

An Uncertain Heritage: *Tinker, Fraser, and the Confederate Flag*

C. Knox Withers

University of Georgia
School of Law

Contact Information

C. Knox Withers
329 Dearing Street
Apt. # 24-B
Athens, Georgia 30605
(706) 316-9132
knoxwithers@yahoo.com

Degrees

B.B.A., May 2000
University of Georgia
Terry College of Business

J.D., Expected May 2005
University of Georgia
School of Law

Dean's Information

Dean Rebecca H. White
University of Georgia
School of Law
Dean's Office
Athens, Georgia 30602
(706) 542-7140
rhwhite@uga.edu

Abstract: The Confederate flag has been controversial at best and explosive at worst. Recently, the American public school has emerged as a new battleground in the struggle over the appropriateness of this Civil War icon. Courts have relied upon two Supreme Court decisions in striking a balance between a student's right to express his or her views and a schoolmaster's charge to maintain discipline: Tinker and Fraser. Although these standards have been helpful in deciding later cases, the Confederate flag cases present a problem when the facts of a given case do not fit neatly into a Tinker or Fraser mold.

Table of Contents

	Page No.
Part I: Introduction.....	1
Part II: The <u>Tinker</u> and <u>Fraser</u> Standards.....	2
Part III: The Confederate Flag Cases.....	6
A. Cases Decided Under the <u>Tinker</u> Analysis.....	7
B. <u>Fraser</u> 's Charge: The Eleventh Circuit Departs from <u>Tinker</u>	12
Part IV. Is <u>Fraser</u> an Appropriate Standard?.....	17
Part V. Conclusion.....	23
Bibliography.....	26

An Uncertain Heritage: *Tinker, Fraser, and the Confederate Flag*

I. Introduction

“I am a bigot and a racist.” “I am proud of my Southern Heritage.” Which of these two statements does one make when he displays an image of the Confederate Flag? The answer depends, of course, on whom one asks. For years, the Confederate flag has been controversial at best and explosive at worst. Recently, a new battleground has emerged in the struggle over the appropriateness of this Civil War icon: the American public school. In many school districts across the country, boards of education have taken affirmative measures to prohibit the Confederate flag from darkening the doorsteps of their schoolhouses. Generally, these prohibitions either follow incidents of disruption that the flag has caused or attempt to prevent disruption before it occurs. Inevitably, such actions also implicate public school students’ First Amendment right to free speech.

Tip-toeing around the issue of free speech in public schools, courts have relied principally upon two Supreme Court decisions in striking a delicate balance between a student’s right to express his or her views and a schoolmaster’s charge to maintain order and discipline: *Tinker v. Des Moines Independent Community School District*¹ and *Bethel School District, No. 403 v. Fraser*.² Each of these two cases established a standard by which courts measure the reasonableness of a school’s decision to prohibit certain forms of speech. Although these standards have been helpful in deciding later cases, each is most successful when applied to cases mirroring its own factual circumstances. The Confederate flag cases present a problem when the facts of a given case do not fit neatly into a *Tinker* or *Fraser* mold.

While leaving the Southern-pride-versus-racist-symbol argument for others, Parts II and III examine *Tinker* and *Fraser* and how courts apply these two analyses to the Confederate flag cases. Part IV identifies the weaknesses apparent in each analysis when applied to the

¹ 393 U.S. 503 (1969).

² 478 U.S. 675 (1986).

Confederate flag cases. Finally, Part IV concludes that, although neither Tinker nor Fraser offers a particularly appealing resolution to the problem of the display of Confederate flags in public schools and despite the fact that courts have normally applied a Tinker analysis, Fraser presents a more appropriate option.

II. The Tinker and Fraser Standards

When school authorities seek to prohibit displays of the Confederate flag and to enforce disciplinary measures pursuant to violations of policy, students and their families invariably assert the First Amendment right to freedom of speech. Tinker is the seminal case concerning the extent to which public school students enjoy the right to free speech. In anticipation of a student protest of the Vietnam War, the principals of the Des Moines public schools implemented a policy prohibiting the wearing of black armbands to school and suspended several students for violating the policy. The students' parents sued to enjoin the school board from enforcing the suspensions, and the district court held for the school district,³ reasoning that such action was necessary in order to maintain discipline and prevent disruption. An equally divided Eighth Circuit affirmed without opinion.⁴

The United States Supreme Court reversed, holding that the students' conduct fell within the purview of the First Amendment because the expression constituted speech that neither caused disruption of school discipline nor impinged the rights of others.⁵ Further, the Court held that content-based prohibitions are constitutionally impermissible in the absence of any evidence that such suppression is necessary to avoid material interference with schoolwork or discipline.⁶ Although school officials must have the "comprehensive authority...to prescribe and control

³ 258 F.Supp. 971 (S.D. Iowa 1966).

⁴ 383 F.2d. 988 (8th Cir. 1967).

⁵ 393 U.S. at 514 (stating that the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others").

⁶ Id. at 513.

conduct in schools,” the Court noted that “[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.”⁷ The Court emphasized that the First Amendment protects the expression of viewpoints when the conduct employed to make the point does not involve the disruption of school activities.⁸ Most importantly, although the district court upheld the suspensions because of a fear of disturbance that the wearing of the armbands would create, the Court stated that the “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”⁹ Thus, Tinker stands for the proposition that school authorities may only suppress the expression of opinion if they are able to show that such expression will “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”¹⁰ Further, a prohibition on expression must be content-neutral unless there is evidence that the restriction on the content of the speech is necessary to curtail disruption and interference with the school’s function.¹¹

The circumstances surrounding nearly every Confederate flag case mirror those presented in Tinker, so it seems reasonable that Tinker’s “undifferentiated fear or apprehension

⁷ Id. at 506-07.

⁸ Id. at 505-08 (The “wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment,” and the conduct was a “passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”).

⁹ Id. at 508; further, the Court noted that “[a]ny departure from absolute regimentation may cause trouble. 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.” Id. at 508.

¹⁰ 393 U.S. at 509.

¹¹ Id. at 511.

of disturbance” test should be the measuring stick for such cases. In Fraser, however, the Supreme Court added a new wrinkle to its “free speech in public schools” jurisprudence. During a school assembly, a student used “elaborate, graphic, and explicit sexual metaphor” in a speech nominating a fellow student for office.¹² The school district disciplinary panel suspended the student, having determined that the speech was “indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance.”¹³ The district court held that the suspension violated the student’s First Amendment right to freedom of speech, that the school’s disciplinary rule was unconstitutionally vague, and that the sanctions violated the Due Process Clause of the Fourteenth Amendment.¹⁴ Finding the case indistinguishable from Tinker, the Ninth Circuit affirmed the district court and rejected the school’s claim that Fraser’s speech was disruptive.¹⁵ Reversing, the Supreme Court held that the First Amendment does not inhibit a school district’s authority to discipline a student for speech that is lewd and indecent, even though adults in other settings may not be so restricted, and the school board has the authority to determine what manner of speech may be inappropriate.¹⁶ The maintenance of order in public

¹² 478 U.S. at 678.

¹³ Id. at 678-79. Further, several students “hooted and yelled” and made sexually suggestive gestures, while others appeared “bewildered and embarrassed. One teacher had to forgo a portion of her scheduled lesson to address the speech with her class. Id. at 678.

¹⁴ Id. 679.

¹⁵ Id. at 679. The Ninth Circuit “explicitly rejected the School District’s argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process.” Id.

¹⁶ Id. at 685-86 (“[I]t was perfectly appropriate for the school to dissociated itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”).

schools, moreover, demands that school boards have flexibility in determining disciplinary procedures, and these procedures need not therefore be as detailed as criminal penal codes.¹⁷

In seeking to balance the freedom to express unpopular views in schools against “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior,” the Supreme Court focused on the inherent purpose and function of American public schools and noted that, although they must promote tolerance of divergent viewpoints, schools “must also take into account consideration of the sensibilities of...fellow students.”¹⁸ The “constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings,” and the school board certainly has the authority to determine what constitutes socially acceptable speech within the school.¹⁹ Therefore, although public school students do not surrender their rights to free speech at the schoolhouse door, the Fraser standard provides that school authorities may prohibit speech that they determine to be lewd or indecent, and such a determination is safely within their authority. Further, school policies that prohibit disruptive conduct need not be as detailed as criminal statutes as long as such policies give students adequate warning that certain conduct may result in disciplinary sanctions.

Is the display of the Confederate flag similar to the wearing of a black armband such that the Tinker test of material and substantial interference with school discipline should be determinative, or is it so offensive that Fraser should control? Indeed, most courts have applied the Tinker standard, but the Eleventh Circuit has departed from the majority and has opted to

¹⁷ 478 U.S. at 686.

¹⁸ Id. at 681 (noting that the “role and purpose of the American public school system” is, at least in part, to “inculcate the habits and manners of civility as values in themselves conducive to happiness and indispensable to the practice of self-government in the community and the nation”).

¹⁹ Id. at 682-83 (agreeing with school authorities that Fraser’s speech was “plainly offensive to both teachers and students – indeed to any mature person”).

apply the more “flexible” Fraser standard to the Confederate flag cases. Why is one preferable to the other? What characteristics do the two tests share, and on which points do they diverge? Under Tinker, in order for a school to suppress a particular viewpoint, school authorities must be able to demonstrate that the expression of that viewpoint is reasonably likely to result in a material and substantial interference with discipline and schoolwork. Fraser, in contrast, holds that, even if there is no reasonable fear of material and substantial interference with discipline and schoolwork, a school may nevertheless suppress speech that it determines to be inconsistent with the school’s fundamental purpose of instilling within students an understanding of socially acceptable behavior.

Certainly, Tinker and Fraser overlap to some degree: any material and substantial disruption of discipline or schoolwork inhibits the school’s role of inculcating the values of civic virtue. Fraser seems to extend beyond Tinker, however, in that it allows schools to suppress speech that causes no material disruption. This expansion may seem insignificant in the context of these two Supreme Court cases: Tinker involved a medium of speech that could hardly be construed as lewd, indecent, or implicating the fundamental values of a civilized society, while Fraser concerned speech that resulted in little, if any, disruption that would warrant disciplinary action under the Tinker standard. Nevertheless, the distinction between these cases becomes important when the “speech” might be viewed simultaneously – but by different parties – as both a “passive expression of opinion”²⁰ and an expression that disregards the “sensibilities of fellow students.”²¹

III. The Confederate Flag Cases

Whether one views the Confederate flag as a symbol of heritage or a vestige of slavery, one cannot deny that the banner is a divisive emblem. Given the often-heated state of racial relations in the United States, it is therefore unsurprising that a clash of viewpoints on the issue

²⁰ Tinker, 393 U.S. at 508.

²¹ Fraser, 478 U.S. at 681.

frequently leads to violence. In turn, most of the cases concerning the exhibition of the Confederate flag in public schools have naturally been decided under the Tinker standard of disruption and interference with school discipline. Further, school districts that prohibit the display of the flag usually prevail, but there are exceptions to this general rule. On occasion, the suppression of the student's display of the flag is found unlawful, and courts sometimes abandon the Tinker standard when the facts of a particular case are unlikely to result in a victory for school officials.

A. Cases Decided Under the Tinker Analysis

The first prominent case in which a court upheld a ban on the display of Confederate flags was Melton v. Young.²² In Melton, the local school and town had experienced significant racial tension related to the display of the Confederate flag – including its use as the official school flag – and the use of the song “Dixie” as the school song. Prior to the 1970 school year, in an attempt to curtail the violence, the Board of Education discontinued the official use of the flag and “Dixie” and prohibited the display of the flag in schools.²³ The principal subsequently suspended a student for wearing a jacket emblazoned with the Confederate flag on one sleeve, having determined that the emblem was provocative and violated school policy, despite the student's claim that he merely wished to demonstrate his Southern heritage. The student sued, claiming a violation of his First Amendment rights, and the district court upheld the suspension as a valid use of the school's authority to prevent disruption of educational activities, even though it found the policy against provocative symbols to be unconstitutionally vague.²⁴ Relying on Tinker, the Sixth Circuit affirmed the decision of the district court, concluding that evidence of prior racial violence warranted the school's reasonable fear that continued display of the Confederate flag

²² 465 F.2d. 1332 (6th Cir. 1972).

²³ Id. at 1333-34.

²⁴ Id. at 1334. The student code of conduct provided that “provocative symbols on clothing will not be allowed.”

would result in further disruption.²⁵ Significant were the facts that, in 1969, demonstrations disrupted classes, “a motorcade drove through various parts of the city waving Confederate flags,” local authorities imposed a city-wide curfew for four nights,²⁶ and school was closed on two occasions.²⁷

In West v. Derby Unified School District, No. 260,²⁸ the Tenth Circuit likewise upheld a student’s suspension under a Tinker analysis. The assistant principal suspended a student who drew a Confederate flag during math class, despite a specific prohibition of such conduct by the school’s racial harassment policy.²⁹ The student’s father filed suit, seeking an injunction against the school district and alleging, *inter alia*, that the school’s policy violated his son’s First Amendment rights to free speech. The district court held for the school district,³⁰ and the Tenth Circuit affirmed, holding that, “where school authorities reasonably believe that a student’s

²⁵ Id. at 1334-35.

²⁶ Id. at 1333.

²⁷ 465 F.2d at 1335. Further, the court reasoned that, in light of “substantial disorder...throughout the 1969-70 school year...centered around the use of the Confederate flag,” school authorities “had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970.” Id. at 1335.

²⁸ 206 F.3d 1358 (10th Cir. 2000).

²⁹ Id. at 1361. The school’s Racial Harassment and Intimidation policy provided that “students shall not...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,” with examples including Confederate flags.

³⁰ West v. Derby Unified School District, No. 260, 23 F.Supp. 1223, 1232 (D. Kan. 1998) (stating that the evidence indicated that “possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to material and substantial disruption of school discipline”).

uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression."³¹ The court accepted the findings of the district court that the school district had experienced racial incidents, "some of which were related to the Confederate flag," including "hostile confrontations between a group of white and black students at school and at least one fight at a high school football game."³² Further, in addition to fear that the student's display of a Confederate flag might arouse violent designs in others, the student, himself, had a history of disciplinary problems.³³ Finally, the court stated that "[t]he fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one."³⁴ A reasonable fear of continued disruption thus justified the student's suspension.

Lastly, the South Carolina district court case of Phillips v. Anderson County School District Five³⁵ demonstrates again the triumph of the Tinker standard. In response to numerous racially motivated confrontations – several of them involving Confederate flag apparel – Lakeside Middle School adopted a dress code providing that student attire "should not interfere with classroom instruction."³⁶ In 1996, the school principal suspended a student who refused to remove a jacket depicting a Confederate flag. The student's mother sued the school district on his behalf, arguing that the suspension violated her son's First and Fourteenth Amendment rights.

The district court granted the school district's motion for summary judgment, concluding that school authorities "had a reasonable basis for determining that [the student's] Confederate

³¹ 206 F.3d at 1366.

³² Id.

³³ Id. at 1362-63. The student once received a three-day suspension "for calling another student 'blackie.'"

³⁴ Id. at 1366 (quoting the district court's opinion, 23 F.Supp. at 1232-33.).

³⁵ 987 F.Supp. 488 (D.S.C. 1997).

³⁶ Id. at 490.

Flag jacket would likely result in another substantial disruption.”³⁷ Echoing West, the court noted that, although some of the past racial confrontations had taken place off school grounds, “[s]chool authorities...are not required to wait until disorder or invasion occurs” before taking steps to ensure that student speech does not disrupt school activities.”³⁸ Instead, as long as there are “substantial facts which reasonably support a forecast of likely disruption, the judgment of the school authorities in denying permission and in exercising restraint will normally be sustained,” as “school authorities ‘have a duty to prevent the occurrence of disturbances.’”³⁹

Thus, the precedent established under Tinker has been fairly successful in justifying bans on the Confederate flag and in upholding the suspensions imposed when students fail to abide by these policies. Generally, as long as there has been *some* violence related to the display of the flag, courts are willing to find that school authorities have a reasonable basis for prohibiting the display of the flag; in such cases, courts deem the fear of disruption to be more than undifferentiated. When a history of past flag-related violence is lacking, however, a prohibition on the Confederate flag is less successful.

In Castorina v. Madison County School Board,⁴⁰ the Sixth Circuit reversed a district court’s grant of summary judgment because a genuine issue of fact existed as to whether the school district had experienced any racially motivated violence. In the fall of 1997, two students attended school wearing t-shirts portraying an image of Hank Williams, Jr. on the front and two

³⁷ Id. at 493 (rejecting Plaintiff’s claim that the suspension was improper because prior disruptions did not occur during actual classroom instruction and noting that “Tinker and subsequent caselaw do not require that the disruption break out while a teacher is conducting a class”).

³⁸ Id. at 492.

³⁹ Id. (citing Chandler v. McMinnville School Dist., 978 F.2d 524, 529 (9th Cir. 1992).). Further, the court noted that the school principal had “been called upon to address five incidents of racial tension directly caused or escalated by the presence of Confederate Flag clothing.” Id. at 493.

⁴⁰ 246 F.3d 536 (6th Cir. 2001).

Confederate flags on the back, along with the slogan “Southern Thunder.” After the students refused his request that they change clothes, the principal suspended each student for violating the school’s dress code, which prohibited the wearing of clothing that depicted any “illegal, immoral, or racist implication.”⁴¹ Litigation ensued, and the district court granted summary judgment in favor of the school board, rejecting the students’ claims that their shirts qualified as “speech,” that they had suffered a violation of their First Amendment rights, and that the school dress code was vague and overbroad.⁴²

Holding that the students’ wearing of the shirts at issue did indeed constitute speech, the Sixth Circuit reversed the district court’s grant of summary judgment because there remained material questions of fact as to whether the school had, in fact, experienced any racially based violence and as to whether the school board enforced its dress code in a content neutral manner.⁴³ The court distinguished the case from Fraser, Hazelwood School District v. Kuhlmeier,⁴⁴ Melton, and West because, in those cases, bans were upheld under factually different circumstances.⁴⁵ Viewing the facts in a light most favorable to the students, the court noted that (1) other students wore clothing venerating Malcolm X with impunity, (2) the students wore their clothing in a manner that did not cause disruption, and (3) the students were expressing their personal views which could in no way be considered “school-sponsored”

⁴¹ Id. at 538. The students received a second suspension after returning from their initial suspensions again wearing the prohibited attire.

⁴² Id. at 539. The district court also found that “even if [the shirts] were ‘speech,’ the plaintiffs failed to show a First Amendment violation.”

⁴³ Id. at 538.

⁴⁴ 484 U.S. 260 (1988) (upholding a school’s right to censor a school newspaper on the grounds that it was not a public forum and the school had the right to control “school sponsored speech”).

⁴⁵ 246 F.3d at 540-41.

speech.⁴⁶ The court therefore considered the prohibition to be a “targeted ban” and thus constitutionally impermissible.⁴⁷

The court also noted that the school had made no showing of disruption.⁴⁸ The court employed the Tinker standard, noting that “silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners” is not subject to regulation.⁴⁹ Further, the court concluded that, [i]f the students’ claims regarding the Malcolm X-inspired clothing (i.e. that other students wore this type of clothing and were not disciplined) and their claims that there were no prior disruptive altercations as a result of Confederate flags are found credible, the court below would be required to strike down the students’ suspension as a violation of their rights of free speech as set forth in Tinker.⁵⁰ Thus, although Tinker has been a sturdy bulwark for public schools and their dress code policies, when past violence related to the expression at issue is lacking, Tinker has proven penetrable.

B. Fraser’s Charge: The Eleventh Circuit Departs from Tinker

Although most Confederate flag cases have been satisfactorily decided one way or the other under the Tinker standard, what happens when the conditions warranting a Tinker analysis are absent? In Castorina, the court simply determined that, without evidence of past racial unrest created by the display of the flag, summary judgment in favor of the school board was

⁴⁶ Id. at 541.

⁴⁷ Id. School authorities could not “single out confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed.” Id. at 542.

⁴⁸ Id. at 542. However, the school board did claim that there had been a prior racially motivated altercation, but the plaintiffs denied that race was the cause of the disruption. The court noted that “[t]his disagreement simply highlights the need for a trial to determine the precise facts of this situation.” Id.

⁴⁹ Id. at 541 (citing Tinker, 393 U.S. at 508.).

⁵⁰ 246 F.3d at 544.

unwarranted. It is also possible, however, that the court could still have resolved the case in favor of school authorities using the more flexible – but less certain – Fraser standard.

Such were the circumstances in Denno v. School Board of Volusia County.⁵¹ During a lunch break, a student displayed a small Confederate battle flag to his friends during the course of a discussion about his hobby as a Civil War reenactor. In the wake of his ensuing suspension, he sued two assistant principals and the school board, alleging a violation of his First Amendment rights. The district court dismissed the complaint as to the claim against the individual defendants on the ground of qualified immunity and granted summary judgment in favor of the school board.⁵²

Interestingly, this case was argued on appeal twice with contrary results. Initially, the Eleventh Circuit applied the Tinker standard and noted that “there had been no disruption in the school attributable to Denno’s actions or similar occurrences; [sic] and there had been no history of racial tension or disorder.”⁵³ The court therefore reversed the district court’s dismissal of the student’s claim against the individual defendants, concluding that, if the student’s allegations of a lack of disruption were true, he had “alleged a violation of the very First Amendment right that Tinker clearly established.”⁵⁴ As to the student’s claim against the school board, local governments and their branches may only be held liable for constitutional deprivations “if such constitutional torts result from an official government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law.”⁵⁵ The court of appeals determined that the

⁵¹ 218 F.3d 1267 (11th Cir. 2000).

⁵² Id. at 1269.

⁵³ Denno v. School Board of Volusia County, 182 F.3d 780, 784 (11th Cir. 1999).

⁵⁴ Id. at 784-85. Qualified immunity “shields government officials from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known.”
Id. at 782.

⁵⁵ Id. at 786.

school officials did not possess the final decision-making authority necessary for its actions to be deemed representative of the government, and the practice of banning Confederate flags was not so persistent and well-settled that it assumed the force of law.⁵⁶ Thus, the court affirmed the district court's grant of summary judgment in favor of the school board.

The court later vacated its holding, however, and ordered a rehearing.⁵⁷ Upon rehearing, the court performed an about-face, applying the "more flexible reasonableness or balancing standard [of Fraser] rather than, or in addition to, the Tinker standard of whether there is a reasonable fear of disruption."⁵⁸ Although a lack of racial disturbance had been cited by the same court earlier as a basis for rejecting the assistant principals' defense of qualified immunity, here, the court observed that "a reasonable school official might have been led to the view that the legal landscape permitted an application of the more flexible Fraser standard where the speech involved intrudes upon the function of the school to inculcate the manners and habits of civility."⁵⁹ The court did not think "that it would be unreasonable for a school official to believe that such displays [of the Confederate flag] have uncivil aspects akin to those referred to in Fraser, in that many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed."⁶⁰ Thus, the court could not conclude that "the actions of the individual

⁵⁶ Id. at 787-88.

⁵⁷ Denno v. School Board of Volusia County, 193 F.3d 1178 (11th Cir. 1999).

⁵⁸ 218 F.3d at 1273-74.

⁵⁹ Id. at 1274.

⁶⁰ Id. The court admitted that "strong arguments can be mounted to the effect that the more flexible Fraser standard is limited to situations in which the speech involved is likely to be perceived as bearing the imprimatur of the school" but declined to determine "the correct legal standard," choosing instead to decide "only whether pre-existing law dictates, that is, truly compels the conclusion that the Tinker standard applies to the exclusion of the Fraser standard." The court was unwilling to so conclude. Id. n.5.

defendants in the instant case violated clearly-established First Amendment rights under the more flexible Fraser standard.”⁶¹

Why did the court reverse its position and reject a Tinker analysis? Unfortunately, neither the order vacating the original opinion nor the opinion upon rehearing hints as to the court’s motivation. One issue is clear, however: under Tinker, this case would have – and, in fact, was – decided differently. There had been no incidences of past racial unrest related to the display of the Confederate flag, so under Tinker, the student’s suspension was constitutionally impermissible. Further, qualified immunity only protects government officials from liability if their conduct does not violate a clearly established right. The majority concluded that Denno’s suspension failed to violate a clearly established right; Judge Forrester, concurring in part and dissenting in part, argued, however, that Tinker *did* clearly establish the right of students to express themselves as long as the expression did not cause material interference with school activities.⁶² Thus, in applying the Fraser standard, Denno seems to expand the ground upon which a court may uphold the suppression of speech in public schools when such speech does not result in the substantial disruption required by the Tinker Court.

⁶¹ Id. at 1275. As before, the court affirmed the district court’s grant of summary judgment in favor of the school board. Id. at 1278.

⁶² Id. at 1285 (Forrester, J. concurring in part and dissenting in part) (noting that the “[t]he law of this circuit clearly answers that the student is at the mercy of the consequences of his speech, and if the speech occasions a material disruption of class work or substantial disorder, he may be punished; otherwise, he may not. Nothing in the court’s opinion establishes that this proposition was seriously in doubt” when the events giving rise to this action occurred.). Indeed, even the majority conceded in its original opinion that, if the student’s allegations of a lack of disruption were true, he had “alleged a violation of the very First Amendment right *that Tinker clearly established*” (emphasis supplied). 182 F.3d at 784.

The Eleventh Circuit continued to depart from the traditional Tinker analysis in Scott v. School Board of Alachua County.⁶³ After the principal suspended a student for displaying a Confederate flag at school in violation of school policy, the student sued, and the district court granted the school board's motion for summary judgment. The Eleventh Circuit agreed with the district court that "school officials can appropriately censure students' speech under...two theories."⁶⁴ The Tinker standard is appropriate when school officials "reasonably fear that such speech is likely to 'appreciably disrupt the appropriate discipline in the school.'"⁶⁵ Alternatively, courts may apply the Fraser standard "even if such speech does not result in a reasonable fear of immediate disruption" because school authorities are nevertheless "charged with the duty to 'inculcate the habits and manners of civility.'"⁶⁶ Because the school had "presented evidence of racial tensions existing at the school" and because "one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the [Confederate flag] could provoke," the ban on the display of the flag was not unconstitutional.⁶⁷

As in Denno, the problem in Scott is that the facts did not rise to the level required by Tinker. Federal case law is clear that "Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."⁶⁸ Despite the school's claim of past racial

⁶³ 324 F.3d 1246 (11th Cir. 2003), *cert. denied*, 540 U.S. 824 (2003).

⁶⁴ Id. at 1248.

⁶⁵ Id. (citing Denno, 218 F.3d at 1271). Indeed, when applying the Tinker standard, the Eleventh Circuit concedes that "school officials are on their most solid footing."

⁶⁶ Id.

⁶⁷ Id. at 1249.

⁶⁸ Ben Richard, Note, Confederate Battle Flags: Offensive Racism or Protected Symbols of Southern Heritage, 5 Fl. Coastal L.J. 140, 142 (2004) (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3rd Cir. 2001).).

unrest, the only evidence of racial violence was a fight that erupted on a school bus two years before the events giving rise to the litigation occurred, and that event did not involve the display of the Confederate flag.⁶⁹ The evidence in this case seems to fall well below the standard required by the Supreme Court in Tinker,⁷⁰ and in applying Fraser to the Confederate flag cases, it seems that the Eleventh Circuit has expanded its holding so as to swallow the rule in Tinker.

IV. Is Fraser an Appropriate Standard?

Before one can answer the question of whether Fraser is an appropriate standard, it might be best to determine whether Tinker is still a valid standard. With the exception of two recent decisions in the Eleventh Circuit, the answer appears to be “yes.” Tinker, though abandoned in Denno and Scott, has not been overruled, and, as all of the other Confederate flag cases discussed above indicate, a finding of material disruption is still the hallmark of every case in which courts have upheld a ban on the display of the flag and subsequent suspensions.⁷¹

⁶⁹ Appellant’s Initial Brief at 8-9, Scott v. School Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003) (asserting that a “dispute erupted between a white student and a black student over who should sit in a particular seat on the bus” and that even the school board concedes “that a display of the Confederate Battle Flag had absolutely nothing to do with this ‘bus incident’”).

⁷⁰ Richard, supra note 68, at 143 (noting that “[t]his level of evidence looks suspiciously like what the Tinker court found constitutionally unacceptable: ‘undifferentiated fear or apprehension of disturbance’”).

⁷¹ See Jonathan Pyle, Comment, Speech in Public Schools: Different Contest or Different Rights?, 4 U. Pa. J. Const. L. 586, 630 (2002) (arguing that “[t]he Confederate flag cases are [an] example of the vitality of the Tinker disruption standard” and that, while courts “might have [chosen to carve] out a ‘racist symbol’ exception to Tinker,” they have not done so).

Though the Eleventh Circuit has achieved its desired result by relying upon Fraser, this merely indicates that Fraser has clouded Tinker but has in no way displaced it.⁷²

On the other hand, upon examining the true purpose of public schools, perhaps Fraser is the more appropriate standard for determining whether school officials have the authority to prescribe certain forms of speech. Tinker permits school authorities to suppress expression only when that expression results in material and substantial interference with the school purpose. The problem with this standard is that it has no prophylactic component; schools may not impose a restriction on speech that disrupts school discipline until *after* that type of speech has, in fact, disrupted school discipline.⁷³ Fraser, in contrast, presents a more flexible standard that allows school officials to prohibit speech deemed to be lewd or offensive, and gives them the discretion to determine what constitutes appropriate speech. Unlike Tinker, the Fraser standard is prophylactic in nature; if the “role and purpose of the American public school system” is to “inculcate the habits and manners of civility,”⁷⁴ then a more flexible standard certainly enables a board of education to ban the expression of certain views that *might* inhibit such inculcation. Thus, although Tinker may protect the First Amendment rights of students more vigilantly than does Fraser, one might argue that Fraser preserves the purpose of public schools more resolutely than Tinker does.

⁷² See, e.g. Castorina, 246 F.3d at 540 (noting that, “[w]hile Tinker has been narrowed by two more recent cases, [Fraser and Hazelwood], neither of these decisions altered Tinker’s core principles concerning the circumstances under which public schools may regulate student speech”).

⁷³ See Michael J. Henry, Chalk Talk: Student Display of the Confederate Flag in Public Schools, 33 J.L. & Educ. 573, 574 (2004) (observing that, “in order for a school to constitutionally ban a particular kind of student speech, the school must be able to show evidence that *this type of speech* has caused disruption in the past” (emphasis supplied)).

⁷⁴ 478 U.S. at 681.

By virtue of Fraser's prophylactic nature, a school need not wait for violence to erupt before taking action. Rather than standing idly by until the Confederate flag sparks violence, school authorities need only *some* facts that demonstrate that there is *some* fear of disruption. Even if past violence was not motivated by the display of the Confederate flag, if the prior unrest has been racial in nature, then perhaps it is not unreasonable to believe that the display of the Confederate flag could cause further disruption. The difference between this reasoning and the Tinker standard is subtle but important: under Tinker, fear is reasonable if the display of the Confederate flag has caused past violence,⁷⁵ whereas Fraser requires only marginal facts tending to suggest disruption.⁷⁶

Indeed, the advantage of Fraser in this regard also reveals a criticism of the Tinker standard. How much violence must there be to satisfy the Tinker test? The easy cases result in suspensions and prohibitions that courts either uphold because there is a sufficient amount of

⁷⁵ See, e.g., Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 254 (3rd Cir. 2002) (noting that, although the expression concerned “redneck” apparel instead of the Confederate flag, “[w]here there have been racial problems involving the Confederate flag, courts have found such bans [on the Confederate flag] constitutional”). Further, the court noted that, when a school seeks to suppress a certain form of expression, it must “point to a particular and concrete basis for concluding that the association [between the speech at issue and speech that has caused disruption in the past] is strong enough to give rise to well-founded fear of general disruption....In other words, it is not enough that speech is generally similar to speech involved in past incidents of disruption, it must be similar in the right way.” Id. at 257.

⁷⁶ See James M. Dedman IV, Note, At Daggers Drawn: The Confederate Flag and the School Classroom – A Case Study of a Broken First Amendment Formula, 53 Baylor L. Rev. 877, 895 (2001) (arguing that, “[a]s the Confederate flag cases indicate, the Fraser standard so muddies the analysis that school officials can justifiably censor non-disruptive speech...so long as the speech is somewhat controversial or marginally unpopular”).

violence attributable to the Confederate flag⁷⁷ or that courts strike down because of a complete lack of past violence related to the flag.⁷⁸ The hard cases are fewer in number and might involve situations where the prospect of violence is slightly more than an “undifferentiated fear or apprehension of disturbance” but does not rise to the level required by Tinker. Denno and Scott might fall into this category, and perhaps the Eleventh Circuit chose to apply Fraser because, if the court wanted to uphold the suspension in each case, doing so under a Tinker analysis would have turned these hard cases into bad law.

Is it appropriate for courts to require schools to wait for violence to erupt before declaring lawful the suspensions imposed in the name of maintaining order and discipline? Some courts have declared that schools need not wait for a brawl before implementing measures designed to prevent disruption;⁷⁹ the Eleventh Circuit's preference for Fraser over Tinker indicates an alliance with this position. Other cases, however, clearly state that a ban or suspension may not stand if

⁷⁷ Melton, West, and Phillips are examples of “easy cases” where past violence clearly related to the Confederate flag justified student suspensions after students disobeyed school policies.

⁷⁸ See, e.g. Castorina. Henry, supra note 72 at 576, emphasizes, however, that Castorina is “the only [case] where the court ruled in favor of the student over the school board.”

⁷⁹ West, 206 F.3d 1366 (adopting the district court's position that, in light of a clear history of racial violence, “[t]he fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the [school] district was required to sit and wait for one”); see also Phillips, 987 F. Supp at 492 (noting that, although students “cannot be punished for merely expressing their personal views” in the absence of disruption, “[s]chool authorities...are not required to wait until disorder or invasion occurs;” instead, if substantial facts support a reasonable forecast of disruption, “the judgment of the school authorities in denying permission and in exercising restraint will normally be sustained”).

there is insufficient disruption to warrant the measure.⁸⁰ These are but a few of the difficult questions raised by the problem of two different standards that may reach the same result.⁸¹

The Fraser standard is not, therefore, immune from criticism. First, it does not demand a finding of material and substantial disruption, as required by Tinker, but instead requires only that the speech be vulgar, lewd, or offensive. Whereas Tinker required more than an “undifferentiated fear or apprehension of disturbance,” the Fraser standard requires no real fear of disruption at all. Indeed, in the two cases in which the Eleventh Circuit disregarded Tinker, the only way in which the court could reach its desired result was through the application of Fraser; for, had the court applied Tinker, it would have been forced to arrive at a contrary result.⁸² Moreover, an examination of *why* the school authorities had the authority to suppress the speech at issue in Fraser reveals that the Confederate flag is not the same thing. Fraser permits the prohibition of

⁸⁰ Indeed, this is the very proposition for which Tinker stands and under which Castorina was decided.

⁸¹ See also Dedman, supra note 76 at 879-80 (positing that “[t]he ambiguity of the Tinker and Fraser interplay enables school officials to invoke the most advantageous of either, or both, to justify their actions, thereby escaping a lawsuit” and creating a “‘headmaster’s veto,’ by which school officials may censor with impunity when the speech is unpopular or marginally controversial. The Confederate flag cases illustrate this quandary. Despite the vastly different factual scenarios and motives of the students, disciplinary suspension has been the uniform result.”).

⁸² Denno’s display of a Confederate flag caused no violence, nor was there any true evidence of violence in Scott. In fact, as noted above, the only racial violence referenced in Scott involved an altercation on a school bus two years prior, and school authorities admitted that the altercation did not derive from the display of the Confederate flag. Appellants’ Initial Brief at 9. Further, there appeared to be an “absence of persistent and continual racial tension” at the school, “let alone racially motivated violence.” Appellants’ Reply Brief at 2.

“obscene,’ ‘vulgar,’ ‘lewd,’ and ‘offensively lewd’” speech.⁸³ The Confederate flag might certainly be offensive to some, but it hardly qualifies as obscene, vulgar, or lewd. Though perhaps unpopular, a display of the Confederate flag is precisely the type of speech that Tinker protects, as long as any expression does not result in material disruption.

A second criticism of Fraser is that it gives schools much more flexibility than did Tinker, perhaps too much. Even if the conditions required by Tinker are lacking, Fraser provides a peg upon which schools can hang a ban on the Confederate flag; for “even if disruption is not immediately likely, school officials are charged with the duty to ‘inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government.’”⁸⁴

Is the Confederate flag so offensive that it may be proscribed under Fraser? Admittedly, the flag stirs emotions on both sides of a heated issue, and it is certainly understandable that some might take offense to its display, but Fraser gives school authorities the power to ban the flag when it truly fails to rise to the level of distaste intended by the Court.⁸⁵ In Scott, for example, the Eleventh Circuit sought to uphold a ban on the Confederate flag by demonstrating that it was vulgar and offensive, but such a determination was based on “the personal beliefs of the judges, not the precedent or evidence presented.”⁸⁶ The flexible Fraser standard gives school authorities the leeway needed to proscribe speech that does not comport with popular sentiment, but as the Tinker court noted, “students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate,” and they may not be “confined to the expression of those

⁸³ 478 U.S. at 687 (Brennan, J., concurring).

⁸⁴ Richard, supra note 68, at 142 (citing Scott).

⁸⁵ See id. Richard argues that “[a]lthough the Eleventh Circuit’s analysis [in Scott] is purportedly grounded on these two Supreme Court cases, its opinion misinterprets the Court’s actual holdings by relying on choice quotes, many of which are dicta.”

⁸⁶ Id.

sentiments that are officially approved.”⁸⁷ For these reasons, Fraser is at least arguably inappropriate when applied to factual circumstances that deviate too far from those existing when the Court rendered its decision.

V. Conclusion

Tinker or Fraser: which is the better standard? Both analyses have advantages. Tinker protects the First Amendment rights of students more ardently than does Fraser because Tinker demands that speech sought to be prohibited be reasonably likely to cause disruption before school authorities suppress it. Fraser better preserves order and discipline in schools because it gives school authorities the power to prevent disruption before it occurs. Both tests are subject to criticism, however, and the disadvantage of each analysis is simply the converse of the other’s benefit. Fraser offers less protection of students’ rights to free speech because the requirements for suppression are less stringent than those under Tinker. Tinker, on the other hand, almost demands a wait-and-see approach to potentially disruptive student expression.

When it comes to the Confederate flag, it is difficult to discern which standard is more appropriate, but one thing is clear: only the Eleventh Circuit has affirmed a school’s authority to prohibit the display of the Confederate flag when the factual circumstances required by Tinker were clearly lacking. The Sixth and Tenth Circuits have applied Tinker.⁸⁸ The Confederate flag debate is perhaps too narrow an issue to hope that the Supreme Court will grant certiorari in order to determine the appropriate standard.

The question then becomes, “Regarding public school children, which is the higher priority: protecting their free speech rights or providing an appropriate learning environment?” In

⁸⁷ 393 U.S. at 511.

⁸⁸ Interestingly, the Eleventh Circuit seems to have relied upon Fraser in an effort to achieve the desired result when the application of Tinker would fail to reach such an end. The Sixth Circuit, however, has applied the Tinker standard in two Confederate flag cases – Melton and Castorina – and reached different results.

the final analysis, the Confederate flag is more like Tinker's armband and less like Fraser's sexual innuendo (or Cohen's jacket, for that matter);⁸⁹ nevertheless, Fraser is probably the better standard for two reasons. First, the group whose rights are at issue consists of children whose parents send them to school to acquire an education so that they might become productive members of a civilized society. Although some might take issue with the notion that it is the role of the government to "inculcate the habits and manners of civility" into America's youth, one must concede that the "constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings"⁹⁰ and that children are not "sent to schools at public expense to broadcast political or any other views to educate and inform the public."⁹¹ To be sure, the largest cost associated with the Fraser analysis is that it has a chilling effect on the free speech rights of public school children. To deny school authorities the power to control discipline and prevent likely disruption before it occurs, however, is to "surrender control of American public school system to public school students."⁹²

Second, the Tinker court noted that, although controversial expression may result in disruption or violence, "our Constitution says we must take this risk,"⁹³ but is this truly a risk we must take? Considering the recent history of school shootings and racially-motivated violence, why must school authorities stand idly by and wait for certain forms of student expression to cause violence at a particular school (thereby giving them reasonable suspicion that future expression of the same type will result in violence) when these authorities *already know* that the

⁸⁹ See also Richard, supra note 68, at 145 (stating that "Confederate flags seem much more analogous to 'Tinker's armband,' especially considering the Eleventh Circuit's inability to classify the flags as 'vulgar and offensive,' than to 'Cohen's jacket'").

⁹⁰ 478 U.S. at 681-82.

⁹¹ 393 U.S. at 522 (Black, J., dissenting).

⁹² Id.

⁹³ Id. at 508.

display of the Confederate flag has the potential to ignite violence? One need only refer to Melton, West, and Phillips to see that the Confederate flag *can* cause disruption. Unfortunately, this is an issue whose solution is not easy.⁹⁴ Tinker puts a school in the impotent position of waiting for violence, while the application of Fraser requires a finding that a symbol of regional pride (at least to some) is vulgar, indecent, and offensive. Though Tinker has been the benchmark for First Amendment rights in public schools, perhaps Justice Black had it right: “taxpayers send children to school on the premise that at their age they need to learn, not teach.”⁹⁵

⁹⁴ Query also which standard is appropriate when a prohibition on the Confederate flag actually *causes* violence instead of subdues it. For example, in Seminole County, Georgia, nine students sued the school board after it prohibited Confederate flag t-shirts. The school district concedes that such apparel has “never cause any detectable trouble,” (Steve Chapman, Free From Free Speech, Chi. Trib., June 3, 2001, at C17), but “if this thing continues, there’s a possibility something will happen” (Dan Chapman, Flag Battle Revived by Suit, Atlanta J. Const., May 13, 2001, at 1E).

⁹⁵ 393 U.S. at 522 (Black, J., dissenting).

Bibliography

Cases

Bethel Sch. Dist., No. 403 v. Fraser, 478 U.S. 675 (1986).

Castorina v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001).

Denno v. Sch. Bd. of Volusia County, 182 F.3d 780 (11th Cir. 1999).

Denno v. Sch. Bd. of Volusia County, 193 F.3d 1178 (11th Cir. 1999).

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

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Melton v. Young, 465 F.2d 1332 (6th Cir. 1972).

Phillips v. Anderson County Sch. Dist. Five, 987 F.Supp. 488 (D.S.C. 1997).

Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003), *cert. denied* 540 U.S. 824 (2003).

Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243 (3rd Cir. 2002).

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

West v. Derby Unified Sch. Dist., No. 260, 23 F.Supp. 1223, 1232 (D. Kan. 1998).

West v. Derby Unified Sch. Dist., No. 260, 206 F.3d 1358 (10th Cir. 2000).

Miscellaneous

Appellant's Initial Brief, Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003).

Appellant's Reply Brief, Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003).

Dan Chapman, Flag Battle Revived by Suit, Atlanta J. Const., May 13, 2001 at E1.

Steve Chapman, Free From Free Speech, Chi. Trib., June 3, 2001, at C17.

James M. Dedman IV, Note, At Daggers Drawn: The Confederate Flag and the School

Classroom – A Case Study of a Broken First Amendment Formula, 53 Baylor L. Rev. 877 (2001).

Michael J. Henry, Chalk Talk: Student Display of the Confederate Flag in Public Schools, 33 J.L. & Educ. 573 (2004).

Jonathan Pyle, Comment, Speech in Public Schools: Different Context or Different Rights?, 4 U.

Pa. J. Const. L. 586 (2002).

Ben Richard, Note, Confederate Battle Flags: Offensive Racism or Protected Symbols of

Southern Heritage, 5 Fl. Coastal L.J. 140 (2004).