Faulkner University

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Fall 2012

Tinker and the Diminution of Public Education

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Available at: https://works.bepress.com/ryan_hardy/1/
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8/29/11
Word Count: 7,777 (9,437 with footnotes)
Tinker and the Diminution of Public Education

Introduction

“Education is perhaps the most important function of state and local governments.”¹

The First Amendment protects individual’s right to freedom of speech and expressive conduct.² However, freedom of speech is not absolute and must sometimes give way to “subordinating valid governmental interests.”³ But the “loss of First Amendment freedoms for even minimal periods of time” is presumed to constitute irreparable harm.⁴

Imagine this: a member of a popular boy band wears an anti-drug shirt, and the group sells anti-drug shirts at their concerts.⁵ A twelve-year-old girl wildly in love with the band buys a shirt and proudly wears it to her school the next day.⁶ By 7:45 A.M., the seventh grader is taken to the principal’s office and before the end of the day the girl is suspended.⁷ Eventually, the student sues the school and the court holds in favor of the school.⁸ Certainly, New Kids on the Block never thought that their “Drugs Suck” shirts would or could cause such

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⁶ Id.
⁷ Id. at 1528–29
⁸ Id. at 1527
uproar. However, in at least one school, it did. Did the court go too far? Do students have rights to free expression in public schools? The answer to those questions are, respectively, that it depends on who you ask and absolutely yes. However, schools have gained more power to regulate student expression in the last 25 years.

The Supreme Court held nearly 68 years ago that students in public schools have First Amendment rights. In *Tinker v. Des Moines School District*, the Supreme Court held that “without a specific showing of constitutionally valid reasons to regulate, “students are entitled to free expression of their views.” The high water mark for student speech came in 1969. However, subsequent Supreme Court decisions have given schools more authority to regulate student expression. Recently schools have suspended students for wearing confederate flags, anti-homosexual t-shirts, pro-homosexual t-shirts, and even anti-drug t-shirts. Some of these suspensions were upheld by the courts while others were not. Both schools and the courts seem

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11 Id. at 511.
14 *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008).
to be confused over exactly what can be prohibited and what is allowed under free expression. The root of this confusion can be found in Tinker’s “substantial disruption or material interference” standard.

Part I of this article discusses clothing as speech. Part II examines Tinker v. Des Moines. Part III examines the three other Supreme Court student expression cases. Part IV discusses the framework set up by the Supreme Court cases. Part IV also illustrates lower court decisions involving specific types of clothing or symbols and the confusion among those lower courts. Part V discusses the mission of public education and its relation to student expression. Part VI describes Tinker’s lasting effects on public education. Part VII explains that the Supreme Court should overrule Tinker and adopt a new standard.

I. When is Clothing Speech?

Tank tops, exposed midriffs, and short shorts are not the only clothing problems facing public school administrators today. Schools also face the challenge of clothing that conveys certain messages through written words, images, or symbols. Shirts with all sorts of things written on them are making their way into America’s schools. Messages ranging from “Drugs Suck”\(^\text{18}\)

\(^{18}\) Id. at 1528.
to "Be Happy, Not Gay"\(^{19}\) have led to student suspensions and subsequently litigation over those suspensions. Wearing a shirt with one of these messages for the purpose of expressing certain views is a symbolic act that is within the Free Speech Clause of the First Amendment.\(^{20}\) However, schools have prohibited them. How far can students push the envelope in expressing their views within the halls of public schools?

The Supreme Court has ruled on more than one occasion that public school students have constitutional rights.\(^{21}\) In 1969, the Court protected certain student expressions and stated that schools should not be "enclaves of totalitarianism."\(^{22}\) However, beginning in 1986, the Court started to back away from free student expression and allowed more authoritarian control to school administrators.\(^{23}\)

II. Substantial Disruption or Material Interference with School Activities: *Tinker v. Des Moines School District*

*Tinker v. Des Moines School District* stands as the high-water mark for student speech rights.\(^{24}\) The case was decided in

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\(^{19}\) *Nuxholl v. Indian Prairie Sch. Dist.*, 523 F.3d 676 (7th Cir. 2008).
\(^{20}\) See *Tinker*, 393 U.S. at 506.
\(^{21}\) See *Barnette*, 319 U.S. at 637.
\(^{22}\) *Tinker*, 393 U.S. at 511.
\(^{24}\) *Chemerinsky*, 36 Loy. U. Chi. L.J. at 124
1969 which was a time of great political and cultural conflict. Tinker was a product of the antiwar, free speech movement that swept the country during the 1960s. The case was decided at the end of the Warren era. Chief Justice Warren was retiring and would be replaced by the much more conservative Warren Burger. Justice Abe Fortas, who wrote the majority opinion in Tinker, had been denied conformation as Chief Justice and would later resign from the Court. In 1968, Justice Fortas authored a book titled Concerning Dissent and Civil Disobedience. In the book, he advocates protest so it’s no surprise that he came down on the side of the student protesters.

In Tinker, a few students wore black armbands to school in protest of the Vietnam War. The school, aware that the protest would be occurring, had recently passed a “no armband” policy. Some of the protesting students were sent home and subsequently suspended because they refused to take off their armbands. Three of the students then filed a claim against the school for violating their First Amendment right to free expression and

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26 Id.
28 Id.
29 Id.
30 Tinker, 393 U.S. at 504.
31 Id.
32 Id.
sought an injunction and nominal damages. The District Court dismissed the claim and on appeal the 8th Circuit affirmed without an opinion. The Supreme Court granted certiorari and reversed the decision.

The Supreme Court determined that an armband is closely akin to “pure speech” which is entitled to comprehensive protection under the First Amendment. Teacher and students both have constitutional rights to freedom of speech and expression that are not “shed” at the “schoolhouse gate”. The Court, however, then had to decide what to do when those rights collide with school policy. The Court, first, examined the nature of the protest which was silent, passive, and nonviolent. The protest was also not widespread, and only a few students wore the armbands and of those few only 5 were suspended. The Court said a fear of disturbance is not enough to overcome the right to freedom of expression, and the school must show more than a desire to avoid discomfort with unpopular viewpoints. The Constitution mandates that we must take the risk of disturbance and that risk is the basis of our national legal framework.

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33 Id. at 505.
34 Id. at 514.
35 Id. at 508.
36 Id. at 506.
37 Id. at 508.
38 Id.
39 Id.
40 Id.
strength.\textsuperscript{41} The school made neither showing of any interference with school activities nor provided any evidence of the anticipation of a disruption caused by the armbands.\textsuperscript{42} In addition, the school had not banned other controversial symbols like the Iron Cross, a traditional symbol of Nazism.\textsuperscript{43} The Court went on to say that schools may not be “enclaves of totalitarianism” and that students are persons under our Constitution both in and out of school.\textsuperscript{44} The Court then quoted from an earlier Supreme Court case, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”\textsuperscript{45}

The \textit{Tinker} court held that without a specific showing of constitutionally valid reasons to regulate, students are entitled to free expression of their views.\textsuperscript{46} The school cannot prohibit free expression absent some evidence that the prohibition is necessary to avoid a substantial disturbance or material interference with school activities.\textsuperscript{47}

Justice Black wrote a vigorous dissent in \textit{Tinker}.\textsuperscript{48} He wrote the purpose of the armbands was to cause a disruption, and the armbands actually did cause a disruption by diverting

\begin{footnotesize}
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 510.
\textsuperscript{43} Id. at 511.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 512.
\textsuperscript{46} Id. at 511.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 515-27.
\end{footnotesize}
students’ minds from school.\textsuperscript{49} Justice Black went further writing that the judiciary had allowed a new era of permissiveness in schools.\textsuperscript{50} He worried that the ruling would give students power over school officials and disrupt the mission and purpose of the school.\textsuperscript{51} Justice Black believed school was a place for children to learn not teach.\textsuperscript{52} Justice Black worried that school discipline, which is integral, would be eroded away allowing students to be defiant and subjecting schools to the whims of not the brightest but the loudest-mouthed students.\textsuperscript{53}

\textit{Tinker} set the standard for determining whether student expression could be prohibited by the school.

\textbf{III. The Post-\textit{Tinker} Trilogy: What’s Left of \textit{Tinker}?}

The Supreme Court has only heard three cases involving student expression since \textit{Tinker} was decided in 1969. In each of those cases, the Supreme Court has gone away from \textit{Tinker} and students’ rights and toward school authority.\textsuperscript{54} In all three

\begin{footnotesize}
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\item \textsuperscript{49} Id. at 517-18.
\item \textsuperscript{50} Id. at 518.
\item \textsuperscript{51} Id. at 525.
\item \textsuperscript{52} Id. at 522.
\item \textsuperscript{53} Id. at 525.
\item \textsuperscript{54} See Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).
\end{itemize}
\end{footnotesize}
cases, the Court has declined to use Tinker, carved out an exception to Tinker, and ruled in favor of the school.\textsuperscript{55}

Bethel School District No. 403 v. Fraser\textsuperscript{56}, decided in 1986, was the first student speech case decided by the Supreme Court since Tinker in 1969.\textsuperscript{57} Fraser, a student, gave a speech filled with sexual innuendo and metaphors at a student assembly, and Fraser was then suspended by the school.\textsuperscript{58} Fraser sued the school for violating his First Amendment rights.\textsuperscript{59} The District Court and the Ninth Circuit both found for Fraser.\textsuperscript{60} The Supreme Court reversed.\textsuperscript{61}

The Court reasoned that the speech was unrelated to any political viewpoint and a high school assembly is no place for sexually explicit speech.\textsuperscript{62} The Court felt that it was important to protect children from vulgar and lewd speech, and a speech like this undermines the mission of the school.\textsuperscript{63} In the majority opinion, Justice Fortas stated students’ Constitutional rights are not automatically equal to those of adults in other settings.\textsuperscript{64}

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\textsuperscript{56} 478 U.S. 675 (1986).
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 677-78.
\textsuperscript{59} Id. at 679.
\textsuperscript{60} Id. at 679-80.
\textsuperscript{61} Id. at 680.
\textsuperscript{62} Id. at 683.
\textsuperscript{63} Id. at 684-86.
\textsuperscript{64} Id. at 682; See also New Jersey v. T.L.O., 469 U.S. 325 (1985).
\end{flushright}
The Court held that schools can prohibit vulgar and lewd speech because it is inconsistent with the fundamental values of public school education.\footnote{Id. at 685-86} The Court pointed out that students have “the classroom right to wear Tinker’s armband but not Cohen’s jacket.”\footnote{Id. at 682 quoting Judge Newman’s concurrence in Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (CA2 1979)(discussing Cohen v. California, 403 U.S. 15 (1971)).}

In contrast with Tinker, the speech was not political but vulgar.\footnote{Id. at 685.} The court chose not to use the substantial disruption test from Tinker opting instead for a balancing test.\footnote{Id. at 685-86.} The court weighed Fraser’s interest in free expression against the school’s basic educational mission.\footnote{Id.} However, in the context of lewd speech the balance always favors the school because that type of speech is against the school’s educational mission.\footnote{70}

Hazelwood School District v. Kuhlmeier\footnote{484 U.S. 260 (1988).} was the next Supreme Court student expression case and came only two years after Fraser. In Hazelwood, a high school principal ordered two articles to be removed from the school newspaper.\footnote{Id. at 262.}

Judicial deference is the major theme of Hazelwood. The Court stated that education is “primarily the responsibility of parents, teachers, and state and local school officials, and not
of federal judges.”73 Schools are not required to sponsor speech that is “inconsistent with shared values of a civilized social order.”74

The Court held that as long as it is “reasonably related to legitimate pedagogical concerns”, schools can exercise editorial control over school-sponsored student publications.75 The Court declined to use the substantial disruption test from Tinker.76 The key difference is that in Tinker the school was forced to tolerate the speech and in Hazelwood the school would have been forced to promote the speech.77

The latest Supreme Court case involving student expression is Morse v. Frederick.78 In Morse, students went from class to the street to watch the Olympic Torch Relay.79 The school treated the outing as a field trip and school officials supervised the students.80 As the torch passed, Frederick unveiled a banner reading “BONG HiTS 4 JESUS.”81 The school principal took the banner and suspended Frederick for ten days citing the school’s policy against promoting illegal drugs.82

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73 Id. at 273.
74 Id. at 286.
75 Id. at 273.
76 Id. at 272–73.
77 Id. at 270–71.
79 Id. at 397.
80 Id.
81 Id.
82 Id. at 398.
Frederick sued the principal and the school. The District Court found for the school, and the Ninth Circuit reversed. The Supreme Court reversed the Ninth Circuit and found for the school.

The Court reasoned that students have some rights to political speech in school but that does not include pro-drug messages. The Court decided that Frederick’s banner promoted marijuana. The Court stated that students’ speech rights do not equal those of adults in other settings. The Court held that school can prohibit student speech that promotes illegal drug use.

The majority in Morse says using the substantial disruption test from Tinker is optional, and it is not a required standard when a student is advocating illegal drug use. Justice Thomas in his concurrence says that Tinker should be overruled. He goes on to write that students have no right to free speech in public schools. Justice Thomas has high praise for Justice Black’s dissent in Tinker calling it “prophetic.”

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83 Id. at 399.
84 Id.
85 Id. at 409.
86 Id.
87 Id. at 402.
88 Id. at 397.
89 Id. at 409.
90 Id. at 408-09.
91 Id. at 422.
92 Id.
93 Id.
Fraser, Hazelwood, and Morse are more in line with Justice Black’s dissent rather than the Tinker majority. These three cases leave students with less protection for free expression in school.

By favoring judicial deference and carving out exceptions, the Supreme Court has weakened the ruling from Tinker. Tinker is now not a mandatory test and does not apply to cases involving vulgarity, lewdness, illegal drugs, or school sponsored activities. The cases following Tinker have muddied the waters and given lower courts difficulty in consistently applying them.

Regardless of exceptions and confusion, Tinker stands as the high water mark for student expression. Of course, Tinker was decided at the end of the Warren Court which is considered more liberal than the Burger and Rehnquist Courts that followed. The case was decided during the height of a liberal time in the last days of a liberal court. In a way, Tinker came along during a “perfect storm” for individual student rights of free expression.

While Tinker was decided in favor of student rights, the three subsequent Supreme Court cases went in favor of school

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95 Chemerinsky, 48 Drake L. Rev. at 527.
96 Id.
authority.\textsuperscript{97} By 1986, when \textit{Fraser} was decided, the Court had shifted to a much more conservative view. Only three justices from \textit{Tinker}, Justice Brennan, Justice White, and Justice Marshall remained on the Court in 1986.\textsuperscript{98} All three of them had voted with the majority in \textit{Tinker}.\textsuperscript{99} However, in \textit{Fraser}, only Justice Marshall sided with the student.\textsuperscript{100} Two years later in \textit{Hazelwood}, both Justice Marshall and Justice Brennan sided with the students.\textsuperscript{101} By 2007, when \textit{Morse} was decided all three had retired.\textsuperscript{102}

Today, on the court, no justices remain from \textit{Fraser} while only Justice Scalia remains from \textit{Hazelwood}.\textsuperscript{103} The majority of the justices remain from \textit{Morse}, and the only two justices to leave the Court since 2007 both dissented in \textit{Morse}.\textsuperscript{104}

The next student speech case, whenever it may come, could do a lot to clarify the scope and meaning of \textit{Tinker}, \textit{Fraser}, \textit{Hazelwood}, and \textit{Morse}. For the sake of clarity and our public

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\item \textsuperscript{102} The Oyez Project, \texttt{http://www.oyez.org/cases/2000-2009/2006/2006_06_278} (last visited April 22, 2011).
\item \textsuperscript{103} The Oyez Project, \texttt{http://www.oyez.org/courts/robt6} (last visited April 22, 2011).
\item \textsuperscript{104} Id.
\end{itemize}
\end{footnotesize}
schools, the Supreme Court should do what they could have done in Morse and overrule Tinker.

IV. Refining the Scope of Tinker and Instituting a New Framework for Determining Regulations on Student Expression

Tinker has never been overruled—not by Fraser, Hazelwood, or Morse. However, each case added an exception to the framework for understanding student freedom of expression in public schools. First, Fraser allows a school to prohibit student expression that is lewd, vulgar, obscene, or plainly offensive. A school will always have the right to prohibit those types of expressions. Second, Hazelwood allows the school to regulate expression in school sponsored activities. The regulation must only be related to a legitimate pedagogical concern. Hazelwood rarely comes up in the context of student clothing. Third, Morse allows the school to regulate student expression if that expression promotes illegal drug use. Some courts and commentators have construed Morse much wider than that even though Justice Alito’s concurrence strictly limits the holding. If student expression does not fall within one of

105 Chemerinsky, 48 Drake at 536-38.
106 Fraser, 478 U.S. at 685-86.
107 Id.
108 Hazelwood, 484 U.S. at 273.
109 Id.
110 Morse, 511 U.S. at 409.
111 Id. at 422.
those three exceptions then the expression falls under the
Tinker substantial disruption or material interference test.\textsuperscript{112}
These cases provide the current framework for evaluating student
expression.

Unfortunately, this current framework has led to much
confusion in the lower courts. When is student expression lewd,
vulgar, obscene, or plainly offensive? When is expression
school sponsored? What expression promotes illegal drug usage?
If expression does not fall within those exceptions, what is a
substantial disruption or material interference with school
activities?

A. Fraser—Lewd, Vulgar, Obscene, or Plainly Offensive

Fraser allows schools to prohibit student expression that
is lewd, vulgar, obscene, or plainly offensive.\textsuperscript{113} This is a per
se rule that empowers the school to protect its students from
these types of expression.\textsuperscript{114}

The First Amendment is not violated when the government
protects children from indecent material.\textsuperscript{115} Fraser allows
schools to prohibit expression that is indecent which means

\textsuperscript{112} Poitr Banasiak, Morse v. Frederick: Why Content-Based Exceptions,
Deference, and Confusion are Swallowing Tinker, 39 Seton Hall L. Rev. 1059,
1076-80 (2009).
\textsuperscript{113} Fraser, 478 U.S. at 686.
\textsuperscript{114} Id. at 685-686.
\textsuperscript{115} Id. at 685.
sexually charged but perhaps not obscene.\textsuperscript{116} One problem is that indecent is a very ambiguous word and determining if something is indecent can be a very difficult proposition.\textsuperscript{117}

Fraser also allows schools to prohibit expression that is plainly offensive.\textsuperscript{118} A problem with plainly offensive is how far expression must go before it is considered plainly offensive. The student’s campaign speech in Fraser rose to that level, although Tinker’s black armbands certainly would not. That leaves a large gap between a sexually charged speech filled with double entendres and a plain, simple black armband. Lower courts are now left to make their own determinations of what is or is not plainly offensive.

Fraser provides a per se prohibition for schools.\textsuperscript{119} The schools are left to determine what is lewd, vulgar, obscene, indecent, or plainly offensive. Lewd and obscene are easier for the school to determine because they both involve the prurient element.\textsuperscript{120} Indecent and plainly offensive leave school administrators in a more murky position. Schools are not allowed to prohibit expression to prevent discomfort from unpopular viewpoints.\textsuperscript{121} However, the ambiguity of Fraser’s

\begin{footnotes}
\item[116] Id.
\item[118] Fraser, 478 U.S. at 686.
\item[119] Id. at 685-86.
\item[120] \textit{Miller}, 54 Baylor L. Rev. at 658.
\item[121] \textit{Tinker}, 393 U.S. at 508.
\end{footnotes}
plainly offensive prong allows schools, unless challenged in the courts, to do just that.

B. Hazelwood—School Sponsored Speech

Under Hazelwood, schools can regulate student expression in school sponsored activities as long as the regulation is related to a legitimate pedagogical concern.\footnote{122 \textit{Hazelwood}, 484 U.S at 273.} The Court defined school sponsored expression as "school sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."\footnote{123 Id. at 271.} Factors to determine school sponsorship include involvement of school’s faculty, the educational value of the activity, and the use of the school’s resources.\footnote{124 Scott Andrew Felder, \textit{Stop the Presses: Censorship and the High School Journalist}, 29 J.L.&Educ. 433, 444 (2000); see also Miller supra note 126 at 662.}

\textit{Hazelwood} is a much more straight forward exception than \textit{Fraser}. \textit{Hazelwood} lacks the ambiguous concepts from \textit{Fraser}, thus, making it much easier for lower courts to apply. Hazelwood, however, rarely comes up in issues involving student clothing. So while \textit{Hazelwood} might be the least ambiguous of the four Supreme Court cases on student expression, its relevance to this article is mainly to show the Supreme Court’s
move away from free student expression in Tinker and more toward
deferece to school authority.

C. Morse—Promoting Illegal Drugs and Possibly Even
More Student Welfare Issues

Under Morse, schools can prohibit student expression if
that expression promotes illegal drug use.125 Morse has led to
much confusion among both lower courts and commentators.126 Read
narrowly, Morse only applies to expression promoting illegal
drug use.127 However, some courts have interpreted Morse to mean
that school officials have a duty to shield students from speech
that advocates activities that would endanger students.128
Although the concurring justices sought to limit the scope of
Morse129, the decision increased significantly the power of
schools to impose regulations on student expression.130

The Court, although referring to drug use, primarily used
harm to students as its reasoning for siding with the school.131
Lower courts could, as it appears, have some leeway to extend
Morse to other activities like smoking, drinking, gambling, and

125 Morse, 551 U.S. at 409.
126 Banasiak, 39 Seton Hall L. Rev. at 1076-80.
127 Morse, 551 U.S. at 409.
128 See Ponce v. Socorro Ind. Sch. Dist., 508 F.3d 765 (5th Cir. 2007).
129 See Morse, 511 U.S. at 422 (Alito, J., concurring).
130 Clay Calvert, Misuse and Abuse of Morse v. Frederick by Lower Courts:
Stretching the High Court’s Ruling too Far to Censor Student Expression, 32
131 Banasiak, 39 Seton Hall L. Rev. at 1071-72.
None of those activities is per se illegal for adults like drugs but all could be viewed as harmful to students’ welfare.

The Fifth Circuit has ruled, using a Morse analysis, that “speech advocating a harm that is demonstrably grave and that derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected.” The Fifth Circuit decided that if the Morse standard applies to harm caused by drug use it should also apply to harm caused by violence. The Fifth Circuit called Justice Alito’s concurrence the controlling opinion and stated that “some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary.” The court went on to state that Tinker is too complicated to be applied to instances of student expression involving threats of violence. The court reasoned school administrators must be allowed to react swiftly and decisively to combat threats of physical violence against students. The Eleventh Circuit has also applied Morse to the threat of school violence. The Eleventh Circuit held that

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132 Calvert, Seattle U.L. Rev. at 31-32.
133 Ponce, 508 F.3d at 770.
134 Id. at 771-72.
135 Id. at 770.
136 Id. at 772.
137 Id.
138 Boim v. Fulton County Sch. Dist., 494 F.3d 978 (11th Cir. 2007).
Morse was a broad rule and could be stretched from illegal drugs to school violence.\textsuperscript{139} District courts have also twisted Morse under the guise of protecting students’ physical, emotional, and psychological well being.\textsuperscript{140}

After Morse, standards for determining whether student expression can be regulated have been further complicated. Narrowly interpreted Morse should only be read like Fraser and Hazelwood as an exception to Tinker. Although Justice Alito was very precise in trying to limit the Morse holding in his concurrence, some lower courts have stretched Morse and subverted Tinker. This has only allowed school administrators to gain even more power and control over student expression. Schools can use Morse to justify regulations based on the potential for any danger or threat to school safety and student welfare.

D. Tinker—Substantial Disruption or Material Interference?

Under Tinker, a school can regulate student expression if that expression causes or would cause a substantial disruption or material interference with the activities of the school or if

\textsuperscript{139} Id at 984.

the expression impinges on the rights of others.\textsuperscript{141} The \textit{Tinker} standard is more student friendly than the later Supreme Court cases that shifted toward school authority, although the \textit{Tinker} standard does impose a limit upon students’ free expression.\textsuperscript{142} The problem with \textit{Tinker} is the ambiguity of substantial disruption or material interference. While students wearing a black armband in protest do not seem overly disruptive, what if students talk about the armband during the school day or during class time? If two students ignore their math teacher and pass notes about the armbands, is that a substantial disruption or material interference? What if half the math class is daydreaming about protest armbands? These questions might be impossible to answer because the disruptions are not so overt as to make them obvious. A school administrator would probably say, like Justice Black in his \textit{Tinker} dissent, that any disruption is substantial, and that any expression that takes away a student’s attention from the school lessons being taught is a substantial disruption and a material interference with school activities.\textsuperscript{143} However, a student, parent, or ACLU member might not agree with that assessment.

\begin{thebibliography}{99}
\bibitem{141} \textit{Tinker}, 393 U.S. at 511-12.
\bibitem{142} Id.
\bibitem{143} Id. at 517-18.
\end{thebibliography}
The Tinker standard does not require an actual disruption.\textsuperscript{144} It only requires that the school reasonably forecast a substantial disruption or material interference.\textsuperscript{145} The Court, in Tinker, stated that the school only needs to show evidence of “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”\textsuperscript{146}

The Court, in Tinker, does require more than just a disruption or interference.\textsuperscript{147} The Tinker standard requires those to be substantial or material.\textsuperscript{148} The problem with the Tinker standard is in defining what substantial and material actually mean. Those terms are ambiguous and can have different meaning to different people according to the contexts in which they arise. For example, take two Confederate flag cases in the Sixth Circuit. In Barr v. Lafon\textsuperscript{149}, the Sixth Circuit applied Tinker to the facts of the case and found that the school could ban the wearing of the Confederate flag.\textsuperscript{150} The school provided plenty of evidence of disruptions.\textsuperscript{151} The record contained “evidence of racial violence, [racial graffiti], threats, and

\textsuperscript{144} Id. at 511-12. \\
\textsuperscript{145} Id. at 514. \\
\textsuperscript{146} Id. \textsuperscript{147} Id. at 510. \\
\textsuperscript{148} Id. \\
\textsuperscript{149} 538 F.3d 554 (6th Cir. 2008). The school is located in Maryville, TN. \\
\textsuperscript{150} Id. at 564-65. \\
\textsuperscript{151} Id. at 569.
racial tensions” at the school.\textsuperscript{152} In 	extit{Castorina v. Madison County}\textsuperscript{153}, the Sixth Circuit applied 	extit{Tinker} and found that the school could not ban the wearing of the Confederate flag absent more evidence.\textsuperscript{154} The court found no evidence of racial tension or incidents involving the Confederate flag.\textsuperscript{155} The Sixth Circuit has found that the same speech can cause a substantial disruption and material interference at one school within the Circuit but not at another school within the circuit. The 	extit{Tinker} standard allowed one banning of the Confederate flag while preventing the other. This inconsistency is a problem for courts as well as schools in deciding regulation to enforce. 	extit{Tinker} also requires more than just the “discomfort and unpleasantness that always accompany an unpopular viewpoint.”\textsuperscript{156} That discomfort and unpleasantness does not equate to any substantial disruption or material interference.\textsuperscript{157} Justice Black, in his dissent from 	extit{Tinker}, argues that if students feel discomfort and unpleasantness, their minds will be diverted from school lessons and that would be a substantial disruption.\textsuperscript{158}

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\textsuperscript{152} Id. at 566.  \\
\textsuperscript{153} 246 F.3d 536 (6th Cir. 2001). The school is located in Richmond, KY.  \\
\textsuperscript{154} Id. at 544.  \\
\textsuperscript{155} Id.  \\
\textsuperscript{156} 	extit{Tinker}, 392 U.S. at 508.  \\
\textsuperscript{157} Id.  \\
\textsuperscript{158} Id. at 517-18.  \\
\end{flushright}
The Tinker standard can be very difficult for a school to prove. The school must provide some actual evidence of disruptions or a forecast of disruption based on facts that would reasonably lead to disruption.\textsuperscript{159} Tinker has the heaviest burden of the Supreme Court cases involving student expression, and Tinker provides student with the most protection.\textsuperscript{160} While not as powerful as it was in 1969 or even in 1985, Tinker still stands as a safeguard for students’ rights to freedom of expression.

Tinker remains good law to this day even after the Supreme Court carved out exceptions in Fraser, Hazelwood, and Morse. However, unlike 1969, today Tinker does not stand as the rule regarding student expression, but instead as the last part of a larger framework that has whittled away part of Tinker’s original power.

E. Lower Court Challenges for Specific Types of Clothing/Symbols: What Standard Applies?

The unsettled waters of free speech rights in public schools are “rife with rocky shoals and uncertain currents.”\textsuperscript{161} After Fraser, Hazelwood, and Morse, some courts and commentators claim that Tinker has been overruled.\textsuperscript{162} However, none of the

\textsuperscript{159} Id. at 514.
\textsuperscript{160} Compared to Fraser, Hazelwood, and Morse.
\textsuperscript{161} Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006).
\textsuperscript{162} See Baxter v. Vigo County Sch. Copr., 26 F.3d 729, 737–38 (7th Cir. 1994).
three subsequent Supreme Court cases expressly overruled Tinker. Tinker remains good law even after the recent assaults on its holding. With Tinker still standing as good law, the question remains when does Tinker apply and if Tinker does not apply when do the other cases apply? Lower courts have used all four cases to determine whether or not a prohibition of student expression is allowed. This section will discuss those four standards that lower courts have used them to decide the prohibitions to certain types of clothing.

1. Political Clothing and Buttons

In the area of political clothing or buttons, the lower courts have used all four of the Supreme Court cases on student expression to decide whether or not a prohibition is appropriate.

In Chandler v. McMinnville\textsuperscript{163}, students wore buttons with “scab” and other phrases in support of their teachers during a strike.\textsuperscript{164} The school suspended them, and the students filed a claim.\textsuperscript{165} The district court used Fraser in siding with the school.\textsuperscript{166} The court ruled the word “scab” was offensive and that the buttons were like Cohen’s jacket.\textsuperscript{167} The Ninth Circuit

\begin{itemize}
  \item \textsuperscript{163} 978 F.2d 524 (9th Cir. 1992). The school is in McMinnville, OR.
  \item \textsuperscript{164} Id. at 526.
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} Id. at 527-28
  \item \textsuperscript{167} Id.
\end{itemize}
rejected the idea that “scab” was offensive.\textsuperscript{168} The Ninth Circuit held that Fraser did not apply, and Tinker was used as the standard.\textsuperscript{169} The case was then remanded back to the district court.\textsuperscript{170}

The Second Circuit made a similar decision in \textit{Guiles v. Marineau}.\textsuperscript{171} A student wore a shirt with images of President Bush, alcohol, and drugs.\textsuperscript{172} The district court used the Fraser analysis to determine that because of the drugs and alcohol the shirt could be banned.\textsuperscript{173} The Second Circuit overruled the district court and stated Fraser only applied to lewd, vulgar, indecent, and plainly offensive.\textsuperscript{174} The images on the shirt did not qualify as any of those, therefore, Fraser was inapplicable.\textsuperscript{175} The Second Circuit applied the Tinker standard instead and found that no disruption was shown so the shirt could not be banned.\textsuperscript{176} The court allowed a thirteen year old boy to wear a shirt to school that depicted drugs and alcohol. This case was decided before Morse, and some courts think this case might be decided differently after Morse.\textsuperscript{177} However, there would be a question of whether the shirt was actually promoting

\begin{footnotes}
\textsuperscript{168} Id. at 530.
\textsuperscript{169} Id. at 530-31.
\textsuperscript{170} Id.
\textsuperscript{171} 461 F.3d 320 (2d Cir 2006). The school is in Williamstown, VT.
\textsuperscript{172} Id. at 322.
\textsuperscript{173} Id. at 323.
\textsuperscript{174} Id. at 327-29.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 330-31.
\end{footnotes}
illegal drug use or not. This shirt would possibly be allowed even today. This, of course, only adds to the confusion in lower courts.

In *Barber ex. rel Barber v. Dearborn Public Schools*\(^{178}\), a student wore a shirt with the words “International Terrorist” written under a picture of President Bush in protest of foreign policy and the impending war in Iraq.\(^{179}\) Ten years earlier, during the Gulf War, there were major disruptions at a nearby school.\(^{180}\) However, no disruptions were shown in this case.\(^{181}\) The court used the *Tinker* standard and said that prohibitions cannot be based off of events at another school in the past.\(^{182}\)

These cases are just a few of the many lower court decisions involving clothing and political speech. As evidenced from these, district courts and circuit courts do not agree on whether to use *Tinker* or *Fraser* and *Morse* could also come into play depending on what the clothing depicts.

### 2. Confederate Flag

The Confederate flag is a very controversial symbol especially in certain areas of the country. Schools have often prohibited the wearing of images of the flag. Confederate flag

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\(^{178}\) 286 F.Supp.2d 847 (E.D.Mich. 2003). The school is in Dearborn, MI.

\(^{179}\) Id. at 849-50.

\(^{180}\) Id. at 857.

\(^{181}\) Id. at 856-58.

\(^{182}\) Id. at 857.
cases are much more like Tinker than cases involving other symbols and depictions discussed in this article. Just as the Vietnam War was a heated topic that caused much division so is the debate over the Confederate flag. Based on that division, Confederate flag cases are sometimes easier for courts to decide because the cases often involve actual disruptions to the school. The issue of racism vs. heritage invokes emotions on both sides that can spill over into violence or demonstration.

The Sixth Circuit has been a hotbed for Confederate flag litigation. Just three years after Tinker, the Sixth Circuit used the Tinker substantial disruption test in Melton v. Young.\textsuperscript{183} The court stated that plenty of evidence of disruption could be found, and therefore the school could ban the Confederate flag.\textsuperscript{184} The court made similar rulings in both Brogdon v. Lafon\textsuperscript{185} and Barr v. Lafon.\textsuperscript{186} The court also used the Tinker standard in Castorina v. Madison County\textsuperscript{187} but found little to no evidence of any tension or incidents at the school.\textsuperscript{188} The case was remanded to determine if any evidence existed.\textsuperscript{189}

\textsuperscript{183} 465 F.2d 1332 (6th Cir. 1972). The school is in Chattanooga, TN.
\textsuperscript{184} Id. at 1335.
\textsuperscript{185} 217 Fed. Appx. 518 (6th Cir. 2007). The school is in Maryville, TN.
\textsuperscript{186} 538 F.3d 554 (6th Cir. 2008).
\textsuperscript{187} 246 F.3d 536 (6th Cir. 2001).
\textsuperscript{188} Id. 542-44.
\textsuperscript{189} Id. at 544.
Other lower courts have made similar rulings using the Tinker standard. In *Phillips v. Anderson*\(^{190}\), a student was suspended for wearing a Confederate flag jacket.\(^{191}\) There was evidence of several racial incidents at the school.\(^{192}\) The United States District Court in South Carolina looked at *Tinker*, *Fraser*, and *Hazelwood* before deciding that *Tinker* was the proper standard to use.\(^{193}\) Twelve years later in *Hardwick v. Heyward*\(^{194}\), the same court also looked to the *Tinker* standard.\(^{195}\) In ruling in favor of the school, the court noted that schools can rely on past incidents to anticipate future disruptions.\(^{196}\) In *BWA v. Farmington R-7 School District*\(^{197}\), the Eastern District Court in Missouri went even farther to include that schools could ban Confederate flags based on reasonably forecasting a substantial disruption based on prior incidents not only at the school but also in the community.\(^{198}\) However, in *Bragg v. Swanson*\(^{199}\), the Southern District Court in West Virginia found that the school cannot base prohibition of the Confederate flag solely on events at another school.\(^{200}\)

\(^{190}\) 987 F.Supp. 488 (D.C.S. 1997). The school is in Anderson Co., SC.
\(^{191}\) Id. at 491.
\(^{192}\) Id. at 490-91.
\(^{193}\) Id. at 493.
\(^{194}\) 674 F.Supp.2d 725 (D.S.C. 2009). The school is in Dillon Co., SC.
\(^{195}\) Id. at 736
\(^{196}\) Id.
\(^{197}\) 554 F.3d 734 (E.D.Mo. 2007). The school is in Farmington, MO.
\(^{198}\) Id. at 741.
\(^{200}\) Id. at 827.
Cases involving the Confederate flag have been in line with the Tinker standard based on the volatility of the issue and its potential for disruption through violence or protest.

3. Pro and Anti-Homosexual

Another area where Tinker has been used is cases involving clothing that are pro or anti-homosexuality. However, some of these cases interpret Tinker differently than others. Some courts have interpreted Tinker as having two prongs. The first prong of Tinker is the substantial disruption or material interference with school activities. The second prong is that a school may regulate student expression or speech if that speech or expression would “impinge upon the rights of other students,” regardless of whether the expression would cause any disruption or interference with school activities.

In Harper v. Poway Unified School District, the Ninth Circuit used this two prong Tinker analysis. A school had prohibited a student from wearing a t-shirt that condemned homosexuality. Instead of using the Tinker substantial disruption analysis, the court focused on Tinker’s other prong.

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202 Id.
203 Id.
204 345 F.3d 1166 (9th Cir. 2006). The school is in Hobbs, NM.
205 Id. at 1177.
206 Id. at 1171-73.
which the court called the “rights of others.” 207 The court reasoned the messages on the shirt impinged on the rights of others “in the most fundamental way.” 208 The court then concluded that “public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.” 209 The court proclaimed that evidence of a disruption was not necessary under the second prong of Tinker and that schools may prohibit certain expression without a substantial disruption. 210

Nuxoll v. Indian Prairie School District 211 is a similar case to Harper. In Nuxoll, the school banned a shirt that read “Be Happy, Not Gay.” 212 In the opinion, Judge Posner focused more on disruption to student welfare than disruption to school activities. 213 Although he focused on student welfare, Judge Poser never suggested the use of Tinker’s second prong. The school showed no facts of harm to student welfare, and the court said the shirt only had a slight tendency to cause disruption. 214

207 Id. at 1177.
208 Id. at 1178.
209 Id.
210 Id. at 1178-80.
211 523 F.3d 668 (7th Cir. 2008). The school is in Naperville, IL.
212 Id. at 670.
213 Id. at 675-76.
214 Id.
Therefore, the shirt was found to be insufficiently derogatory.\textsuperscript{215}

Other cases involving homosexual clothing have focused mainly on \textit{Tinker}'s substantial disruption test. In \textit{Gilman v. Holmes County School Board}\textsuperscript{216}, a school had banned pro-homosexual shirts.\textsuperscript{217} The court focused on the \textit{Tinker} substantial disruption standard and found no disruption and that any forecasted disruption was only speculative and theoretical.\textsuperscript{218} Therefore, the school's ban was improper. Although the court used the substantial disruption standard, it did mention \textit{Tinker}'s second prong. The court said in this instance that the expression did not interfere "with rights of other students to be secure and let alone."\textsuperscript{219}

The cases that use the two prong \textit{Tinker} analysis focus on student welfare. \textit{Morse} also has been stretched by some courts to protect students' safety and welfare. It is possible that courts could stretch \textit{Morse} into the realm of homosexual clothing under the idea of protecting students' psychological and emotional health.

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\textsuperscript{215} Id. at 676.
\textsuperscript{216} 567 F.Supp.2d 1359 (N.D.Fla. 2008). The school is in Ponce de Leon, FL.
\textsuperscript{217} Id. at 1362.
\textsuperscript{218} Id. at 1373-74.
\textsuperscript{219} Id.
\end{flushright}
4. Lewd, Vulgar, Indecent, or Plainly Offensive

Merriam Webster’s dictionary defines “lewd” as “inciting to sensual desire or imagination,”\textsuperscript{220} “vulgar” as “lewd, obscene, or profane in expression,”\textsuperscript{221} and “indecent” as “being or tending to be obscene.”\textsuperscript{222} Courts have mostly used Fraser in determining whether clothing deemed vulgar, lewd, indecent, or offensive can be prohibited by schools.

In \textit{Boroff v. Van Wert City Board of Education}\textsuperscript{223}, a school banned a student from wearing a Marilyn Manson shirt with a picture of Jesus and the word “BELIEVE” with LIE highlighted.\textsuperscript{224} The court used Fraser to uphold the school’s ban on the shirt.\textsuperscript{225} Although the shirt contained nothing lewd, vulgar, or indecent, the court stated that the shirt was offensive.\textsuperscript{226} In this case, it could certainly be argued that the court overstepped the bounds of Fraser and that Tinker should have been used.

In \textit{Pyle v. South Hadley}\textsuperscript{227}, a school banned sexual double entendre shirts.\textsuperscript{228} The court found that this case was the equivalent of Fraser, and the shirt ban was allowed.\textsuperscript{229}

\textsuperscript{221} Id. at 2566.
\textsuperscript{222} Id. at 1142.
\textsuperscript{223} 220 F.3d 465 (6th Cir. 2000). The school is in Van Wert, OH.
\textsuperscript{224} Id. at 467.
\textsuperscript{225} Id. at 469–71.
\textsuperscript{226} Id.
\textsuperscript{227} 861 F.Supp 157 (D.Mass. 1994). The school is in South Hadley, MA.
\textsuperscript{228} Id. at 158–59.
\textsuperscript{229} Id. at 168–70.
Sometimes courts go over the top to ban certain messages. In Broussard v. Norfolk\textsuperscript{230}, a seventh grade student wore a shirt that said “Drugs Suck.”\textsuperscript{231} The court reasoned that the word suck has sexual connotations and Fraser would allow the banning of the shirt.\textsuperscript{232} The court also noted that the shirt could cause disruption and could be banned under Tinker as well.\textsuperscript{233} The court here seems to be stretching a bit because the student was twelve years old. The case might have turned out differently if the student had been eighteen.

V. Mission of Public Education

“[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”\textsuperscript{234} There are two dominant models in public education: the Inculcation Model and the Marketplace Model.\textsuperscript{235} In the Inculcation Model, the purpose of the public school system is to teach students certain values and beliefs.\textsuperscript{236} In the Marketplace Model, public schools should present a variety

\begin{footnotes}
\footnote{230} 801 F.Supp. 1526 (E.D.Va. 1992). The school is in Norfolk, VA.
\footnote{231} Id. at 1528.
\footnote{232} Id. at 1534.
\footnote{233} Id. at 1537.
\footnote{234} Brown, 347 U.S. at 493.
\footnote{236} Id.
\end{footnotes}
of ideas and encourage students to be free thinkers.\textsuperscript{237} The Supreme Court has supported each model in its rulings on public schools.\textsuperscript{238}

Historically, the duty of public schools has been recognized to prepare youth for participation in the democratic process.\textsuperscript{239} The Supreme Court has supported the Inculcation Model stating public schools are vital to “inculcating fundamental values necessary to the maintenance of a democratic political system.”\textsuperscript{240} The Court went on to state that all teachers have an obligation to “promote civic virtues.”\textsuperscript{241} In Fraser, the Court stated that the work of public schools includes teaching “the habits and manners of civility.”\textsuperscript{242}

One of the first Supreme Court cases to question inculcation was \textit{West Virginia Board of Education v. Barnette}\.\textsuperscript{243} The Court held that the Pledge of Allegiance was narrow ideological indoctrination and not compulsory.\textsuperscript{244}

The next major case to question inculcation was \textit{Tinker}\.\textsuperscript{245} Justice Fortas, quoting \textit{Shelton v. Tucker} in the majority opinion, states that the classroom is the marketplace of ideas

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{237} Id.
\item \textsuperscript{238} See \textit{Ambach v. Norwich}, 441 U.S. 68 (1979) (supporting inculcation); \textit{Barnette}, 319 U.S. 624 (questioning inculcation)
\item \textsuperscript{239} Mitchell supra note 251 at 700.
\item \textsuperscript{240} \textit{Ambach}, 441 U.S. at 77.
\item \textsuperscript{241} Id. at 80.
\item \textsuperscript{242} \textit{Fraser}, 478 U.S. at 681.
\item \textsuperscript{243} \textit{Barnette}, 319 U.S. at 641
\item \textsuperscript{244} Id. at 641-42.
\item \textsuperscript{245} \textit{Tinker}, 393 U.S. 503
\end{itemize}
\end{footnotesize}
and that the future of our nation “depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues’, (rather) than through any kind of authoritative selection.” 246 Justice Fortas goes on to proclaim that schools are not “enclaves of totalitarianism”, school officials do not have absolute authority over students, and schools cannot suppress expressions with which they do not wish to contend. 247

Of course, Justice Black’s vigorous dissent in Tinker argues very staunchly in favor of inculcation. 248 Justice Black wrote that “school discipline, like parental discipline, is an integral and important part of training our children to be good citizens— to be better citizens.” 249 Justice Black feared the implications of the Court supporting a marketplace idea. 250 He feared that schools would be overtaken by protests and other types of unrest because the school would be powerless to stop them. 251

The inculcation vs. marketplace of ideas debate goes hand in hand with the debate over freedom of student expression. Both reached their high points during the Warren Era with Tinker and both have been significantly altered since that time. Both

246 Id. at 512 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))
247 Id. at 511.
248 Id. at 515.
249 Id. at 524.
250 Id. at 524-25.
251 Id.
rise and fall, as do many other issues, depending on which political party is in power in this country. Perhaps with changes in our society and events like Columbine, rights of student expression and the Marketplace Model may never again reach the levels they achieved in Tinker.

VI. Tinker’s Lasting Effects on Public Schools

Tinker should be viewed as a product of a turbulent time in American History. Marin Luther King and Robert F. Kennedy had just been assassinated and the Vietnam War was still going on. This was a time of significant unrest when young people were rebelling and questioning authority. Tinker fit in with the counter culture movement on the late 1960s. Today, however, that decision has unfortunately helped to erode the foundations of order, respect, and discipline that are all necessary for public schools to be effective.

A. In Loco Parentis

In loco parentis, which literally means in the place of a parent, has been applied to public schools as far back as 1837.252 “One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous.

252 Morse, 551 U.S. at 413 (Thomas, J., dissenting).
members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits... The teacher is the substitute of the parent; ... and in the exercise of these delegated duties, is invested with his power.”

The doctrine gives power to teachers to act with parental authority over students. The power to discipline students “is essential to the preservation or order, decency, decorum, and good government in schools.”

David Whitman wrote that “the paternalistic presumption, implicit in the schools... is that the poor lack the family and community support, cultural capital, and personal follow-through to live according to middle-class values.”

Mr. Whitman recognizes the need for public schools to provide paternalistic protection and value inculcation to students. Without the public schools, a great number of children would have no parental authority figures or any sense of discipline.

*Tinker* dealt a heavy blow to the doctrine of *in loco parentis*. Instead of viewing schools and school officials as parental figures, *Tinker* made them the adversary.

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255 Mr. Whitman is a Senior Writer at the U.S. Department of Education.
saw schools as “enclaves of totalitarianism.” Based on these views, the Court did not want public schools having in loco parentis powers. The decision took power from public schools and handcuffed school administrators. The Tinker majority refused to trust the judgment of educators.

B. Tinker Weakens Public Schools’ Power to Regulate Student Speech

The Supreme Court severely weakened the public schools’ power to regulate student speech with the Tinker decision. Schools are now subject to judicial oversight of their day-to-day affairs. School officials are subject to judicial review for decisions on what causes a disruption or interference with school activities. This has aided in the deterioration of public schools in America. Justice Black’s fears have become realities. Teachers, who were once considered respected authority figures, are now subjected to defiance, disrespect, and disorder.

Although the three subsequent student speech cases all went against Tinker and created exceptions, Tinker still survives. The Supreme Court should give power back to the schools by

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258 Tinker, 393 U.S. at 511.
259 Dupre, 65 Geo. Wash. L. Rev. at 73-73.
260 Morse, 551 U.S. at 420 (Thomas, J., dissenting).
261 Dupre, 65 Geo. Wash. at 50.
262 Id.
263 Id.
overruling Tinker. Substantial disruption is too vague of a concept for school officials, who are not trained in the law. Instead of doing the right thing, school officials must first question what a court would think of the discipline. Guessing what a court would think is not an effective way to govern a school.

C. What Exactly is a Substantial Disruption of Material Interference?

If students in a math class are chatting about a symbol on a shirt instead of fractions, should the math teacher really have to think about whether the shirt is a “substantial disruption” or should the teacher be able to force the student to change shirts? Justice Black would correctly say change the shirt, but the Tinker majority might say otherwise depending on the nature of the chatter. Teachers are stuck with this conundrum of whether to discipline students or just ignore them and avoid the trouble or even a potential lawsuit. Students are easily distracted and even a minor distraction can disrupt and ruin an entire class period. However, when school officials decide to prohibit distracting symbols or shirts, they create a situation where courts can second guess even the best of decisions. Tinker allows students to subvert school rules.
Tinker did not define “substantial disruption or material interference.” That ambiguity leaves school officials guessing based on how they think a court might rule. It also invites countless challenges and endless litigation regarding what “substantial disruption or material interference” means in the school context. That is not an effective method for teachers or students. Lower courts have been left to determine what it means on a case-by-case basis. It is time for the Supreme Court to take notice of these struggles and overrule Tinker.

D. Tinker Created a “Broken Window”

Tinker aided the downward turn of the American educational system. The decision created a “broken window” by allowing open defiance of school authority. In 1982, James Q. Wilson and George L. Kelling introduced the “broken windows” theory.\(^{264}\) The theory asserts that small amounts of disorder, like a broken window that is left unrepaired, will over time lead to crime and more disorder.\(^{265}\) Wilson and Kelling argued that if small crimes were tolerated then the neighborhood disorder would serve as a signal to other criminals that crimes go unpunished.\(^{266}\) The one unrepaired broken window progressively leads to the breaking


\(^{265}\) Id.

\(^{266}\) Id.
down of the community’s values and standards.\textsuperscript{267} \textit{Tinker} served as a “broken window” for public education. Every misconduct or defiant act that \textit{Tinker} allowed because it did not meet the substantial disruption or material interference standard further eroded the values, discipline, and order of public schools.

While \textit{Tinker} was not alone, it has more than served its part in the diminution of public education. \textit{Tinker} has caused schools to relax their disciplinary practices. Teachers are now leery of maintaining a high level of discipline because of the fear of lawsuits. The Court should overrule \textit{Tinker} and adopt the standard laid out by Justice Harlan in his \textit{Tinker} dissent.

**VII. What Should the Supreme Court do to Remedy the Problems Caused by \textit{Tinker}?**

In abolishing \textit{Tinker} and imposing a new standard, the Court should look to Justice Harlan’s dissent from \textit{Tinker}. Although only a paragraph long, Justice Harlan sets forth a standard that does not strip schools of their power to discipline and is much clearer than the ambiguous “substantial disruption or material interference” standard. In the Harlan standard, students are required to show that the school was motivated by something other than “legitimate school concerns.”\textsuperscript{268} For example, the student must show that the school was prohibiting an unpopular

\textsuperscript{267} Id.

\textsuperscript{268} \textit{Tinker}, 393 U.S. at 526 (Harlan, J., dissenting).
viewpoint while allowing the dominant view.\textsuperscript{269} The student would need to show some evidence of bad faith by the school in its prohibition.

The Harlan standard would serve almost like the business judgment rule for corporations.\textsuperscript{270} It would create a presumption in favor of the schools and courts would only intervene if the students could provide some evidence of bad faith. This would allow schools to create an environment of discipline and order rather than an environment of permissiveness. If the Supreme Court would overrule \textit{Tinker} and adopt Justice Harlan’s standard, it could begin to repair some of the “broken windows” of our public schools.

\textbf{Conclusion}

Children are sent to school to learn, not to cause disruptions and protest. However, \textit{Tinker} opened an avenue that allows students to do just that. \textit{Tinker} and its defiance of authority made public schools the enemy of student expression. Justice Black’s fears have become reality. Public schools are being subjected to the whims of not the brightest but the loudest-mouthed students. What else could justify courts or

\textsuperscript{269} Id.
\textsuperscript{270} Bryan A. Garner, \textit{Black’s Law Dictionary} 83 (3d pocket ed. 2006). The business judgment rule shields directors from liability for unprofitable business decisions as long as the decisions were made in good faith, with due care, and within the director’s authority.
parents allowing a thirteen year old to wear a shirt depicting the President snorting cocaine and drinking alcohol?271

Although subsequent cases added exceptions, Tinker is still a viable standard for student speech cases. It is time for the Supreme Court to free public schools from the burdens imposed by Tinker and opt for a new standard that leaves school officials with the power to control their schools. The Court should overrule Tinker and replace it with Justice Harlan’s standard. That would clear up the vagueness of Tinker’s “substantial disruption or material interference” standard and put public education back on the road to order, discipline, and decorum.

271 See Guiles, 461 F.3d at 321.