the class would then get to vote on which design they wanted. The plaintiff, a student in the gifted program, submitted a

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105 Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3dd 668 (2008).
shirt design and believes that his design won a plurality of the votes in the first election, but the teachers held a runoff election and his shirt did not win. Believing that the voting was rigged and unfair, the students in the gifted program protested the contest by creating and wearing the design they believed should have won. Once the school administrators discovered their protest plans, they prohibited the students from wearing the protest shirts to school. The Seventh Circuit held that this prohibition was constitutional because the shirt itself was not protected speech, the principal was reasonable in prohibiting students from wearing it to school, and the school did not prohibit the students from protesting the competition, but just protesting it through wearing the shirts.

In Nuxoll, a high school student wanted to wear a shirt that said “Be Happy, Not Gay” to display his disapproval of homosexuality in response to the annual “Day of Silence,” a demonstration with the intention of bringing attention to the harassment members of the LGBTQ+ community face. The school prohibited the student from wearing this shirt because of a school policy that forbid derogatory comments that refer to sexual orientation. The court held that the school unconstitutionally restricted the student’s First Amendment rights by not allowing him to wear the shirt that displayed his political position on homosexuality.

_Eighth Circuit_

The Eighth Circuit, like many other circuit courts, began their student free speech jurisprudence with the issue of underground student newspapers. In _Bystrom v. Fridley High School_, students challenged a school policy which prohibited the distribution of unofficial written materials on school grounds unless preapproved by the school administrators. Although the underground student newspaper in this case did not cause a disruption at the school, the court

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held that the policy was constitutional even though it gave the school administrators the power of prior review and restraint over speech that was not sponsored by the school. The court doubled-down on the Bystrom holding in Henerey ex rel. Henerey v. City of St. Charles.\textsuperscript{107} In Henerey, a student was running in a student council election, a condition of which was signing a contract agreeing to obey all school rules, including a rule stating all campaign materials needed to be approved by the school’s administration. Without getting approval from the school, the student handed out condoms with stickers attached to them baring his campaign slogan, which led to his disqualification from the election. The Eighth Circuit held that the election was a school-sponsored activity under Hazelwood, thus the school had the constitutional authority to exercise control over the student’s speech. In analyzing the constitutionality of the school policy requiring prior approval itself, the court, citing Bystrom, held that the policy was constitutional.

The Eighth Circuit has held that schools have the ability to control and punish students for speech that originated off school grounds even in situations other than underground student newspapers. In Doe v. Pulaski County Special School District,\textsuperscript{108} a student wrote an offensive and vulgar letter about another student at his home, but kept it at his house and did not intend it to ever reach the school. However, without the student’s knowledge, one of his friends took the letter from his house and gave it to the student who was the subject of the letter while they were at school, which ultimately lead to the student being expelled from school. In finding that this expulsion was constitutional, the court did not use the Tinker test but instead held that the school was proper in punishing the student because of the letter’s threatening content. The court again avoided using the Tinker test by categorizing student speech as a true threat in D.J.M. v.

\textsuperscript{108} Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (2002).
Hannibal Public School District. In D.J.M., the court held constitutional a suspension stemming from threats made by the student online through an instant messenger website. The court has held that a school can punish students for online speech created off school grounds even when the speech does not constitute a true threat. In S.J.W. v. Lee’s Summit R-7 School District, two brothers were suspended for creating a blog that contained racist and sexually explicit comments about their high school classmates. Using the Tinker test, the Eighth Circuit held that the suspension was constitutional because the school was able to show that the blog caused disruptions during the school day.

Even outside the above described cases, the Eighth Circuit has not been protective of students’ first amendment rights in school. In Sonkowsky v. Board of Education for Indep. No. 721, the court held upheld the school’s punishment of a student for refusing to color a picture of a football player in Minnesota Vikings colors due to him being a fan of the Green Bay Packers, a rival of the Vikings. The student was also not allowed to wear his Packers jersey in a class photo that was being sent to the Vikings as part of a contest they hosted, and he was not allowed to participate in a celebratory parade unless he agreed not to wear his Packers jacket, which was reportedly the only jacket he owned. In B.W.A. v. Farmington R-7 School District, the court held that the school’s policy banning students from wearing the Confederate Flag was constitutional because past racially charged incidents in the school provided substantial evidence that wearing the flag would lead to disruptions in the school. Lowry v. Watson Chapel School District is the only identified case where the Eighth Circuit ruled in favor of students’ free

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speech rights. In *Lowery*, students wore black armbands to protest the school’s uniform policy. The court held that even though the students were protesting a school policy as opposed to a national one, the relevant facts of the case were so similar to *Tinker* that its holding was dispositive.

*Ninth Circuit*

The Ninth Circuit has taken a different approach to restricting students’ free speech rights under *Tinker* by creating different standards for when school administrators can censor student speech and punish a student for their speech. While satisfying the *Tinker* test allows school administrators in the Ninth Circuit to censor student speech, in order to punish students for the use of “pure speech” the school must show additional justification for their action, such as the violation of a statute or school rule. Under this standard, the court found in *Karp v. Becken*\(^{114}\) that a walk-out of a school assembly where students were protesting the decision not to rehire a teacher could be stopped by the school administration when there was a reasonable forecast the walk-out would cause a disruption, but the school officials could not discipline the same students for participating in the walk-out. However, in *Corales v. Bennett*,\(^{115}\) the court held that the school could discipline students who walked out of the school to protest pending immigration reform measure not because of their participation in the protest, but because of the school’s policy against truancy. Likewise, in *Lavine v. Blaine School District*,\(^{116}\) the Ninth Circuit found that punishment resulting from a poem that threatened a school shooting was proper not because of the content of the speech, but to “avert perceived potential harm.”\(^{117}\) Additionally, true threats, such as a student telling a school guidance counselor they were going to shoot her, can subject


\(^{115}\) *Corales v. Bennett*, 567 F.3d 554 (2009).


\(^{117}\) *Id.* at 983.
the student to discipline because neither Tinker, nor the First Amendment, protect speech deemed to be a true threat. In Dariano v. Morgan Hill Unified School District, the court held that the school acted properly in requiring students to remove American flag clothing during the school’s Cinco de Mayo celebration due to anticipated race-related violence because the school only restricted students from wearing the clothing, it did not punish them. Any punishment in Dariano would have been given greater constitutional scrutiny and would have likely been found unconstitutional.

Outside of the abovementioned line of cases creating a distinction between schools censoring student speech and punishing student speech, the Ninth Circuit has decided a wide range of student speech cases, mirroring the factual circumstances of cases from other circuits. In Hatter v. Los Angeles City School District, the court held that the school could not interfere with a peaceful protest of the school’s dress code by boycotting the school’s annual chocolate drive fundraiser without showing that the protest created a disruption or the school administration could reasonably forecast a disruption was going to occur. In Burch v. Barker, the court sided with the authors of an underground school newspaper in holding a school policy requiring the prior approval of student-written materials before they could be distributed to students in the school unconstitutional. In once again ruling to protect students right to protest, the court in Chandler v. McMinnville School District held that, without showing a disruption, the school could not prevent students from wearing “scab” buttons to protest replacement teachers in a teacher union strike. Pinard v. Clatskanie School District 6J exemplifies the

importance a showing of disruption has on the Tinker analysis as it applies to student protest. In Pinard, students on the varsity basketball team protested their head coach by signing a petition asking for him to be removed and refusing to participate in a game. The court held that there was no disruption caused by the petition, thus it was protected by the First Amendment under Tinker and could not be the basis for censorship or punishment. However, the boycotting of the game was not protected by Tinker because refusing to play in the scheduled game “substantially disrupted and materially interfered with the operation of the varsity boys’ basketball program.”

The Ninth Circuit has also expanded Tinker to allow school administrators to punish students for speech that occurred off school grounds. One such example is Wynar v. Douglas County School District, where the court held that the school acted constitutionally when it expelled a student for sending violent and threatening instant messages to his friends on a social media website, primarily centered the student’s perceived desire and ability to conduct a mass school shooting. Likewise, in C.R. v. Eugene School District 4J, the court held that the school acted constitutionally when it punished a student for speech that sexually harassed two other students even though the speech occurred in a public park adjacent to school grounds just minutes after the conclusion of the school day.

Tenth Circuit

The Tenth Circuit did not decide a case involving students’ free speech rights in K-12 public schools until 1996 with Seamons v. Snow. In Seamons, a high school football player was hazed by other players. After the hazing incident, the head coach pressured the player not to

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124 Id. at 759.
report the hazing to the school administration or local newspapers, but the player refused to listen to the coach, and was ultimately removed from the team. While the court held that the coach did not violate his First Amendment rights when he pressured him not to report the incident, the student’s rights were violated when the coach removed him from the team because he reported the incident to the administration.

In *West v. Derby Unified School District No. 260* and *Taylor v. Roswell Independent School District*, the Tenth Circuit held that the school administrators constitutionally restricted the students’ speech because speech caused a substantial disruption, thus satisfying the *Tinker* test. In *West*, a student was suspended for drawing a Confederate Flag during class, which violated the school’s “Racial Harassment and Intimidation” policy. The school district created this policy in response to a history of racial tension in the school district, particularly violent and otherwise disruptive incidents stemming from students wearing or portraying the Confederate Flag in school. Citing this history, the court held that the administrators could reasonably forecast that the drawing of the flag would cause a disruption, thus the suspension was constitutional. In *Taylor*, the court found that the school acted constitutionally in restricting the student speech because an actual disruption had occurred in the school as a result of the speech. The *Taylor* case dealt with a group of students who wanted to hand out rubber fetus dolls to protest abortion. The students were initially allowed to distribute the dolls despite not getting the required prior approval from the school, but were later forced to stop handing out the dolls after students were found throwing the dolls, using them to clog up toilets, setting them on fire, and otherwise causing substantial disruptions throughout the school. The Tenth Circuit held that

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these disruptions obviously justified the school administrator’s restriction of the students’ speech on that day as well as preventing the students from distributing the dolls again on a later date.

In the summer after the infamous Columbine shooting, Columbine High School wanted to make a “concentrated effort to change the appearance of the building to avoid incorporating sensory cues that could reactivate memories of the attack,” so they invited students and other members of the community affected by the attack to paint tiles that would be affixed to the interior school walls. However, the school prohibited people from painting references to the attack, the date of the attack, the initials or names of victims, the Columbine ribbon, religious symbols, or anything else that would be considered obscene or offensive. Despite this policy, many tiles were painted containing prohibited images or references, and when the school refused to put them up in the school, a lawsuit was filed. In the ensuing lawsuit, *Fleming v. Jefferson County School District R-1*, the Tenth Circuit held that the tile painting project was school sponsored speech under *Hazelwood*, and that *Hazelwood* allows educators to make viewpoint-based restrictions on school sponsored speech. Therefore, the school acted constitutionally in refusing to put up the tiles that did not conform to the school’s policy.

**Eleventh Circuit**

While most other circuits have been hearing student free speech cases since the 1960’s and 70’s, the Eleventh Circuit was not created until 1981. Even though it was founded in 1981, the court did not hear a student speech case until *Denno v. School Board of Volusia County, Florida* in 2000. In *Denno*, and later in *Scott v. School Board*, the court held that school policies, whether official or unwritten, banning the wearing of Confederate Flags in school were

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131 *Id.*
constitutional. In both cases, the schools did not have to show a history of racial tensions or other disruptions caused by the Confederate Flag. Instead, the court held that the school could prohibit the flag both under Tinker and Fraser because the flag in itself is “dangerous because it is perceived as offensive by so many people.” The Eleventh Circuit also held that school administrators acted constitutionally when they punished a student for writing and showing to a classmate a ‘fictional’ first-person narrative of the student shooting their math teacher. The court concluded that in a climate of increasing violence in schools, administrators must be able to act quickly to prevent any perceived threats of violence from being carried out.

While the court has held that school administrators can constitutionally restrict student speech when it comes to the Confederate Flag and threats of violence, it has also held school administrators have acted unconstitutionally by punishing students for protesting the Pledge of Allegiance and maintaining policies requiring all non-school sponsored materials be approved prior to being distributed. In Holloman ex rel. Holloman v. Harland, a student protested the school compelling another student to stand and say the Pledge of Allegiance by standing and silently raising a fist during the pledge the following day, and was punished by the school. The court held that the school could not compel the student to say the Pledge of Allegiance, and, under Tinker, could only punish his silent protest if it caused a substantial disruption, and no such disruption occurred in this case. In Heinkel v. School Board, a student wanted to participate in a Day of Remembrance, which was a nationwide anti-abortion movement. As part of the movement, the students wanted to distribute anti-abortion literature to their classmates, and, as required by school policy, submitted the material to the principal for prior approval.

134 Id. at 1248.
While the court held the school could have reasonably foreseen the anti-abortion material would cause a disruption in the school, thus acted properly in preventing it from being distributed, the policy requiring prior approval itself was unconstitutional because it did not provide for procedural safeguards of students’ First Amendment rights and allowed unrestrained discretion when deciding which material could and could not be distributed in school.

2016 Young Voter Turnout

All voting data relied on in this study for the 2016 Presidential Election is provided by the United States Census Bureau. According to the Census Bureau, 39.4% of Young Voters in America voted in the 2016 election. New Hampshire had the highest percentage of Young Voter turnout in the 2016 election with 56.1%, and Wyoming, Kentucky, and Nebraska all exceeded 50%. On the opposite end of the spectrum, Texas, Tennessee, and Hawaii all had less than 30% turnout, with Hawaii having the lowest at 20.4%. Table 2-1, below, breaks down the Young Voter Turnout in the 2016 election by state:

Table 2-1 18-24 Percent Voted by State

18-24 Percent Voted by State

138 Full data sheet available here: https://www2.census.gov/programs-surveys/cps/tables/p20/580/table04c.xlsx
Furthermore, the voting data by state was used to calculate the Young Voter Turnout in the 2016 election in each Federal Circuit, which will be used in calculating the Young Voter Turnout Ranking. As Table 3-1, below, shows, the Fourth Circuit was the circuit with the highest Young Voter turnout with 47.4%, while the Fifth Circuit had the lowest turnout with 32%.

Table 3-1 18-24 Percent Voted by Circuit

![Table showing 18-24 percent voted by circuit]

The full breakdown of Young Voter percent voted by state and circuit is attached as Appendix.

Analysis

Using the court precedents and the voting data discussed above, each circuit was given a Free Speech Ranking and a Young Voter Turnout Ranking. For the Free Speech Ranking, circuits were ranked from 1 to 11, with 1 being the least restrictive on students’ free speech rights and 11 being the most restrictive. Likewise, for the Young Voter Turnout Ranking, circuits were ranked from 1 to 11 with 1 being the highest percent of young voter turnout and 11 being the lowest. In addition to ranking each circuit from 1-11 for the Free Speech and Young Voter Turnout Rankings, the circuits were also divided into three tiers for each ranking. For the Free Speech Ranking, circuits that were most protective of students’ free speech rights were placed in Tier 1, the circuits that were most restrictive of students’ free speech rights were placed in Tier 3, and circuits that were protective in some contexts and restrictive in others were placed in Tier 2.
For the Young Voter Turnout Ranking, Tier 1 consists of circuits with greater than 43% turnout, Tier 2 consists of circuits with 36-43% turnout, and Tier 3 consists of circuits with under 36% turnout. Table 4-1, below, shows the full compilation of data including the Free Speech Rankings, Young Voter Turnout Rankings, and tier placements for each circuit.

Table 4-1 Compilation of Data

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Conclusion

After comparing each circuits’ Free Speech Ranking to their Young Voter Turnout Ranking, it is clear that no relationship between the two variables exists. No circuit achieved the same ranking for both variables, and only three, the Third, Nineth, and Eleventh Circuits, ranked
in the same tier for both. There are many possible explanations for the lack of relationship between the two variables, but one possible explanation is that the difference in free speech restrictions allowed by the circuit courts do not have a practical effect on the day-to-day policies and operations of schools. This could either be because the differences in the circuit court decisions are not large enough to cause a difference in school policies in the various circuits or because schools do not consider all the relevant case law in their circuit when creating their policies.

Another possible explanation, as explained by CIRCLE in the literature review, is that no school in any circuit provides its students with a truly effective civic education, meaning that it has a limited effect on whether Young Voters vote across the country. As a possible result of this, Young Voter turnout is low even in the highest-ranking circuits. While the Fourth Circuit has the highest turnout rate at 47.4%, which was 15.4% higher than the lowest circuit, it was still well below the national average for all voters in the 2016 presidential election of 55.4%. While this study was unable to find a relationship between Federal Circuit Courts’ restriction on students’ First Amendment rights and Young Voter turnout rates in the 2016 Presidential Election, it does bring to light the need for more effective civic education programs in school, which would include allowing students to exercise their First Amendment rights with less restrictions, in order to increase Young Voter turnout rates across the board.

There are many suggestions for future research that stem from this study. One suggestion would be to investigate the consideration that is given to applicable federal case law when school districts are creating their policies, especially the consideration given to the cases discussed in this study when creating policies that limit students’ rights to free speech. Another suggestion for future research would be to find the reasons why Young Voters in states like Wyoming,
Kentucky, and Nebraska vote at a higher rate than Young Voters in states like Texas, Tennessee, and Hawaii, and how much, if at all, schools account for these differences.
REFERENCES


3. For the purpose of this study, “Young Voter” will be defined as voters between the ages of 18-24.


6. Peter Levine; Mark Hugo Lopez, Youth Voter Turnout has Declined, by Any Measure, The Center for Information and Research on Civil Learning and Engagement (2002).

7. CIRCLE Staff, Young Voters in the 2016 General Election, Center for Information and Research on Civil Learning and Engagement (2016).

8. CIRCLE Staff, Young People Dramatically Increase their Turnout to 31%, Shape 2018 Midterm Elections, Center for Information and Research on Civil Learning and Engagement (2018).

9. Id.

10. CIRCLE Staff, At Least 80 Electoral Votes Depended on Youth, Center for Information and Research on Civil Learning and Engagement (2012).

11. CIRCLE Staff, At Least 80 Electoral Votes Depended on Youth, Center for Information and Research on Civil Learning and Engagement (2012).


19. Id.


24. Id.


*Riseman v. School Committee of Quincy*, 439 F.2d 148 (1st Cir. 1971).


117 Id. at 983.
124 Id. at 759.
131 Id.
134 Id. at 1248.
138 Full data sheet available here: https://www2.census.gov/programs-surveys/cps/tables/p20/580/table04c.xlsx
APPENDIX

Young Voter Data by State

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* denotes an 18-24 Percent Voted derived from a total population less than 100,000.