

“Clothing Isn’t Speech”

And Other Bad Legal Takes

AASB/ACSBA 2023

3 Things Everyone Thinks They Can Do

- Call Plays in Football
- Run a School System
- Practice Law



@BadLegalTakes

Policymaking Authority

§ 16-1-30

§16-8-8 and -9

§16-11-9

§ 16-1-30, Code of Alabama

- The local board of education shall, upon the written recommendation of the chief executive officer, determine and establish a written educational policy for the board of education and its employees and shall prescribe rules and regulations for the conduct and management of the schools.

§ 16-8-8, Code of Alabama

- The general administration and supervision of the public schools of the educational interests of each county shall be vested in the county board of education.

§ 16-8-9, Code of Alabama

- The county board of education shall exercise through its executive officer, the county superintendent of education and his professional assistants control and supervision of the public school system of the county.

§ 16-11-9

-
- The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city.

BAD LEGAL TAKE!!!!



Limitations on BOE Authority

- Supremacy Clause of U.S. Constitution
- First Amendment to U.S. Constitution
- Fourteenth Amendment to U.S. Constitution
- Alabama Constitution

Article VI, U.S. Constitution – Supremacy Clause

- This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment 1, U.S. Constitution

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

Five Freedoms Guaranteed by First Amendment

- Freedom of Religion
- Freedom of Speech
- Freedom of the Press
- Right to Peaceably Assemble
- Right to Petition Gov't for Redress of Grievances

BAD LEGAL TAKE!!!!



Amendment 14, U.S. Constitution

- No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

§ 4, Constitution of Alabama

- That no law shall ever be passed to curtail or restrain the liberty of speech or of the press, and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

BAD LEGAL TAKE!!!!



Tinker v. Des Moines Independent Community School District

- 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).



“

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

”

Tinker, supra, 393 U.S. at 506.

“

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.

“Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.”

Tinker, supra, 393 U.S. at 508.

“

A student may express opinion -
if he does so without ‘materially and substantially
interfer(ing) with the requirements of appropriate
discipline in the operation of the school’ and without
colliding with the rights of others.

”

Tinker, 393 U.S. at 513.

Hazelwood School Dist. v. Kuhlmeier

- School officials were able to constitutionally regulate the content of material published in the school newspaper



Bethel School District No. 403 v. Fraser

- Student could be constitutionally disciplined for sexual innuendos in Student Council nomination speech.

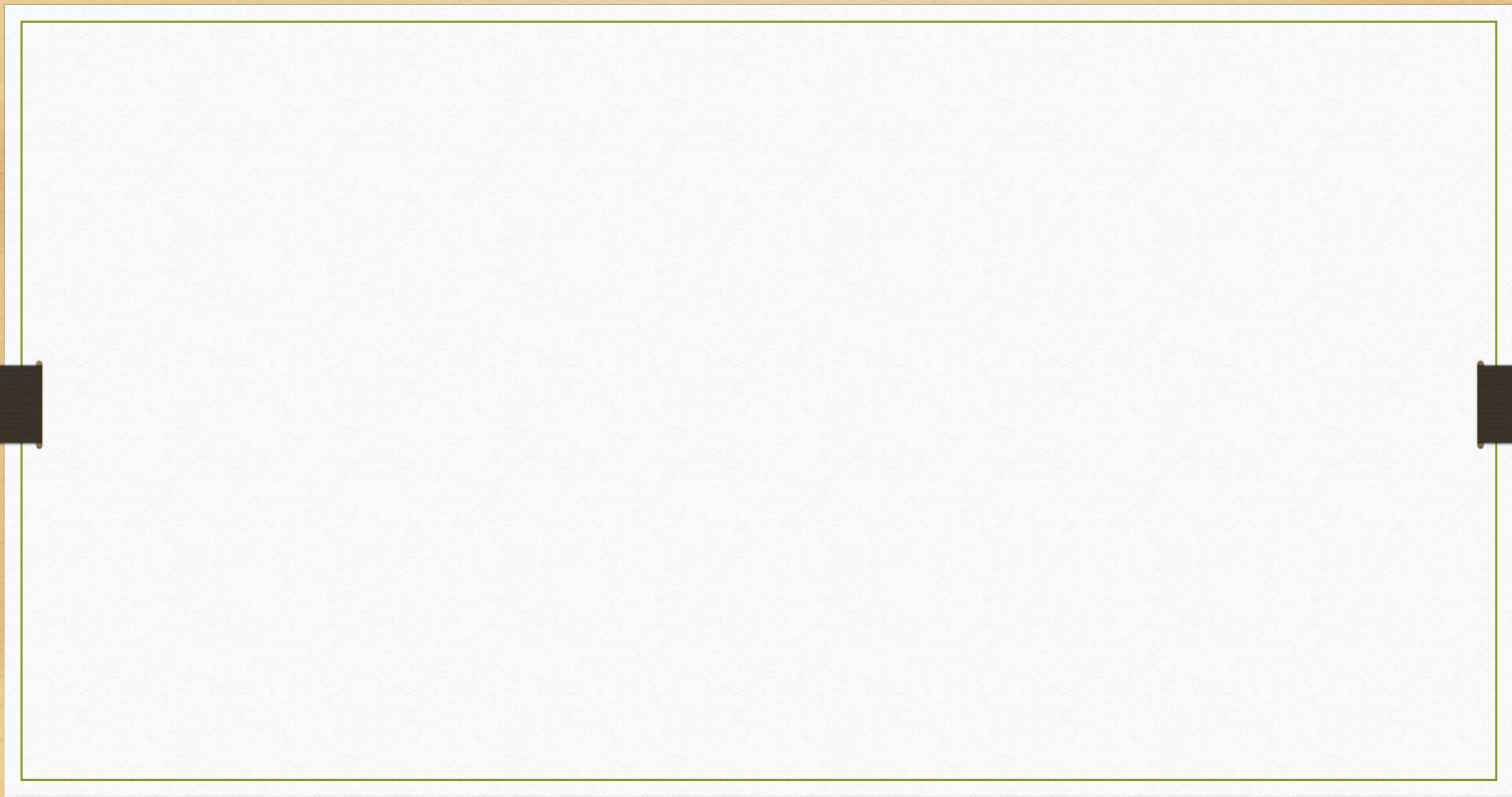


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Morse v. Frederick

- Student punished for banner at school activity.





BAD LEGAL TAKE!!!!



Regulation of Medium v. Content

Medium of Expression

- Time
- Place
- Manner

Content of Expression

- Specific Viewpoints
- Allowing one thing, not another similar thing

Two Elements of Freedom of Religion

Establishment

- Government cannot “establish” a religion (e.g., Church of England, Quakers).

Free Exercise

- Government cannot prohibit a person from freely exercising his religion.

Smith v. Walker Co. BOE



BAD LEGAL TAKE!!!!



Sapp v. School Board of Alachua County,
Florida



What's the next Battleground?

- Pro-Life v. Pro-Choice?
- “Let’s Go Brandon” shirt – Actual case in Michigan
- “There are only 2 genders” shirt – Actual case in Massachusetts

BEWARE THE
“HECKLER’S
VETO”!!!



Summing It Up

- At least be viewpoint-neutral
- Try to be content-neutral
- Focus on “material and substantial interference” with education program
- Enforce it consistently
- Include your Board attorney