Symbolic student speech since Tinker

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SYMBOLIC STUDENT SPEECH
SINCE TINKER

by

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1954

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ABSTRACT

Symbolic Student Speech
Since Tinker

by

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When students exercise their First Amendment right of free speech, it can sometimes conflict with the obligation of public school officials to maintain a safe and orderly environment on their campuses. Three Supreme Court decisions—Tinker v. Des Moines, 393 U.S. 503 (1969), Bethel v. Fraser, 478 U.S. 675 (1986), and Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)—have addressed the most common types of student expression. Hazelwood dealt with school-sponsored printed material and Fraser established ground rules to handle public address by students. In both instances, the Supreme Court endorsed the school’s authority to regulate the amount of “free speech” that can be exercised by students in the public schools.

Only Tinker, the earliest of the three decisions and heavily quoted from in the other two, spoke to the issue of symbolic speech: that which is neither
spoken aloud nor published for distribution. Symbolic speech is the type most frequently encountered in schools, given the Court's endorsement of reasonable prior restraint of the printed word and schools' careful monitoring of students' public speaking.

Over the years, student speech cases have found judges seeking to resolve issues which were not exact fits for these landmarks by quoting "sound bites" from one or more of them. This has resulted in rulings which often can raise more questions than they answer.

This study targeted symbolic student expression: that which is neither spoken aloud nor published. In reviewing case law dealing with this type of speech, the study determined how the various federal courts have interpreted the Tinker landmark over the past three decades. The study investigated possible patterns in the courts' rulings which could provide additional guidance for today's harried school administrators.
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CHAPTER 1

INTRODUCTION

On February 8, 1990, public school teachers went on strike in McMinnville, Oregon. Mindful of its obligation to continue instruction, the school district responded by hiring replacement teachers. On February 9, two students whose fathers were among the striking faculty appeared at school with buttons and stickers on their clothing. The buttons, which had obviously been conceived and ordered well in advance for the students to wear, bore slogans like “I’m Not Listening, Scab” and “Do Scabs Bleed?” The students were suspended for the day when they refused to remove the buttons.

On February 13, the next scheduled day of school, they reappeared with other buttons and stickers which displayed slogans including “Scabs” with a line drawn through the word (no scabs), “We Want Our Real Teachers Back,” and “Students United for Fair Settlement.” One sticker read “Scab We Will Never Forget,” (a sentiment typical of a striking teacher, not of a student). The students were ordered to remove their stickers and buttons on grounds that wearing them was disruptive. Attorneys for the students filed an action
in district court pursuant to 42 U.S.C. § 1983, claiming that there had been no
disruption and that the school administrators' reason for demanding the
removal of the buttons was false and pretextual, violating the students' First
Amendment rights to freedom of expression. In response, the school district
moved to dismiss the complaint for failure to state a claim pursuant to Rule
12(b)(6) of the Federal Rules of Civil Procedure. The district court agreed with
school officials that the slogans on the buttons were "offensive" and
"inherently disruptive." The school district's motion to dismiss was granted.

The students appealed, and the matter was brought before the Ninth
Circuit Court of Appeals sitting in Portland, Oregon. Chandler v. McMinnville
Schl. Dist., 978 F.2d 524 (9th Circuit, 1992), described more fully later, ended
in a reversal in favor of the students. The court relied heavily on arguments
presented in three Supreme Court cases handed down between 1969 and 1988
which lower courts across the nation routinely cite as precedents to assist in
deciding the merits of similar cases. These landmark decisions were:

(1) Tinker et al. v. Des Moines Independent Community School District
et al., 393 U.S. 503 (1969). In December of 1965 students wore black
armbands to school in protest of the war in Vietnam, and were suspended
when they refused to remove them. The district court for the Southern
District of Iowa — Tinker et al. v. Des Moines Independent Community School

1 This section of the code forbids any person or agency to deprive a citizen of
"rights, privileges, or immunities secured by the Constitution and laws."
District et al., 258 F. Supp. 971 (1966) — upheld the school's authority in the matter. An appeal heard en banc by the Eighth Circuit Court of Appeals ended in a divided court. By default, this result did not alter the lower court's stand, but opened the way for an appeal to the U.S. Supreme Court. Granting certiorari, the Supreme Court ruled 5-4 in favor of the student appellants. Tinker established that adolescent students may exercise their constitutional right of free speech in school, as long as no “material and substantial disruption” [quoting Burnside v. Byars, 363 F.2d 744 (5th Circuit, 1966)] of the school's educational mission occurs in the process. “Material and substantial disruption” has become the measuring stick for many subsequent rulings involving students' symbolic speech.

(2) Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986). While Tinker was an example of non-verbal, “symbolic” expression, the Fraser case concerned itself with a high school student's speech which contained unmistakable sexual innuendo. Against the advice of teachers whose opinions he had solicited, when Fraser spoke to his audience of 600 high school students—many of whom were just 14 years old—the reaction was predictably unruly. Fraser was suspended, and his father responded by taking the school district to court. The district court for the Western District of Washington and later the Ninth Circuit Court of Appeals both ruled in favor of Fraser, holding that his speech was akin to Tinker's armband—just another part of a student's constitutionally protected right of free expression.
As it had in the *Tinker* matter, the Supreme Court overturned the original ruling. In effect, *Fraser* set limits on student verbalization\(^2\) while confirming that reasonable regulatory authority over students' utterances belongs to school officials. Chief Justice Warren Burger, writing the court's opinion:

"The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior...[The First Amendment rights of school children]...are not automatically coextensive with the rights of adults in other settings."

and later, Chief Justice Burger wrote:

"...Simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, it does not follow that the same latitude must be permitted to children in a public school."

Even in dissent, Justice John Paul Stevens said:

---

2 *Fraser*’s speech: “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most...of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.”
"The fact that the speech may not have been offensive to his audience - or that he honestly believed that it would be inoffensive - does not mean that he had a constitutional right to deliver it. For the school not the student - must prescribe the rules of conduct in an educational institution."

References to the Fraser ruling has not, however, been limited to other cases involving verbalized expression; judges have recognized that the symbolic communication of students should be subject to the same analysis and review as that which is spoken out loud.


Having previewed an issue of the school-sponsored newspaper, a Missouri high school principal directed that the student journalists remove two articles dealing with divorce and teen pregnancy, which he believed were inappropriate for the young audience served by the paper. The district court for the Eastern District of Missouri upheld the school's right to exercise prior restraint of student expression, but the 8th Circuit Court of Appeals overturned the ruling. In the case cited, the Supreme Court reversed the circuit court's decision, advising that:

"[T]he standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student
expression...educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”

and

“Student preparation for adult experiences does not necessarily ensure adult experiences on the school campus. For example, schools need not tolerate student speech that is inconsistent with the school’s basic educational mission.”

Hazelwood is sometimes cited in symbolic expression cases when written words are involved; but the usefulness of this precedent is lessened when the student expression takes place outside the limiting context of school-sponsored publications.

The Supreme Court’s student speech precedents do not cover all possible modes or combinations of expression. Although these landmark rulings have been, and continue to be, cited scores of times in other actions alleging students’ freedom of speech violations, the outcomes of subsequent cases have been as divergent as the opinions of the Justices in the split decision of Tinker, to be presented later.
Purpose of the Study

This study examined cases involving symbolic expression, where the symbol may or may not include words. Symbolic student practices which have arisen since Tinker include other armband incidents, buttons bearing questionable messages, clothing bearing slogans and illustrations, sit-ins, walk-outs, picketing, tattooing, and ethnic and religious adornment, to mention a few. The examples are many, focusing directly on adolescent students' freedom of speech in the school setting. Numerous representative rulings were analyzed to detect any patterns that might provide guidance for school administrators who must deal with symbolic speech issues.

Research Questions

In the course of reviewing the rulings of the various federal courts—district, circuit, and supreme—in cases dealing with symbolic student expression, the study has sought answers to the following questions:

1. Do the courts agree on the Supreme Court’s Tinker findings after thirty years?

2. In the light of relevant case law, what is the meaning of the “material or substantial disruption” referred to in Tinker?

3. Have the courts' interpretations of the Tinker precedent worked over time to change our general understanding of it?
4. Do other circuits follow the conceptual framework set down by the Ninth Circuit Court of Appeals in *Chandler*?

5. When there are religious overtones in symbolic expression, is it dealt with differently by the courts than secular symbolic speech?

6. Must someone be called a name out loud to have effect, or can an insult take place in the form of a the slogan on a button worn on another’s person? (Do Scabs Bleed? — We’re Not Listening, Scab — Scab, We Will Never Forget).

7. Is insulting or intimidating symbolic expression in a public school classroom more protected than similar insults delivered on a public street?

**Definition of Terms**

Definitions offered by the courts are used when available. The default authority is Merriam-Webster (1994).

**Fighting words:** Words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” U.S. Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

**Scab:** 3 a: a contemptible person; b (1): a worker who accepts employment or replaces a union worker during a strike; b (3): one who works for less than union wages or on nonunion terms. Merriam-Webster (1994).
Slogan: 1 a: A war cry or rallying cry; b: a word or phrase used to express a characteristic position or stand or a goal to be achieved. Merriam-Webster (1994).

Symbol 5: An act, sound, or object having cultural significance and the capacity to excite or objectify a response. Merriam-Webster (1994).

Symbolic speech: A person's conduct which expresses opinions or thoughts about a subject which may or may not be protected by the First Amendment. Actions which have as their primary purpose the expression of ideas as in the case of students who wore black arm bands [Tinker] to protest the war in Vietnam. Such conduct is generally protected under the First Amendment as “pure speech” because very little conduct is involved. Black's law dictionary (6th ed., 1990).

Rationale

We live in an age when adolescents are continually challenging authority as they attempt to define themselves in the context of increasingly complex entrance into adulthood. There are many young people struggling through these difficult years without the kind of parental guidance and/or extended family support that has been provided in the past. Assuming by default many of the social responsibilities for which families were traditionally accountable, schools have become identified with the adult authority that adolescents are trying to throw off. In the process, the evolving constitutional
rights of students are often the subject of inquiry—and litigation—involving school authorities.

Since the *Tinker* decision was handed down, students have experienced more success in defending their First Amendment rights in court. Against the traditional backdrop of *in loco parentis*, some school administrators find it difficult to recognize, let alone accept, the limits imposed on their authority when it comes to student rights. This study was intended to help administrators find comfortable legal ground on which to base their decisions regarding student symbolic expression.

Limitations and Delimitations

Some limitations and delimitations should be considered when the results of this study are reviewed:

1. With minor exceptions, the case law examined in the study was represented by actions brought in the federal courts. Even though the rights in question are also guaranteed in many state constitutions, the ultimate authority in such matters rests with the federal court system.

2. The full text of the court's opinions is not presented except when a more detailed analysis of the case requires it. For reference purposes, the majority's *Tinker* opinion appears in the Appendix.

3. An arbitrary cutoff date of May 15, 1998 was imposed on the inclusion of completed and published federal court cases in the study.
4. Because of the sheer bulk of cases citing *Tinker* (2,194), only those involving secondary school students were examined. Some selected non-school/non-student cases were referenced owing to their relevance to the inquiries made by the study, and to their having been cited in court opinions.

**Significance of the Study**

This study addressed an area of school administration where little, if any, solid guidance exists. Principals need to be aware of trends in the courts, and to be confident about passing along that information to their faculties and administrators. In an age when school districts are frequent targets of expensive litigation for a variety of alleged oversights and misdeeds, any help that might prevent a lawsuit should be welcomed by school leaders. The study attempted to provide an analytical framework for administrators to reference when dealing with symbolic expression incidents, possibly helping schools to reduce the risk of (a) making errors in judgment and (b) creating liability by unintentionally abridging students’ legitimate First Amendment rights of free speech.
CHAPTER 2

REVIEW OF THE LAW AND LITERATURE

A change in the traditionally conservative attitude of the U.S. Supreme Court toward student rights pertaining to symbolic speech dates back to the mid-1940s, when the case of *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624 (1943) was decided. In *Barnette*, the issue was whether or not students were obliged to obey school regulations that included the mandatory salute and pledge of allegiance to the flag as part of the school’s daily opening exercises. Although the students’ protest against the pledge was based on religious grounds, the Court’s finding in the students’ favor set the stage for subsequent litigation concerning the First Amendment rights of school children. *Amicus curiae* briefs were filed by the American Civil Liberties Union (ACLU) and the American Bar Association’s Committee on the Bill of Rights urging the court to affirm the decision of the lower court (Southern District of West Virginia) which favored the students, as well as by the American Legion, urging reversal of the lower court.

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3 Friend of the court
In a doughty decision—given that the nation was going through some of the darkest days of World War II and patriotism was peaking—the Supreme Court ruled in favor of the students. The Court thereby reversed its earlier position in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), which also bore on the refusal of children to salute the American flag. The *Gobitis* decision had been written by Justice Felix Frankfurter, a leading supporter of judicial restraint who was reluctant to interfere with the policies of the executive or legislative branches of government unless those policies were clearly unconstitutional. Three years later, Justice Robert H. Jackson wrote the *Barnette* decision. The reversal of *Gobitis* served notice that the temperament of the Court was undergoing a liberal shift under Harlan F. Stone, whose years as Chief Justice “were marked by changing constitutional views and by division within the Supreme Court.” (Murphy, 1996).

The Vietnam Era

The federal courts were relatively silent on students’ rights issues until the outbreak of hostilities in Vietnam. The nation was deeply divided over the sending of American troops to honor commitments to the all but defunct Southeast Asia Treaty Organization, formed after France’s defeat by Communist forces in Vietnam. As the Allied body count continued to rise, protests escalated. Inevitably, students became deeply involved. Draft cards were burned publicly. Even those too young to be drafted took part.
The Tinker Armbands

In December of 1965, 15-year-old John F. Tinker, his 13-year-old sister Mary Beth, and their friend 16-year-old Christopher Eckhardt were part of a meeting of like-minded adults and students at the Eckhardt residence in Des Moines, Iowa. It was decided that in order to publicize their objections to the Vietnam hostilities and the attendant loss of life, the group would wear black armbands (the traditional symbol of mourning) during the holiday season and by engaging in fasting. The idea was not new; some of the group had demonstrated their position in the same way earlier. It was decided that the young people would wear their armbands to school.

In a hastily-called meeting, principals of Des Moines public schools, learning of the students' plan, adopted the policy that students who wore such armbands to school would be asked to remove them. If the students refused, they would be suspended until they reappeared at school without the controversial, thereby potentially disruptive, symbols. Officials said they were fearful that the armbands would create a disruption on campus by offending other youngsters whose relatives were in the armed services in Vietnam.

Mary Beth and Christopher wore their armbands to school on the 16th of December. John Tinker wore his the following day. All three were suspended (along with four other students), and did not return to school until Christmas recess was over and the agreed-on period for wearing the armbands

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had expired. The youngsters' fathers filed in district court, seeking an injunction to prevent school officials' disciplining of the students.

The district court was unsympathetic. It ruled in *Tinker et al. v. Des Moines Independent Community School District et al.*, 258 F.Supp. 971 (S.D. Iowa, 1966) that the administrators were well within their authority in acting to prevent a disturbance which would interrupt school discipline. Undaunted, the plaintiffs appealed. The Eighth Circuit court, hearing *Tinker et al. v. Des Moines Independent Community School District et al.*, 383 F.2d 988 (8th Circuit, 1968) found itself divided equally. Accordingly, the district court’s decision was not affected. When the Supreme Court agreed to hear the case, *Tinker et al. v. Des Moines Independent Community School District et al.*, 393 U.S. 503 (1969), the stage was set for it to either reinforce the authority of school officials or to break new ground in the area of student rights.

In a 5-4 decision, the Supreme Court reversed the 8th Circuit, looking carefully at both *Burnside v. Byars*, 363 F.2d 744 (5th Circuit, 1966) and *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Circuit, 1966). In those two cases, to be discussed later, the same panel of judges, on the same day, ruled oppositely on very similar matters. The difference was that in one case it was shown that there had been disruption on campus on account of students' "freedom buttons," and in the other, there had been no disruption. Relying partly on that distinction, the Supreme Court held that
the *Tinker* armbands had not caused much fuss during instructional time, and commented that:

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

Hence, *Tinker* extended First Amendment freedom of speech rights to adolescent students, provided that their exercise of those rights does not compromise the orderly environment of the school. Justice Abe Fortas, writing for the majority, declared that

> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Justice Fortas also made the point that in *Tinker* there was

> "...no evidence whatever of petitioners' [students] interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone."

A particularly poignant phrase in the *Tinker* opinion was that which immortalized the *Burnside* "material and substantial disruption" doctrine on
which subsequent courts have leaned so heavily. To suppress pure or symbolic speech, schools must justify their decision by showing:

"facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, at 514.

For years, the federal courts have assumed that the material and substantial disruption standard is dispositive on questions of secondary and elementary school student speech. But an equally valid position is that *Tinker* defined public schools as limited public forums, opening subsequent cases to examination by the traditional time, place, and manner analysis. (Dever, 1985) referring to *Cox v. Louisiana*, 379 U.S. 559 (1965).

It is often instructive to look into the makeup of the Supreme Court in order to appreciate its internal dynamics and to hold a ruling up to stronger light. Abe Fortas had gained fame earlier in his appeal to the same Court on behalf of Clarence Earl Gideon, a Florida man who had been convicted without benefit of counsel: *Gideon v. Wainwright*, 372 U.S. 335 (1963). Memphis-born Fortas, having gained a reputation as a strong advocate for individual freedoms, was named to the Supreme Court in 1965 by President Lyndon Johnson. He served until 1969. Not long after the Tinker decision was handed down, Fortas resigned following widespread criticism of his association with Louis E. Wolfson, who had been convicted of stock manipulation in 1967.
The thin majority's opinion in *Tinker* was rebutted in a spirited dissent written by 83-year-old Justice Hugo L. Black, a Franklin Roosevelt appointee from Alabama who served on the Court for over three decades from his appointment in 1937 until his death in 1971. (Freyer, 1987). Mr. Justice Black wrote:

“...I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In *Cox v. Louisiana* [379 U.S. 559 (1965)], for example, the Court clearly stated that the rights of free speech and assembly ‘do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time’... I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. [Emphasis added]. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new
revolutionary era of permissiveness in this country fostered by
the judiciary...I wish therefore...to disclaim any purpose to hold
that the Federal Constitution compels the teachers, parents, and
elected school officials to surrender control of the American
public school system to public school students.”

Mr. Justice Black was not finished. He went on to say:

“It may be that the nation has outworn the old-fashioned
slogan that ‘children are to be seen and not heard,’ but one may,
I hope, be permitted to harbor the thought that taxpayers send
children to school on the premise that at their age they need to
learn, not teach...Turned loose with lawsuits for damages and
injunctions against their teachers as they are here, it is nothing
but wishful thinking to imagine that young, immature students
will not soon believe it is their right to control the schools rather
than the right of the States that collect the taxes to hire the
teachers for the benefit of the pupils. This case, therefore,
wholly without constitutional reasons in my judgment,
subjects all the public schools in the nation to the whims
and caprices of their loudest-mouthed, but maybe not
their brightest, students.” [Emphasis added].

According to civil libertarian law professor Thomas I. Emerson, the
significance of the Tinker decision lay not only in the Court’s delineation of
the scope of student First Amendment rights but in the Court's willingness to second-guess public school authorities (Emerson, 1970, p. 608).

If the matter in Tinker had been heard a century earlier in the Supreme Court under Chief Justice Salmon Chase, a different ruling might well have been handed down, perhaps also offering the advice that if any similar student insubordination took place in the future, it should be dealt with in the wood shed and not in the courtroom. There is a strong hint of this persuasion in Justice Black's Tinker dissent.

Since Tinker, a myriad of "free speech for kids" cases have filled courtrooms as litigious parents—as often as not accompanied by advocates from the ACLU—test the will of school authorities in the liberal climate of extending constitutional rights to minors, whom some authorities regard as being unprepared to accept the responsibilities and self restraint that go along with the full ensemble of adult rights.

The Tinker armbands were passive expressions of personal opinion. When a student wears words or meaningful symbols on his or her person, this type of expression takes on a new meaning. A review of the "freedom button" cases which the Tinker court cited is in order. Both these events took place after the now famous armband incident, but were concluded prior to the Supreme Court's review of Tinker.
Burnside's Voter Registration Buttons

Shortly after the start of the 1964-1965 school term in Philadelphia, Mississippi, Principal Montgomery Moore of Booker T. Washington High School learned that a number of students planned to wear buttons to school promoting the “One Man One Vote” initiative intended to increase voter registration among blacks. In an exercise of prior restraint, the principal told the student body that the buttons would not be allowed in school because they had nothing to do with education, and besides, they probably would “cause commotion.” When a number of students wore their “freedom buttons” to school, they were sent home and later suspended until they returned without the buttons. The district court for the Southern District of Mississippi upheld the principal’s action, but when the matter reached the Fifth Circuit Court of Appeals, that court reversed. In its Burnside opinion, the court said:

“Regulations which are essential in maintaining order and discipline on school property are reasonable...[but]...wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speech making, all of which are protected methods of expressions, [sic] but all of which have no place in an orderly classroom. If the decorum had been so disturbed by the presence of the ‘freedom buttons,’ the principal
would have been acting within his authority and the regulation forbidding the presence of buttons on school grounds would have been reasonable. But the affidavits and testimony before the district court reveal no interference with educational activity and do not support a conclusion that there was a commotion or that the buttons tended to distract the minds of the students away from their teachers. Nor do we think that the mere presence of ‘freedom buttons’ is calculated to cause a disturbance sufficient to warrant their exclusion from school premises unless there is some student misconduct involved. Therefore, we conclude after carefully examining all the evidence presented that the regulation forbidding the wearing of ‘freedom buttons’ on school grounds is arbitrary and unreasonable, and an unnecessary infringement on the students’ protected right of free expression in the circumstances revealed by the record.”

Blackwell Case Involved Insubordinate Students

Across town at Henry Weathers High School, Principal O. E. Jordan found that his students were creating a disturbance with very similar buttons. They were distributing the buttons in the hallways and pinning them on classmates who had not asked for them. One high schooler attempted to put a button on a younger child, who began crying. At one point, a school bus driver
brought a box of the buttons into a classroom and began passing them out to the students without their teacher’s permission. Principal Jordan acted swiftly to gain control in the school, but over the next several days the situation escalated.

School Superintendent H. G. Fenton became involved, and suspensions of up to 20 days for student insubordination were not uncommon. Finally, as many as 300 students from various elementary and secondary schools in the community, who continued to wear their freedom buttons, were suspended for the balance of the school year. On behalf of the suspended students, injunctive relief was sought in the district court for the Southern District of Mississippi, but it was denied. The Blackwell appeal was taken to the Fifth Circuit court. Ironically, the court’s ruling in this matter came down on the same day as that of the Burnside case—which it closely resembled.

In Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Circuit, 1966), the court ruled against the appellants, finding that substantial disruption had taken place, not only on the school grounds but also in classrooms. Writing for the appellate panel, Judge Gewin said:

“In the case now before us, the affidavits and testimony from the district court present quite a different picture from the record in Burnside where no disruption of classes or school routine appeared in evidence...[S]tudents conducted themselves
in a disorderly manner, disrupted classroom procedure, interfered
with the proper decorum and discipline of the school and
disturbed other students who did not wish to participate...”

Chandler’s Scab Buttons

A recent case involved buttons worn by students which contained
potentially insulting and disruptive messages. In Chandler v. McMinnville
School District, 978 F.2d 524 (9th Circuit, 1992), a circuit court panel sitting in
Portland, Oregon heard an appeal from the United States District Court for
the District of Oregon, where Judge Owen M. Panner had presided. The facts
of the case were as follows (quoting the circuit court’s disposition):

“On February 8, 1990, the school teachers in McMinnville,
Oregon commenced a lawful strike. In response to the strike, the
school district hired replacement teachers. Chandler and Depweg
were students at McMinnville High School and their fathers were
among the striking teachers. On February 9, 1990, Chandler and
Depweg attended school wearing various buttons and stickers on
their clothing. Two of the buttons displayed the slogans ‘I’m Not
Listening, Scab’ and ‘Do Scabs Bleed?’ Chandler and Depweg
distributed similar buttons to some of their classmates.

During a break in the morning classes, a temporary
administrator saw Depweg aiming his camera in a hallway as if to
take a photograph. The administrator asserted that Depweg had no right to take his photograph without permission and instructed Depweg to accompany him to the vice principal’s office. Chandler witnessed the request and followed Depweg into the office, where they were met by vice principal Whitehead. Whitehead, upon noticing the buttons, asked both students to remove them because they were disruptive. Depweg told Whitehead that his morning classes had not been disrupted. A replacement teacher in one of Depweg’s classes confirmed that there had been no disruption. Nonetheless, Whitehead ordered that the buttons be removed. Chandler and Depweg, in the belief that the buttons were protected as a lawful exercise of free speech, refused to comply. They also refused to be separated. Whitehead then suspended them for the remainder of the school day for willful disobedience.

Depweg and Chandler returned to school on February 13, 1990, the next regularly scheduled school day, with different buttons and stickers on their clothing. They each wore a button that read ‘Scabs’ with a line drawn through it (i.e., no Scabs), and a sticker that read ‘Scab, We Will Never Forget.’ In addition, they displayed buttons with the slogans ‘Students United for Fair Settlement,’ and ‘We Want Our Real Teachers Back.’

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Approximately 1:45 p.m., assistant vice principal Hyder asked Chandler to remove those buttons and stickers containing the word ‘scab’ because they were disruptive. Chandler, anticipating further disciplinary action, complied with the request.

Chandler and Depweg filed this action in district court, pursuant to 42 U.S.C. § 1983, alleging that the school officials’ reasons for requesting the removal of the buttons were false and pretextual, and therefore violated their First Amendment rights to freedom of expression. They state that the buttons caused no classroom disruption. They further allege that many of their classmates wore the same buttons, but that none were asked to remove them. Chandler and Depweg charge that the school singled them out for punishment, in violation of their First Amendment rights to freedom of association, because they led the student protest against the school district’s decision to hire replacement teachers.

The school district moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted the motion, stating that the slogans on the buttons were ‘offensive’ and ‘inherently disruptive.’"
The Circuit Court’s Analysis

“We start on agreed ground: students in public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ [Tinker]... ‘They cannot be punished merely for expressing their personal views on the school premises ... unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students.’ [Hazelwood], quoting [Tinker] at 509, 512-13. The schoolroom prepares children for citizenship, and the proper exercise of the First Amendment is a hallmark of citizenship in our country. Nevertheless, this educational experience has its limitations. The First Amendment rights of public school students ‘are not automatically coextensive with the rights of adults in other settings.’ [Fraser]... Student preparation for adult experiences does not necessarily ensure adult experiences on the school campus. For example, schools need not tolerate student speech that is inconsistent with the school’s ‘basic educational mission.’ [Hazelwood]... at 266. Despite the fact that the suppression of speech has obvious First Amendment implications, courts are not necessarily in the best position to decide whether speech restrictions are appropriate. ‘The determination of what manner
of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' and not with the federal courts. See [Fraser] ...at 683, 685; [Hazelwood]...at 267.

Chandler and Depweg argue that the district court applied an incorrect standard when it dismissed the complaint as a matter of law. They contend that this case is governed by Tinker. In Tinker, junior high school students were suspended for wearing black armbands in protest of the Vietnam war. The Court held that display of the armbands was a 'silent, passive expression of opinion, unaccompanied by any disorder or disturbance' and that there was 'no evidence whatever of interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone'...[Tinker] at 508. The Court explained that 'where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.' Id. at 509.

In this case, the district court dismissed the action although there was no allegation of disruption or interference with the rights of other students, relying primarily on Fraser. Fraser involved a speech given by a student at a high school
assembly. The speech contained sexual innuendo and metaphor. [Fraser] at 683. The Court held that the school district acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students...in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser’s] would undermine the school’s basic educational mission...Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the “fundamental values” of public school education.

The district court also relied upon Fraser’s distinction of [Cohen]. In Cohen [v. California, 403 U.S. 15 (1971)], the Court held that a man could not be criminally prosecuted for wearing a jacket bearing an obscene statement disapproving the draft. Id. at 26. The Court pointed out that students have ‘the classroom right to wear Tinker’s armband, but not Cohen’s jacket.’ [Fraser]... at 682. The district court ruled that the buttons in this case were akin to Cohen’s jacket. (emphasis added)
Chandler and Depweg argue that Fraser is distinguishable from this case on three grounds. First, they contend that the buttons constituted a ‘silent, passive expression of opinion’... ‘akin to pure speech.’ *Tinker*, 393 U.S. at 508. They contrast the silent expression of the buttons with the sexually implicit speech in *Fraser*. Next, the students focus on the fact that the speech in *Fraser* was made at a school assembly, a sanctioned school event, whereas their display of the buttons was a passive expression of personal opinion. They cite language in *Hazelwood* that distinguishes between suppression of ‘a student’s personal expression that happens to occur on the school premises,’ and educators’ authority over ‘school-sponsored [activities] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.’ *Hazelwood*, 484 U.S. at 271. Finally, Chandler and Depweg argue that because their buttons expressed a political viewpoint they are therefore accorded greater protection. They point out that the Court in *Fraser* distinguished between the lewd speech in *Fraser* and the political speech in *Tinker*, thereby implying that restrictions on political speech should be governed by the more exacting *Tinker* test. *Fraser*, 478 U.S. at 685.
...We turn to Hazelwood for guidance in interpreting the meaning and scope of the earlier Tinker and Fraser cases. Hazelwood involved a dispute over the deletion of two pages of an issue of a school newspaper. The principal deleted the pages because they contained an article addressing students’ experiences with pregnancy, and another article describing the impact of divorce on students at the school. The newspaper was written and edited by students in a journalism class as part of the school’s curriculum [Emphasis added]. Hazelwood, 484 U.S. at 262-64. The Court declined to apply Tinker, holding instead that ‘the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.’ Id. at 272-73. The Court then validated discretionary editorial control by school officials over the school-sponsored newspaper ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’ Id. at 273; see also Planned Parenthood of Southern Nevada v. Clark County School Dist., 941 F.2d 817, 828 (9th Cir. 1991) (en banc) (‘first amendment affords educators greater control in deciding when the school will affirmatively
promote or lend its name and resources to particular speech’),
citing Hazelwood, 484 U.S. at 271-72.

Although Hazelwood is not directly on point, it is
instructive because it interpreted Tinker and Fraser together.
The Court pointed out that there is a difference between the First
Amendment analysis applied in Tinker and that applied in
Fraser...The decision in Fraser rested on the ‘vulgar, lewd, and
plainly offensive’ character of a speech delivered at an official
school assembly rather than on any propensity of the speech to
‘materially disrupt classwork or involve substantial disorder or
invasion of the rights of others.’ Hazelwood, 484 U.S. at 271 n.4,
quoting Tinker, 393 U.S. at 513.

We have discerned three distinct areas of student
speech from the Supreme Court’s school precedents:
(1) vulgar, lewd, obscene, and plainly offensive speech,
(2) school-sponsored speech, and (3) speech that falls into
neither of these categories. We conclude, as discussed
below, that the standard for reviewing the suppression of
vulgar, lewd, obscene, and plainly offensive speech is
governed by Fraser, 478 U.S. at 683-85, school-sponsored
speech by Hazelwood, 484 U.S. at 273, and all other

speech by Tinker, 393 U.S. at 513-14. [Emphasis added].

We first address the question of whether school officials
may suppress vulgar, lewd, obscene, and plainly offensive speech,
even when it is expressed outside the context of an official school
program or event. Hazelwood focused on two factors that
distinguish Fraser from Tinker: (1) the speech was ‘vulgar, lewd,
and plainly offensive,’ and (2) it was given at an official school
assembly. Hazelwood, 484 U.S. at 271 n.4. Whereas both of these
factors were present in Fraser, we believe the deferential Fraser
standard applies when the first factor alone is present. ‘Surely it
is a highly appropriate function of a public school education to
prohibit the use of vulgar and offensive terms in public
discourse...’ Fraser, 478 U.S. at 683.

‘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.’
Hazelwood, 484 U.S. at 266, quoting Fraser, 478 U.S. at 685.
Therefore, school officials may suppress speech that is vulgar,
lewd, obscene, or plainly offensive without a showing that such
speech occurred during a school- sponsored event or threatened to
‘substantially interfere with [the school’s] work.’ Tinker, 393

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U.S. at 509. Such language, by definition, may well ‘impinge[ ]
upon the rights of other students,’ id., and therefore its
suppression is ‘reasonably related to legitimate pedagogical
concerns.’ Hazelwood, 484 U.S. at 272-73.

We turn next to the second category involving speech or
speech-related activities that “students, parents, and members of
the public might reasonably perceive to bear the imprimatur of
the school.” In such cases, school officials are entitled to ‘greater
control’ over student expression. Id. at 271. A school has the
discretion to ‘disassociate itself’ from an entire range of speech,
including ‘speech that is, for example, ungrammatical, poorly
written, inadequately researched, biased or prejudiced, vulgar or
profane, or unsuitable for immature audiences.’ Id. (internal
quotations omitted). According to Hazelwood, federal courts are
to defer to a school’s decision to suppress or punish vulgar, lewd,
or plainly offensive speech, and to ‘disassociate itself’ from speech
that a reasonable person would view as bearing the imprimatur of
the school, when the decision is ‘reasonably related to legitimate
pedagogical concerns.’ Id. at 271, 273.

The third category involves speech that is neither
vulgar, lewd, obscene, or plainly offensive, nor bears the
imprimatur of the school. To suppress speech in this
category, school officials must justify their decision by showing 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.' Tinker, 393 U.S. at 514. However, the "First Amendment does not require school officials to wait until disruption actually occurs...In fact, they have a duty to prevent the occurrence of disturbances." Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973). [Emphasis added].

...We now turn to the facts alleged in this case. No effort was made by the school officials to suppress the buttons containing the statements 'Students United for Fair Settlement' or 'We Want Our Real Teachers Back.' Rather, the suppression only involved statements containing the word 'scab.' The word 'scab,' in the context most applicable to this case, is defined as a worker who accepts employment or replaces a union worker during a strike.' Webster's Third New Int'l Dictionary 2022 (unabridged ed.) (1986). Although a dictionary definition may not be determinative in all cases, it is helpful here. 'To be sure, the word is most often used as an insult or epithet.' Old

4 The reader will note the similarity of this definition and the one cited in Chapter 1, from a more recent Webster.
Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264, 283, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974). However, the word is also ‘common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the NLRA.’ Id., citing Linn v. Union Plant Guard Workers, 383 U.S. 53, 60-61, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966). Given the requirement to construe the complaint in a light most favorable to Chandler and Depweg, we are satisfied that these buttons cannot be considered per se vulgar, lewd, obscene, or plainly offensive within the meaning of Fraser. At this stage in the litigation, the school officials have made no showing that the word ‘scab’ reasonably could be so considered.”

The Court’s Ruling

“This brings us to the second category of school speech. There is nothing in the complaint alleging that Chandler and Depweg’s buttons reasonably could have been viewed as bearing the imprimatur of the school. The buttons expressed the personal opinion of the students wearing them, and they were displayed in a manner commonly used to convey silently an idea, message, or political opinion to the community. See Burnside v. Byars, 363 F.2d 744, 747 (5th Cir. 1966). In addition, they expressed a
position on a local political issue that was diametrically opposed to the school district's decision to hire replacement teachers. Therefore, the complaint does not show that a reasonable person could have viewed the buttons as bearing the imprimatur of the school.

We turn, therefore, to the third category of school speech and its standard: whether the ‘scab’ buttons were properly suppressed because the school officials reasonably forecasted that they would **substantially disrupt, or materially interfere with**, school activities. *Tinker*, 393 U.S. at 514. [Emphasis added]. The district court held that the ‘scab’ buttons were inherently disruptive, but nothing in the complaint or the analysis of the district court substantiates this conclusion. We conclude that the district court erred in holding, without more, that the ‘scab’ buttons were inherently disruptive.

We express no opinion on the question whether, on remand, the school district may be able to meet the reasonable forecast test. We deal with a Rule 12(b)(6) dismissal of a complaint, which may be granted only if Chandler and Depweg could prove no facts to support their claim. That is not the case here because we **hold that the ‘scab’ buttons were not**
inherently disruptive.⁵ [Emphasis added] ...Although some of
the slogans employed by Chandler and Depweg could be
interpreted as insulting, disrespectful or even threatening, we
must consider the facts in the light most favorable to the students
in reviewing the district court’s dismissal of the complaint.”

Chief Circuit Judge J. Clifford Wallace did not overlook the potential
insult brought into school by the word “scab.” On remand, he opined, the
school district might attempt to show that “scab” is such an inherently
provocative and insulting word that school officials reasonably foresaw a risk
of substantial disruption in a classroom.

Reopened in 1992 following the circuit court’s reversal, the case was
reterminated on March 15, 1993 on stipulation of the parties with prejudice.

The Chandler case, because it was labeled a close parallel to Tinker, provided
the trigger that prompted this study. While the Chandler court drew upon

⁵ The concurrence suggests that we lend credence to the notion that there
exists a class of “inherently disruptive” words. On the contrary, we merely
respond to the district court’s holding that the “scab” buttons were inherently
disruptive. The district court stated in its order dismissing Chandler and
Depweg’s second amended complaint that: “Plaintiffs’ buttons were inherently
disruptive.” ... Chandler and Depweg are appealing from the dismissal of their
second amended complaint; the order dismissing that complaint thus forms the
basis of this appeal. As such, we address it, and we conclude that the district
court erred in holding that the “scab” buttons were inherently disruptive. We
cannot simply ignore the district court’s holding. To do so would be to ignore
the district court’s rationale for ruling the way it did. Thus, contrary to the
concurrence’s stated fear, we are not suggesting that “there exists a subclass of
words that are inherently disruptive.”
Tinker, Fraser, Hazelwood, and others, it relied most heavily on Burnside’s “material and substantial disruption” doctrine. This study probed other symbolic speech cases subsequent to Tinker to see if the various courts have adopted or dealt otherwise with the concept of “no harm, no foul” — or more realistically, “no material or substantial disruption, no case.”
CHAPTER 3

METHODOLOGY

This study included a thorough review of case law emanating from the federal court system dealing with symbolic expression issues involving public school students. Specifically, the following procedure was followed in order to identify appropriate cases for analysis.

1. The Tinker case was “Shepardized”—a process that involved the manipulation of a computerized data base of U.S. case law to extract a listing of all subsequent cases which have cited Tinker.

2. 2,194 federal and state cases since 1969 contain references to Tinker. For purposes of this study, hundreds of state cases were discarded since final authority on constitutional issues lies with the federal courts. Additional hundreds of cases did not involve educational settings, and were eliminated from consideration. Cases outside the K-12 spectrum were also ignored, since the study focuses on the public schools, not on higher education. Each of those remaining was examined for relevance. Those not dealing directly with symbolic student speech, or providing instructive analysis on that subject, were bypassed. For example, a very large number of cases dealt with student publications — school-sponsored and “underground.”
3. Each of the symbolic speech cases was studied in depth in order to
determine the facts at issue, to note the court's holding and its rationale, and
to review the dissenting opinion(s), if any were published.

4. The cases were sorted by geographic region as represented by the
federal circuit in which each original complaint began. This organization is
part of the matrix of cases presented in Chapter 5.

5. The various decisions were also grouped according to the nature of
the expression; e.g., all cases involving the wearing of buttons containing
slogans. The presentation of findings in Chapter 4 followed this format in
order to keep all like cases together, as well as to provide a smoother narrative
for the reader.

6. Opinions were tabulated to detect patterns that might reveal a
predisposition or predictability of judgment in any of the Circuits.

Among the sources used during the study were:

1. The Clark County Law Library and UNLV's William S. Boyd Law
School's library, indexes of legal periodicals.

2. The case law and law journal databases on the Lexis service,
accessible through the School of Business at the University of Nevada, Las
Vegas.

3. Law-based web sites on the Internet, including:
   - http://www.law.emory.edu/FEDCTS/
   - http://www.findlaw.com/
• http://www.law.indiana.edu/law/
• http://www.lectlaw.com/
• http://www.lawguru.com/search/
• http://www.gpo.ucop.edu/catalog/supreme/
• http://www.law.cornell.edu/

4. On-line journals available on the Internet

5. Journal articles available through the Educational Resources Information Center (ERIC)

Relevant opinion and commentary gleaned from law reviews and journal articles which address student symbolic expression have been quoted and/or cited in the study. A major source for that activity included:


Education law and related textbooks were reviewed to supplement current literature, and are listed with the references.
CHAPTER 4

FINDINGS OF THE STUDY

The study focused on cases in the federal court system dealing with student symbolic expression in the years since the Supreme Court handed down the landmark Tinker decision in 1969. Answers were sought to the following questions:

1. Do the courts agree on the Supreme Court's Tinker findings after thirty years?
2. In the light of relevant case law, what is the meaning of the "material or substantial disruption" referred to in Tinker?
3. Have the courts' interpretations of the Tinker precedent worked over time to change our general understanding of it?
4. Do other circuits follow the conceptual framework set down by the Ninth Circuit Court of Appeals in Chandler?
5. When there are religious overtones in symbolic expression, is it dealt with differently by the courts than secular symbolic speech?
6. Must someone be called a name out loud to have effect, or can an insult take place in the form of a the slogan on a button worn on another's
person? (Do Scabs Bleed? — We’re Not Listening, Scab — Scab, We Will Never Forget).

7. Is insulting or intimidating symbolic expression in a public school classroom more protected than similar insults delivered on a public street?

Each of these questions is taken up in the summary in Chapter 5. In the following, briefs of the numerous cases are presented. The symbolism of expression varies, as we shall see. Because of that, the cases have been organized chronologically within several categories. Because Tinker involved armbands, we first look at other cases in which armbands—and another mute article of “pure speech”—have played a part. Also mainly in the Vietnam era, some cases dealt with the way students were expressing their displeasure by dishonoring the flag and refusing to recite the Pledge of Allegiance. These cases follow the armband incidents.

Thirdly, we examine the difficulties that arose around the retirement of time-honored school logos and sports team names, spurred by civil rights concerns. What follows is an extensive examination of cases involving some very expressive t-shirts and other items of clothing worn by students. Next, we look at student demonstrations—some passive, some not.

Three cases show how student expression with religious overtones were dealt with in different ways. We will then review a half dozen cases which fall into a category which can only be labeled as nondescript. These are included as, in the words of a favorite professor, a “frolic.”
In concluding the reviews, we delve into the matter of buttons and tags worn by students because of the similarity of these cases with the Ninth Circuit's *Chandler v. McMinnville* (1992), which set wheels under this study in the first place. Following the review of cases, we attempt to find answers to our research questions. Finally, some guidelines are presented which could help a school administrator find a way through the thicket of symbolic student expression. Figure 1 illustrates geographical boundaries of the various circuits.

![Geographical Boundaries of the Federal Circuits](image)

**Figure 1. Geographical Boundaries of the Federal Circuits**
Armbands and Berets


At the graduation ceremonies on June 5, 1969, nearly two dozen seniors decided to distribute brief tracts and to wear armbands over their gowns in order to protest what they felt were immoderate policies in effect at the school. The armbands bore the legend "HUMANIZE EDUCATION." The students wore the arm bands even though they had been requested not to wear any insignia which deviated from the formal graduation attire. On the other hand, there was no report of disruption or disorder at the Commencement exercises. The school composed a letter which it proposed to include in any participating student's record requested by a college or university, to the effect that the student had participated in an unsanctioned demonstration.

It should be expected that the affected students would seek to stop such a communication from being included in their records. They sought injunctive relief in the U.S. District Court for the Eastern District of Pennsylvania, expressing that (a) they feared that their chances of acceptance would be harmed by the information, and (b) they contended that the school officials might attempt to prevent succeeding graduates from expressing their views in future graduation exercises. The court denied plaintiffs' motion: "We perceive no threatened irreparable harm flowing from the proposed letter..." The court also rejected the argument about future graduating classes, refusing to
speculate about what they may or may not choose to do, or about what action the school might take. The school officials were advised to take the lessons of \textit{Tinker} seriously.

\textbf{Hernandez v. School District Number One, 315 F.Supp. 289}  
(District of Colorado, 1970)

In the late 1960s and early 1970s, Denver, Colorado high schools were experiencing the influx of a sizeable number of students of Mexican heritage. As the 1969-1970 term began at North High School, Hernandez asked on behalf of a number of his fellow “Chicanos” if they would be permitted to wear black berets and long hair while in school. Hernandez said the wearing of berets would be a symbol of their Mexican culture; it would show unity among Mexicans; it would be a symbol of respect, and a symbol of their dissatisfaction with society’s treatment of their race, and of their desire to improve that treatment.

Principal Shannon, himself of Mexican descent, told Hernandez that he was sympathetic with their desire to generate respect for the Mexican culture. Shannon granted the request. He said they could try it and see if everyone could live with it. A week or so later, the same students requested permission to have an observance of Mexico’s Independence Day (September 16) by having a walkout of students to form a parade and demonstration. Despite an out-of-control demonstration the previous year at another (West) high school in the system, Shannon granted that request as well. He also arranged for assemblies
at the school to note the significance of the day and to present appropriate Mexican entertainment. So far, so good. No disruptions occurred other than absences due to the walkout.

Unfortunately, having been granted these concessions the black beret wearers (to quote Shannon's later testimony) “...were becoming arrogant, and they were boisterous, and they were trying to have their way in the things in school.” Their berets were being used as a symbol of power to disrupt classes. When a teacher was reading in class a paper on the significance of September 16, Hernandez snatched the paper and told her he knew more about it than she did. They refused to give their names to teachers when they caused disturbances during passing periods, shouting “Chicano power!” One teacher supervising hallways gave directions to some students. A black beret student stated “Don’t listen to that old bag -- the berets will take care of her.”

In district court, it was shown that Shannon made a number of attempts to induce the gang to moderate their conduct, to no avail. Within a month after they had been given permission to wear the berets, the students had succeeded in creating an atmosphere of tension in the school and had been responsible for numerous incidents of disruption of the educational process. Shannon forbade the further wearing of berets, and when the students refused to comply he placed them on suspension. They sued through their parents, but in the meantime returned to school without the berets.
Quoting Tinker, the court said "...[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place or types of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." The plaintiffs had also alleged violation of their procedural due process rights by virtue of the suspension without a warning and hearing. On an examination of the facts in the case as well as the leeway allowed school officials by Colorado statute, the court ruled in favor of Principal Shannon.


Discontented with certain educational policies and practices within the schools of Tahoka, Texas, citizens of Mexican descent formed a group known as Concerned Mexican American Parents began a number of efforts to communicate their feelings to school authorities. Meetings were organized and letters were sent. Finally, the parents group planned to take their grievances to court.

In the meantime, as an expression of support for those activities, a group of secondary students—not all of whom were of Mexican descent—began wearing brown arm bands to school. At the time, no dress regulations covered the wearing of armbands. Sensing a approaching problem, the Board of Education met and adopted a supplement to the student handbook that
covered "any act, unusual dress, coercion of other students, passing out
literature, buttons, etc., or apparel decoration that is disruptive, distracting, or
provocative so as to incite students of other ethnic groups will not be
permitted." The Board also adopted a regulation that declared that a student
who violated the new code could be temporarily suspended on grounds of
"incorrigibility."

When the inevitable disregard for the ruling occurred, followed by the
equally inevitable suspensions, the present case commenced. The court found
that no material or substantial interference had compromised educational
processes, and quoted Tinker: "The wearing of an armband for the purpose of
expressing certain views is the type of symbolic act that is within the Free
Speech Clause of the First Amendment."

**Butts v. Dallas Independent School District, 436 F.2d 728
(8th Circuit, 1971)**

Students at various Dallas, Texas high schools, protesting the hostilities
in Vietnam, wore black armbands to school. This was no passive symbolic
speech in the eyes of administrators, however. There had been demonstrations.
Leaflets were distributed which bore the "peace symbol" and exhorted people
to leave school and their jobs to attend a gathering to promote a moratorium.
There was, in fact, substantial disorder before the day's classes began. At one
school a bomb threat was received.
Based on all this, administrators suspended the armband wearers, who through their parents sought injunctive relief in the district court for the Northern District of Texas. The court was unsympathetic and denied the motion of plaintiffs. On grounds of Fourteenth Amendment protection, the matter was taken to the Fifth Circuit Court of Appeals, which in early 1971 reversed the lower court. In the deeper probe into the situation made by the appeals court, it surfaced that there had been wearers of white arm bands as well, and it was those students who had generated much of the commotion. None of the white arm band students was suspended. Noting "hasty staff work" as the reason for the one-sided suspensions, the court observed: "After all, over 44,000 Americans have died in Vietnam and all of us must mourn them. We differ only in what we think the President and Congress ought to do to end the bloodshed."

**James v. Board of Education**, 461 F.2d 566 (2nd District, 1974)

As a sidebar, it is perhaps interesting that teachers fared no better in most courts of original jurisdiction with their arm bands than students did, although the courts of appeals have a way of coming to the rescue. Charles James, a probationary teacher of junior English at Central High School in Addison, New York, wore a black arm band to school on November 14, 1969, a Vietnam Moratorium Day. He was promptly suspended. James returned to his

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6 By the end of the war, the toll was over 47,000.
teaching duties a few days later, but he wore the arm band again on December 12, another Moratorium Day. This time his action resulted in his dismissal. At his appearance in district court, James’ application for preliminary injunction was denied. The Second Circuit Court of Appeals reversed the lower court and James was reinstated. The school’s petition for a writ of certiorari was denied by the Supreme Court. Further action was taken in district court which resulted in James’ receiving damages in the amount of nearly $21,000. Moreover, in the intervening time James had earned a Master’s degree, which entitled him to a higher position on the salary schedule. The new rate was used to calculate his award.


On the morning of May 7, 1970, 11th grader Bennett Wise wore a white arm band bearing the words “Strike” to classes at the Marple-Newtown Senior High School in Delaware County, Pennsylvania. He was not alone. Between 30 and 50 students had similar arm bands reading “Strike,” “Rally,” or “Stop the Killing.” Before Wise’s math teacher sent him to the office, six or seven other students had been advised by Principal Vincent Sauers that they would have to remove the arm bands bearing such words. Sauers’ apprehension was fed by a general state of tension and unrest—sometimes violence—on campuses across the nation. Four students had been gunned down at Kent State University just three days earlier. At Marple-Newtown there had been the distribution of
literature urging students to attend protest rallies. A general uneasiness lay over the nearly 2,000 students.

Sauers asked Wise to remove his arm band, but Wise refused. After a conference with his mother, Wise borrowed a marker and wrote “Rally Sat.” on the reverse side of his arm band. He then returned to class. Later Sauers spotted Wise at a phone booth, in the process of calling the American Civil Liberties Union. At that time his arm band read merely “Rally.”

Sauers told Wise he could either wear a black or other plain arm band, or wear one with a peace symbol, a dove, or a omega sign; in no case could he continue to wear the band that said “Rally.” Wise refused again, and was suspended.

Wise remained out of school until May 14, and the following week the Board met. On their agenda was disposition of the matter. They upheld Sauers’ rationale for suspending Wise, but also lifted the suspension.

In district court action, Wise asked that the records of his suspension be expunged. After a careful review of Tinker, the court ruled in favor of the school district, saying that “the limited restrictions imposed upon the students were reasonable and necessary. The refusal of a student to obey the reasonable requests in this case was insubordinate and unprotected activity.”
The National Emblem

Students recognize symbolism. Whether it's sewn to the seat of their pants, made into a vest, flown upside-down or simply ignored, the American flag has received its share of abuse from protesting adolescents.


"America is perhaps the greatest country in the world," wrote Raymond Miller, a black 12th grader at Jamaica High School (New York) who went on to say that America must undergo certain basic changes and provide true equality, freedom, and justice for all. It must end oppression of minorities, and give black people a greater opportunity to advance. In his written statement explaining his reason for not participating in the traditional pledge of allegiance to the flag that began each school day, Miller spoke for himself and his two white co-plaintiffs Mary Frain and Susan Keller, junior high school students. Additionally, one of the girls had declared herself an atheist who objected to the phrase "under God."

The students declined to stand silently during the pledge because they felt that would indicate their support. They were also given the option of standing outside their classrooms in the hall during the pledge, but refused that as well on the grounds that exclusion from the classroom was a punishment for exercising their constitutional rights. At the junior high school, authorities responded by placing the 12-year-old girls on suspension.
Publicity from that event apparently sharpened the high school principal’s interest in Miller’s behavior. It wasn’t long before Miller was suspended too.

The aggrieved parties sought injunctive relief from their suspensions. The preliminary injunctions were granted by the district court, which consolidated the two complaints into a single civil action. In its ruling, the court found relevant comment in the decisions of two Supreme Court Justices. In the Barnette opinion, Justice Robert Jackson said “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[,] or force citizens to confess by word or act their faith therein.” In Tinker, Justice Abe Fortas wrote “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” By ‘expression of opinion’ Fortas was taken to mean silent or passive expression as well as spoken and/or acted.

**Goetz v. Ansell, 477 F.2d 636 (2nd Circuit, 1973)**

Honor student and class president Theodore Goetz expressed opinions identical to those of Raymond Miller in the preceding case. When he refused to stand and participate in the pledge, school officials offered him the options of standing silently during or leaving the classroom during the pledge. He
declined both offers. Fearing that Theodore might be suspended, his mother sought a preliminary injunction from the district court. The judge dismissed the complaint for failure to exhaust administrative remedies and also ruled against the plaintiff on the merits of the complaint.

When the matter was appealed to the 2nd Circuit under 42 U.S.C. § 1983, both rulings were overturned. Judge Feinberg did not address the question of whether the doctrine of exhaustion of administrative remedies applies in a section 1983 suit; and because the appellant's older brother had been suspended the year before by the same school district for identical behavior, declaring that "remedy" to be futile. Further, the court said that "if the state cannot compel participation in the pledge, it cannot punish non-participation." Being required to leave the classroom might be viewed by some as punishment, no matter how benign the defendants' motive might be, Judge Feinberg continued. The court recalled Justice Brennan's document of concurrence in *Abington School District v. Schempp*, 374 U.S. 203 (1963):

"The excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insults."

Symbols of the Confederacy

The Battle Flag of the Confederate States of America is, to some, a reminder of the ante bellum South and slavery. Other associated symbols can rouse similar feelings of antipathy among blacks and others of like mind. It is
sometimes difficult to discern whether the use of those symbols is prompted by a desire to humiliate people of color or whether it is simply an expression of regional and historical pride, without a darker agenda.

Other minorities have spoken out against the use of symbols they found demeaning. Professional sports teams have been criticized for adopting names that offended some native Americans; e.g., Chiefs, Redskins, and Braves—symbols which are employed in a complimentary sense since they imply strength and prowess. It is interesting to note that no citizens of Scandinavian heritage have yet objected to the Viking symbol employed by Minnesota’s NFL franchise. Still, the horror of slavery is a difficult reality to dispel, especially when so many descendants of its victims have not achieved full social equality.

**Augustus v. School Board of Escambia County**, 507 F.2d 152 (5th Circuit, 1975)

In 1960, a court order directed the School Board of Escambia County to reorganize the school system on a unitary, non-racial basis. In 1973, the district court for the Northern District of Florida received a petition for preliminary injunction against the use of the name “Rebels” as Escambia High School’s nickname, its use of the Confederate Battle Flag as a school symbol, and the singing of the song “Dixie” at school functions. The plaintiffs’ argument was that these practices were symbolic resistance to the 1960 court order to desegregate. It was argued that the offensive practices generated a
feeling of inferiority among the black students, and that the symbols were a cause of violence and disruption in the school. During the hearing, the plaintiff-intervenors dropped their complaint about the singing of "Dixie."

The preliminary injunction was granted, but numerous citizens and white students of the school protested that they had not used the symbols in the manner described in the complaint. The case under discussion, 361 F. Supp. 383, was a plea to make the preliminary injunction permanent. The case concluded with the court ruling in favor of the plaintiffs. It was found that (a) the use of the name "Rebels" and use of the flag of the Confederacy continued to be racially irritating, (b) the use of these symbols was a major cause of racial tension in the school, (c) the situation escalated with time, (d) the use of the symbols was an obstacle to the effective operation of a unitary school, (e) the disruption would likely continue if the symbols were used, and (f) even if the symbols had not been chosen as racial irritants, they had that effect on the black students. A permanent injunction was issued. The court found that the symbols under discussion had the same effect as the "fighting words" referred to in the Supreme Court ruling in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

The Fifth Circuit Court of Appeals, in its review of the district court’s findings, observed that the use of the symbols discussed above were not the only cause of racial tension, and that the school had taken immediate steps to eliminate them. The only change made in the circuit court’s determination
was to modify the injunction to make it a temporary one once again. Circuit
Judge Moore wrote a strong dissent in which he referred to the “tyranny of the
courts” that was created when they intervene in the conduct of students and
spectators at a sporting event. “If the will of the vast majority is to be
overridden at the behest of a small minority,” Judge Moore continued, “then
that concept of our so-called democratic system might as well be scrapped.”


A similar case appeared in the 4th Circuit Court of Appeals in the late
1980s. Johnny Reb, the former cartoon symbol of the Fairfax (Virginia) High
School Rebels, was eliminated by principal Harry Holsinger after he received
complaints from black students and parents. Other students protested his
decision in various ways before finally bringing suit in district court. The
district court first dismissed the students’ complaint as frivolous, but the
circuit court reversed and remanded. 816 F.2d 162 (4th Circuit, 1987). At
trial, the district court granted a directed verdict in favor of Holsinger as to the
broad “censorship” claim, and the jury also found in his favor on the claim of
“protest restriction.” In 852 F.2d 801 (4th Circuit, 1988) the circuit court
affirmed the results of trial.

Initially, after Johnny Reb had been eliminated as a symbol of the
school and its teams, the majority students protested by holding rallies at
school, launching a petition drive, attending a school board meeting, and
displaying blue ribbons. Only once did Holsinger interfere with any of the student actions; on that occasion he prevented plaintiff Crosby from posting notices on the school bulletin boards. The next day he relented and allowed the postings, but his initial action gave rise to the civil action described.

In its final determination, the Circuit Judge wrote: “Under the ... Supreme Court decisions noted [Tinker, Fraser, and Hazelwood] ... school officials have the authority to disassociate the school from controversial speech even if it may limit student expression. Principal Holsinger was within his power to remove a school symbol that blacks found offensive.


In the U.S. district court for the Anderson Division in South Carolina, suit for damages and for declaratory and injunctive relief was brought by a mother on behalf of her son James Kinley, a student at Lakeside Middle School. Kinley was suspended for wearing a jacket to school that had been fashioned to look like the Battle Flag of the Confederacy, on grounds that the jacket would result in a substantial and material disruption of and interference with the educational process at Lakeside. The defendants moved for summary judgment. The district court sided with the school district and its co-defendants, among whom was Lakeside Principal Don. R. Saxon.

On the face of it, the judgment would appear to be in conflict with the Tinker decision, by now considered by the courts as next to holy writ; but an
examination of the facts presented in court show the Court's reasoning and the rationale for its decision. Since the Phillips matter contains an excellent example of the kind of disruption the Tinker court would not have approved of, the findings of fact are excerpted as follows.

"Lakeside Middle School had experienced several incidents of racial tension, including incidents resulting from its students wearing garments which depicted the Confederate Flag. Two such incidents occurred during the 1991-1992 school year. The first, which occurred in the fall of 1991 as the students were lining up to change classes, involved an altercation between a black female student and a white male student wearing a shirt depicting the Confederate Flag. The classes were ultimately disrupted and a student was nearly assaulted. The second incident occurred in the Spring of 1992 when another white male student wore a Confederate Flag T-shirt to school. Racial remarks were exchanged among white and black students at a fast food restaurant directly across from the school, and a physical confrontation ensued. Some of the students were injured in the fight, and the incident was reported to the Anderson County Sheriff's Department.

Three additional incidents occurred during the 1994-1995 school year. In October of 1994, two black female students
reported to the Lakeside principal ... [Saxon] ... that they had observed a white male student wearing a garment depicting the Confederate Flag, and that when they asked him 'what he meant' by wearing the Flag, the student responded that he disliked black people. School personnel requested that the student remove the garment, and the student complied. Later that school year, in March of 1995, the same white student got into a fight with a black male student across the street from the school. The following day, school officials were notified that the white student had brought a razor blade to school for the purpose of striking the black student. Upon receipt of this information, school officials sought out the white male student's cousin in order to determine the student's intention. The white male student's cousin was Kinley. Although school officials eventually were able to persuade Kinley to reveal his cousin's plan, Kinley was suspended for three days because of his involvement in the incident.

Another episode involving the Confederate Flag occurred in the Spring of 1995 when a seventh-grade science teacher reported that a black female student and a white female student had gotten into an argument over the white student's wearing a Confederate Flag bandanna. The matter was settled when the
white student complied with a request that she remove the bandanna.

In addition to these incidents directly related to the Confederate Flag, the school had experienced other incidents of racial unrest and tension, including a verbal altercation and threats of physical violence by four white students towards black students during a class in November of 1995. By the 1994-1995 school year, Lakeside had instituted an informal policy of asking students to remove or turn inside-out their Confederate Flag clothing before it created disruptions. Indeed, Kinley testified that he and his cousin had been asked to do so during that year and that both had complied with the request.

On Friday, January 5, 1996 at approximately 8:30 a.m., the Assistant Principal of Lakeside, Mike Ruthsatz ... discovered Kinley wearing a Confederate Flag jacket and brought him to Principal Saxon’s office. Saxon asked Kinley to remove the jacket and to refrain from wearing it to Lakeside because of the previous problems the school had experienced with students wearing clothing items depicting the Confederate Flag. When Kinley refused to remove the jacket, his mother and stepfather were contacted by telephone and informed of the situation. Kinley testified his stepfather told him not to remove the jacket. Phillips
and her husband were advised that Kinley could not wear the jacket to school and that Kinley might be suspended for insubordination. According to Phillips' testimony, her husband contacted the local press at the conclusion of the call with the school, and she and her husband left to go to the school. When they arrived, the press was not on-site, so they left and went to the fast food restaurant across the street from the school. Upon meeting a television truck, they returned to the school and signed Kinley out. The television station then conducted an interview of Kinley and his stepfather. Kinley was ultimately suspended from Lakeside for three days for refusing to comply with Saxon's request to remove the Confederate Flag jacket.

The following Tuesday, January 9, 1996, Saxon held a conference with Kinley and Phillips concerning Kinley's three-day suspension. Saxon informed them that Kinley would be allowed to return to Lakeside if he did not wear the jacket. Phillips kept Kinley out of school for the three-day suspension, which ended Friday, January 12, 1996. On that day, Phillips brought Kinley back to school wearing the Confederate Flag jacket. Saxon again asked Kinley and Phillips to remove the jacket, but they refused. Saxon then suspended Kinley for an additional five days.
The following Tuesday, January 16, 1996, Saxon held another conference with Kinley and Phillips concerning Kinley’s five-day suspension. Saxon continued to refuse to allow Kinley to wear the jacket to Lakeside, and Phillips continued to refuse to return Kinley to school unless he was allowed to wear the jacket. Ultimately, Phillips sent Kinley to live with a relative and enrolled Kinley in another middle school. The lawsuit described followed. There is no indication whether the alternative middle school allowed Kinley to wear his jacket, or whether the move was intended simply to save face for the family."

T-shirts and Other Garments That Offended


The plaintiff, Rod Gano, a Twin Falls (Idaho) High School student and talented caricaturist, was requested by members of the senior class to draw a sketch of three school administrators. Gano complied and his drawing was transferred to T-shirts to be sold to other students during homecoming week. Gano’s rendering was far from complimentary. It showed the three administrators sitting against a fence labeled "Bruin Stadium, Home of the Bruins." Each administrator is holding a different alcoholic beverage and is
acting drunk. While one administrator holds aloft a beer mug, another holds a wine cooler, while the third grasps a bottle of whiskey. A case of "light beer" sits nearby. The phrase, "It doesn't get any better than this," not coincidentally lifted from a then current television beer commercial, appears just below the caricature.

When the administrators discovered the T-shirts and the plan to sell them to the students, they suspended the plaintiff. The suspension lasted two days, October 5 and 6, 1987. Gano returned to school the following day. He was noted as being absent during second period on October 8. On that date he had worn the T-shirt to school, and was told to go home and change during second period. He wore the T-shirt again on October 15, 1987, and was sent home to change it. Although he was free to return to school without the T-shirt, he failed to return on October 16, 1987, and is listed as being absent on that date. Gano was informed that as often as he chose to wear the offending shirt he would be sent home to change it.

Through his father, Gano filed for preliminary injunction to prevent further suspensions that might arise from his wearing of the shirt in question. The district court examined Gano's situation in the light of the probability of his success in a trial on the merits of the case and whether serious questions were raised and the balance of hardship tipped sharply in his favor. After a review of the facts, the court denied Gano's motion. Judge Marion J. Callister was specific in his rationale:
“In the present case, the school has determined that the T-shirt—which is clearly offensive—cannot be tolerated. In this state, schools are statutorily charged with teaching about the ‘effects of alcohol.’... When the school disciplines the plaintiff for wearing a T-shirt falsely depicting the administrators in an alcoholic stupor, it is engaged in its statutory duty. It is teaching the students that falsely accusing one of being drunk is not acceptable. The administrators are role models, as stated by the United States Supreme Court, and their position would be severely compromised if this T-shirt was circulated among the students. This case appears to clearly fall within the Bethel [Fraser] precedent, and thus the court finds that the plaintiff has only a minuscule chance of success on the merits.

With regard to the balance of harm, the plaintiff would be effectively prevented from falsely accusing the administrators of being drunks. The court cannot find that the plaintiff suffers much harm by being so prevented. When this case is examined in its entirety, the plaintiff has so little success on the merits and would suffer so little harm that the court finds that a preliminary injunction is not warranted.”

Broussard v. School Board of the City of Norfolk, 801 F.Supp. 1526 (E.D. Virginia, 1992)

Well-meant expression can sometimes miss the mark and go awry.

Twelve-year-old Kimberly Broussard, a student at Blair Middle School in Norfolk, VA, attended a ‘New Kids on the Block’ concert at which she
purchased a T-shirt that sported on its front in large block letters the words “DRUGS SUCK.” Kimberly decided to wear her shirt to school, where some 1,200 students aged 11 to 15 years were in attendance.

Vigilant school administrators spotted the T-shirt and informed Kimberly that they considered the word “suck” to be inappropriate in the school setting. She was asked to either turn her shirt inside-out or to change into another the school had on hand. Kimberly balked at these options, and phoned home to see if one of her parents would bring a different shirt to school. According to the court’s record of the events, lengthy and not particularly conciliatory telephone conversations ensued which involved various school authorities, Kimberly’s mother (Ruth Lord), and Kimberly’s step father.

The disagreement hinged on three issues: (a) the immediacy of a threatened suspension if the girl did not change her shirt, (b) whether or not the slogan “drugs suck” was in poor taste, and (c) whether or not the word “suck” had sexual connotations in the minds of middle schoolers who would see it if Kimberly were allowed to wear the shirt in school. Meanwhile, Kimberly protested that she had worn the shirt to make the point with her schoolmates that using drugs is bad.

Mr. Lord came to the school, and when Kimberly continued to refuse to change her shirt the two of them left. The girl remained home for the balance of the school day. In another call to the school, Mrs. Lord said that Kimberly would be wearing the shirt on campus again. At that point, the principal placed
Kimberly on a one-day suspension. Norfolk School Superintendent Gene Carter wrote to the Lords:

"Clothing containing messages couched in strong language is inappropriate, especially when the language has an overt sexual connotation. Such messages are even more likely to be disruptive when directed at adolescents, as opposed to mature adults."

Educators at the secondary level know that "suck" is part of the adolescent vocabulary, and that it carries varied meanings according to context. But simply because a word is used frequently by students does not require the school to condone or overlook its use. Such a policy would bring well-deserved criticism from parents and other taxpayers.

The Lords brought suit, contending that Kimberly’s First Amendment right of free speech had been denied her and that her Fourteenth Amendment right to procedural due process was also trampled because of the suspension without notice.

The district court (Eastern District of Virginia, Norfolk Division) decided that the family was well aware that disciplinary action could follow the girl’s repeated refusals to change out of the offending garment, and accordingly denied the due process claim. Judge Robert Doumar also ruled against Kimberly on the alleged free speech violation, relying on the testimony of a certain Dr. Spiva, professor of educational administration at nearby Old Dominion University, who said that in his experience suggestive words such as
suck undoubtedly create disruption among teenage students.


Janet Corso, a minor plaintiff in this action, designed a T-shirt in November of 1991 which portrayed a typical teen wearing “Guess” jeans, “Adidas” sneakers, and a “Raiders” baseball cap. She wrote down numerous slogans which she felt were candidates to be added to the shirt. One of them was “the best of the night’s adventures are reserved for people with nothing planned.” Janet later said she liked that one and chose it for the shirt she was designing because it conveyed the message “be spontaneous, have fun; if you plan things, they often turn out wrong.” She completed her design and had six of the shirts printed. She, Denise McIntire (the primary litigant), and other girls wore the shirts with some regularity during the 1991-1992 basketball season. No disturbance of any kind was noted by anyone as a result of wearing the shirts.

Bethel Principal Charles Franklin admitted that he had seen the shirts being worn during that time, but had not realized that the slogan was copied from a liquor advertisement for Bacardi Black. But Superintendent James Harrod had known as early as November, having been informed by the mother of one of the girls who wore the shirts. However, he testified that the first he knew of the girls wearing their shirts to school was in March 1992, at which time he directed Mr. Franklin to suspend any students who wore the shirts in
school. It was also brought out that he instructed Franklin to have the teachers give "pop quizzes" for which students not present would receive zeroes.

Testimony was heard from an advertising expert to the effect that the same slogan might be used to promote a variety of products; in the absence of product identification it was not a "liquor ad." A professor of social psychology testified that the T-shirt in question "absolutely does not advertise Bacardi Black."

The court found that McIntire and the other plaintiffs had met their burden of demonstrating a substantial likelihood of success on the merits of their claim that their First Amendment rights had been violated. The phrase employed on the shirts conveyed an idea. As such it was speech not encroaching on more important interests, and therefore presumably protected by the First Amendment. The court went on to say that the defendants had failed to prove that the message on the shirts advertised an alcoholic beverage.

Also, even though the T-shirts in question bore the words "Jrs. 91-92," no mention was made of Bethel High School; consequently the shirts could not be conceived as bearing the imprimatur of the school. The court cleared away the complaints against most of the defendants, and ordered that no action be taken by the school against students wearing the shirts either before or after the ruling.
Once again the need for school officials to establish sufficient reason to anticipate "material and substantial disruption" before curtailing students' rights of free speech is at issue. Plaintiffs in this action were four Jeglin siblings aged 7, 9, 12, and 14 and 17-year-old Darcee LeBorgne. Revisions to the student dress code in the San Jacinto (California) Unified School District denied students the right to wear clothing bearing writing, pictures, or any other insignia identifying professional sports teams or colleges on school district campuses or at school district functions. After the revisions were approved and sent to parents, the plaintiffs were on various occasions found to be in violation of the code and were threatened with suspension.

The instant action was brought in U.S. district court for the Central District of California by plaintiffs seeking declaratory and injunctive relief alleging abuse of their First Amendment rights.

In its ruminations, the court reflected that a forecast of substantial disruption depends on facts which would reasonably lead school officials to take action. In this case, the administrators of the schools involved cited the suspected presence of gang activity on their campuses related to the wearing of the forbidden garments. Upon hearing evidence, however, the court said:

"As for the elementary school population of the San Jacinto School District, defendants have offered no proof at all of any
gang presence at those schools or of any actual or threatened
disruption or material interference with school activities. There
accordingly is no justification for application of the restrictive
dress code to that elementary school population and the
abridgment of free speech rights resulting therefrom.

As for the middle school population, although some evidence
of gang presence is offered, that evidence shows only a negligible
presence and no actual or threatened disruption of school
activities. It is our view again that defendants have not carried
their burden of showing justification for application of the
restrictive dress code to that middle school population and the
abridgment of free speech resulting therefrom.

Evidence concerning the situation at San Jacinto High
School is conflicting. There is, for example, a substantial dispute
as to whether the wearing of sports oriented clothing is even a
showing of gang colors on the San Jacinto High School campus.
Reliable student testimony indicates that gang members do not
wear university or sports clothing on that campus but instead
identify themselves by wearing white T-shirts and dickies, the
latter being a brand of work pants. One witness, president of the
San Jacinto High School Associated Student Body, a member of
the honor roll, president of the San Jacinto High School Future
Farmers of America and student representative to the San Jacinto School District Unified Board of Trustees, says that she has never observed the wearing of college or professional sports team clothing to lead to any classroom or campus disruption or disorder; that the ones most often wearing professional sports team or college clothing were school athletes; and that ... 'The gang members at San Jacinto High School wear their Pendleton shirts, Nike shoes, white t-shirts, baggy pants, dickie pants or black pants, hair styles and walk their walk just as they did last school year, 1991-92, and at the beginning of the 1992-93 school year before [dress code changes] ... were ever implemented or enforced. The teachers and administrators are not in touch with this issue on the campus...They have spent a lot of time on this (clothing) issue instead of addressing the behavior of individuals ...This whole prohibition against wearing college or professional sports team logos or writings has affected only the regular kids who follow the rules. The gang kids are still wearing their plain white T-shirts and dickie pants...' 

Other evidence supports the School District position and in our view defendants have carried their burden of showing both a gang presence, albeit of undefined size and composition, and activity resulting in intimidation of students and faculty that
could lead to disruption or disturbance of school activities and may justify curtailment of student First Amendment rights to the extent found in enforcement of the district’s dress code. While it is by no means certain that the otherwise offending dress code will negate that presence and possible disruption, we assume that in carrying out their duties defendants will recognize and from time to time review their encroachments of First Amendment rights of their student population and revise any restrictions to conform to the existing situation.

In sum, we find and conclude that defendants have failed to carry their burden of proof of justification for the curtailment of elementary and middle school students free speech contained in that portion of their dress code forbidding the wearing of clothing free of writing, pictures or any insignia which identifies any professional sports team or college.”

This ruling would appear to grant school authorities somewhat greater flexibility in dealing with potential problems at the high school level than at schools where younger students are in attendance.

**Baxter v. Vigo County Sch. Corp. et al., 26 F.3d 728 (7th Circuit, 1994)**

Between February, 1988 and May, 1991 Chelsie Baxter, a student at Lost Creek Elementary School (Terre Haute, Indiana), and her parents attempted
to complain and object to grades and racial bias and certain policies at the school. From time to time, Chelsie arrived at school wearing one of several T-shirts that read “UNFAIR GRADES”, “RACISM”, and “I HATE LOST CREEK”. Principal Ray Azar prohibited the shirts at school and subjected Chelsie to disciplinary action. Restraining orders and alleged false prosecution were also said to have been directed at Chelsie’s parents, James and Wilma Baxter. Charges of educational neglect and abuse brought against the parents were dismissed.

The Baxter’s sued, asking for $1.5 million in compensatory and punitive damages. They named a number of other individuals and entities as co-defendants, including the County and State Welfare Departments. In district court for the Southern District of Indiana, Terre Haute Division, the complaint was dismissed for failure to state a claim. In the 7th Circuit Court of Appeals, it was noted that the Baxter’s bore the burden of showing that Chelsie enjoyed a clearly established right to wear her expressive T-shirts in school. They had relied on Tinker to establish that right, but the court cited Fraser and Hazelwood language to point out (a) that the ages of the students involved gave the school increased flexibility7 and (b) the emotional maturity of the students was insufficient to allow student speech on potentially sensitive

7 Specifically, the Supreme Court in Fraser said: “[S]imply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in public school.”
topics. The court also mentioned the paucity of federal court rulings on free speech involving grammar school students. At length, the circuit court affirmed the earlier decision to disallow the Baxters’ complaint.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), Justice Potter Stewart wrote in concurrence on the subject of extending the full rights of adults to minor children: “I think a state may permissibly determine that, at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of first amendment guarantees. It is only upon such a premise, I should suppose, that a state may deprive children of other rights — the right to marry, for example, or the right to vote — deprivations that would be constitutionally intolerable for adults.”

*Pyle v. South Hadley School Committee et al.*, 861 F.Supp. 157
(District of Massachusetts, 1994)

In his final comments on the Pyle matter, District Judge Michael A. Ponsor wrote: “This case is a reminder that it is easy to assume a tempest in a teapot is trivial, unless you happen to be in the teapot.”

The novelty T-shirt industry continues to have an impact on the prurient interests of teens, as well as on the administrators of their schools. In this case, two boys and their father (at the time a professor of constitutional law at nearby Mt. Holyoke College), with ACLU assistance, disputed the authority of
school officials to forbid the wearing of T-shirts whose inscriptions and graphics they found to be offensive and inappropriate in school.

The Pyle brothers arrived for classes one day at South Hadley High School (Massachusetts) wearing T-shirts with printed slogans. One was “See Dick Drink. See Dick Drive. See Dick Die.” So far not a serious problem; but there was a fourth line—”Don’t Be a Dick”—that upset administrators. The other brother’s shirt proclaimed “Coed Naked Band: Do It to the Rhythm.”

Other shirts the Pyle boys wore to school over time bore such messages as “Coed Naked Censorship—They Do It in South Hadley,” a shirt celebrating the Smith College Centennial that said “A Century of Women on Top,” and one showing the picture of two men in naval uniforms kissing each other accompanied by the words “Read My Lips.” One shirt bore the picture of a marijuana leaf and the slogan “Legalize It.” The controversy—at times assuming an almost playful tone as each new provocative slogan made its appearance—continued through the school year as the Pyles defied what they believed were ill-defined regulations and taunted school authorities, who continued to strive for consensus on a revised school dress code that would address the T-shirt problem.

In their first trip to court, the Pyles sought injunctive relief against the school’s ban on their suggestive apparel. Judge Ponsor found the issue to have more in common with Fraser than with Tinker, under which authority the Pyles’ complaint rested. The motion for temporary restraining order was
denied. A four-day bench trial followed in which the same court was asked to rule on two issues: (a) whether the slogans on the shirts were vulgar and (b) whether they had violated a ban on clothing that 'harasses, threatens, intimidates, or demeans' certain individuals or groups. Finding that no material or substantial disruption had occurred, the court allowed injunctive relief as to the school dress code, but found in favor of the defendants in all other matters.

Judge Ponsor wrote: "[W]hether this decision is correct or not, no court system in the world today, and none that has existed in the history of the world, would take so much time to address the concerns of two high school students sent home over their T-shirts."

Student Demonstrations

_Farrell v. Joel_, 437 F.2d 160 (2nd Circuit, 1971)

Protesting the suspension of three fellow students, a group of about 30 high school students at the Morgan School in Clinton, Connecticut, assembled outside the school's administrative offices and conducted a "group sit-down." When the group refused to disperse, Principal Rexford Avery read to them Rule 15(c) of the Board of Education's policies:

"Pupils who walk out of school, sit in, damage property, harass teachers will be dealt with as follows: ... 2. Pupils who walk out or sit in will be given the opportunity to return to their classes and appoint designated leaders [sic]"
to meet with the school officials to discuss and seek solutions to the problem.

3. Pupils who fail to heed the warning to return to classes and continue the walk-out and/or sit-in, will be suspended at once."

Upon the reading of the policy, some students left for class, but others remained. During a subsequent morning break the crowd of students swelled to nearly 300. Fearing violence, Principal Avery called an assembly at which student “leaders” were elected. The following week, after a period of relative calm, the matter was taken up at an open meeting of the school board. Afterward, the board voted in closed session to suspend Farrell and several others for 15 days. The district court issued a temporary restraining order which resulted in the appellant and the others only being out of school for ten days. The same court denied injunctive relief against Farrell’s suspension and held that the suspension did not violate her constitutional rights.

The Second Circuit Court of Appeals affirmed the lower court’s ruling, citing Tinker: “The first amendment does not guarantee the right to substantially disrupt the operation of a school.” By now it should be apparent that there are sufficient “sound bites” in Tinker to fit almost any situation.

Gebert et al. v. Hoffman et al., 336 F.Supp. 694
(E.D. Pennsylvania, 1972)

Other sit-in demonstrations took place at Abington High School (near Philadelphia) in mid December 1970, both during and after school hours. The school board acted promptly, obtaining a preliminary injunction in the Court
of Common Pleas of Montgomery County, restraining such behavior, suspending about 36 students, and enforcing the suspensions. The district court issued a temporary restraining order enjoining school officials from continuing to prosecute the state court action and from continuing the suspensions. An evidentiary hearing was held two months later, and in June 1971 the district court vacated its restraining order but retained jurisdiction over claims related to the student suspensions.

The students claimed that they had been within their First Amendment rights; and if they were mistaken, there was no notice given prior to the suspensions (no due process). The court looked to *Cox v. Louisiana*, 379 U.S. 559 (1965) and similar Supreme Court rulings and found that “even outside the school environment, the Court has held that where speech is mixed with conduct, as in the case of a sit-in, the state may reasonably regulate the time, place, and manner of such activity.” The test is threefold:

1. The state’s action must be content-neutral;
2. It must serve a substantial and legitimate governmental interest; and
3. It must leave open adequate alternative channels of communication.

Even in *Tinker* the Court said “[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech.”
The district court in the Gebert case ruled that the conduct of the sit-in participants disrupted the normal operation of the school, and that the resulting suspensions did not trample on their First Amendment rights.

Karp v. Beeken, 477 F.2d 171(9th Circuit, 1973)

Students including plaintiff Steven Karp, planned a chant and a walkout at an athletic awards ceremony at Canyon del Oro High School in Pima County, Arizona, protesting the non-renewal of a teacher's contract. The local press was informed. The high school Principal and other officials later testified that the school athletes had threatened to stop the proposed demonstration. Accordingly, the assembly was canceled because school officials feared a walkout might provoke violence.

Later in the morning, newsmen appeared on the campus and set up their equipment. During this time, Karp and other students, during a free period, were milling around outside the building talking with the newsmen. The Vice-Principal testified to his impression that there was a general atmosphere of excitement and expectation pervading the campus and classrooms. There was an intense feeling something was about to happen. Some students actually walked out from class, notwithstanding the cancellation of the assembly.

About the time when the assembly walkout would have occurred, someone pulled the school fire alarm, which, had it not been previously
disconnected by the Vice-Principal, would have emptied every room in the entire school. Approximately fifty students gathered in the area of the multi-purpose room, talking among themselves and with news media personnel.

Excited by the situation, twenty to thirty of the junior high students who share facilities with the high school and who were eating at the high school cafeteria during their lunch period, interrupted their lunch and ran into the area of the multi-purpose room to watch the group of students and news people gathered there. The junior high students ran about the group excitedly and, as a result, their supervisors determined their lunch period should be shortened. They were returned to their classrooms earlier than usual.

Karp went to the school parking lot, carried signs from his car to the area where the students had congregated near the multi-purpose room, and proceeded to distribute them. The Vice Principal ordered the students to surrender their signs, claiming they were not permitted to have them. All obeyed except Karp. He finally gave up his sign when the official requested it a second time, and accompanied the Vice Principal into the office. Students began chanting, and pushing and shoving developed between the demonstrators and some student athletes. When school officials intervened, the demonstration broke up.

Karp was threatened with a five-day suspension, but was offered a reduction to three days if he promised not to bring any more signs on campus.
Backed by his father, Karp refused. As expected, the circuit court weighed the student’s rights as set down in *Tinker*, but also looked to *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Judge Wallace opined: “federal courts should treat the *Tinker* rule as a flexible one dependent upon the totality of relevant facts in each case.” Nonetheless, the court came down on the side of Karp in reversing and remanding the earlier proceedings. Karp’s signs were “pure speech,” the court said; and his suspension was a violation of his First Amendment rights.


Two cases involving student picketing and unauthorized handbill distribution were consolidated by the district court for the District of Puerto Rico in the *Cintron* matter. A junior high student distributed leaflets to other students advocating Puerto Rican independence. He received a five-day suspension for his activities. In the companion incident, two high school students participated in a picket line set up outside their school. A loudspeaker was used at one point. Following the activity, the boys were given five-day suspensions. One of them was also reprimanded for distributing political literature. Temporary restraining orders were issued on behalf of the three.

The students claimed violations of their First, Fifth, Eighth, and Fourteenth Amendment rights; but the court quickly disposed of the more frivolous claims (e.g., “cruel and unusual punishment”). Going directly to the
validity of the school rules the plaintiffs had broken, the court found them unconstitutional and void on their face. The school’s actions were viewed as heavy handed, considering that the school had been able to take control of the situation as easily as it had. The boys’ suspensions were declared void and ordered permanently enjoined. The students’ records were also ordered expunged.

The cause of Puerto Rican independence has traditionally been taken up by each new generation throughout the 20th Century. An equally strong sentiment exists there for statehood.

Cases with Religious Overtones

Cheema v. Thompson, 67 F.3d 883 (9th Circuit, 1995)

As one might expect, when religious freedom is involved in freedom of expression matters, the courts are especially careful in their decisions. Consider the case of children of the Sikh faith who attend public schools wearing daggers as a symbol of their religious beliefs. This practice has caused concern in several California communities. At Yuba City, Selma, and Live Oak, accommodation was reached successfully when the Khalsa Sikh population agreed to (a) dull the blades of the kirpans, (b) limit their length to

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8 The Sikh faith originated in India, but numerous people of that persuasion have resettled in Western nations, including the United States.
2½ inches, and (c) securely rivet the blades to their sheaths. But a dispute in Livingston resulted in legal action.

The matter was brought to district court for the Eastern District of California, where the school district was ordered to make accommodation for the wearing of kirpans until the matter could be argued on its merits. This ruling stirred the pot even further. California Senate President pro tem Bill Lockyer was able to get a bill passed to permit the wearing of kirpans in school. The measure was vetoed by Governor Pete Wilson. The inevitable appeal landed in the Ninth Circuit. Excerpts of that court's proceedings follow.

"Appellants Livingston Union School District (the "school district") appeal the district court's preliminary injunction ordering them to accommodate three schoolchildren's religious practices until this dispute under the Religious Freedoms Restoration Act of 1993... can be litigated on the merits. We review the district court's preliminary injunction for abuse of discretion...Finding none, we affirm.

Three young Khalsa Sikh children stand at the center of this controversy: Rajinder, Sukhinder, and Jaspreet Cheema (together, the "children" or "Cheemas"). A central tenet of their religion requires them to wear at all times five symbols of their faith: "kes" (long hair), "kangha" (comb), "kachch" (sacred
underwear), "kara" (steel bracelet), and a "kirpan" (ceremonial knife). This case began when the school district in which the Cheemas reside refused to allow the children to wear kirpans to school.

The school district relied on its total ban of all weapons, including knives, from school grounds. It also pointed to two state statutes, both of which it thought compelled its policy... As far as the school district was concerned, there was nothing left to discuss; a kirpan was unquestionably a knife, and as such it fell squarely within the absolute ban.

This left the Cheema children with two choices if they wished to attend school: either leave their kirpans at home (and violate a fundamental tenet of their religion) or bring them to school (and face expulsion and/or criminal prosecution). The children did neither, electing instead to stay home while their parents brought this federal action under the Religious Freedoms Restoration Act [(RFRA)].

The district court faithfully applied RFRA to the facts of this case and came up with an injunction that it judged appropriate. We do not endorse the terms of the injunction, but neither do we think the district court abused its discretion. If the school district dislikes the injunction, it should use its
opportunity to litigate this dispute on the merits to present the
district court with adequate evidence from which a fully informed
decision can be made.

AFFIRMED.”

A thoughtful dissent was written by Circuit Judge Charles E. Wiggins:

“Evidence presented to the district court supported its
finding of dangerousness. The district court was presented with
an affidavit from a school secretary who was able to observe
Jaspreet Cheema’s (supposedly unnoticeable) kirpan. Worse still,
she observed that Jaspreet’s 4 year-old brother was wearing one,
too. And, most alarmingly, the secretary stated that Jaspreet told
her that “if anybody steals from me, I can put this to them.”
While making this statement he grabbed his kirpan. This
occurrence is disputed.

Two other incidents involving the Cheema children and
their kirpans, which are undisputed, also supported the district
court’s original finding. A first grade child submitted an affidavit
in which he stated that he saw Rajinder and Jaspreet Cheema
with their kirpans out on the school grounds. He stated that
Rajinder was attempting to cut the rope on the flag pole, until
Rajinder’s grandfather arrived and the children put their kirpans
away. A teacher from another school submitted an affidavit in
which she reported having seen Rajinder, Jaspreet, and Harpreet Cheema, on the same day, playing with their kirpans around the flag pole. She reported that she saw them try to hoist a kirpan up the flag pole.

There exists very little case law on the issue of a Sikh’s right to carry a kirpan in public arenas. I suggest, however, that Sikhs are in a number of instances denied the right to exercise this religious practice in the interest of public security. For example, I imagine that a Sikh is not allowed to carry a kirpan when boarding an airplane or entering a federal courtroom. In each instance, the federal government’s compelling interest in public safety outweighs the Sikh’s First Amendment right to exercise his religion. Similarly, I believe that the school district’s compelling interest in school children’s safety outweighs the Cheema children’s right to wear their kirpans in school.

Furthermore, I challenge the majority’s subtle suggestion that the school district lacks a compelling interest...The majority implies that while the school district would have a compelling interest in protecting the students from those fears which are reasonably related to a real threat, no such real threat even exists here. I remind the majority that the issue before us involves a seven-or eight-inch knife with a four-inch blade...The district
court judge specifically noted that, having examined the Cheema children’s kirpans, he did not consider them to appear harmless.

Furthermore, the district court judge specifically found that the weapon-like qualities of the kirpans make them "a danger to children in school." ... Such factual findings are not clearly erroneous. In addition, I emphasize the potential dangers of permitting knives in school. First, we must be concerned with the abnormal, non-law-abiding Sikh child. If such a child were to carry a kirpan, he would pose a substantially greater threat to the safety of the other children than he otherwise would because now he would be armed. Second, we must consider that a non-Sikh child may somehow seize a Sikh child's kirpan and threaten or harm other children. Such a child would not otherwise have access to a knife while in school. Finally, and most importantly, we must be concerned with the fact that the Sikhs at issue are children and thus have the maturity and judgment of children. Given that Sikhs are to use their kirpans in life-or-death situations, we would be forced to rely on school children to make the determination as to when their lives are at stake. Clearly, school officials need not knowingly expose the non-Sikh school children to such an unacceptable position of vulnerability.
It is axiomatic that we owe our children a safe, and
effective, learning environment. The current plan of
accommodation, however, does not allow the school district to
provide either. I trust that a better decision will be reached at the
conclusion of the pending trial. We simply cannot allow young
children to carry long, wieldable knives to school. Period.”

*Chalifoux v. New Caney Ind. Sch. Dist.*, 976 F.Supp. 659
(S.D. Texas, 1997)

A school’s ban on certain symbolic expressions of religious belief can also
result in litigation. No court has found that a student wearing a simple cross
or star of David creates disruption or intimidation in school. It would seem
unlikely that any similar symbol of personal religious belief would land the
wearer in court. Nonetheless, the following item appeared recently in
*Education Week*, a periodical aimed at educators and other education
stakeholders.

“The parents of two Texas high school students have filed a
federal lawsuit challenging a district’s policy that bars Roman
Catholic rosary beads as a gang symbol. The 5,500-student New
Caney district, about 30 miles south of Houston, has included
rosary beads on its list of prohibited gang symbols for several
years, Superintendent Jerry Hall said.
Two freshmen at New Caney High School, David Chalifoux and Jerry Robertson, began wearing the beads early this year. In March, they were told they could not wear them outside their clothes because the beads were considered gang apparel.

The boys’ parents sued the district in U.S. district court in Houston on May 19. The suit claims the gang policy violates the boys’ First Amendment right to freedom of speech and free exercise of religion. It seeks a halt to the policy and unspecified monetary damages.

Mr. Hall said the district will defend its policy.” (Lawsuit filed over rosary, 1997).

A bench trial was held during late July, 1997. The court found that there had not been the slightest evidence of disruption on account of the students wearing their rosaries; nor had they ever been approached by known gang members on account of the rosaries. Because the plaintiff students claimed that they intended their rosaries to be an expression of their faith, and because no contradictory evidence was brought by the district, the court ruled that the act was protected speech under the First Amendment. It also found the school district’s policy that defined rosaries as gang-related void for vagueness. Plaintiffs’ wearing of their rosaries was protected by their freedom of religion guarantees. The students were also awarded attorneys’ fees and costs, but no monetary damages were awarded because no evidence of actual
monetary loss had been presented.

Stephenson v. Davenport Community School District,
Docket No. 96-1770 (8th Circuit, 1997)

When Brianna Stephenson was an eighth grader in the Davenport, Iowa Community School District, she tattooed a small cross between her thumb and index finger. She attended school for two and one-half years with the tattoo in plain view without incident. According to court records, the girl intended her tattoo to be a form of "self expression. She did not consider the tattoo a religious symbol; nor did she intend the tattoo to communicate gang affiliation.

Later, attending Davenport West High School, she was an honor student with no record of gang activity or disciplinary problems. Meanwhile, gang presence in district schools escalated. Student brought weapons on campus and violence resulted from gang members threatening other students who displayed rival gang signs or symbols.

At the beginning of the 1992-1993 school term, Brianna met with her school counselor, Wayne Granneman, to discuss her class schedule. When Granneman noticed the tattoo he suspected that it might have gang significance. He notified Associate Principal Jim Foy. Foy consulted Police Liaison Officer David Holden who, based on a drawing and description of the tattoo, stated his opinion that it was a gang symbol. Foy phoned Brianna's mother and informed her the girl was suspended for the day because her tattoo was gang-related. The parents met with Foy the following morning and agreed
that Brianna would continue in school on a temporary basis with the tattoo covered by a bandage. Foy informed the parents that Brianna needed to remove or alter the tattoo, or else the school would suspend her for ten days.

Brianna met with a tattoo specialist who advised her that laser treatment was the only effective method of removing the tattoo. Later, Officer Holden examined Brianna's tattoo and confirmed his earlier opinion that it was a gang symbol.

School officials granted the girl a two-week extension until the tattoo could be removed, but warned Mrs. Stephenson that if the tattoo was not removed by the end of the two weeks, the school would suspend her at the time and would recommend to the Advisory Council that she be excluded from school by the Davenport Board of Education.

The doctor performing the removal burned through four layers of skin in the process and then followed up the procedure with two months of various appointments at which skin was scraped off with a razor blade to prevent the bleeding of the tattoo. The procedure, which cost about $500, left a scar on Brianna's hand. The girl and her parents sued the school district, claiming that the school's regulation was vague and over-broad, and that the school had violated her procedural due process rights. They also alleged that the district had failed to adequately train its personnel.

The district court granted summary judgment for the appellees (the school district) and the Stephensons appealed to the Eighth Circuit. That court
affirmed in part and reversed in part. It found that the school’s regulation governing forbidden gang activity was void for vagueness because it used the term “gang” without further definition; the ruling also said the regulation failed to provide restricting definition and standards for enforcement. However, Brianna’s contention that she had been denied due process was thrown out since she had failed to exhaust all available administrative remedies at the school. The allegation that district personnel were improperly trained was also discarded. By the time the Eighth Circuit’s opinion was handed down, the girl had graduated.

C. H. v. Oliva et al., 990 F.Supp. 341 (Dist. of New Jersey, 1997)

While C. H.’s son, Z. H. was in kindergarten in 1994, students in his class were asked to make posters depicting things for which they were thankful. Z. H.’s poster professed his thanks for “Jesus.” All the posters were then put on display in the school hallway. An unknown person removed Z. H.’s poster because of its religious theme. When Z. H.’s teacher noticed, she remounted the poster, although in a less conspicuous position.

When Z. H. was promoted to first grade, his teacher Grace Oliva maintained a policy in her room which rewarded students who had arrived at a certain level of reading proficiency by allowing them to read a book of their own choosing to the rest of the class. This is what Z. H. planned to read:
“Jacob traveled far away to his uncle’s house. He worked for his uncle, taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob’s big family lived on his uncle’s land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said ‘Please don’t be angry any more.’ But Esau wasn’t angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.”

Ms. Oliva recognized that Z. H.’s selection had biblical implications, having been adapted from Genesis 29:1-33:20. She allowed the others to read their non-religious stories to the class, but only allowed Z. H. to read his story to her.

When Z. H.’s mother learned that Ms. Oliva considered the story to be inappropriate, she demanded that Z. H. be allowed to read his story to the entire class, and also demanded that an apology be made to both her son and herself. When Ms. Oliva failed to comply, suit was initiated in U.S. district court for the District of New Jersey. The complaint was in two parts: (a) that the defendants had “willfully and intentionally” violated Z. H.’s rights to freedom of expression under the First Amendment, and (b) that the defendants, by failing to exercise their supervisory powers or to implement a
policy to allow for expression of religious beliefs in the classroom, aided in that
violation. The complaint sought monetary and injunctive relief. In response,
the defendants filed a motion to dismiss the complaint, or alternatively, for
summary judgment.

The defendants sought the protection of the Eleventh Amendment, which has consistently been interpreted to prohibit Federal courts from
hearing suits brought by citizens against their own State. The court explained
that “counties and municipalities, although considered persons acting under
the color of state law...are not considered part of the state for purposes of
Eleventh Amendment immunity.” Nonetheless, the court granted the petition
for summary judgment and dismissed the complaint.

A Miscellany of Expression

The Flutter of Hair in the 1970s

Numerous cases involving students’ violation of school grooming codes
arose in the early 1970s as men and boys, taking the cue from the pop culture,
let their hair grow to near shoulder length (and some beyond). Because these
cases are numerous, only two were selected for the purpose of recording the
nature of the complaints and the manner in which the courts dealt with

9 Which says: the judicial power of the United States shall not be construed to
extend to any suit in law or equity, commenced or prosecuted against one of
the United States by Citizens of another State, or by Citizens or Subjects of
any Foreign State.
them. A good many cases citing Tinker were about students with long hair.

**Crossen v. Fatsi, 309 F.Supp. 114 (Dist. of Connecticut, 1970)**

A first year student at Tourtellotte Memorial High School in Thompson, Connecticut, Raymond Crossen decided to grow a full beard and mustache despite the school’s dress code—which was specific about hair length and facial hair. Raymond was advised of the regulations and was given a weekend to comply. When he refused, he was ordered suspended until such time as he returned to school in conformity with the code. His father did not support Raymond’s position, but his mother did. Action was filed in district court to have the court order Raymond’s reinstatement. The plaintiff-pupil claimed that his beard and mustache did not specifically defy the dress code, and even if it did, he had been denied his First Amendment right of free expression as well as his Fourteenth Amendment right to due process.

The court granted the relief sought by Raymond on grounds that the dress code was “vague, uncertain, and ambiguous.”

**Dunham v. Pulsifer, 312 F.Supp. 411 (Dist. of Vermont, 1970)**

Steven Dunham and co-plaintiffs Prentiss Smith and Paul Weber were enrolled at Brattleboro, Vermont Union High School in the 1969-1970 school year, good students and members of the school’s tennis team. The two and other team members decided to affect long hair styles. During the following weeks, six of the top eight players on the team were dismissed because of their
hair length. No other disciplinary problems were reported or suggested during the court hearing on the matter. Chief Judge Leddy opined:

"It is to be noted that under the existing athletic code, Billy Kidd, the world famous skier, would be unable to make the ski team. Joe Pepitone and Ken Harrelson, two colorful and popular major league ball players, would be unable to make the baseball team. Joe Namath would be barred from the football team and Ron Hill, who won the Boston Marathon on April 19 of this year, would not even be permitted to try out for the track team."

Fourteenth Amendment equal protection of the law was at issue in this case. After learning that no similar grooming code was in place for students in general or for participants in other organized school activities—debate, band, glee club for example—the judge ruled on the side of the plaintiffs.

Dillon v. Pulaski County Special School District, 468 F.Supp. 54 (Western Div., E.D. Arkansas, 1978)

Laura Beth Lester, a teacher at North Pulaski High School in Jacksonville, Arkansas, spotted plaintiff Leonard Dillon kissing a girl in a school hallway. When Ms. Lester twice directed Leonard to desist, he remarked "What a drag." Both Leonard's behavior and his remark to the teacher were in direct violation of rules in the school's Student Conduct Handbook. Not long after, the Dillons received a "recommendation for expulsion" notice in the mail.
A hearing was set up before the Pupil Personnel Committee of the school district, where the Dillons failed to get satisfaction on Leonard's behalf. They then requested and were granted a school board hearing. Although Ms. Lester was present, the board refused to hear her testimony. They voted to expel Leonard, and shortly thereafter the Dillons' attorney brought suit in the district court for Eastern Arkansas.

The plaintiff asserted that he was denied his Fourteenth Amendment right of due process by the sudden expulsion, and further claimed that his kissing the young lady was part of his First Amendment freedom of expression. Leonard sought an award of damages and a mandatory injunction that would reinstate him as a student in good standing. At one point in its opinion, the court said:

"Democracy at work requires that citizens learn to question the decisions of those in authority, but these citizens must also learn to voice their objections in a reasonable and effective manner. One goal of the educational process, therefore, should be to instill in students a respect for authority."

Despite this admonition to young Dillon, the court ruled in his favor on the due process claim. The district was ordered to reinstate him. But, because the plaintiff failed to establish that he had suffered harm, the award of damages amounted to just one dollar.


**Fricke v. Lynch, 491 F.Supp. 381 (Dist. of Rhode Island, 1980)**

Prom time was nearing at Cumberland High School in Rhode Island. Plans were underway for a lovely affair to be held at the Pleasant Valley Country Club in nearby Sutton, Massachusetts. Only couples would be allowed to attend, but a student's partner need not be a senior—or for that matter even a student at the high school. At the time tickets were bought, the student was required to list the name of his or her date. Senior Aaron Fricke decided the time had arrived for him to "come out of the closet." He asked principal Richard Lynch for permission to bring a male escort. Permission was refused, but in the meantime Aaron had asked a former student to attend with him and had been accepted. The principal wrote the following letter to Aaron's home:

"Dear Aaron:

This is to confirm our conversation of Friday, April 11, 1980, during which I denied your request to attend the Senior Reception on May 30, 1980 at the Pleasant Valley Country Club in Sutton, Massachusetts, accompanied by a male escort. I am denying your request for the following reasons:

1. The real and present threat of physical harm to you, your male escort and to others;

2. The adverse effect among your classmates, other students, the School and the Town of Cumberland, which is certain to
follow approval of such a request for overt homosexual interaction (male or female) at a class function;

3. Since the dance is being held out of state and this is a function of the students of Cumberland High School, the School Department is powerless to insure protection in Sutton, Massachusetts. That protection would be required for property as well as persons and would expose all concerned to liability for harm which might occur;

4. It is long standing school policy that no unescorted student, male or female, is permitted to attend. To enforce this rule, a student must identify his or her escort before the committee will sell the ticket.

I suspect that other objections will be raised by your fellow students, the Cumberland School Department, parents and other citizens, which will heighten the potential for harm.

Should you wish to appeal my decision, you may appeal to the Superintendent of Schools, Mr. Robert G. Condon. You will be entitled to a hearing before him or his designee. If you are not satisfied with his decision, you may appeal to the Cumberland School Committee. You are entitled to be represented by counsel, to examine and cross examine witnesses and to present witnesses
on your own behalf. Further procedural details may be obtained from the Superintendent’s office.

If you have any further questions, please feel free to contact me. I am sending a copy of this letter to your parents in the event they wish to be heard.

Sincerely,

Richard B. Lynch, Principal”

In a later meeting, Aaron confirmed his commitment to being gay, although he would not rule out the future possibility that he might turn bisexual. No accommodation could be reached on the subject of the prom.

After Aaron filed suit, an event which was reported in Rhode Island and Boston newspapers, violence against him broke out at the school. He was assaulted by another student and received a facial cut which required five stitches to close. No further problems arose. In his complaint, Aaron contended that the school’s action violated (a) his First Amendment right to free speech—demonstrating his sexual orientation and that of his intended companion—and (b) his Fourteenth Amendment guarantee of equal protection of the law. (Mullins, 1981).

The District Court of Rhode Island cited Tinker: “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” It further stated that no showing was made by the defendant that the forbidden conduct would “materially and substantially interfere” with
appropriate discipline in the operation of the school (or at its functions). To the
defense’s allegation that Fricke’s intended “expression” would infringe on the
rights of other students, the court responded that the intended behavior was
quiet and peaceful, demanding no response from others, and would be lost in a
crowd of some 500 people.

Although ruling for Aaron, the court allowed that “the social problems
presented by homosexuality are emotionally charged; community norms are in
flux, and the psychiatric profession is itself divided in its attitude...This court’s
role...is not to mandate social norms or impose its own view of acceptable
behavior. It is instead, to interpret and apply the Constitution as best it can.
The Constitution is not self-explanatory, and answers to knotty problems are
inevitably inexact. All that an individual judge can do is apply the legal
precedents as accurately and honestly as he can, uninfluenced by personal
predilections or the fear of community reaction, hoping each time to disprove
the legal maxim that ‘hard cases make bad law’.”

(Western Div., S.D. Ohio, 1987)

Violations of their protections under the First and Fourteenth
Amendments were alleged in a district court complaint brought by Warren
Harper and his sister Florence after they were prevented from entering the
Edgewood High School (Ohio) Junior-Senior Prom on the campus of Miami
University in nearby Oxford. School officials denied them entrance because of the way each was dressed.

Warren had arrived at the prom dressed as a woman, wearing earrings, stockings, high heels, a dress, and a fur cape. Florence, on the other hand, wore a black tuxedo and men's shoes.

In his ruling, Southern Ohio District Court Judge Carl B. Rubin observed that “[I]n the present case, the school board’s dress regulations are reasonably related to the valid educational purposes of teaching community values and maintaining school discipline.” He cited Jackson v. Dorrier, 424 F.2d 213 (6th Circuit, 1970) to the effect that the responsibility for maintaining proper standards of decorum and discipline “is not vested in the federal courts, but in the principal and faculty of the school.”


In 1987, the association between gang membership and the wearing of earrings by high school boys was argued successfully in an Illinois district court, which upheld a school ban on the practice. Darryl Olesen Jr.’s claim that the school policy violated his first amendment rights was set aside by District Judge Plunkett, who also denied the claim that such a policy was in violation of 14th Amendment’s equal protection clause because the same ban did not apply to female students. The school’s position was strengthened when it was shown that considerable serious gang problems had been going on at the
school over a period of four years. Although many male students today—and possibly their fathers as well—have adopted the practice of wearing an earring, the Olesen court found that the First Amendment "does not protect a student's wearing of an earring to express his individuality in violation of the school dress code."

**Bivens v. Albuquerque Public Schools, 899 F.Supp. 556**
(District of New Mexico, 1995)

Since the mid-1990s, many male secondary students have taken to wearing their trousers so low on their hips as to present the immediate danger of their sliding the rest of the way to their ankles. Some clothing manufacturers, ever sensitive to an opportunity to capitalize on a fad, quickly brought out garments made expressly to emphasize the style. In most places, the practice became known as "sagging."

Freshman Richard Bivens received numerous verbal warnings about wearing his sagging pants to school during the first several weeks of the 1993-1994 term at Del Norte High School in Albuquerque, New Mexico. The school's prohibition against sagging pants was put in place in response to a gang problem. But Richard contended that he was not, and had no desire to be, a gang member. He said he wore the sagging pants as a statement of his identity as a black youth and as a way to express his link with black culture and the styles of black urban youth.
Ignoring all the warnings, Richard was given a suspension. Although notice of a hearing was sent home, his mother Susan Green claimed not to have received it until the day after the hearing had taken place. At the hearing, officials took account of Richard’s many warnings and of the fact that he was failing all his classes. He had also accrued excessive absences. His suspension was extended through the end of the semester. Richard’s mother responded by filing suit, citing First and Fourteenth Amendments. Meanwhile, Richard continued his school attendance at a different school which did not have a ban on sagging. His status was non-credit for the semester, however.

District Judge Santiago E. Campos studied the evidence presented as well as legal precedents before ruling in favor of the school district. As to the due process claim, he noted that although Mrs. Green was not home to receive the hearing notice which had been sent by certified mail, she had received instead a postal notice of failure to deliver certified mail over a week before the scheduled hearing. She had neither contacted the post office for re-delivery nor gone to the post office to collect the item in person. Commenting on the First amendment claim, the Judge said:

“Even if the wearing of sagging pants could be construed as protected speech, I would have grave doubts about the merits of Plaintiff’s claim. Not all constraints on protected excessive conduct by school children are unconstitutional...the dress code adopted at Del Norte was a reasonable response to the perceived problem of gangs within the school.”  Summary
judgment was granted in favor of the defendants.

Buttons, Tags, and Other Signs

Recall the Burnside and Blackwell rulings discussed in Chapter 2, one which upheld the wearing of “freedom buttons” by students in an environment free of disruption and one which ruled in favor of school authorities where substantial disruption had occurred. Even before Tinker, Blackwell’s “presence or absence of disruption” paradigm was key to the court’s ruling. In the much later Chandler action, described in Chapter 1, the absence of “material and substantial disruption” saved the day for students even when their buttons bore messages which could have easily ignited trouble had the replacement teachers taken offense to the messages. The following cases present additional food for thought where wearing slogans is concerned.

**Hatter v. Los Angeles City High School District**, 452 F.2d 673 (9th Circuit, 1971)

Shasta Hatter and Julie Johnson wore tags on their dress that said “BOYCOTT CHOCOLATES” as a protest against the school’s dress code. Shasta stood across the street from Venice High School and distributed leaflets as students arrived for class. They felt that interfering with the annual chocolate drive, a means by which some school functions were financed, they could call attention to their dissatisfaction with the school dress code and other policies. When a suspension followed, the girls sued by “next friend” alleging
First and Fourteenth Amendment violations. The district court dismissed the complaints, and the girls filed an appeal with the Ninth Circuit.

On closer examination of the facts, the appellate court reversed the lower court and remanded the matter with directions to vacate the order and conduct further proceedings consistent with the findings.


In March of 1969, a challenge arose to a long-standing school policy at Shaw High School in East Cleveland, Ohio. The school's policy forbade the wearing of "buttons, badges, scarves and other means by which the wearers identify themselves as supporters of a cause or bearing messages unrelated to their education." Thomas Guzick arrived at school on March 11, 1969, wearing a button that said:

"April 5 Chicago

G.I. Civilian

Anti-War

Demonstration

Student Mobilization Committee"

He and another student also had a number of pamphlets advertising the event. They stopped at Principal Donald Drebus' office to ask permission to distribute the pamphlets. Not only was permission denied, but they were also ordered to
remove the buttons from their clothing. The other boy complied, but Guzick refused and thereupon Drebus suspended him.

Within days, an action was filed in district court alleging a violation of Guzick's First Amendment rights. The court denied the preliminary injunction that had been requested and dismissed the complaint. Guzick's attorney filed with the Sixth Circuit Court of Appeals. Regarding the school's prohibition of slogans or messages worn on the person, the circuit judge observed:

"The rule was created in response to a problem which Shaw has had over a period of many years. At the time high school fraternities were in vogue, the various fraternities at Shaw were a divisive and disruptive influence on the school. They carved out portions of the school cafeteria in which only members of a certain fraternity were permitted to sit. The fraternities were competitive and engaged in activities which disrupted the educational process at Shaw...The same problem was encountered with informal clubs, which replaced high school fraternities and sororities. The problem again exists as a result of racial mixture at Shaw. Buttons, pins, and other emblems have been used as 'identifying' badges. They have portrayed and defined the divisions among students in the school. They have fostered an undesirable form of competition, division, and dislike. The presence of these emblems, badges, and buttons are taken to
represent, define, and depict the actual division of the students in various groups.”

The court went on to acknowledge that as benign as Guzick’s buttons may be, allowing their wear would regenerate practices which had proven to be troublesome in the past. In view of what the court viewed as an “incendiary” situation at the high school, the court rejected the Tinker arguments. The opinion cited the district court’s findings as follows:

“The court has concluded that if all buttons were permitted at Shaw High, many students would seek to wear buttons conveying an inflammatory or provocative message or which would be considered an insult or affront to certain of the other students. Such buttons have been worn at Shaw High School in the past. One button of this nature, for example, contained the message ‘Happy Easter, Dr. King.’ This button caused a fight...in the school cafeteria at Shaw. Other buttons, such as ‘Black Power,’ ‘Say It Loud, Black and Proud,’ and buttons depicting a black mailed fist have been worn at Shaw and would likely be worn again, if permitted.”

Affirming the lower court’s decision, Senior Circuit Judge O’Sullivan remarked:

“We will not attempt an extensive review of the many great decisions which have forbidden abridgment of free speech. We
have been thrilled by their beautiful and impassioned language.

They are a part of our American heritage. None of these masterpieces, however, were [sic] composed or uttered to support the wearing of buttons in high school classrooms. We are not persuaded that enforcement of such a rule as Shaw High School's no-symbol proscription would have excited like judicial classics. Denying Shaw High School the right to enforce this small disciplinary rule could, and most likely would, impair the rights of its students to an education and the rights of its teachers to fulfill their responsibilities."

**Berner v. Delahanty**, 129 F.3d 20 (1st Circuit, 1997)

This study has probed the findings of the courts to determine guidelines for school administrators. Our search has uncovered many divergent approaches to choosing precedents which help jurists separate out the facts of each case and bring their salient points forward. In the process, the rights of students have been shown to be sometimes advancing, sometimes retreating. What guidance can be gained by looking not at what is *said* in court but rather at what is *done* there?

On October 31, 1995, attorney Seth Berner was seated in the gallery of Judge Thomas E. Delahanty's courtroom, waiting for his turn to appear before the court. Berner wore a circular button pinned to his lapel. It was about two
inches in diameter and bore the words "No on 1 - Maine Won't Discriminate."
The sentiment was in opposition to a statewide referendum that voters were
scheduled to consider at the November election. Neither the pin nor its
message were related to Berner's business before the court.

At one point during the day's proceedings, Judge Delahanty called Berner
to the bench. The following exchange took place:

Judge: Mr. Berner...Can you remove the political pin while
         you're in the courtroom?
Berner: Your Honor, what happened to my right to political
         speech?
Judge: Not in the courtroom. We don't take sides.
Berner: I want the record to reflect that I don't think there's any
         authority for that.
Judge: The courtroom is not—that may be, but the courtroom is
       not a political forum.
Berner: Your honor, I want the record to reflect that I object to
       that."

Berner alleged in district court that the button ban violated the First
Amendment. District Judge Gene Carter presided over a flurry of motions,
including an unsuccessful one from Berner for preliminary injunction. The
defense alleged that the action should be dismissed for lack of standing and
failure to state a claim. Judge Carter threw out the lack of standing argument,
assuming that as an attorney Berner had standing to sue. The Judge then ruled that Berner’s complaint stated no claim upon which relief could be granted. Berner wouldn’t take no for an answer. He filed an appeal with the First Circuit court, and in the process probably learned a lesson as the panel affirmed the lower court’s ruling. Circuit Judge Selya said:

“An attorney is free, like all Americans, to hold political sentiments. In a courtroom setting, however, lawyers have no absolute right to wear such feelings on their sleeves (or lapels, for that matter). Judge Delahanty’s policy ... is a reasonable means of ensuring the appearance of fairness and impartiality in the courtroom, and the plaintiff has made no supportable allegation that the restriction is viewpoint based. Consequently, Berner’s complaint fails to state a claim upon which relief can be granted.

The Berner matter is not a student or school related situation, but it does shed some light on the kind of reasoning that might be brought to bear in student expression cases. One might wonder if:

Berner : courtroom :: student : classroom.

Whereas Judge Delahanty was supported in his insistence that no political speech disrupt the dignity and neutrality of his courtroom, it is clear from a careful reading of Chandler that a classroom teacher has no similar defense.
SUMMARY, CONCLUSIONS AND RECOMMENDATIONS
FOR FURTHER STUDY

Summary

Of the 34 principal cases discussed in the study, students prevailed in 18 while losing out in 14. Two ended in what might be termed a “draw.” This suggested that the chances of a school administrator’s ultimately prevailing against willful students in similar circumstances are slightly less than 42 percent. Considering those odds and the high cost of litigation, a far better alternative is knowing one is on solid constitutional footing in the first place. To begin, let us address the study questions in turn.

1. Do the courts agree on the Supreme Court’s Tinker findings after thirty years?

   The Supreme Court itself began modifying Tinker in 1986 when it decided the Fraser case, and continued two years later with Hazelwood. Although these decisions made it clear that Tinker was to remain the authority in matters involving symbolic speech, Fraser and Hazelwood each fenced off large chunks of student First Amendment issues.
The answer is that in the area of symbolic expression, Tinker remains the primary authority in all circuits. Judges in the Ninth Circuit's Chandler case, which triggered this study, read Tinker like scripture. Consistently in the various cases examined by the study, where student expression is passive, the courts have challenged school officials to show that their curtailment of student expression was prompted by a real threat of material and substantial disruption (the Blackwell - Tinker connection). But when actions accompany symbolic expression, or in cases in which previous incidents helped to forecast disruption, schools are more likely to be supported. Official dress codes have not fared well at all; most have been found void for vagueness. Even when connections were noted between gang membership and certain types of apparel, the school authorities' apparent inability to precisely define "gang" or "gang apparel" has led to rulings favoring students.

Fads and trends like hair styles, body piercing, and tattooing are things that school officials may have to tolerate, knowing that they will fade away when students move on to something new. Notable exceptions are found in Harper v. Edgewood Bd. of Educ., et al, 655 F.Supp. 1353 (Western Div., S.D. Ohio, 1987), where social propriety won out over frivolous cross-dressing; and in Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (Dist. of New Mexico, 1995), where sagging pants were judged not to be a form of speech.

The courts have not applied Tinker's immunity to distasteful slogans or illustrations worn on T-shirts. Even with the help of their law professor father,
two brothers—despite favorable court rulings—finally had to cave in to a solid dress code adopted by their school, but not until they had run the administrators ragged. *Pyle v. South Hadley School Committee, et al.*, 824 F.Supp. 7 (Dist. of Massachusetts, 1993) and *Pyle v. South Hadley School Committee, et al.*, 861 F.Supp. 157 (Dist. of Massachusetts, 1994).

Student armbands, as long as they don’t contain slogans that offend or inflame, are well within *Tinker’s* bosom. Every armband case examined in the study supported the students’ First Amendment rights, with the exception of *Wise v. Sauers*, 345 F.Supp. 90 (E.D. Pennsylvania, 1972), in which armbands silently urged students to “strike.”

The use of school symbols like the Confederate Battle Flag, or “Johnny Reb” characters may offend segments of the school population, and will not be supported by the courts as exercises in protected expression, despite strong dissenting opinions such as in *Augustus v. School Board of Escambia County, Florida, et al.*, 361 F.Supp. 383 (Pensacola Div., N.D. Florida, 1975) and *Augustus v. School Board of Escambia County, Florida, et al.*, 507 F.2d 152 (5th Circuit, 1975)

Recall that *Tinker* also had the effect of defining the school as a limited public forum. Issues of student expression can also be evaluated in the traditional time, place, and manner analysis. A rule of thumb when evaluating an incident involving student expression paraphrases former Chief Justice Oliver Wendell Holmes to the effect that the reach of one’s arm ends where the
other fellow's nose begins. Our free speech guarantee does not allow us to trample on someone else's rights, Tinker not withstanding.

2. In the light of relevant case law, what is the meaning of the "material or substantial disruption" referred to in Tinker?

The mere suspicion that order could be disturbed by student expression is insufficient, and will not vindicate school officials who have abridged student expression. Courts have insisted that school officials prove the existence of a real and immediate danger of violence or the collapse of discipline, based on student conduct at the moment or on their previous performance under similar circumstances. If school officials are able to establish that they were actually in jeopardy of losing control of a situation, then reasonable measures taken to secure or regain control have been viewed in court to fall under the school's obligation to assure a safe and orderly environment. Examples include Farrell v. Joel, 437 F.2d 160 (2nd Circuit, 1971), Gebert v. Hoffman, 336 F. Supp. 694 (E.D. Pennsylvania, 1972), and of course the Blackwell case from which Tinker borrowed some of its language.

3. Have the courts' interpretations of the Tinker precedent worked over time to change our general understanding of it?

Apart from the Fraser and Hazelwood modifications, the study has found no evidence that any court's understanding of the Tinker ruling has materially changed over time. Given District Judge Owen M. Panner's scholarly analysis in Chandler, quite the opposite is clear. Judge Panner said, "We have
discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude...that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by Fraser, 478 U.S. at 683-85, school-sponsored speech by Hazelwood, 484 U.S. at 273, and all other speech by Tinker, 393 U.S. at 513-14. [Emphasis added].

4. Do other circuits follow the conceptual framework set down by the Ninth Circuit Court of Appeals in Chandler?

To answer this question, it is necessary to understand what concepts the Chandler panel of judges agreed on. First, they determined that there had not been any real disruption in the school when the students appeared with their various “scab” buttons. Even the replacement teachers, at whom most of the insulting slogans were aimed, admitted that the buttons had not prompted any serious trouble. The Tinker absence of disruption standard immediately disarmed the school officials’ case for suspending David Chandler and Ethan Depweg in the eyes of the circuit court, in spite of the lower court’s having applied Fraser and Hazelwood language in dismissing the student’s original complaint.

Secondly, the circuit court rejected the earlier Hazelwood-inspired claim that if the school had allowed the buttons, the language on the buttons might be perceived as bearing the imprimatur of the school. Given the positive
identity of sides in the ongoing labor dispute (school officials versus striking teachers), such a conclusion would defy logic.

Finally, the circuit court properly chose to rule out any concern with where the buttons came from, and at whose instigation they were worn. Although it was clear that the students had not produced the buttons without the help of their parents and the teachers' union, the only issue the court concerned itself with was the behavior of the students and the reaction of the school officials. Since the standard of judgment was Tinker, it was unavoidable that the students' behavior would be seen by the court as reasonably bland and passive, while the school officials' reaction would be judged to be disproportionate and legally indefensible.

This said, the examination of similar "button" cases in other circuits (the 5th and 6th) shows agreement on confining deliberations to the claims of the parties in dispute. If the interests of the government (in the person of its creature, the school) override the expression of thought on the part of student(s), then the school will prevail. If not, the student(s) nearly always win in court.

5. When there are religious overtones in symbolic expression, is it dealt with differently by the courts than secular symbolic speech?

Four cases in particular provide answers. It may be significant that two of them ended in a "draw" of sorts. In Stephenson v. Davenport Community School District, Docket No. 96-1770 (8th Circuit, 1997) a girl with no gang

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affiliation and a commendable academic record went through expensive and painful procedures to remove a cross tattoo the school district thought was gang-related. Even though her suspension may have been heavy-handed, the complaint in her appeal to the Eighth Circuit was denied on grounds that she had failed to exhaust administrative remedies. The district’s policy was declared void for vagueness, and Brianna’s claim for damages was upheld. In its findings, the court expressed what many other courts may feel:

"[W]e enter the realm of school discipline with caution, appreciating that our perspective of the public schools is necessarily a more distant one than that of individuals working within these schools who must prepare pupils for citizenship in the Republic."

In Cheema v. Thompson, 67 F.3d 883 (9th Circuit, 1995), another draw situation resulted. Even though the young Sikh students eventually wore their ceremonial daggers at a shorter than usual length and riveted securely to their sheaths, they still wore them. There were no clear winners.

The young elementary school boy who was thankful for Jesus in C. H. v. Oliva et al., 990 F.Supp. 341 (Dist. of New Jersey, 1997) lost his bid for free expression in the Third Circuit, but the students who wore their rosaries outside their clothing in Chalifoux v. New Caney Ind. Sch. Dist., 976 F.Supp. 659 (S.D. Texas, 1997) won theirs in the Fifth. There does not appear to be any special favorable attention paid by the courts when religious expression is involved; instead, care is taken that student activities do not violate the
establishment clause of the First Amendment. There is no detectible difference from one circuit to another in this regard.

6. Must someone be called a name out loud to have effect, or can an insult take place in the form of a slogan on a button worn on another’s person? (Do Scabs Bleed? — We’re Not Listening, Scab — Scab, We Will Never Forget).

Although Chandler’s replacement teachers voiced no objection to the buttons that were put in their faces, there are people who would consider “Do Scabs Bleed?” to have threatening overtones, “We’re Not Listening, Scab” to be insolent, and “Scab, We Will Never Forget” to suggest some kind of future retaliation. The apparent purpose for these and other slogans was intimidation. According to the legal terms analysis available on the Internet’s http://www.lectlaw.com/ref.html, “Intimidate - means to intentionally say or do something which would cause a person of ordinary sensibilities to be fearful of bodily harm. It is not necessary to prove that the victim was actually frightened, and neither is it necessary to prove that the behavior of the person was so violent that it was likely to cause terror, panic or hysteria.”

Again, we look to Tinker for part of the answer. No disruption took place. The replacement teachers were self-assured enough to overlook the intended intimidation of the buttons and were intent on doing their temporary jobs, letting administrators deal strike-related problems. The issue of the slogans and whether or not they were “vulgar, lewd, obscene, or plainly offensive” had
been resolved by the district court. The slogans were obviously not vulgar, lewd, or obscene; and they did not offend the district court judge. Since the replacement teachers failed to come forward with any complaint, the Judge was not obliged to complain on their behalf. Any Fraser evaluation was moot.

If any guidance falls from this question, perhaps it is embodied in an Education Week Chandler-inspired article.

"Ivan Gluckman, the director of legal services for the National Association of Secondary School Principals said he agreed that this kind of case should be governed by the Tinker analysis. But as to whether he would advise school principals to forbid strike-related buttons, 'it is just going to depend on how reasonable the apprehension of disruption is,' he said." (Court reinstates students' speech suit over button ban, 1992).

7. Is insulting or intimidating symbolic expression in a public school classroom more protected than similar insults delivered on a public street?

Once more, "disruption" is the key. The Chandler buttons were no more potentially disruptive than the "strike" armbands in Wise v. Sauers, 345 F.Supp. 90 (E.D. Pennsylvania, 1972). The buttons did not urge students to act, but the Wise armbands did. Marching and chanting pickets might be considered intimidating by some, but in Cintron v. State Board of Education, 384 F.Supp. 674 (Dist. of Puerto Rico, 1974) students who marched were upheld.
It is interesting to compare the expression on Chandler's buttons and the blatant "Fuck the Draft" on the young man's jacket in Cohen v. California, 403 U.S. 15 (1971). Cohen wore his jacket in the court house and was arrested and fined. His conviction was overturned by the Supreme Court, which pointed out that the others in the public area of the court house didn’t have to look. Neither did Chandler's replacement teachers have to pay attention to the buttons. It appears that they did not allow what they saw rile them visibly.

No student would ever get by with the public outburst in the case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), when a frustrated Chaplinsky loudly declared that the city fathers were crooks and commies and racketeers. In fact, young Fraser was punished for his objectionable speech. Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

The answer to the question is no. Students are not more insulated in school when they express their opinions than they would be off school grounds. Standards of conduct are what they are, even though they may change from time to time. Today's society has a more liberal cast than a few decades ago, but in keeping with the cyclical nature of things, there are also some signs of a conservative swing ahead.

Matrix of Cases Studied

Table 1 lists the student symbolic expression cases the study has examined, the year in which each was decided, the geographical circuit, the
level of jurisdiction, the issue involved, and the outcome—whether favoring the student or school district.

Table 1.

**Matrix of Student Symbolic Expression Cases.**

<table>
<thead>
<tr>
<th>CASE</th>
<th>YR</th>
<th>CIR</th>
<th>LVL</th>
<th>ISSUE</th>
<th>STU</th>
<th>SCH</th>
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<tr>
<td>Dunham v. Pulsipher</td>
<td>70</td>
<td>1</td>
<td>D</td>
<td>hair style not to code</td>
<td>X</td>
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<td>Pyle v. South Hadley</td>
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<td>not standing for pledge</td>
<td>X</td>
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<td>2</td>
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<td>Farrell v. Joel</td>
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<td>C</td>
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<td>2</td>
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<td>wouldn't say pledge</td>
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<td>C</td>
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<td>Harper v. Edgewood</td>
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<td>D</td>
<td>students cross-dressing</td>
<td>X</td>
<td></td>
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In the column labeled LVL, D=district court and C=circuit court

In the words of Law Professor Perry A. Zirkel of Lehigh University, “Ever since the Supreme Court’s landmark decision in Tinker...school districts have had to think twice before attempting to discipline; i.e., to censure or, more directly, to censor students for their expression. However, a pair of modern Supreme Court decisions...[Fraser and Hazelwood]...have reinterpreted the First Amendment Free Speech Clause in relation to public school students.

Although the legal literature is replete with scholarly analyses of these successive court pronouncements and their lower court progeny, education practitioners lack practical guidance in terms of the current legal boundaries established by recent student expression case law.” [Emphasis added]. (Zirkel, 1997).
Zirkel offers a checklist that he suggests could provide that guidance.

Appearing in his recent article in the Education Law Reporter was the following (Zirkel’s material is indented):

"1. If your district or school has a pertinent policy, is it unconstitutionally vague or overbroad—e.g., does it ban virtually every form of student “hate” or “anti-bias,” speech?
   a. If YES and you are sued, you’re likely to lose.
   b. If NO, proceed to item #2.

The problem with this question is that it requires the school official to figure for himself what might be unconstitutionally vague or overbroad. Even school district lawyers might be uncomfortable determining such a judgment, which could be off the mark in court owing to the predisposition or persuasion of the judge.

2. Has the student engaged in expression that is protected by the First Amendment—e.g., does it convey a particularized message?
   a. If NO, the student is likely to lose.
   b. If YES, proceed to item #3.

Again, are school officials able to discern what is a “particularized message?
Maybe not.
3. Is the student's expression "school-sponsored"—i.e., does a significant segment of the community perceive it as having the endorsement of the administration?
   a. If YES, proceed to item #4.
   b. If NO, proceed to item #5.

This is easier. It is usually not difficult to determine what appears to bear the imprimatur of the school.

4. Do you have a rational justification for any censuring or censoring of the student's expression—e.g., legitimate pedagogical concerns, including values inculcation?
   a. If YES and you are sued, you're likely to win.
   b. If NO, proceed to item #5.

A school-sponsored publication (Hazelwood) or event under school control like an assembly (Fraser) provides authorities with ample justification for limiting student expression.

5. Is the student's expression lewd or otherwise offensive—e.g., based on sex, alcohol/drugs, or violence?
   a. If YES and you are sued, you are likely to win.
   b. If NO, proceed to item #6.

This is easy. The courts will not tolerate this type of expression, whether spoken, written, or worn.
6. Do you have compelling justification for any censuring or censoring of this residual, narrow category of student expression—can you prove that it has caused or imminently will cause substantial disruption?

   a. If YES and you are sued, you are likely to win.

   b. If NO and you are sued, you are likely to lose.

This is the sticky wicket. In symbolic expression cases, there must be compelling proof of (a) imminent danger of a breakdown of discipline or (b) a pattern of behavior that has caused substantial disruption under similar circumstances in the past.

7. Is there a state law in your jurisdiction that provides stronger protection for student speech than does the federal Constitution?

   a. If YES and you are sued, you are likely to lose.

   b. If NO, the odds still strongly favor you."

Knowledge of state law is important, but unless your search of pertinent statutes uncovers extraordinary protection for student speech, litigants will be basing their complaints on the U.S. Constitution and bringing suit in federal district court.

Zirkel's checklist is the closest thing to a helpful tool for school administrators the study has found, but some of its potential traps argue
strongly for competent legal support. The "safest" administrator is a proactive
one, who decides on action by thinking through "what if" scenarios before one
of them jumps up unsuspectedly.

Conclusions

The significance of the Tinker decision lay not only in the Court's
delineation of the scope of student First Amendment rights but [also] in the
Court's willingness to second-guess the school authorities. (Emerson, 1970,
p. 608). When Tinker was decided, school officials found they had been
surprised by the sudden left turn taken by the Supreme Court; although
followers of the law might have read into Burnside a hint of things to come.
The new trend didn't only involve well-behaved students putting on an
armband to protest the continuation of what they and their parents believed to
be a pointless conflict overseas. The Tinker outcome had the effect of inviting
students to bring a lot more real or imagined rights into the classroom, as long
as no serious disruption was caused. Significantly, courts were seen to be fairly
permissive in terms of how much commotion they would see as "material and
substantial disruption." For administrators, trying to preserve order in their
schools, the bar had been raised.

It may be that the adoption of Tinker went too far in limiting the ability
of school officials to control expressive activities within the schools. (Dagley,
Justice Black’s fear that *Tinker* ushered in a “new era” in which courts would play a significant role in school discipline was well founded. Since *Tinker*, hundreds of cases have been brought by students alleging violations of their constitutional rights. (Dever, 1985, p. 1167).

Adolescents have demonstrated over the years that they will take on causes for the sake of taking something on as much as for the support of the cause itself. *Tinker* provided ways for imaginative teens to distract teachers and school administrators from their main jobs—helping students learn the curriculum, and providing guidance toward happy, productive citizenship.

Looking at the cases that have been presented in this study, another reality can be seen. Controversial student expression seems to run in spurts. There was a heavy concentration of this kind of activity in the courts between 1969 and 1975—an era in which the Vietnam War had capturing the nation’s daily attention, engendering lusty controversy. The U.S. presence in Vietnam was the main issue, but there were others as well. A closely related group of cases had to do with decreasing respect for the flag and any mandatory showing of patriotism; e.g., the Pledge of Allegiance repeated at the beginning of each day in public schools. Cases involving race and ethnicity reflected the tumultuous days of the Civil Rights movement, when some sections of the nation were struggling to convert to unitary, unsegregated school systems.

Only sporadic activity in terms of student symbolic expression that reached the courts occurred from 1976 through the end of the 1980s. This may
reflect the nation’s preoccupation with Watergate, the Iranian hostage situation, and the infatuation of the boom years when people were too busy trying to get ahead to worry about how their kids were behaving in school and what school authorities were doing about it.

Starting in 1992, however, a gradual increase is seen in secondary student litigation concerning First Amendment freedom of expression rights. In the six years through 1997, more such matters appeared in the federal courts than had been brought in the prior 17 years. This may substantiate the theory that such things are, indeed, cyclical.

With the increases of gang activity in and around schools and the violence that attends it, schools are being forced to adopt stricter enforcement measures and codes of dress and deportment. It will be a surprise if those codes don’t prompt another spurt in legal activity as today’s students test their own constitutional rights.

The rules have not changed much, however; and that should be some comfort to administrators. The key element of acceptable student expression is still the lack of disruption on campus or in the classroom. Beyond that, Hazelwood guides us through the thicket of school-sponsored student writing and its on-campus distribution. Fraser merely reinforces common sense and good taste when it comes to what schools must permit students to say.

More help is available. In United States v. O’Brien, 391 U.S. 367 (1968), the Supreme Court established a four-part test to determine whether a
governmental regulation that incidentally affects free speech is constitutionally permissible.

1. The regulation must be within the government’s [read as “school’s” or “state’s”] constitutional powers.

2. The regulation must further “an important or substantial government interest.”

3. The government interest must be “content-neutral,\(^{10}\)” meaning that it must have a purpose other than the restriction of free speech.

4. The restriction must be narrowly tailored to inhibit free expression only to the extent necessary to further its legitimate goals. (Sarke, 1998, pp. 155, 156).

While arming themselves for battle against disruptive student expression, administrators may also benefit from a brief expression of a more permissive viewpoint—albeit from legal academia and not from the public school trenches.

If the power to control student behavior is exercised to suppress student initiative, which is invariably probing and often intentionally provocative, and

\(^{10}\) The Supreme Court has turned increasingly in recent years to organizing principles that cut across the various lines of doctrine. One of the most important of these is the distinction between content-based and content-neutral regulations of speech. The distinction has enjoyed growing prominence as a judicial tool for categorizing government actions regarding expression and for justifying the level of scrutiny applied to those actions. (Williams, 1991, p. 616).
not to prepare students for a public marketplace that offers many options and knows few restraints, then Mary Beth [Tinker] will have had reason indeed to wear a black arm band. (Whatever happened to Mary Beth Tinker and other sagas in the academic marketplace of ideas, 1993, p. 412).

Where, then, is the list of points administrators can take away from the study? Perhaps that is found in the following:

1. Schools may regulate student speech as long as the rationale for doing so is reasonably related to a legitimate pedagogical concern.

2. A school’s toleration of speech is categorically different from its sponsorship or promotion of speech. Although schools do not have to tolerate non-school-sponsored expression that is not deleterious to its educational mission, they do not have to place the school’s imprimatur behind the dissemination of student expression.

3. School officials have broad discretion in determining student expression and may consider the impact of such expression on the smooth running of the school as well as on the rights of other students, staff, and on the values of the community.

4. School officials have authority not only to control expression from inside the school, but also to prevent expression to school students from outside sources that it considers inappropriate for a school setting. An excellent example is the case of Planned Parenthood of Southern Nevada, Inc. v. Clark County School District et al., 941 F.2d 817 (9th Circuit, 1991). This
well-meaning and respectable organization wished to place advertisements in school-sponsored publications advising students of services in the areas of birth control methods, pregnancy testing, and related subjects. When the school district declined to accept the advertisements, Planned Parenthood went to court. The district court upheld the school’s authority, and on appeal the Ninth Circuit affirmed. If student publications have not been opened as public forums, the school’s policies will be upheld in court. This leads directly to point 5.

5. School authorities have discretion as to when school facilities and resources may be used as a public forum; such a forum is not created where school activities are reserved for a specific pedagogical use.

6. Student expression may be regulated by school personnel as long as the activity is under the aegis of the school—this would include experiences that take place off school property.

7. A school need not tolerate student speech that is considered lewd, vulgar, or lacking in respect for authority.

8. School officials have discretion over personal student expression that merely happens to occur in school only if it substantially disrupts the smooth functioning of the school or has a deleterious effect on the rights of other students.
9. Schools must have a compelling reason for engaging in overt viewpoint discrimination against student expression. (Sperry, Daniel, Huefner, & Gee, 1997).

The National Association of Secondary School Principals recently published an edition of their NASSP Bulletin dedicated to school law subjects which administrators may find useful. It covers areas of legal concern in addition to that on which this study has focused. (Osborne et al., 1998).

Recommendations for Further Study

While the cases presented in this study represent rulings from the federal courts, it is sure that the state courts deal with many student-related matters which, on examination, would reveal the presence of symbolic expression issues that were never elevated to the status of constitutional complaints. This would undoubtedly be true in our more populous states. An example is found in Phoenix Elementary School District No. 1 v. Greene et al., 189 Ariz. 476 (Div. 2 Dept. B, Court of Appeals of Arizona, 1997).

After the superior court of Maricopa County issued a permanent injunction against two students' wearing clothing that violated their school's mandatory dress code, the students and their parents took their appeal to the Arizona Court of Appeals. The dress code set forth a simple format for all students. Boys were to wear white shirts with collar. No logos. The shirt could be either knitted or broadcloth. Navy blue pants or shorts. Girls were to wear
white collared blouses or knitted shirt. No logos. Navy blue pants, shorts, or skirt. The navy blue bottoms for all students were to be purchased only at J. C. Penney. Any student not wishing to comply with the dress code would be assisted in transferring to any other same level school in the district. The code took effect on September 5, 1995.

On September 6, the plaintiff students wore non-conforming clothing. One wore a shirt with a United States flag and wording stating “USA,” “I Support My Country,” and “America.” The other student wore a T-shirt with a picture of Jesus Christ, and the slogans “Jesus,” “True Spirit,” and a Bible accompanied by the words “The School of Higher Learning.” The parents notified the school that (a) they would never comply with such a strict dress code, (b) they were entitled to opt out of it, and (c) enforcement of the code violated the students’ First Amendment right of free speech.

The parents received word from the school district that the students had been transferred to a different school which did not have a dress code. In retaliation, the students and their parents marched into the school without permission the following day, distributing anti dress code literature.

In separate actions, each side sought declaratory and injunctive relief. After consolidating the cases, the trial court conducted a hearing, made extensive findings of fact, and concluded that the mandatory dress code did not offend the First Amendment. The appeal under discussion followed. After examining the record of the previous trial, the court ruled that the school
district's “content-neutral dress code constitutionally regulates the students' first amendment speech rights in the nonpublic forum of their school...[it] is reasonable in view of the[ir] pedagogical mission...” [Emphasis added].

A survey of school administrators, presenting them with a variety of hypothetical situations to analyze based on their understanding of school law would help shed more light on how well prepared school leaders are to face legal issues when confronted by them. A similar survey of classroom teachers could yield interesting results as well.

A perhaps more revealing study would be one involving high school students themselves. A document could be prepared containing the factual summaries of actual cases like the ones taken up in this study, and the students could be asked to indicate their agreement or disagreement with various conclusions drawn from the facts and from the rulings of the courts.

A study of student expression in post-secondary education could prove fruitful. One can’t help wondering about the fate of the cartoon figure that today represents the University of Nevada, Las Vegas, or of its sports team names that echo the “Rebel” theme should dissident students choose at some time to take offense. Perhaps college age students are not so sensitive. Ironically, many UNLV student athletes over the years have been African
Americans. One basketball squad even won the national championship under the name "Running Rebels."

At some time in the future, a replication of this study might be able to determine the accuracy of our prediction of periodic polar swings of student behavior. In any event, the last word has not been written on student symbolic expression.
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Miscellaneous

APPENDIX A

THE SUPREME COURT TINKER RULING

Tinker et al. v. Des Moines Independent Community School District et al., 393 U.S. 503

Certiorari to the United States Court of Appeals for the Eighth Circuit.


Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting en banc, affirmed by an equally divided court.

Held:

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these

11 Just the opinion of the majority, through Justice Abe Fortas, is presented.
circumstances, their conduct was within the protection of the free speech clause of the First Amendment and the due process clause of the Fourteenth.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment.

3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments.

Reversed and remanded.

Mr. Justice Fortas delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and Petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965 a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.
The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired— that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under Sec. 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F. Supp. 971 (1966). The Court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially
interferes" with the requirements of appropriate discipline in the operation of

On appeal, the Court of Appeals for the Eighth Circuit considered the
case en banc. The court was equally divided, and the District Court’s decision
was accordingly affirmed, without opinion. 383 F.2d 988 (1967). We granted

The District Court recognized that the wearing of an armband for the
purpose of expressing certain views is the type of symbolic act that is: within
the free speech clause of the first amendment. See *West Virginia v. Barnette*,
229 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966). As we shall discuss, the
wearing of armbands in the circumstances of this case was entirely divorced
from actually or potentially disruptive conduct by those participating in it. It
was closely akin to “pure speech” which, we have repeatedly held, is entitled to
comprehensive protection under the First Amendment. Cf. *Cox v. Louisiana*,

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

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262 U.S. 390 (1923), and Bartels v. Iowa, 262 U.S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the due process clause of the Fourteenth Amendment prevents states from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. See also Pierce v. Society of Sisters, 268 U.S. 510 (1925); West Virginia v. Barnette, 319 U.S. 624 (1943); McCollum v. Board of Education, 333 U.S. 203 (1948); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (concurring opinion); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Engel v. Vitale, 370 U.S. 421 (1962); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Epperson v. Arkansas, ante, p. 97 (1968).

In West Virginia v. Barnette, supra, this court held that under the first amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

"The Fourteenth Amendment, as now applies to the states, protects the citizen against the state itself and all of its creatures—boards of education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedom of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S., at 637.
On the other hand, the court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See Epperson v. Arkansas, supra, at 104; Meyer v. Nebraska, supra, at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 (1968); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no
indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. 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, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with
the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside v. Byars*, supra, at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the iron cross, traditionally a symbol
of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this nation’s involvement in Vietnam—was singled out for prohibition.

Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress “expressions of feelings with which they do not wish to contend.” Burnside v. Byars, supra, at 749.

In Myer v. Nebraska, supra, at 402, Mr. Justice McReynolds expressed this nation’s repudiation of the principle that a state might so conduct its schools as to “foster a homogeneous people.” He said: “In order to submerge
the individual and develop ideal citizens, Sparta assembled the males at seven
into barracks and intrusted their subsequent education and training to official
guardians. Although such measures have been deliberately approved by men
of great genius, their ideas touching the relation between individual and state
were wholly different from those upon which our institutions rest; and it
hardly will be affirmed that any legislature could impose such restrictions
upon the people of a state without doing violence to both letter and spirit of
the constitution. This principle has been repeated by this Court on numerous
occasions during the intervening years. In Keyishian v. Board of Regents, 385
U.S. 589, 603, Mr. Justice Brennan, speaking for the court, said: "the vigilant
protection of constitutional freedoms is nowhere more vital than in the
The classroom is peculiarly the 'marketplace of ideas.' The nation's future
depends upon leaders trained through wide exposure to that robust exchange
of ideas which discovers trust 'out of a multitude of tongues, (rather) than
through any kind of authoritative selection.'"

The principle of these cases is not confined to the supervised and
ordained discussion which takes place in the classroom. The principal use to
which the schools are dedicated is to accommodate students during prescribed
hours for the purpose of certain types of activities. Among those activities is
personal intercommunication among the students. This is not only an
inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfering" with the requirements of Appropriate discipline in the operation of the school" and without colliding with the rights of others. Burnside v. Byars, supra, at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (c.a. 5th Cir. 1966).

Under our constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The constitution says that Congress (and the states) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted
circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C.S.C. 1967) (orderly protest meeting on state college campus); Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (D.C.M.D.Ala. 1967) (expulsion of student editor of college newspaper).

In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the constitution's guarantees. As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained round in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their
disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the state to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.
APPENDIX B

CASES CITING TINKER (SHEPARDIZED LISTING)

The following pages contain a listing of 1,277 of the cases in the federal court system which contain a reference to Tinker. Counting state court entries (which were beyond the scope of this study), there were 2,194 total cases on record which have cited the Tinker case. The federal cases in the following list are presented with Supreme Court cases first, then entries by circuit. It is from this printout, obtained from the Lexis/Nexis service available at the Lied School of Business at the University of Nevada, Las Vegas, that the cases appearing in the study were drawn.

It should be noted that the study does not contain student symbolic expression cases from the 11th Circuit. This is because the cases germane to the study took place prior to the creation of the 11th Circuit. Alabama, Florida, and Georgia, formerly in the 5th Circuit, are now part of the 11th.

Most cases in the study came from the federal district courts, of which there are 95 in the United States and its possessions.
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Tinker v. Des Moines Independent Community School District, 383 F.2d 988

<=11> Same case

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<=12> Same case

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