# Comment

## Student Speech Rights in the Modern Era

### I. INTRODUCTION

Many things have changed since the United States Supreme Court's last major student speech case, *Hazelwood School District v. Kuhlmeier*,[1] was decided in 1988. In 1999 a tragic school shooting occurred at Columbine High School in Colorado. During that same time period, there were a number of other occurrences of major violence at public schools. Since then, schools and legislatures have scrambled to prevent the occurrence of similar incidents. For example, a number of states have enacted anti-bullying statutes. Some were motivated to do so by a U.S. Secret Service report indicating that bullying played a role in many school shootings.[2] Indeed, the two shooters at Columbine had been bullied.[3] Thus, it is logical for school officials and legislators to want to do everything in their power to ensure that students in their schools are not subjected to abusive speech that might evoke feelings of rage that could lead to further violence.

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1. 484 U.S. 260 (1988).
2. January W. Payne, *Bully for Them: Efforts to Stop Children's Intimidation of Other Children Appear to Pay Off . . . Outside the U.S.*, WASHINGTON POST, Final Edition, Aug. 23, 2005, at F1.
3. *Id.*

Related to the idea of fostering a more accepting school environment is growing concern over the treatment of homosexual students. The gay rights movement has gained substantial support in recent years and has pushed for tolerance of homosexual students in schools. Some schools have taken a proactive approach to promote diversity.[4] Nevertheless, many students carry strong religious and political views in opposition to homosexuality. Therefore, some school systems have attempted to regulate speech that might be harmful to homosexual students.[5]

Additionally, racial tensions and related violence continue to be present in schools. The need to eliminate race-related violence is even more urgent in light of Columbine and other school shootings. Not surprisingly, school systems have also attempted to regulate a wide range of speech that might lead to racial violence.[6]

Given the need to promote a safe school environment that does not cultivate violence or intimidation, it would seem that courts would be increasingly deferential to attempts by school officials and legislators to limit such negative activity by enacting rules that restrict student speech. After all, the United States Supreme Court, following *Tinker v. Des Moines Independent Community School District*,[7] seemed to acknowledge the realities of school administration by allowing school officials greater leeway to regulate student speech in *Bethel School District No. 403 v. Fraser*[8] and *Hazelwood*.

This Comment will examine recent federal court decisions that have sought to strike the delicate balance between the need for student discipline and the right to free expression. This Comment will focus on the way lower courts have addressed restrictions on student speech that "happens to occur" on school grounds and will only address speech occurring in school-sponsored publications and assemblies indirectly. Given the challenges facing school administrators, courts have been surprisingly reluctant to allow restrictions on student speech. Yet, the courts' reluctance is wise because providing too much leeway to school administrators would risk turning schools into "enclaves of totalitarianism."[9]

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4. See, for example, the diversity program at issue in *Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780 (E.D. Mich. 2003).

5. For an example, see the anti-harassment policy at issue in *Saxe v. State College Area School District*, 240 F.3d 200, 202-03 (3d Cir. 2001).

6. *See, e.g., id.*

7. 393 U.S. 503 (1969).

8. 478 U.S. 675 (1986).

9. *Tinker*, 393 U.S. at 511.

## II. BACKGROUND CASES

The United States Supreme Court has decided three cases critical to understanding American student speech jurisprudence: *Tinker v. Des Moines Independent Community School District*,[10] *Bethel School District No. 403 v. Fraser*,[11] and *Hazelwood School District v. Kuhlmeier*.[12] In *Tinker* the Court protected student speech that does not cause, or will not foreseeably cause, substantial disruption in the school environment.[13] However, in *Fraser* and *Hazelwood*, the Court placed limitations on student speech rights.[14]

### *A. The Protection of Non-Disruptive Speech in Tinker*

The landmark case of *Tinker* is the foundation of modern student speech jurisprudence. The Court held that school officials cannot prohibit student expression unless the forbidden speech would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" [15] School officials suspended five students who wore black armbands to school in protest of the Vietnam War.[16] The parents of the students sought nominal damages and an injunction to prevent school officials from disciplining their children.[17] The district court dismissed the claim, holding that the school officials' actions were reasonable to prevent disciplinary problems.[18] The Eighth Circuit Court of Appeals affirmed.[19]

In laying out its analysis, the Court noted that the problem in the case was one where the rules of school authorities collided with the students' free speech rights.[20] On one hand, the suspended students' political expression was not aggressive and did not interfere with the schools'

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10. 393 U.S. 503 (1969).
11. 478 U.S. 675 (1986).
12. 484 U.S. 260 (1988).
13. 393 U.S. at 509.
14. *See Fraser*, 478 U.S. at 685; *Hazelwood*, 484 U.S. at 276.
15. *Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
16. *Id.* at 504. School officials learned of the planned protest just days before it was to take place. Therefore, they instituted a policy under which students would be asked to remove their armbands and, if that measure failed, the students would be suspended. *Id.*
17. *Id.*
18. *Id.* at 504-05 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966)).
19. *Id.* at 505 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967)).
20. *Id.* at 507.

work or with the rights of other students.[21] Rather, the wearing of armbands at the school was the type of symbolic speech, similar to "pure speech," that was entitled to First Amendment[22] protection.[23] On the other hand, while "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court noted that it had repeatedly emphasized the need to affirm school officials' authority to control student conduct.[24]

The Court disagreed with the district court's determination that the suspensions were reasonable because school officials feared a disturbance from the armbands.[25] The Court declared that "undifferentiated fear or apprehension of disturbance" was not sufficient to defeat the right to free expression. [26] This was the case because:

> [a]ny 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; 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.[27]

Consequently, in order for a state to constitutionally prohibit the expression of an opinion, it must show more than a wish to avoid the discomfort that accompanies the expression of unpopular viewpoints.[28] The Court stated that prohibitions would not be upheld when there is no evidence that the forbidden expression "'materially and substantially interfere[s]'" with proper school disciplinary requirements.[29]

The Court determined that the district court did not make a finding that school officials had reason to suspect that the student protest would substantially interfere with school operations or infringe upon the rights

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21. *Id.* at 508. The Court acknowledged that while some students made hostile comments to the students wearing armbands, there were no violent acts or threats of violence on school grounds. *Id.*

22. U.S. CONST. amend. I.

23. *Tinker,* 393 U.S. at 505-06.

24. *Id.* at 506-07.

25. *Id.* at 508.

26. *Id.*

27. *Id.* at 508-09.

28. *Id.* at 509.

29. *Id.* (quoting *Burnside*, 363 F.2d at 749).

of others.[30] Rather, the school officials' action "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 this Nation's part in the conflagration in Vietnam."[31] Indeed, school authorities allowed students to wear other political and controversial symbols, including the Iron Cross, a Nazi symbol.[32] The Court noted that school officials singled out the armbands worn in protest of American involvement in Vietnam.[33] Therefore, the Court concluded that "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."[34]

The Court added that students' rights are not limited to the classroom.[35] Instead, the rights extend to the cafeteria, the playing field, and other parts of the campus.[36] Consequently, students may express opinions on controversial opinions as long as the expression does not "for any reason—whether it stems from time, place, or type of behavior—materially disrupt[ ] classwork or involve[ ] substantial disorder or invasion of the rights of others."[37] Applying that standard, the Court determined that because the record did not contain evidence that would have led school officials to expect a substantial disruption or material interference with school operations, and because no disturbances actually occurred, the school officials had unconstitutionally restricted the students' expression.[38]

Justice Black entered a vigorous dissent.[39] One concern that Justice Black raised was that students and teachers might use schools "at their whim" to express themselves.[40] While acknowledging that neither the states nor the federal government could regulate the content of speech, Justice Black stated, "I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases."[41]

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30. *Id.*
31. *Id.* at 510.
32. *Id.*
33. *Id.* at 510-11.
34. *Id.* at 511.
35. *Id.* at 512-13.
36. *Id.*
37. *Id.* at 513.
38. *Id.* at 514.
39. *Id.* at 515-27 (Black, J., dissenting).
40. *Id.* at 517 (Black, J., dissenting).
41. *Id.* (Black, J. dissenting).

Additionally, Justice Black disagreed with the majority's conclusion that the armband-wearing students did not interfere with school activities.[42] While acknowledging that none of the protesting students engaged in aggressive behavior, Justice Black noted that there was evidence that the armbands caused negative comments and the poking of fun at the students.[43] He also pointed out that disputes with one of the armband-wearing students "wrecked" a mathematics lesson.[44] Justice Black then concluded that while the students' conduct did not actually "disrupt" school work, "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."[45]

Justice Black was also concerned about the implications the majority's holding would have on school discipline.[46] He predicted that "some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders."[47] Furthermore, he predicted that students, "[t]urned loose with lawsuits for damages and injunctions," against their teachers, would soon believe that they had the right to control the schools.[48] Therefore, the majority's decision "subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."[49]

In summary, the Court in *Tinker* provided for protection of basic student speech rights. However, in *Fraser*, the trend toward allowing restrictions on student speech began.

### *B. The Restriction of Vulgar Speech Under Fraser*

In *Fraser* the Court held that school authorities could reasonably punish a student in response to a lewd and indecent speech given at a school-sponsored program.[50] In that case, Matthew Fraser delivered a speech nominating another student for elected office.[51] Throughout the speech Fraser "referred to his candidate in terms of an elaborate,

42. *Id.* at 517-18 (Black, J., dissenting).
43. *Id.* at 517 (Black, J., dissenting).
44. *Id.* (Black, J., dissenting).
45. *Id.* at 518 (Black, J., dissenting).
46. *Id.* at 524-25 (Black, J., dissenting).
47. *Id.* at 525 (Black, J., dissenting).
48. *Id.* (Black, J., dissenting).
49. *Id.* (Black, J., dissenting).
50. 478 U.S. at 677, 685.
51. *Id.* at 677.

graphic, and explicit sexual metaphor."[52] Prior to the speech, two teachers told Fraser that he probably should not deliver the speech and that delivering the speech might result in severe consequences.[53] According to a school counselor, some students reacted to the speech by yelling, and others simulated the sexual acts Fraser's speech alluded to.[54] A teacher stated that she had to use part of her instructional time to discuss the speech.[55] The following day, the school's assistant principal informed Fraser that, in the school's opinion, Fraser had violated a school rule that prohibited "'[c]onduct which materially and substantially interferes with the educational process . . ., including the use of obscene, profane language or gestures.'"[56] Subsequently, school officials informed Fraser that he was to be suspended for three days and could not be considered as a possible graduation speaker.[57]

As a result, Fraser sued the school district in the United States District Court for the Western District of Washington. The district court held that the punishment violated Fraser's right to free speech.[58] The Court of Appeals for the Ninth Circuit affirmed and, in the process, rejected the school district's arguments that the speech was disruptive and that the school had an interest in protecting minors who were in "an essentially captive audience" from indecent language in a school-sponsored setting.[59] The court reasoned that giving the school district unlimited discretion to determine what speech is decent would "'increase the risk of cementing white, middle-class standards for determining

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52. *Id.* at 677-78. Fraser's speech read as follows:

> 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.

*Id.* at 687 (Brennan, J., concurring).

53. *Id.* at 678.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 679. Interestingly, by the selection of his fellow students, Fraser spoke at the school's graduation ceremony. *Id.*

59. *Id.* at 679-80.

what is acceptable and proper speech and behavior in our public schools.'"[60]

The United States Supreme Court began by distinguishing the case from *Tinker*.[61] The Court noted the "marked distinction" between the sexual content in Fraser's speech and the political expression in *Tinker*.[62] In *Tinker* the Court stated that that case did not concern an expression that intruded on school operations or other students' rights.[63]

The Court then established that the purpose of schools is to teach students the "'habits and manners of civility'" necessary for life in a democratic society.[64] The Court added that the fundamental values student needed to learn included tolerance of differing political and religious views.[65] Furthermore, the Court noted that students must consider the sensibilities of others.[66] As the Court stated, "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[67] Importantly, the court pointed to the fact that even in legislatures, where spirited political debates are held, offensive expression is prohibited.[68]

The Court also took account of the unique nature of the school setting by noting that even though a certain offensive form of expression is permissible for adults, it is not necessarily so for students in public schools.[69] This view is supported by the notion that public school students' constitutional rights are not necessarily coextensive with those of adults outside of the school setting.[70] With this in mind, it is appropriate for public schools to prohibit vulgar and offensive expression.[71] Indeed, "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject

60. *Id.* at 680 (quoting Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1363 (9th Cir. 1985)).
61. *Id.*
62. *Id.*
63. *Id.* (citing *Tinker*, 393 U.S. at 508).
64. *Id.* at 681.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 681-82.
69. *Id.* at 682.
70. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).
71. *Id.* at 683.

to sanctions."[72] It is the school board who can determine what forms of speech are inappropriate.[73]

Furthermore, the Court noted that the educational process is not limited to what students learn from the curriculum.[74] Rather, students also learn about the appropriate form of discourse by observing the behavior and form of expression employed by teachers and older students.[75] Therefore, schools "may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[76]

The Court stated that Fraser's sexual innuendo was "plainly offensive to both teachers and students—indeed to any mature person."[77] The Court was particularly concerned that Fraser's speech would harm the younger students at the school, who were just starting to become aware of human sexuality.[78] The Court stated that its First Amendment jurisprudence had allowed some limitations on speakers in reaching unlimited audiences with sexually explicit messages when children may be present in the audience.[79]

Consequently, the Court held that the school district's punishment of Fraser was permissible.[80] The Court elaborated:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.[81]

Therefore, it was appropriate for the school to assert that vulgar speech like Fraser's was inconsistent with the values of public education.[82]

In his concurrence, Justice Brennan objected to the majority's characterization of the speech as "obscene," "vulgar," "lewd," and

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 684.
80. *Id.* at 685.
81. *Id.*
82. *Id.* at 685-86.

"offensively lewd."[83] In Justice Brennan's opinion, the worst that could be said about Fraser's speech was that, given school officials' discretion to teach students to participate in civil and effective discourse and to avoid disruption of school activities, school officials could constitutionally determine that Fraser's remarks were not permissible.[84] To Justice Brennan, Fraser's speech was a far cry from the "very narrow class" of speech that is not entitled to any First Amendment protection at all.[85] Furthermore, partly because Fraser's speech was no more "obscene" than most television programs or movies, Justice Brennan also disagreed with the majority's contention that school officials' actions were permissible because younger students were present.[86] He even stated that Fraser's speech might have been protected if he had given it at school "but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."[87]

In his brief dissent, Justice Marshall contended that Fraser's speech was not disruptive under *Tinker*.[88] While he recognized that school officials need to be given broad discretion to establish that certain conduct is inconsistent with the school's educational objectives, Justice Marshall insisted that "where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education."[89]

In his dissent, Justice Stevens asserted that, while schools could permissibly regulate the content and style of student speech, students must be given fair notice of the scope of the regulation and the sanctions that will be imposed for violating it.[90] Justice Stevens noted Fraser's stellar academic record and the fact that Fraser was well-respected by his peers.[91] This fact was important partly because it showed that Fraser was probably better-suited to judge whether his speech would offend his fellow students "than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."[92] Fraser did not necessarily have a constitutional right to deliver his speech simply because he did not think it would be offensive or because

83. *Id.* at 687 (Brennan, J., concurring).
84. *Id.* at 687-88 (Brennan, J., concurring).
85. *Id.* at 688 (Brennan, J., concurring).
86. *Id.* at 689 n.2 (Brennan, J., concurring).
87. *Id.* at 689 (Brennan, J., concurring).
88. *Id.* at 690 (Marshall, J., dissenting).
89. *Id.*
90. *Id.* at 691 (Stevens, J., dissenting).
91. *Id.* at 692 (Stevens, J., dissenting).
92. *Id.*

it was not actually offensive to the audience.[93] However, "it does mean that he should not be disciplined for speaking frankly in a school assembly if he had no reason to anticipate punitive consequences."[94] Therefore, Justice Stevens questioned whether Fraser was put on notice by the school's disciplinary rule, the warnings he received from teachers, or the obvious impropriety of his actions.[95]

Thus, in *Fraser*, the Court began placing limitations on the protection it provided for student speech in *Tinker*. In *Hazelwood*, the Court continued this trend by allowing for further limitations on student speech.

### *C. Restrictions on School-Sponsored Speech Under Hazelwood*

In *Hazelwood* the Court held that a school principal could permissibly order the exclusion of two articles from the school's student newspaper.[96] On May 10, 1983, the faculty newspaper adviser presented the principal with proofs for the May 13, 1983, edition of the school newspaper. The principal objected to two articles featured in the proofs. One of the stories at issue dealt with student pregnancy and the other one described the effect of parental divorce on students. The principal had two concerns with the pregnancy story. First, although the story used false names, the principal feared that the pregnant students could be identified through the content of the article. Additionally, the article contained references to sexual activity and birth control, which the principal thought were inappropriate for younger students. In the divorce article, a student mentioned in the article made specific complaints about her father's behavior. The principal felt that the parent should have had the opportunity to respond to the complaints or to consent to their being published. At the time of his decision, the principal did not know that the faculty newspaper advisor had removed the student's actual name from the final version of the story.[97]

The principal believed that there was not sufficient time to make the necessary changes before the publication date. He believed his only two options were to publish the newspaper without the two pages on which the articles at issue appeared or to not publish the newspaper at all. Therefore, he directed the faculty newspaper adviser to remove the two

93. *Id.*
94. *Id.* at 692-93 (Stevens, J., dissenting).
95. *Id.* at 693-96 (Stevens, J., dissenting).
96. 484 U.S. at 276.
97. *Id.* at 263.

pages containing the objectionable articles. The principal's superiors concurred with the principal's decision.[98]

Subsequently, three student staff members of the newspaper sought injunctive relief and monetary damages in the United States District Court for the Eastern District of Missouri.[99] The district court held that there had been no violation of the First Amendment and concluded that school officials could limit student speech occurring as part of educational activities, such as school-sponsored newspapers that are published as part of journalism classes, if there is a reasonable basis for the decision.[100]

The United States Court of Appeals for the Eighth Circuit reversed, holding that the school newspaper was a public forum that was meant to be a medium of student expression.[101] Therefore, school officials could only censor the contents of the newspaper when the censorship was necessary to avoid material disruption under the *Tinker* standard.[102] Applying the *Tinker* standard, the court determined that there was no evidence in the record to indicate that the principal would have anticipated a material disruption.[103] Furthermore, the court concluded that the articles did not invade the rights of others because the school could not have been liable in tort to anyone for publishing the articles.[104]

The United States Supreme Court first considered whether the school newspaper could be considered a public forum.[105] The Court noted that for public schools to be considered public forums, school authorities must have "'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"[106] But, "[i]f the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."[107]

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98. *Id.* at 263-64.
99. *Id.* at 264.
100. *Id.* (citing Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1466, 1467 (E.D. Mo. 1985)).
101. *Id.* at 265 (citing Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372 (8th Cir. 1986)).
102. *Id.* (citing *Kuhlmeier*, 795 F.2d at 1374).
103. *Id.* (citing *Kuhlmeier,* 795 F.2d at 1375).
104. *Id.* at 265-66.
105. *Id.* at 267.
106. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).
107. *Id.* (citing *Perry Educ. Ass'n*, 460 U.S. at 46 n.7).

The Court noted that the school newspaper in *Hazelwood* was part of the school curriculum.[108] It was part of the Journalism II class at the school and students received academic credit for the course. Additionally, the class was taught during school hours by a faculty member.[109] The Court determined that school officials did not depart from their policy that the newspaper was part of the school's curriculum and that the faculty supervisor made many of the required decisions involved in publishing the paper.[110] The faculty advisor was also the final authority on the content of the paper.[111] Therefore, school officials did not create a public forum and could regulate the content of the newspaper.[112]

The Court then distinguished the question presented in *Hazelwood* from the question in *Tinker*.[113] The Court noted that the question in *Tinker* was whether school officials had to tolerate student speech that happened to occur on school grounds.[114] The question in *Hazelwood*, on the other hand, concerned the ability of educators to regulate expression in school-sponsored productions and in other activities that members of the community "might reasonably perceive to bear the imprimatur of the school."[115] The latter type of expressive activity can be considered part of the school curriculum, even if it does not occur in a classroom setting, as long as the activity is intended to convey knowledge or skills to students and is supervised by faculty members.[116]

The Court noted that schools can exercise more control over the second type of student speech "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[117] Thus, schools can regulate not just disruptive speech under the *Tinker* standard, but also speech that is, for example, poorly written or researched, inappropriate for younger audiences, or biased.[118] The Court noted that, with this type of

108. *Id.* at 268.
109. *Id.*
110. *Id.*
111. *Id.* (citing *Kuhlmeier*, 607 F. Supp. at 1453).
112. *Id.* at 270.
113. *Id.* at 270-71.
114. *Id.*
115. *Id.* at 271.
116. *Id.*
117. *Id.*
118. *Id.*

expression, schools can set standards that may be higher than those applied to "real world" newspapers or theatrical productions and "may refuse to disseminate student speech that does not meet those standards."[119] Additionally, school officials can regulate student expression that appears to encourage activities such as drug or alcohol use.[120] Without this power, schools would be kept from fulfilling their role in society.[121]

Therefore, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[122] The Court then concluded that the principal's conduct in removing the two articles and the pages on which those articles were located was reasonable.[123] Consequently, the school officials did not violate the First Amendment.[124]

Justice Brennan dissented and contended that the principal did violate the First Amendment by censoring student expression that neither disrupted classwork nor interfered with the rights of other students.[125] Justice Brennan noted that some free student expression can hinder school instructional activities.[126] He gave the example of a student standing to give a political speech in the middle of a calculus class.[127] Another example was that of a student giving a lewd speech to a school audience.[128]

Justice Brennan contrasted these types of distractions from student speech that conflicts with the school's message without preventing the school from expressing that message.[129] For example, a student in a political science class who responds to the teacher's question with a statement advocating socialism interferes with the school's presentation of the message that capitalism is a better system.[130] Another example of this type of disruption is a student who gossips about sexual activity while on school grounds, thereby muddling the official policy condemning

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119. *Id.* at 271-72.
120. *Id.* at 272.
121. *Id.*
122. *Id.* at 273.
123. *Id.* at 274-76.
124. *Id.* at 276.
125. *Id.* at 278 (Brennan, J., dissenting).
126. *Id.* at 279 (Brennan, J., dissenting).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

teenage sex.[131] He also noted that student newspapers that present moral positions that differ from those of their schools fall into this category as they might interfere with a school's "legitimate inculcation of its own perception of community values."[132] He then stated that "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students in the foregoing hypotheticals, converting our public schools into 'enclaves of totalitarianism'[133] that 'strangle the free mind at its source.'"[134]

Justice Brennan disagreed with such an approach, noting that students maintain their First Amendment rights when they enter the school building[135] and that "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate."[136]

Justice Brennan then argued that the appropriate standard to apply in *Hazelwood* was the *Tinker* standard.[137] He criticized the majority for distinguishing between student speech that "happens to occur" on school grounds and speech that is school-sponsored or bears the imprimatur of the school.[138] He contended that the Court "offer[ed] no more than an obscure tangle of three excuses to afford educators 'greater control' over school-sponsored speech than the *Tinker* test would permit."[139]

The first of these "excuses" was educators' right to control the school curriculum.[140] Justice Brennan asserted that *Tinker* addressed this issue.[141] He stated that schools may punish the student who disrupts calculus class with a political diatribe not because a stricter standard applies in the curricular settings, but "because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose."[142]

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131. *Id.* at 280 (Brennan, J., dissenting).
132. *Id.*
133. *Id.* (quoting *Tinker*, 393 U.S. 511).
134. *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
135. *Id.* (citing *Tinker*, 393 U.S. 503, 506 (1969)).
136. *Id.*
137. *Id.* at 280-82 (Brennan, J., dissenting).
138. *Id.* at 281 (Brennan, J., dissenting).
139. *Id.* at 282 (Brennan, J., dissenting).
140. *Id.* at 283 (Brennan, J., dissenting).
141. *Id.*
142. *Id.*

Justice Brennan also contended that schools could also "censor" poor writing or research under *Tinker*.[143] Justice Brennan agreed with the majority that educators do not have to sponsor school publications that do not meet the appropriate standards.[144] However, according to Justice Brennan, the educator can censor such writing "because to reward such expression would 'materially disrup[t]' the newspaper's curricular purpose."[145]

Nevertheless, Justice Brennan argued that censorship intended to protect the audience or dissociate the sponsor from the student expression did not advance the curricular objectives of a student newspaper.[146] He said this was so "unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."[147] The school in *Hazelwood*, he noted, did not claim such a purpose.[148]

The second "excuse" the majority presented for permitting more control over school-sponsored speech was the school's interest in shielding young students from unsuitable material.[149] Justice Brennan asserted that *Tinker* provided that schools' mandate to instill moral and political values "is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."[150] He noted that limiting newspaper content based on "potential topic sensitivity" was problematic because such a standard invited "manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object."[151] He noted that the facts in *Hazelwood* illustrated how school officials could disguise viewpoint discrimination as protecting students from sensitive subjects.[152] According to Justice Brennan, the real reason the pregnancy article was objectionable was that "[i]t might have been read (as the majority apparently does) to advocate 'irresponsible sex.'"[153]

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143. *Id.* at 283-84 (Brennan, J., dissenting).
144. *Id.* at 284 (Brennan, J., dissenting).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 285 (Brennan, J., dissenting).
150. *Id.* at 285-86 (Brennan, J., dissenting).
151. *Id.* at 287-88 (Brennan, J., dissenting).
152. *Id.* at 288 (Brennan, J., dissenting).
153. *Id.* (citation omitted) (Brennan, J., dissenting).

The third "excuse" provided by the majority was "the school's need to dissociate itself from student expression."[154] The concern here was that student expression could be attributed to the school.[155] Justice Brennan noted that while the school might have a legitimate interest in distancing itself from student expression, the school could not broadly limit personal liberties when more narrow means could be applied.[156] Justice Brennan stated that the majority approved of "brutal censorship" in *Hazelwood* instead of considering "less oppressive" options such as publishing a disclaimer.[157]

Therefore, Justice Brennan concluded that the censorship in *Hazelwood* was not warranted under *Tinker* because it was not intended to prevent a material disruption of classwork or an invasion of the rights of other students.[158]

In *Hazelwood* the majority again allowed for restrictions to be placed on student speech. It appeared at this point that the Court was becoming more deferential to school administrators in their efforts to provide orderly schools. Observers likely would have expected lower courts to follow this trend by allowing more regulation of student speech, especially in light of the numerous school shootings that have occurred since *Hazelwood* was decided.

## III. THE NEED FOR DISCIPLINE VERSUS THE RIGHT TO FREE SPEECH

The following cases represent the efforts of a number of district courts and courts of appeals to address the free speech issues concerning regulations by school districts and administrators. The difficulty these courts face is balancing the need for school safety and order with the constitutional rights of students. Instead of being deferential to school administrators, as might have been expected after *Hazelwood*, the courts have been surprisingly protective of student speech.

### *A. Nixon v. Northern Local School District Board of Education*

The court in *Nixon v. Northern Local School District Board of Education*[159] enjoined school officials from prohibiting a student from wearing a t-shirt condemning homosexuality, Islam, and abortion.[160]

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154. *Id.* at 282-83 (Brennan, J., dissenting).
155. *Id.* at 288-89 (Brennan, J., dissenting).
156. *Id.* at 289 (Brennan, J., dissenting) (citing Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 602 (1967)).
157. *Id.*
158. *Id.* at 289-90 (Brennan, J., dissenting) (citing *Tinker*, 393 U.S. at 513).
159. 383 F. Supp. 2d 965 (E.D. Ohio 2005).
160. *Id.* at 967, 975.

There, Nixon, a middle school student, wore a t-shirt that contained the message: "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"[161] While there was no evidence that Nixon's shirt disrupted school operations, school officials considered the t-shirt to be offensive and inappropriate, and prohibited Nixon from wearing it at school. Prior to this incident, school officials had forbidden students from wearing shirts containing messages school officials considered inappropriate, including Confederate flags, an alcohol advertisement, and Playboy Bunny logos. However, the school had allowed other controversial t-shirts, such as one with a depiction of President George W. Bush with "International Terrorist" written on his forehead.[162]

Nixon's parents sought a preliminary injunction in the United States District Court for the Southern District of Ohio.[163] The court first determined that Nixon's act of wearing the t-shirt constituted expression protected by the First Amendment.[164] The school district argued that Nixon did not have a right to wear the t-shirt because it was plainly offensive under *Bethel School District No. 403 v. Fraser*[165] and invaded on the rights of others under *Tinker v. Des Moines Independent Community School District*.[166] The court first rejected the argument that the t-shirt was plainly offensive under *Fraser*.[167] The court noted that the t-shirt was not plainly offensive merely because other students did not agree with the messages it contained.[168] Rather, the court noted that *Fraser* dealt, not with content, but with the offensive manner in which content is conveyed.[169] Therefore, "[s]peech that contains a potentially offensive political viewpoint is not included in this category of regulated expression."[170]

Because the offensive nature of Nixon's t-shirt was the result of the views the t-shirt contained, the court determined that the case should be analyzed under *Tinker*.[171] The court cited several cases where courts had upheld speech regulations where there had been a prior history of violence or disruption that justified the regulations and one

161. *Id.* at 967.
162. *Id.* at 967-68.
163. *Id.* at 966.
164. *Id.* at 969.
165. 478 U.S. 675 (1986).
166. 393 U.S. 503 (1969).
167. *Nixon*, 383 F. Supp. 2d at 971.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

case where there had been an actual disruption.[172] The school contended that there was a potential for the t-shirt to lead to disruption.[173] This potential for disruption was presumed because there were Muslims, homosexuals, and individuals who have had abortions, present at the school.[174] But, "[t]he mere fact that these groups exist[ed] at [the school], and the fact that they could find the shirt's message offensive, falls well short of the *Tinker* standard for reasonably anticipating a disruption of school activities."[175] The court noted that, in contrast to other cases where courts allowed restrictions on student speech under *Tinker*, the school district presented no evidence that there had been past violence or disorder that would make disruption of school operations reasonably likely.[176] Therefore, the court concluded that "the school's decision to ban [Nixon's] shirt was more than likely caused by 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint'" and that such a motive is not sufficient to allow regulation of a student's political viewpoint.[177]

The court then rejected the school district's argument that the t-shirt invaded on the rights of other students.[178] The court noted that it was not aware of a single decision to uphold a school regulation of student speech based solely on the invasion of rights language from *Tinker*.[179] The court stated that invading on the rights of others consisted of interfering with other students' "rights to be secure and to be let alone."[180] The court determined there was no evidence that Nixon's silent expression did so.[181]

Because the school district failed to establish a disruption of school activities or an invasion of the rights of other students, the court concluded that school officials "clearly violated [Nixon's] First and Fourteenth Amendment rights by prohibiting him from wearing his t-

172. *Id.* at 973. *See, e.g.,* Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003); West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972).
173. *Nixon*, 383 F. Supp. 2d at 973.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 974 (quoting *Tinker*, 393 U.S. at 509).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

shirt."[182] The Court determined that all factors favored granting an injunction and therefore granted Nixon's motion for an injunction.[183]

### *B. Castorina v. Madison County School Board*

In *Castorina v. Madison County School Board*,[184] the court reversed a grant of summary judgment for the school district where school officials prohibited two students from wearing t-shirts that contained the Confederate flag.[185] In that case, two students wore t-shirts that featured a picture of country music star Hank Williams, Jr. on the front and two Confederate flags and the words "Southern Thunder" on the back.[186] The students asserted that they wore the t-shirts "in commemoration of Hank Williams, Sr.'s birthday and to express their southern heritage."[187] The school prohibited the students from wearing the t-shirts pursuant to the school's dress code, which prohibited clothes containing "'any illegal, immoral or racist implication."[188] The students were suspended twice for wearing the t-shirts. After the first suspension, the students returned to school wearing the t-shirts, and the principal suspended them again. The students never returned to the school.[189]

The United States District Court for the Eastern District of Kentucky determined that the wearing of the t-shirts did not constitute speech for

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182. *Id.*

183. *Id.* at 975. *But see* Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096 (S.D. Cal. 2004). In *Harper* the court denied a preliminary injunction where school officials prohibited a student from wearing a t-shirt condemning homosexuality. *Id.* at 1100, 1122. The defendants moved to dismiss for failure to state a claim and argued that the speech on the t-shirt was plainly offensive and that, consequently, *Fraser* would apply. *Id.* at 1103-04. The court refused to infer the facts necessary to support a conclusion that the t-shirt was plainly offensive under *Fraser* and noted that on a motion to dismiss the facts must be viewed in the light most favorable to the plaintiff. *Id.* at 1105. Then the court analyzed the case under *Tinker* and determined that it could not say as a matter of law that school officials reasonably believed the t-shirt would lead to the type of disruption that would make censorship permissible. *Id.* at 1106. Therefore, the court denied the defendants' motion to dismiss. *Id.* at 1106-07. Nevertheless the court denied Harper's motion for a preliminary injunction because Harper "failed to demonstrate a likelihood of success on the merits of any of the claims that survived defendant's motion to dismiss and that the balance of the hardships do not tip sharply in plaintiff's favor." *Id.* at 1122.

184. 246 F.3d 536 (6th Cir. 2001).

185. *Id.* at 538.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 539.

First Amendment purposes and did not find the dress code to be vague and overbroad.[190]

The United States Court of Appeals for the Sixth Circuit first considered whether the students' conduct constituted protected speech under the First Amendment.[191] The court focused its inquiry on whether the students intended to convey a particularlized message.[192] The students had stated that they wanted to express pride in their southern heritage.[193] The Court noted that the t-shirts contained two Confederate flags and the words "Southern Thunder" and that the songs of Hank Williams, Jr. and Hank Williams, Sr. "have strong appeal in the South."[194] Therefore, the court concluded that the students "intended to express more than a mere appreciation for the life and music of either performer" and noted that the students' decision to wear the shirts to school again after their initial suspension "demonstrate[d] that the students fully appreciated the message that school administrators understood the T-shirts to convey."[195] Consequently, because the students wanted to convey a message regarding their southern heritage along with their desire to commemorate Hank Williams, Sr.'s birthday, the court concluded that the act of wearing the t-shirts constituted speech for First Amendment purposes.[196]

The court then considered whether the school board had authority to regulate the students' speech.[197] The court distinguished the case from other cases where courts upheld school bans on the Confederate flag because the students stated that school officials did not punish other students at the school who wore clothes "venerating" Malcom X, the students did not disrupt school activities by wearing the t-shirts, and the students were making personal statements by wearing the t-shirts.[198] The court also noted that the students' speech could not be interpreted as being school-sponsored.[199] After considering all of these facts, the court determined that the case should be analyzed under *Tinker*.[200]

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190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 540.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 540-41. *See* Melton v. Young, 465 F.2d 1332 (6th Cir. 1972); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000).
199. *Castorina*, 246 F.3d at 541.
200. *Id.*

The court noted that, "[v]iewing the facts in the light most favorable to the students, the school has banned only certain racial viewpoints without any showing of disruption."[201] Importantly, the students claimed that clothing associated with Malcolm X and the Black Muslim movement was not prohibited along with clothing depicting Confederate flags and, the Court noted that this fact "gives the appearance of a targeted ban, something that the Supreme Court has routinely struck down as a violation of the First Amendment."[202] The only distinction from *Tinker* was that the school system adopted an explicit policy prohibiting the wearing of black armbands whereas the dress code in *Castorina* was "a facially neutral policy that [was] enforced, according to the students, in a content-specific manner."[203] The court then stated that "the school board cannot single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed."[204]

*Fraser* was not applicable to the case because the school was not regulating the manner of speech.[205] Students could wear t-shirts depicting other flags.[206] Consequently, "it is the content of speech, not the manner, that [school officials] wish[] to regulate."[207]

The court also distinguished *Fraser* because a key foundation of the United States Supreme Court's holding in *Fraser* was that Fraser's speech was disruptive and that the school's punishment of Fraser was viewpoint-neutral.[208] If there was no history of racial violence in the school system, then the students' wearing of the t-shirts might not have been disruptive at all.[209] The school district contended that there had been a racially based fight at the school, but the students asserted that race did not cause the incident.[210] The court concluded that the disagreement illustrated the need for a trial to ascertain the factual background.[211]

The *Hazelwood* analysis was not appropriate because the students' actions "were not school sponsored, nor did the school supply any of the resources involved in their wearing the T-shirts" and because "no

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201. *Id.* at 542.
202. *Id.* at 541.
203. *Id.* at 542.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* (citing *Fraser*, 478 U.S. at 685).
209. *Id.*
210. *Id.*
211. *Id.*

reasonable observer could conclude that the school had somehow endorsed the students' display of the Confederate flag."[212]

The court concluded that the students' suspensions would be invalidated if they could prove the facts they alleged, assuming there was no history of racial violence that made the ban necessary.[213] Furthermore, "even if there ha[d] been racial violence that necessitate[d] a ban on racially divisive symbols, the school [did] not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols and not others."[214] Therefore, the court reversed the district court's grant of summary judgment and remanded the case for trial.[215]

In his concurring opinion, Justice Kennedy of the Sixth Circuit questioned the majority's treatment of the fight at the school that allegedly resulted from racial tensions.[216] He noted that the majority did not consider the fight dispositive evidence that disruption would result from displaying the Confederate flag because some students testified that the dispute did not stem from the Confederate flag.[217] The real issue, according to Justice Kennedy, was

> whether the principal acted on what he reasonably believed to be actual evidence that the shirts would be disruptive. So long as he was told by a student that a confederate flag was the subject of the prior fight and he was not unreasonable for believing that student, he had a reasonable basis to infer that [the students'] shirts would spark more disruption.[218]

Justice Kennedy also disagreed with the majority's assertion that a school system could not single out one racially divisive symbol for regulation.[219] Rather, "likely disruption is both sufficient and necessary to justify regulation."[220] Therefore, he asserted the school's act of prohibiting shirts containing the Confederate flag did not necessarily

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212. *Id.* at 543.
213. *Id.* at 544.
214. *Id.*
215. *Id. See also* Bragg v. Swanson, 371 F. Supp. 2d 814, 827-28 (S.D. W. Va. 2005). In *Bragg* the court applied *Tinker* and held that a ban on displays of the Confederate flag violated the First Amendment. *Id.* at 829. The court also enjoined school officials from enforcing that ban, noting that "there are a variety of innocent flag uses that would be silenced by the broadly worded policy. These uses, which would neither be intended, nor reasonably conceived, to amount to the advancement or glorification of racism, would nonetheless be suppressed." *Id.*
216. *Castorina*, 246 F.3d at 545 (Kennedy, J., concurring).
217. *Id.*
218. *Id.*
219. *Id.* at 547 (Kennedy, J., concurring).
220. *Id.*

mean that the school would have to prohibit Malcolm X shirts.[221] Furthermore, "I question whether the school could be permitted to prohibit displaying a symbol of either Malcolm X or the confederate flag unless it could show evidence that such a display would result in disruption."[222] Thus, he concluded that protected speech could only be regulated if it disrupts, or is on the verge of disrupting, school activities.[223]

### *C. Saxe v. State College Area School District*

In *Saxe v. State College Area School District*,[224] the court held that the school district's anti-harassment policy was unconstitutionally overbroad because it regulated more speech than could be prohibited under the *Tinker* standard.[225] In *Saxe*, a school district enacted an anti-harassment policy.[226] The plaintiffs were two students and an unpaid volunteer for the school district. The plaintiffs sued the school district in the United States District Court for the Middle District of Pennsylvania, alleging that the policy was facially unconstitutional and that they feared they would be punished for "speaking out about their religious beliefs, engaging in symbolic activities reflecting those beliefs, and distributing religious literature."[227] In particular, the plaintiffs were Christians and believed that, under their faith, homosexuality was a sin and that they had "'a right to speak out about the sinful nature and harmful effects of homosexuality.'"[228]

The district court determined that the policy did not prohibit anything that was not already prohibited under federal and state statutes used to define harassment in other contexts.[229] The court asserted that

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221. *Id.*
222. *Id.*
223. *Id.*
224. 240 F.3d 200 (3d Cir. 2001).
225. *Id.* at 217.
226. *Id.* at 202. The policy defined harassment as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender , sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Id.* Some examples of harassment provided in the policy were: "unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffit, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures." *Id.* at 203.
227. *Id.* at 203 (citation omitted).
228. *Id.* (citation omitted).
229. *Id.* at 204 (quoting Saxe v. State Coll. Area Sch. Dist., 77 F. Supp. 2d 621, 627 (M.D. Pa. 1999)).

harassment, as set forth in federal and state statutes, was not protected speech under the First Amendment.[230] Therefore, the district court dismissed the plaintiff's First Amendment claims.[231]

The United States Court of Appeals for the Third Circuit reversed.[232] The court disagreed with the district court's "categorical pronouncement" that harassment was not protected under the First Amendment.[233] The court noted that while "non-expressive, physically harassing conduct" was clearly not protected speech, "the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrates religious beliefs."[234] Furthermore, when anti-harassment laws attempt to restrict such expression, "however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[235]

An additional problem, the court noted, was that anti-harassment laws that are loosely worded may restrict offensive speech based on subject matter and viewpoint.[236] The court cited the Supreme Court's decision in *R.A.V. v. City of St. Paul*,[237] in which the Court held that a hate-speech ordinance was unconstitutional because it discriminated based on content and viewpoint.[238] That ordinance prohibited "'fighting words' that aroused 'anger, alarm or resentment on the basis of race, color, creed, religion or gender.'"[239] The Court expounded on the problem of content and viewpoint discrimination in the statute:

> Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by those speaker's opponents.[240]

230. *Id.*
231. *Id.*
232. *Id.* at 202.
233. *Id.* at 206.
234. *Id.*
235. *Id.*
236. *Id.* at 207.
237. 505 U.S. 377 (1992).
238. *Saxe*, 240 F.3d at 207 (citing *R.A.V.*, 505 U.S. at 391).
239. *Id.* (citing *R.A.V.*, 505 U.S. at 380).
240. *Id.* (quoting *R.A.V.*, 505 U.S. at 391).

The court pointed out, however, that it was not insinuating that no restrictions on expressive speech under anti-harassment law could survive constitutional scrutiny.[241] Rather, the court was merely noting that there was no categorical rule that excluded "harassing" expression from First Amendment protection.[242]

Turning to the policy at issue, the court noted that the anti-harassment provision was "considerably broader" than federal anti-discrimination laws.[243] The court noted that the relevant federal anti-discrimination statutes covered harassment on the basis of "sex, race, color, national origin, age, and disability."[244] The school's policy however, included much more, such as what the court considered "a catch-all category of 'other personal characteristics' (which, the Policy states, includes things like 'clothing,' 'appearance,' 'hobbies and values,' and 'social skills')."[245] The court noted that while attempting to prohibit students from making negative comments about things such as other students' appearance or clothing "may be brave, futile, or merely silly," regulating negative comments about values was a different matter.[246] By regulating such comments, "the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment."[247] The fact that speech regarding another person's values causes offense to others is not a reason to prohibit it; instead, it is the reason it needs to be protected because "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[248]

Because there was no "harassment exception" to the free speech clause, the court then analyzed the case under traditional student speech jurisprudence.[249] The court considered some of the policy's definitions of harassment to be facially overbroad, but proceeded to determine whether a reasonable limiting construction was possible.[250] Under a

241. *Id.* at 209.
242. *Id.* at 210.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 408-09 (1989)).
249. *Id.* at 211.
250. *Id.* at 215.

narrow reading of the policy, the court opined that there were four elements required for speech to be prohibited: "(1)verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics and (3) that has the purpose or effect of either (3a) substantially interfering with a student's educational performance or (3b) creating an intimidating[,] hostile, or offensive environment."[251] The court determined that neither the *Hazelwood* nor the *Fraser* standard applied because the policy reached beyond vulgar or lewd speech, extended to all areas and contexts at the school (including the hallways and playgrounds), and covered speech that extended well beyond "school-sponsored" expression.[252]

Consequently, the policy had to be analyzed under *Tinker*.[253] The court concluded that the policy was overbroad under *Tinker* because it "punish[ed] not only speech that actually causes disruption, but also speech that merely intends to do so."[254] This result occurred because the policy restricted speech that had the "'purpose or effect'" of disrupting educational activities or causing a hostile environment, thus ignoring "*Tinker's* requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it."[255]

The court was also concerned about the part of the policy that prohibited expression that created "'an intimidating, hostile or offensive environment.'"[256] The court determined that the school district could not justify the policy as a means of avoiding liability for harassment because the policy prohibited more expression than could possibly lead to liability under the applicable case law.[257] Furthermore, the court noted that the school district could not justify the policy by arguing that speech resulting in a hostile environment could be prohibited because it infringed upon the rights of others.[258] The court stated that the standard for what constitutes invasion on the rights of others under *Tinker* was not clear.[259] However, "it is certainly not enough that the speech is merely offensive to some listener."[260] The court then noted that

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251. *Id.* at 216.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 216-17.
256. *Id.* at 217.
257. *Id.*
258. *Id.* (citing *Tinker*, 393 U.S. at 513).
259. *Id.*
260. *Id.*

> [b]ecause the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.[261]

Finally, the court held that the school district had not provided adequate proof that the hostile environment prohibition was needed to prevent disruption.[262] The court noted that the school did not provide any specific reason, as required by *Tinker*, "why it anticipate[d] substantial disruption from the broad swath of student speech prohibited under the Policy."[263]

The court concluded that the policy covered much more student speech than was permissible under *Tinker* and was therefore unconstitutionally overbroad.[264]

### *D. Newsom v. Albemarle County School Board*

In *Newsom v. Albermarle County School Board*,[265] the court held that a student was entitled to a preliminary injunction with respect to his claim that a portion of his school's dress code prohibiting students from wearing items relating to violence was overbroad.[266] The problems with Alan Newsom, a middle school student, began during the 2001-2002 school year.[267] At that time, the school dress code prohibited students from wearing "'messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group.'"[268] On April 29, 2002, Newsom wore a t-shirt containing a depiction of three men holding firearms along with the letters "NRA"

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261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. 354 F.3d 249 (4th Cir. 2003).
266. *Id.* at 253, 261.
267. *Id.* at 252.
268. *Id.*

and the words "SHOOTING SPORTS CAMP."[269] An assistant principal spotted the t-shirt and believed that the men depicted on the shirt were sharpshooters. The image on the shirt reminded her of the school shootings at Columbine High School and other similar incidents. The assistant principal was concerned that the t-shirt might distract other students and that other students might associate the contents of the shirt with incidences of school violence in other schools.[270] She was also concerned that the t-shirt conflicted with the school's message that "Guns and Schools Don't Mix."[271] Consequently, the assistant principal requested that Newsom change the t-shirt or turn it inside out. After some discussion, Newsom went to the restroom to turn his t-shirt inside out.[272]

During the summer of 2002, the dress code was modified to prohibit "'messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group.'"[273] In September 2002, Newsom sued the school board and other school officials in the United District Court for the Western District of Virginia, alleging, *inter alia*, that school officials violated his First Amendment rights when they prohibited him from wearing the NRA t-shirt in April 2002 and that the new dress code was overbroad and vague. He requested a preliminary injunction to prevent the enforcement of the new dress code to the extent that it restricted non-threatening and non-violent images or messages regarding firearms or weapons. The district court denied the request for a preliminary injunction, finding that Newsom had failed to establish a likelihood of success on the merits. The district court asserted that school officials could censor the t-shirt because they were prohibiting the form of the message (depictions of men holding guns) rather than the message itself.[274]

The United States Court of Appeals for the Fourth Circuit determined that non-violent expression regarding weapons should be analyzed under *Tinker*.[275] The court first determined that the *Hazelwood* standard was not appropriate because the school did not sponsor clothing related to weapons and "no reasonable observer could conclude that [the school]

269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 253.
273. *Id.*
274. *Id.* at 253-54.
275. *Id.* at 257.

somehow endorsed the t-shirt worn by Newsom, or any other student's clothing that contained a message related to weapons."[276]

In looking at the facts in the case at bar, the court determined that there was no evidence that Newsom's clothing or any other clothing relating to weapons worn by other students had caused, or would cause, a substantial disruption at the school.[277] There was also no evidence that such clothing had interfered with the rights of other students.[278] Thus, "this lack of evidence strongly suggest[ed] that the ban on messages related to weapons was not necessary to maintain order and discipline" at the school.[279]

The court also looked at the scope of the dress code and noted that the dress code could be read to extend to many lawful, nonviolent symbols.[280] For example, students would not be allowed to wear or carry items displaying the state seal of Virginia, because that symbol includes a woman holding a spear, which is a weapon.[281] The court also noted that a nearby high school featured a patriot bearing a musket as its school mascot.[282] Consequently, clothing featuring this mascot would also be banned by the dress code.[283] Finally, the court noted that even clothing containing the school's message that "Guns and Schools Don't Mix" would have been barred under the dress code.[284]

After considering the fact that there was no evidence that clothing containing messages related to weapons had ever caused a disruption or infringed upon the rights of others at the school and the fact that the code prohibited a very broad range of symbols, the court concluded that "[u]nder these circumstances, and in the absence of any cogent limiting construction of the [dress code] . . . Newsom demonstrated a strong likelihood of success on the merits of his overbreadth claim."[285] The court also determined that the other factors for determining the appropriateness of a preliminary injunction all favored Newsom.[286]

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276. *Id.*
277. *Id.* at 259.
278. *Id.*
279. *Id.*
280. *Id.* at 259-60.
281. *Id.* at 260.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 261.

Therefore, the court held that the district court inappropriately denied Newsom's request for a preliminary injunction.[287]

### *E. Barber v. Dearborn Public Schools*

In *Barber v. Dearborn Public Schools*,[288] the court granted a student's request for a preliminary injunction when school officials had prohibited the student from wearing a t-shirt that was critical of President George W. Bush.[289] On February 17, 2003, Bretton Barber wore a t-shirt that contained a photograph of President George W. Bush along with the phrase "International Terrorist."[290] During the school's lunch period, a student approached an assistant principal and requested that the assistant principal do something about Barber's t-shirt because that student considered the t-shirt inappropriate. While the assistant principal perceived that the student was angry, he did not sense that the student planned to harm Barber. Shortly thereafter, a teacher expressed his own concern about the t-shirt to the assistant principal.[291]

About five minutes later, the assistant principal found Barber and informed him that the shirt was inappropriate. The assistant principal directed Barber to turn the t-shirt inside out or remove it. Barber refused to comply. Therefore, the assistant principal instructed Barber to call his father. After calling his father, Barber left school and did not return that day.[292]

The assistant principal claimed that he made the decision to prohibit Barber from wearing the shirt because he believed, based on the comments of the teacher and the student, that the shirt had caused a disruption and had the potential to cause further disruption at the school. He also said that he wanted to protect Barber. The assistant principal did not, however, find that the t-shirt violated the school's code of conduct or promoted drugs, alcohol, or terrorism.[293]

The school's principal later informed Barber that he could not wear the shirt to school again. The principal felt that the shirt was inappropriate partly because the student who earlier commented to the assistant principal about Barber's t-shirt informed her that he was upset

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287. *Id.* *But see* Guiles v. Marineau, 349 F. Supp. 2d 871, 880, 881 (D. Vt. 2004) (applying *Fraser* and holding that a school could require a student to cover images of drugs and alcohol on his politically-oriented t-shirt).

288. 286 F. Supp. 2d 847 (E.D. Mich. 2003).

289. *Id.* at 849, 860.

290. *Id.* at 849.

291. *Id.* at 849-50.

292. *Id.* at 850.

293. *Id.*

about the t-shirt because he had a relative serving in the military and that he had other family members who had served in previous wars.[294] Although that student told the principal that "'he really wanted to get [Barber],'" the principal concluded that the student did not represent a threat to Barber.[295] The principal was also concerned about the t-shirt because there were a number of Iraqi students who attended the school who had left Iraq because of Sadaam Hussein, and those students supported American military action in Iraq. She was particularly concerned about the possibility of disruption due to her experience while working at another high school during the 1991 Gulf War. There, Yemenese students wore t-shirts and carried items supporting Sadaam Hussein. As a result, a major disruption, including fights and protests, took place.[296]

The principal feared a similar disruption involving students who supported the Iraq war. On the day Barber wore the shirt, the principal was particularly concerned because war in Iraq was imminent and because the government had recently raised the terror alert level.[297]

The court determined that the case should be analyzed under *Tinker*.[298] The court noted that the *Fraser* analysis was not appropriate because the t-shirt was not vulgar or obscene and did not deal with alcohol, drugs, or sex.[299] The *Hazelwood* analysis was not appropriate because the wearing of the t-shirt was not a school-sponsored activity.[300] While school officials argued that if they could not ban the shirt it would appear that the school was endorsing the message on the t-shirt, the court disagreed and stated that "no reasonable person could conclude that a school endorses the messages on its students' clothing."[301]

In examining the facts of the case under *Tinker*, the court determined that school officials could not establish that a substantial disruption had occurred.[302] The court noted that the assistant principal deemed the t-shirt inappropriate based on comments from one teacher and one student.[303] The court concluded that "[e]ven when considered together, these comments do not constitute a material and substantial disruption

294. *Id.*
295. *Id.*
296. *Id.* at 851.
297. *Id.*
298. *Id.* at 856.
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* at 856-57.
303. *Id.* at 856.

of the school's activities" and that there was no evidence that the t-shirt had caused a disruption during Barber's morning classes, between classes, or during the first part of Barber's lunch period.[304]

Moreover, the court also held that the school had not established a potential threat of substantial disruption.[305] The court disagreed with the assistant principal's contention that he prohibited Barber from wearing the shirt because he feared a disruption, noting that the record did not "reveal any basis for [the assistant principal's] fear aside from his belief that the t-shirt conveyed an unpopular political message."[306] Such a belief was insufficient under *Tinker*.[307]

Furthermore, the court was not persuaded by the principal's assertion that she feared disruption based on her previous experience at another school during the 1991 Gulf War.[308] The court was not convinced that "that incident which occurred more than ten years earlier at a different high school warranted the action taken by [the principal]."[309] Additionally, the court noted that there was no evidence to suggest that Iraqi students would respond to the t-shirt in a disruptive manner.[310] Indeed, "it is improper and most likely detrimental to our society for government officials, particularly school officials, to assume that members of a particular ethnic group will have monolithic views on a subject and will be unable to control those views."[311]

The court stated that the tensions between supporters and opponents of the Iraq war were not greater than those that were present during the Vietnam War.[312] Also, the court pointed out that other courts had not found schools to be inappropriate venues for political debate.[313] On the contrary, "students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others."[314]

The court thus held that Barber had a substantial likelihood of success on the merits.[315] The court further opined that the absolute prohibition on Barber's ability to wear the shirt to school might have constitut-

304. *Id.* at 856-57.
305. *Id.* at 857-58.
306. *Id.* at 857.
307. *Id.* (citing *Tinker*, 393 U.S. at 509).
308. *Id.*
309. *Id.* .
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 857-58.
314. *Id.* at 858.
315. *Id.*

ed irreparable harm.[316] Finally, the court considered the public interest and determined that it weighed in favor of Barber, and therefore granted a preliminary injunction.[317]

### *F. Sypniewski v. Warren Hills Regional Board of Education*

In *Sypniewski v. Warren Hills Regional Board of Education*,[318] the court held that the district court erred by failing to enjoin a school district from prohibiting a t-shirt containing the word "redneck."[319] The school district in *Sypniewski* had a history of racial tensions. The racial problems began in 1999 when, as part of a Halloween activity, a white student dressed as a black person with a noose around his neck.[320] During the 2000-2001 school year, a group of students formed a gang known as "the Hicks," which wore clothing displaying Confederate flags to celebrate "White Power Wednesdays."[321] One Wednesday, a student walked down a school hallway waving a large Confederate flag. Other incidents involved other displays of the Confederate flag, the playing of a racist song in the school parking lot, and a fight.[322]

In response to the racial incidents in the school district, the school board implemented a racial harassment policy in March 2001.[323] The policy provided, in relevant part, that

> District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred.[324]

Shortly after the enactment of the policy, Thomas Sypniewski wore a t-shirt to school featuring "redneck" jokes by comedian Jeff Foxworthy. Sypniewski and his two brothers, who had their own Foxworthy t-shirts, had worn the t-shirts to their respective schools numerous times prior

316. *Id.* at 859.
317. *Id.* at 860.
318. 307 F.3d 243 (3d Cir. 2002).
319. *Id.* at 246, 258.
320. *Id.* at 247-48.
321. *Id.*
322. *Id.*
323. *Id.* at 249.
324. *Id.*

to the enactment of the racial harassment policy.[325] When Sypniewski refused to turn his t-shirt inside-out, the school's vice principal suspended him.[326] The vice principal was mainly concerned with the presence of the word "redneck" "'because of the troubling history of racial tension at [the] school and the possibility that the term 'redneck' would incite some form of violence and at a minimum be offensive and harassing to [the school's] minority population.'"[327]

The Sypniewski brothers sued the school district in the United States District Court for the District of New Jersey seeking, *inter alia*, a preliminary injunction to prevent enforcement of the racial harassment policy because, according to the Sypniewskis, the policy amounted to impermissible regulation of their right to free expression. The district court denied the injunction request.[328]

On appeal, the court applied *Tinker* because the t-shirt was not school-sponsored and did not contain vulgar language.[329] The school district argued that the t-shirt was offensive because, considering the history of racial tension in the school district, the word "redneck" implied racial intolerance. The school district also contended that the word "redneck" was associated with the Hicks and with the racial problems at the school to such an extent that school officials could expect that a t-shirt containing that word would cause a disruption.[330]

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325. *Id.* at 249-50. The t-shirt read as follows:

Top 10 reasons you might be a Redneck Sports Fan if

10. You've ever been shirtless at a freezing football game.
9. Your carpet used to be part of a football field.
8. Your basketball hoop used to be a fishing net.
7. There's a roll of duct tape in your golf bag.
6. You know the Hooter's [sic] menu by heart.
5. Your mama is banned from the front row at wrestling matches.
4. Your bowling team has it's [sic] own fight song.
3. You think the "Bud Bowl" is real.
2. You wear a baseball cap to bed.
1. You've ever told your bookie "I was just kidding."

*Id.*

326. *Id.* at 251.

327. *Id.* Technically, Sypniewski was not suspended under the racial harassment policy. The vice principal classified the wearing of the t-shirt as a violation of the school's dress code, which predated the harassment policy. While he apparently used the dress code in order to avoid the harsher penalties given for violation of the harassment policy, the vice principal believed the t-shirt also violated the harassment policy. *Id.*

328. *Id.* at 252.

329. *Id.* at 254.

330. *Id.* at 255.

However, the court disagreed, noting that there was not a sufficient history to support a ban on the use of the word "redneck."[331] Indeed, the court noted that the greatest inference to be made from the district court's findings was that the word might come to be offensive in the future.[332] This inference was not, the court added, a well-founded fear of disturbance under the *Tinker* standard.[333]

Furthermore, "mere association" with items and activities that had led to racial unrest in the past was not sufficient.[334] The court noted that "[a]rguably, this reasoning could encompass country music and any number of things identifiably 'country.' The First Amendment would have little meaning if schools could go that far."[335] Therefore, when school officials want to prohibit a term that is only related to terms that have been disruptive in the past, they must "point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others."[336]

Because the record did not support such an association, the court concluded that the Sypniewskis had established that they were likely to succeed on the merits of their free speech claim relating to the Foxworthy t-shirt.[337] Concluding that the likelihood of success on the merits was determinative, the court held that the district court erred by not enjoining enforcement of the racial harassment policy with respect to the Foxworthy t-shirt.[338]

The Sypniewskis also argued that the racial harassment policy was facially overbroad.[339] The court determined that the case did not fall under its decision in *Saxe* because the language in the racial harassment policy at issue was different and narrower than the language involved in *Saxe*.[340] The court also stated that, unlike in *Saxe*, "the history of racial hostility demonstrates the policy was intended to address a particular and concrete set of problems involving genuine disruption. . . ."[341]

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331. *Id.* at 256.
332. *Id.* at 257.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at 257-58.
338. *Id.* at 258.
339. *Id.*
340. *Id.* at 261.
341. *Id.* at 261-62.

Nevertheless, the court noted its concern that the policy's prohibition of speech creating "ill will" and its prohibition of harassment "by name calling" appeared to cover speech that could not be regulated under *Tinker*.[342] After some discussion, the court determined that, given the state of racial relations at the school, a prohibition on racial harassment by name calling was permissible.[343] However, the prohibition on speech creating ill will was more problematic.[344] The court noted that "by itself, an idea's generating ill will is not a sufficient basis for suppressing its expression" and that "[a]s a general matter, protecting expression that gives rise to ill will—and nothing more—is at the core of the First Amendment."[345] The court determined that using the ordinary meaning of ill will, it could not be inferred that ill will was the type of hostility that could be expected to lead to a serious possibility of disruption.[346] Therefore, prohibiting speech creating ill will "expand[ed] the policy too far into the domain of protected expression."[347]

The court determined that the rest of the policy was constitutionally permissible given the history of racial problems in the school district.[348] The court then rejected the Sypniewskis' vagueness and content discrimination claims.[349]

## IV. ANALYSIS

Even though schools are faced with the need to maintain discipline and prevent violence, courts have been surprisingly reluctant to allow restrictions on student expression that "happens to occur" at school. The courts have, for the most part, refused to extend the scope of *Bethel School District No. 403 v. Fraser*[350] and *Hazelwood School District v. Kuhlmeier*.[351] Instead, the courts have consistently analyzed the cases under the standard set forth in *Tinker v. Des Moines Independent Community School District*,[352] and have often rejected restrictions on student speech. It is fortunate that courts have resisted the temptation to dilute First Amendment protection in the name of providing safe

342. *Id.* at 262.
343. *Id.* at 264.
344. *Id.*
345. *Id.* at 264-65.
346. *Id.* at 265.
347. *Id.*
348. *Id.*
349. *Id.* at 267, 268.
350. 478 U.S. 675 (1986).
351. 484 U.S. 260 (1988).
352. 393 U.S. 503 (1969).

schools. The dangers of restricting student speech far outweigh the benefits.

### *A. The Courts have Consistently Followed Tinker*

In each of the lower court cases examined, the courts held in favor of students. This trend is likely a result of the courts' applying *Tinker* rather than the more deferential standards established in *Fraser* and *Hazelwood*.

The courts have given a variety of reasons for applying *Tinker* instead of *Fraser*. One reason the courts have given is that the restrictions were based on the viewpoint expressed rather than the manner of expression.[353] Another reason for applying *Tinker* rather than *Fraser* is that the speech at issue is not lewd or vulgar.[354]

Similarly, the courts have not liberally construed the meaning of the term "school-sponsored," thus preventing cases from falling under the *Hazelwood* analysis. For example, courts have not accepted the argument that schools endorse the messages on t-shirts by allowing students to wear them.[355]

### *B. The Courts have Wisely Followed the Tinker Standard*

By generally following *Tinker*, the courts have wisely avoided the difficulties inherent in expanding the roles of *Fraser* and *Hazelwood*. In the vast majority of student speech cases, the *Tinker* standard allows courts to appropriately balance the need for discipline in schools with student speech rights.

**1. The *Fraser* Standard.** The courts have generally not been willing to extend the scope of plainly offensive speech under *Fraser* to include speech that is merely disagreeable to other students.[356] For example, the court in *Nixon v. Northern Local School District Board of Education* stated that *Fraser* is limited to the manner in which information is conveyed and does not include "[s]peech that contains a potentially offensive political viewpoint."[357] It is important to note,

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353. *See, e.g.,* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (E.D. Ohio 2005).

354. *See, e.g.,* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3d Cir. 2001).

355. *See, e.g.,* Newsom v. Albermarle County Sch. Bd., 354 F.3d 249, 257 (4th Cir. 2003).

356. *See e.g., Nixon*, 383 F. Supp. 2d at 971.

357. *Id.* at 971.

however, that the Eleventh Circuit has given strong indications that it follows a more liberal interpretation of *Fraser*.[358]

The danger involved in applying *Fraser* to offensive viewpoints can be illustrated by examining the widespread use of the word "offensive" in American culture. Individuals who have friends and family serving in the military in Iraq might say they are offended by war protests. Many say they are offended by any display of the Confederate flag. Others are offended by abortion clinics. In fact, it seems that Americans are obsessed with avoiding offense of others. Thus, extending *Fraser* to include what everyday citizens consider "offensive" would encompass an inordinate amount of student speech.

The primary danger in extending *Fraser* that far would be that it would lead to the censorship of ideas, rather than merely the manner in which ideas are conveyed. For example, under the facts alleged in one case, a teacher told a homosexual student that "she did not want to hear any talk of him being gay, that she found it sickening, and wanted such discussion stopped."[359] To that teacher (and probably a number of other students), the speech was presumably very offensive. The teacher was likely offended by what the student was saying rather than the way he said it.[360] If this type of offensiveness were sufficient to suppress speech, the school could suppress the student's non-disruptive message, regardless of whether it was presented in a way that is generally unacceptable in society.

Additionally, extending *Fraser* to include offensive ideas would allow schools to advocate a viewpoint and then prohibit dissent. For example, some schools hold programs such as "diversity weeks" to encourage acceptance of homosexuals and other groups.[361] Some students might want to speak out against this type of program by, for example, wearing a t-shirt condemning homosexuality as immoral.[362] Homosexual students would likely be very offended by such a t-shirt. If schools could prohibit that message under *Fraser* simply because some students disapproved of it, schools would be able to suppress a substantial portion of the opposition to the school-sponsored message. Such a result would be unacceptable because "the free speech clause protects a wide variety

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358. *See, e.g.,* Denno v. Sch. Bd. of Volusia County., 218 F.3d 1267 (11th Cir. 2000).

359. McLaughlin v. Bd. of Educ. of the Pulaski County Special Sch. Dist., 296 F. Supp. 2d 960, 963 (E.D. Ark. 2003).

360. *See id.* at 964.

361. For an example of a school diversity week, see Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003).

362. This hypothetical is based on the fact pattern in Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096 (S.D. Cal. 2004). *See* discussion, *supra* note 183.

of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."[363] Therefore, schools cannot constitutionally force students to listen to one school-approved viewpoint without allowing students to express opposing viewpoints, even when those opposing viewpoints may be repugnant to many.

Similarly, extending the scope of *Fraser* to include the everyday meaning of the word "offensive" would allow school administrators excessive leeway in determining what speech can be regulated. This point is obvious under the facts of the Eleventh Circuit case of *Denno v. School Board of Volusia County*.[364] In that case, Denno, an aficionado of Civil War history who took part in Civil War reenactments, "quietly" conversed with friends about his interest in Civil War history.[365] The conversation took place outside during Denno's lunch break. While leading the discussion, Denno showed his friends a small (4" x 4") Confederate flag. An assistant principal saw the flag and told Denno to put it away. Denno attempted to explain the historical meaning behind the flag,[366] but the assistant principal told Denno to "'shut up'"[367] and demanded that Denno go to the office with him.[368] On the way to the office, the assistant principal informed Denno that he was suspended.[369] The assistant principal said that he found the flag to be a symbol of racisim and informed Denno that he "had no rights at the school."[370] Importantly, the school apparently did not have a policy prohibiting display of the flag, and there were no allegations of a history of racial problems at the school.[371]

Applying the *Fraser* standard in this type of situation, as the Eleventh Circuit apparently does,[372] allows school administrators to restrict

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363. *Saxe*, 240 F.3d at 206.
364. 218 F.3d 1267.
365. *Id.* at 1270.
366. *Id.*
367. *Id.* at 1278 (Forrester, J., dissenting).
368. *Id.* at 1270-71.
369. *Id.* at 1271.
370. *Id.* at 1278 (Forrester, J., dissenting).
371. *Id.*
372. In determining whether qualified immunity should apply in *Denno*, the Eleventh Circuit stated that "we cannot conclude that a *Fraser* balancing of the circumstances in the instant case would lead to the inevitable conclusion that the individual defendants here violated the First Amendment rights of the students." *Id.* at 1275. The court also stated that a reasonable school official would not look just at *Tinker* but would also balance Denno's freedom to espouse a controversial viewpoint "against the school's interesting in teaching students the boundaries of social appropriate behavior." *Id.* at 1275. In *Scott v. Alachua County School Board*, 324 F.3d 1246 (11th Cir. 2003), the Eleventh Circuit cited

speech at their whim. The assistant principal in *Denno* said he believed that the Confederate flag was a racist symbol.[373] He was personally offended by the message *he believed* Denno was trying to convey and felt he could therefore suppress the speech.[374] However, the *Fraser* standard does not rely on whether or not an individual is offended by a message he believes someone is trying to convey; instead, it deals with expression that is "wholly inconsistent with the 'fundamental values' of public education" and that "undermine[s] the school's basic educational mission."[375] Displaying a flag while carrying on a quiet conversation about history with a group of friends during lunchtime hardly undermines the school's mission, unless the school's mission is to make all of its students conform to school administrators' viewpoints. As the dissent in *Denno* pointed out, the Confederate flag stimulates discussion of differing viewpoints of history, politics, and social issues.[376] The dissent added that "[d]iscourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect." [377] Thus, school administrators should not be allowed to suppress the exchange of ideas simply because they personally find a given idea to be offensive. To allow such suppression would expand administrators' authority well beyond constitutionally acceptable bounds.

Finally, including offensive ideas under *Fraser* would stifle classroom debate. For example, a student in a government class might be prevented from arguing that the federal government should not use federal funds to provide housing to hurricane victims because some hurricane survivors in the class might be offended by the remark. Thus, that entire viewpoint would be left out of the debate. A student might be forbidden from opposing affirmative action because taking such a position would be considered racist and would thus offend minority students. These dissenting viewpoints should not be suppressed because "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[378]

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*Denno* with approval and upheld a ban on the Confederate flag under *Tinker* and *Fraser*. *Id.* at 1247-50.

373. *Denno*, 324 F.3d at 1278 (Forrester, J., dissenting).

374. *See id.*

375. *Fraser*, 478 U.S. at 685-86.

376. *Denno*, 218 F.3d at 1285 (Forrester, J., dissenting).

377. *Id.*

378. *Id.* at 210 (quoting Texas v. Johnson, 491 U.S. 397, 408-09 (1989)).

If students are to participate in a free society, they need to be able to face ideas that they find repulsive. It is not practical to teach students that suppression is the way to deal with conflicting ideas. As the court in *Barber v. Dearborn Public Schools*[379] stated, "students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others."[380]

**2. The *Hazelwood* Standard.** The courts have generally not applied *Hazelwood* to student speech that "happens to occur" at school. Courts have, for example, rejected the argument that schools endorse messages on clothing by failing to restrict them.[381] Courts are wise to not extend school-sponsored speech to encompass individual student expression. To do so would essentially allow schools to ban any speech that conflicts with the school's message. Justice Brennan recognized this danger in his *Hazelwood* dissent.[382] He presented the hypothetical of a student in a political science class who responds to a teacher's question with a statement advocating socialism, a message that conflicts with the school's desired message that capitalism is a better system.[383] He also gave the example of student gossip regarding sexual activities that conflicts with the school's policy of condemning teenage sex.[384] As Justice Brennan correctly noted, "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech," then school officials could censor students in these situations, thus "converting our public schools into enclaves of totalitarianism that strangle the free mind at its source."[385]

**3. The *Tinker* Standard.** When addressing speech that "happens to occur" at school, courts typically rely on *Tinker*.[386] *Tinker* is appro-

379. 286 F. Supp. 2d 847 (E.D. Mich. 2003).

380. *Id.* at 858.

381. *See, e.g.*, *Newsom*, 354 F.3d at 257 (4th Cir. 2003) (stating that "no reasonable observer could conclude that [the school] somehow endorsed the t-shirt worn by Newsom, or any other student's clothing that contained a message related to weapons" and thus refusing to apply *Hazelwood*); *Barber*, 286 F. Supp. 2d at 856 (noting that "no reasonable person could conclude that a school endorses the messages on its students' clothing").

382. *Hazelwood*, 484 U.S. at 279-80 (Brennan, J., dissenting).

383. *See id.* at 279 (Brennan, J., dissenting).

384. *Id.* at 280 (Brennan, J., dissenting).

385. *Id.* (citations and quotation marks omitted).

386. *See e.g., Barber*, 286 F. Supp. 2d at 856.

priate in these cases because it still allows schools to maintain discipline while protecting students' First Amendment rights.

First, *Tinker* is adequate for meeting the disciplinary needs of today's schools. It allows school administrators to prevent bullying and other discipline problems. If speech that is otherwise protected is used to intimidate or harass another student, it then likely amounts to an invasion of another person's rights and disrupts school operations and can therefore be restricted. If a t-shirt aggravates racial tensions and leads to disruption, it can be prohibited. If a student's diatribes against homosexuality in the school cafeteria leads to fights, then it, too, can be prohibited.

Second, the *Tinker* standard is effective at protecting student speech from suppression. It prevents schools from imposing their views on students without allowing students to express, in the appropriate context, a contrary view. Under *Tinker*, such speech can only be prohibited if it causes or can be reasonably foreseen to cause a material disruption or intrusion on the rights of other students.[387] Thus, educators cannot arbitrarily prevent a student from questioning an approved school position by wearing an expressive t-shirt, discussing the unsanctioned viewpoint with fellow students, or presenting a contrary position in a class discussion.

The *Tinker* standard also prevents school officials from sweeping up broad categories of speech as part of well-intentioned policies. For example, it keeps schools from prohibiting negative comments about broad categories such as values[388] and from restricting speech that is only vaguely related to speech that can reasonably be believed to cause disruption.[389]

In sum, even considering the tumultuous times faced by school administrators, *Tinker* still strikes the appropriate balance in dealing with speech that "happens to occur" at school. Dealing with student speech is not easy. Administrators may have to make difficult decisions that could be avoided with a more deferential standard. However, as the court stated in *Tinker*:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this

387. *Tinker*, 393 U.S. at 513.
388. *Saxe*, 240 F.3d at 210.
389. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 257 (3d Cir. 2002).

> 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.[390]

Thus, those charged with the job of educating students who are compelled to attend public schools should be held to the highest standard when they attempt to regulate student speech. That high standard is provided in *Tinker*.

BRETT THOMPSON

390. *Tinker*, 393 U.S. at 508-09 (internal citation omitted).