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Intellectual Seriousness and the First Amendment's Protection of Free Speech for Students

Allen K. Rostron

INTELLECTUAL SERIOUSNESS AND THE FIRST AMENDMENT'S PROTECTION OF FREE SPEECH FOR STUDENTS

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"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Justice Abe Fortas made that eloquent declaration in *Tinker v. Des Moines Independent Community School District*, the Supreme Court's monumental 1969 ruling about the exercise of First Amendment rights within schools.[2] It has long been one of my favorite lines from any of the Supreme Court's opinions.[3] It seemed obvious to me, particularly when I was a student, that schools should not be "enclaves of totalitarianism"[4] and that the Constitution should protect the rights of everyone, young and old, to express their views. The inspiring story underlying the *Tinker* case further reinforced my feelings about the Court's decision. A trio of young people bravely took a stand against the Vietnam War, wearing black armbands that struck me as a particularly solemn and dignified form of protest. In old black-and-white news photos, the Tinker children looked so earnest, always smiling pleasantly but seeming so calmly resolute in their convictions.[5]

Courts have heard a wide variety of claims about students' speech rights over the years since *Tinker*, and unfortunately most of the cases involve far less uplifting stories. Students bring lawsuits challenging all manner of restrictions on their expression. They demand the right to wear everything from ghoulish "Marilyn Manson" shirts[6] and cutesy "I ♥ Boobies" bracelets[7] to memorial messages paying tribute to a fellow student killed by rival gang members.[8] Students claim the Constitution protects their scathing mockery and even threats

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[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[2] The Bill of Rights applies directly to the federal government only, but freedom of speech and all other rights protected by the First Amendment have been incorporated into the Fourteenth Amendment so that they apply with equal force to state and local government actions. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034-35 (2010). For the sake of brevity, I will simply use the term "First Amendment" in this Article even when technically a First Amendment right incorporated into the Fourteenth Amendment is actually at issue.

[3] *See also In re* Gault, 387 U.S. 1, 28 (1967) (Fortas, J.) ("Under our Constitution, the condition of being a boy does not justify a kangaroo court.").

[4] *Tinker*, 393 U.S. at 511.

[5] I was not surprised to learn that the dramatic tale inspired a musical theater production. *See* Matt Nelson, *Musical Revisits Tinker v. Des Moines*, DES MOINES REG., Oct. 24, 2010, at B2.

[6] *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467 (6th Cir. 2000).

[7] *See* H. v. Easton Area Sch. Dist., 827 F. Supp. 2d 392, 393 (E.D. Pa. 2011).

[8] Kuhr v. Millard Pub. Sch. Dist., No. 8:09CV363, 2012 WL 1402637, at *1 (D. Neb. Apr. 23, 2012).

of violence against teachers or classmates.[9] Even when students seek to express themselves about political matters, the cases tend to involve rather coarse means of doing so. Liberal students insist on wearing shirts that describe George W. Bush as an "International Terrorist"[10] or depict him as an alcoholic, a cocaine user, and the "Chicken-Hawk-in-Chief."[11] Conservative students fight for the right to hang posters featuring a link to a website that condemns the Islamic religion with gruesome videos of terrorists beheading hostages.[12] *Tinker* ensured that students would have freedom of expression, but perhaps not surprisingly, young people's speech often turns out to be quite crudely juvenile.

While dismayed by this trend in the cases, I am not ready to give up on *Tinker* and the constitutional protection of student speech. I believe the time has come, however, for courts to be upfront about the fact that a great deal of student speech contributes little or nothing to any intelligent dialogue or useful exchange of ideas. Judges should begin to explicitly consider the intellectual seriousness of student speech as one of the factors influencing whether the speech merits constitutional protection. Speech that stems from thought, study, and reason deserves to be protected more than speech that reflects little or no thinking or learning. Indeed, students attend school in order to learn and to develop their intellectual capacities, and so it seems particularly fitting that educators and judges should be able to draw distinctions about the intellectual seriousness of speech in the school setting.

Part I of this essay provides a basic review of the Supreme Court's significant rulings about the free speech rights of students. Part II looks at how the lower courts continue to be divided over difficult questions about the constitutional analysis required by *Tinker* and the Supreme Court's other key precedents on student speech. In particular, it illustrates the uncertain and disputed character of this area of First Amendment law by examining the varying approaches that lower courts have used in a line of cases about student displays of the Confederate flag. Part III proposes that courts can make a small step forward by explicitly making intellectual seriousness a legitimate factor for school officials to consider in deciding what student expression to permit or prohibit.

I. STUDENT SPEECH AT THE SUPREME COURT

One of the most remarkable things about the Supreme Court's decisions concerning free speech in schools is how much each of the cases has reflected

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[9] *See infra* notes 37-38 and accompanying text.
[10] Barber *ex rel.* Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849 (E.D. Mich. 2003).
[11] Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006).
[12] Bowler v. Hudson, 514 F. Supp. 2d 168, 171 (D. Mass. 2007).

important issues and trends of its day.[13] Each case is like a time capsule capturing something significant about the era in which it arose. Fear of radical foreign influences during the Red Scare following the first World War led to *Meyer v. Nebraska*, where the Court struck down a Nebraska law prohibiting schools from teaching foreign languages to children until after the eighth grade.[14] The resurgence of the Ku Klux Klan and anti-Catholic nativism in the 1920s produced *Pierce v. Society of Sisters*, where the Court struck down an Oregon law requiring all parents to send their children to public rather than private schools.[15] The Court's 1940 decision in *Minersville School District v. Gobitis*, allowing schools to expel students with religious objections to saluting the American flag and reciting the Pledge of Allegiance, came at a time of rising patriotic fervor as the nation moved closer to involvement in another world war.[16] A few years later, after a nationwide wave of violence against Jehovah's Witnesses, the Court overruled *Gobitis* in *West Virginia State Board of Education v. Barnette*.[17] While Hitler and America's other totalitarian enemies might coerce national unity through measures like forcing children to salute a flag, America was fighting for principles that included tolerance of dissenting views.[18]

A few decades later, the United States was at war again, this time in Vietnam. The *Tinker* case arose because three teenagers in Iowa were suspended from school in December 1965 for wearing black armbands to express their opposition to the war.[19] At that point, the anti-war movement had just begun to coalesce and the majority of Americans still supported the American military's involvement in Vietnam.[20] By the time the Iowa students' case reached the

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[13] Scott A. Moss, *The Overhyped Path from* Tinker *to* Morse*: How the Student Speech Cases Show the Limits of Supreme Court Decisions—for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1407 (2011) (describing how "[e]ach of the Supreme Court's high school student speech cases reflected the social angst of its era").

[14] Meyer v. Nebraska, 262 U.S. 390, 402 (1923). The Court framed the issue in terms of the rights of schools, teachers, and parents, rather than students. *Id.* at 399-400.

[15] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

[16] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S 624 (1943).

[17] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[18] *See id.* at 641 (describing "the fast failing efforts of our present totalitarian enemies" to eliminate dissent and achieve national unity); *see also id.* at 627-28 & n.3 (noting concerns that the hand gesture with which Americans saluted their flag should not bear too much of a resemblance to Nazi or other fascist salutes).

[19] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

[20] *See* Joseph Carroll, *The Iraq-Vietnam Comparison*, GALLUP (June 15, 2004), http://www.gallup.com/poll/11998/iraqvietnam-comparison.aspx (noting that in the latter part of 1965 a majority of Americans supported President Johnson's handling of Vietnam and only about a quarter of Americans thought it had been a mistake to send troops into Vietnam).

Supreme Court, opposition to the war had intensified.[21] The Court heard arguments in the case just a few months after riots rocked the Democratic National Convention in Chicago and just a few days after Richard Nixon won the 1968 presidential election by promising a return to "law and order" and a crackdown on unruly protestors.[22] The Supreme Court ruled in favor of the students in *Tinker*, emphasizing that there was no evidence "that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[23] Justice Hugo Black's dissent read like it was Nixon campaign literature, warning that "groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins" and that "[o]ne does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa Schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders."[24]

Prurience was a bigger concern than political protests by the time the Supreme Court returned to the issue of student speech in the 1980s. Tipper Gore and other politically-connected mothers formed the Parents Music Resource Center to push for warning labels on music with explicit lyrics.[25] A media frenzy about censorship of "porn rock" ensued and a circus atmosphere surrounded Senate committee hearings featuring testimony from musicians like Frank Zappa, Dee Snider, and John Denver.[26] Less than a year later, the Supreme Court decided *Bethel School District No. 403 v. Fraser*, upholding a school's authority to punish a student for delivering a lewd speech at a school assembly.[27] The Court again ruled in favor of school officials in *Hazelwood School District v. Kuhlmeier*, concluding that a principal could censor student newspaper stories about controversial topics like teen pregnancy because the newspaper was a school-sponsored publication and therefore its contents might reasonably be perceived as having the school's endorsement.[28]

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[21] *See id.* (noting that public approval of President Johnson's handling of Vietnam dropped dramatically later in his term, averaging just thirty-seven percent in 1967).

[22] Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 331-348 (2012).

[23] *Tinker*, 393 U.S. at 509.

[24] *Id.* at 525 (Black, J., dissenting). John Marshall Harlan also dissented, but he took the milder position that courts should defer to school officials absent evidence that a restriction on student expression was not motivated by legitimate school concerns. *See id.* at 747-48 (Harlan, J., dissenting). The Supreme Court also decided a case about free expression at the college level that reflected the 1960s zeitgeist. *See* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973) (ruling in favor of journalism graduate student expelled in 1969 for distributing an "underground" newspaper containing article entitled "Mother Fucker Acquitted" and political cartoon depicting police officers raping the Statue of Liberty and the Goddess of Justice).

[25] Richard Harrington, *The Capitol Hill Rock War*, WASH. POST, Sept. 20, 1985, at B1.

[26] *Id.*

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

[28] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-73 (1988).

The Supreme Court's most recent case about student speech, *Morse v. Frederick*, concerned a high school senior suspended for displaying a banner that school officials regarded as advocating illegal drug use.[29] Hoping to attract the attention of television news cameras as the Olympic Torch Relay passed his school, the student unfurled a large banner bearing the odd phrase "BONG HiTS 4 JESUS."[30] The Court carved another exception to the *Tinker* analysis, holding that a school can prohibit speech promoting illegal drugs even if the speech does not threaten to substantially disrupt school activities or infringe on the rights of other students.[31] Again, the case captured much about modern American culture, reflecting not only lingering anxiety about drugs but also the notion that a silly stunt might produce a moment of fame in an era when YouTube clips and reality television shows can lead to instant stardom.

Tinker thus provided a basic test for restrictions on student expression, requiring the school to show that the prohibited speech posed an undue risk of disrupting school activities or infringed too much on the rights of other students. But the Supreme Court's subsequent cases about student speech have shed little light on exactly what it takes to satisfy those requirements. Instead of applying the *Tinker* test in cases like *Fraser*, *Hazelwood*, and *Morse*, the Supreme Court created exceptions where *Tinker* does not apply. As a result, the Supreme Court's decisions provide only a hazy sketch of principles rather than a clear roadmap of rules for resolving student speech issues.

II. STUDENT SPEECH IN THE LOWER COURTS

The lower court cases provide an equally intriguing record of changing times in America. The political and social turmoil of the 1960s and early 1970s tended to produce cases about students fighting for the right to speak about serious causes, such as protesting for civil rights,[32] criticizing the U.S. presidential candidates,[33] or debating the merits of U.S. involvement in Vietnam.[34] The sexual revolution soon hit schools as well, with students arguing that *Tinker* opened the door to a new era of frank discussion of sexual matters.[35]

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[29] Morse v. Frederick, 551 U.S. 393 (2007).
[30] *Id.* at 397, 401.
[31] *Id.* at 403-09.
[32] *See, e.g.*, Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
[33] *See, e.g.*, Oxfeld v. N.J. State Bd. of Educ., 344 A.2d 769 (N.J. 1975).
[34] For example, in *Hill v. Lewis*, 323 F. Supp. 55 (E.D.N.C. 1971), students wore black armbands to express their opposition to the war, as in *Tinker*, but other students wore red-white-and-blue armbands to symbolize the opposite point of view. The court upheld the school's prohibition of armbands, despite the case's superficial similarity to *Tinker*, because the protests produced disorder in the school including noisy demonstrations in the hallways and threats of violence. *Id.* at 57-59.
[35] *See, e.g.*, Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1045 (2d Cir. 1979) (ruling in favor of high school students punished for off-campus production and distribution of

Other new trends affecting young people and schools eventually found their way into the cases. With an increasing number of openly gay students in high schools, controversies have arisen about student speech concerning moral views on sexual orientation.[36] A series of shootings at schools, such as the killing sprees at Columbine and Virginia Tech, have put educators on edge and led to a series of cases about how schools should respond to warning signs such as students writing stories or poems with dark, violent content.[37] The advent of internet-based technology like Facebook, e-mail, and instant messages has produced a slew of cases about the extent to which schools should be able to regulate expression initiated outside school grounds but available via computers or other electronic devices within schools.[38]

While the lower courts have considered a wide array of student expression, the Confederate flag has been one of the most frequently litigated issues. In a line of cases stretching back forty years,[39] courts have considered whether the First Amendment gives students the right to express themselves by wearing shirts or other apparel bearing images of the Confederate flag. These cases illustrate how lower courts have been unable to reach agreement on several key points about the analysis of student speech issues.

The Confederate flag cases have been decided largely through application of *Tinker*'s test concerning disruption of school activities. If school officials have reasonable grounds to forecast that allowing students to wear

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publication containing sexual satire modeled after *National Lampoon* magazine); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (ruling in favor of school officials who prohibited student publication's distribution of sex questionnaire to eleventh and twelfth grade students).

[36] *See, e.g.*, Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874 (7th Cir. 2011) (finding that students who disapproved of homosexuality on religious grounds had a right to wear t-shirts and buttons reading "Be Happy, Not Gay").

[37] *See, e.g.*, Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007) (upholding school's finding that student violated code of conduct by writing a diary threatening a Columbine-style attack); Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978 (11th Cir. 2007) (upholding school's suspension of high school student who wrote about a "dream" of shooting a teacher); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (upholding school's suspension of middle school student who sent instant messages to classmates with drawing depicting the shooting of a teacher).

[38] *See, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (concluding that middle school violated student's free speech rights by punishing her for using her home computer to create an insulting MySpace profile of her school's principal), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (holding that high school could not punish student for creating lewd MySpace profile of school's principal), *cert. denied*, 132 S. Ct. 1097 (2012); T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011) (overturning school's punishment of high school students for taking sexually provocative photos at sleepover and posting them on Facebook and MySpace); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (ruling that high school student's posting of video clip on YouTube did not pose a reasonably foreseeable risk of substantially disrupting school activities).

[39] The earliest published rulings were in *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *aff'g* 328 F. Supp. 88 (E.D. Tenn. 1971).

Confederate flag shirts will result in substantial disruption of school activities, then a school's prohibition of the flag's display will be upheld.[40] Courts therefore must make a case-by-case assessment of the circumstances surrounding each student and school.

In some cases, the evidence supporting the school's policy has been extremely strong. For example, the earliest major case about student display of the flag, *Melton v. Young*, involved a Tennessee high school that had been integrated for only a few years and that remained racially polarized.[41] Black students walked out of several pep rallies to protest the use of the word "Rebel" as the nickname for the school's athletic teams and the use of the song "Dixie" and the Confederate Flag as school symbols.[42] During the half-time break of a football game, police had to stop black students who went on the field and attempted to burn a Confederate flag.[43] A backlash ensued, with hundreds of white students walking out of classes to protest against a rumored plan to drop the school's use of the flag and "Dixie" song.[44] The controversy inflamed the community, with motorcades driving through the city waving Confederate flags and crowds gathering to display the flags.[45] After clashes between black and white demonstrators nearly turned into a riot, the city had to impose a curfew for four nights.[46] Despite repeated police intervention and arrests, confrontations between black and white students at the school became such a problem that the school had to shut down for two days and then again for a week so that school officials could implement new measures to restore order.[47] Under those circumstances, judges concluded that the school could prohibit a student from wearing a jacket with a Confederate flag emblem on the sleeve,[48] despite the student's assertion that he wore the jacket merely to show that he was proud of his Confederate heritage.[49]

As years passed and the era of school desegregation became a distant memory, one might think that disputes about students wearing the Confederate flag would become less common. Instead, a flurry of litigation about the flag has

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[40] *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, 896-905 (2001) (citing Confederate flag cases that illustrate application of the substantial disruption standard).

[41] *Melton*, 465 F.2d at 1333.

[42] Melton v. Young, 328 F. Supp. 88, 91-92 (E.D. Tenn. 1971).

[43] *Id.* at 92.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 93.

[48] Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972). *But see id.* at 1337-38 (Miller, J., dissenting) (arguing that the flag was a "harmless emblem" worn "in a quiet, peaceful and dignified manner").

[49] *Melton*, 328 F. Supp. at 94. The student had been suspended a year earlier for wearing clothing that had a cross and "KKK" on it. *Id.*

occurred over the past fifteen years. Some of the cases have involved schools with very sad and alarming records of racial turmoil. A Kansas high school, for example, had members of the Aryan Nation organization waiting just outside its entrance to distribute literature and solicit new members; meanwhile, students inside the school distributed Ku Klux Klan membership applications.[50] In some instances, schools could point to a string of specific problems, such as fights or arguments, arising because of students wearing Confederate flag items.[51] But even a pattern of racial problems unrelated to the Confederate flag could suffice to justify a ban on display of the flag, for "[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."[52]

For most courts, the issue thus boils down to a case-by-case factual inquiry about the degree to which Confederate flags pose a risk of disruption at a particular school.[53] In some sense, this seems like an odd result, because it means that students at one school may have a constitutional right to wear Confederate flag t-shirts while students at a school on the other side of town do not. But that variation in students' rights across schools seems to have been exactly what the *Tinker* Court envisioned. The majority opinion in *Tinker* drew inspiration from a pair of Fifth Circuit decisions concerning all-black high schools in Mississippi that prohibited students from wearing "freedom buttons" signifying support for the civil rights movement.[54] The *Tinker* majority found it "instructive" that the two cases, decided by the same Fifth Circuit panel on the same day, reached different conclusions.[55] In one case, the Fifth Circuit concluded that the commotion surrounding the buttons was sufficient to justify the school's ban on wearing the buttons,[56] while in the other case the court found no evidence that the buttons had disturbed school activities, discipline, or order.[57]

Applying the *Tinker* test, courts usually have had no trouble finding that the school showed a sufficient record of racial troubles to justify banning

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[50] West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1226 (D. Kan. 1998), *aff'd*, 206 F.3d 1358 (10th Cir. 2000).

[51] *See, e.g.*, Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488, 490-91, 493 (D.S.C. 1997) (upholding flag ban where school had "five incidents of racial tension directly caused or escalated by the presence of Confederate Flag clothing").

[52] *West*, 23 F. Supp. 2d at 1232-33.

[53] Some decisions suggest that the risk-of-disruption inquiry can be conducted at the school district level, so that a district can have a uniform policy concerning the Confederate flag at all of its schools. *See* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 337 (6th Cir. 2010) ("Plaintiffs point to no authority for the proposition that the school district is required to apply district policy on a school-by-school or classroom-by-classroom basis.").

[54] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 & n.1 (1969) (citing Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), and Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)).

[55] *Tinker*, 393 U.S. at 505 n.1.

[56] *Blackwell*, 363 F.2d at 753.

[57] *Burnside*, 363 F.2d at 748-49.

Confederate flags.[58] But the *Tinker* requirements are not entirely toothless. For example, in *Castorina ex rel. Rewt v. Madison County School Board*, the Sixth Circuit considered the punishment of two high school students suspended for wearing Hank Williams, Jr. concert t-shirts that featured two Confederate flags and the words "Southern Thunder."[59] The record showed that just one day before the plaintiffs got in trouble, there had been a fight at the school involving students wearing Confederate flag shirts.[60] The court nevertheless remanded the case for further factual development because witnesses' accounts differed as to whether the fight started because of the shirts.[61]

The U.S. Court of Appeals for the Eleventh Circuit has taken an alternative path in Confederate flag cases, rejecting the notion that the risk of disruption posed by Confederate flags at schools must be assessed on a case-by-case basis. The Eleventh Circuit's unique approach originated in *Denno v. School Board of Volusia County*, a case involving a Florida high school student suspended for nine days for showing a small Confederate flag to several friends at school.[62] The Eleventh Circuit initially ruled in the student's favor, by a 2-1 vote, finding that the student's claims against the school's principals should be allowed to proceed beyond the Rule 12(b)(6) dismissal stage because the student alleged that the school had no history of racial tension or disorder.[63] However, one judge changed his mind. The panel reheard the case and issued a 2-1 decision in the school's favor, with the majority finding that *Fraser*, not *Tinker*, was the Supreme Court precedent that should control the case's outcome.[64] The revised ruling in *Denno* asserted that while *Tinker* turned on proof of a reasonable forecast that the prohibited expression would disrupt the school,

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[58] *See, e.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 736-37 (8th Cir. 2009) (describing series of racially-charged incidents); A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 218-19 (5th Cir. 2009) (describing extensive record of race-related problems); Barr v. Lafon, 538 F.3d 554, 566-67 (6th Cir. 2008) (describing evidence of racial violence, threats, and tension).

[59] Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 538 (6th Cir. 2001).

[60] *Castorina*, 246 F.3d at 545 (Kennedy, J., concurring).

[61] *Id.* at 542 (majority opinion); *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254-58 (3d Cir. 2002) (finding that high school had record of racial disturbances sufficient to justify banning clothes featuring the Confederate flag, but not to justify suspending a student for wearing a t-shirt with text containing the word "redneck"). Some decisions have strained mightily to deny that Confederate flags pose a substantial risk. For example, the court in *Bragg v. Swanson*, 371 F. Supp. 2d 814 (W.D. W. Va. 2005), struck down a county's policy prohibiting displays of the flag in schools even though the flag had played a central role in a series of appalling racist incidents at the county's schools. The court brushed off those incidents because they happened at high schools other than the one attended by the plaintiff and because the plaintiff had a black classmate who testified that plaintiff was not a racist and that the school did not have racial problems even though seventy-five to eighty percent of the white students wore Confederate flag clothing. *See id.* at 820, 827.

[62] Denno v. Sch. Bd. of Volusia Cnty., 182 F.3d 780 (11th Cir.), *reh'g granted & opinion vacated by* 193 F.3d 1178 (1999), *rev'd in part on reh'g*, 218 F.3d 1267 (11th Cir. 2000).

[63] *Denno*, 182 F.3d at 785.

[64] *Denno*, 218 F.3d at 1271-76.

Fraser showed that highly offensive speech can be prohibited even if unlikely to produce such disruption.[65] Schools have an important interest in "teaching students the boundaries of socially appropriate behavior," even when an inappropriate means of discourse does not threaten to disrupt school activities.[66] The result, according to the *Denno* decision, is a "reasonableness or balancing standard" that is more flexible than *Tinker*'s reasonable-fear-of-disruption test.[67] The majority in *Denno* thus concluded that reasonable school officials could have read *Fraser* as authorizing them to prohibit Confederate flags, based on the school's interest in teaching the boundaries of socially acceptable behavior.[68] Although many people might display the Confederate flag for non-racist reasons, "common experience also teaches that many people perceive the flag as offensive, constituting either a racist message or at least reflecting an uncivil lack of sensitivity to the sensibilities of many people."[69]

Courts thus cannot agree on whether students' rights to display the Confederate flag must be adjudicated on a school-by-school basis under *Tinker* or instead can be resolved by a more sweeping judicial conclusion that the flag is offensive enough to be prohibited under *Fraser*. But the uncertainties about student speech rights do not end there. An equally thorny question has arisen about whether restrictions on student speech must be viewpoint neutral. For example, if a school prohibits students from wearing shirts with Confederate flags on them, does the school also need to prohibit students from wearing shirts that say "Black Power" or have pictures of controversial black leaders like Malcolm X?

The Sixth Circuit has led the way in arguing for a neutrality requirement. In its view, a school "cannot single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed."[70]

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[65] *Id.* at 1271-72.

[66] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoted in *Denno*, 218 F.3d at 1271).

[67] *Denno*, 218 F.3d at 1273-74.

[68] *Id.* at 1274-75. Technically, the court merely held that this reading of *Fraser* was reasonable, not that it was necessarily correct. Finding that the school officials could have reasonably relied on *Fraser* was enough to entitle them to qualified immunity from liability to the student. *See id.*

[69] *Id.* at 1274 n.6; *see also* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 338-42 (6th Cir. 2010) (Rogers, J., concurring) (upholding a Confederate flag ban on the ground that schools can prohibit "racially hostile or contemptuous speech, without having to show that such speech will result in disturbances," just as the Supreme Court upheld bans on lewd speech in *Fraser* and pro-drug speech in *Morse* without requiring schools to satisfy *Tinker*'s disruption standard); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1248-49 (11th Cir. 2003) (concluding that a school's Confederate flag ban could be justified under either a *Tinker* analysis or a *Fraser* analysis).

[70] Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 542 (6th Cir. 2001). The Sixth Circuit later clarified that viewpoint neutrality does not mean that a school prohibiting racially divisive expression must also ban racially inclusive speech. A rule allowing students to promote racial harmony but not racial hatred is a content-based regulation, but not viewpoint discrimination. *See* Barr v. Lafon, 538 F.3d 554, 572 (6th Cir. 2008). This means, for example, that a school

In particular, the Sixth Circuit has concluded that schools banning Confederate flag clothing must also ban clothing bearing the "X" symbol associated with Malcolm X.[71]

At first glance, the neutrality requirement seems sound. Common sense suggests that schools should not be able to censor one point of view about controversial issues. The neutrality requirement also draws support from *Tinker*, where the majority opinion noted that the schools prohibiting black armbands had not stopped other students from wearing political campaign buttons or even "the Iron Cross, traditionally a symbol of Nazism."[72] Items used to protest American military involvement in Vietnam had been "singled out" and the Court declared that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[73]

Notice, however, that the Supreme Court's call for viewpoint neutrality in *Tinker* suggested a significant caveat. Schools should not be discriminating against anyone's opinion "at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."[74] If a Confederate flag shirt and a Malcolm X shirt pose an equally serious risk of disrupting school activities and discipline, then it does seem unfair for a school to prohibit one and not the other. But it is unrealistic to think that all controversial messages will pose the same risk. Again, the Sixth Circuit essentially assumed, without specific explanation, that a Malcolm X shirt is the mirror equivalent of a Confederate flag shirt.[75] But the X and the Confederate flag are both complicated symbols that can have a multitude of meanings. It is possible that one could pose a severe risk of disrupting a school and the other would not. Likewise, a school could find that student expression concerning "White Power" or "White Pride" poses a different level of risk than seemingly parallel messages about "Black Power" or "Black Pride."

Other courts have rejected the Sixth Circuit's determination that restrictions on student speech must be viewpoint neutral. They have emphasized that even though students have First Amendment rights, "the public school setting is fundamentally different from other contexts."[76] A school therefore

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banning shirts that say "I hate black people" would also need to ban those saying "I hate white people," but not those saying "I like people of all races." Or to give a more realistic example, a school could ban Confederate flags while permitting students to wear shirts commemorating Martin Luther King, Jr.'s "I have a dream" speech.

[71] *Castorina*, 246 F.3d at 541; *see also* Bragg v. Swanson, 371 F. Supp. 2d 814, 828 n.10 (W.D. W. Va. 2005) (asserting that it would be "troubling" if a school prohibited Confederate flag shirts but not Malcolm X shirts).

[72] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510-11 (1969).

[73] *Id.* at 511.

[74] *Id.*

[75] *See Barr*, 538 F.3d at 574 (noting that "[b]oth parties construe Malcolm X iconography as the ideological counterpoint to the Confederate flag").

[76] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 267 (3d Cir. 2002).

could be justified in adopting a policy that prohibits racially provocative speech but not other controversial expression unrelated to race.[77] Moreover, a school can selectively censor expression of viewpoints about racial issues that pose a risk of disruption sufficient to satisfy the *Tinker* standard, while permitting expression of competing views that do not pose such a risk.[78] In other words, if Confederate flag clothing causes a greater risk of disruption than a Malcolm X shirt, a school can ban the former and not the latter.[79]

Scholars have also dissected the problems with the Sixth Circuit's viewpoint neutrality requirement. For example, Professor John E. Taylor analyzed the question in detail and convincingly showed that *Tinker* allows schools to place viewpoint-discriminatory restrictions on student speech if the discrimination is justified by the viewpoints' varying propensity to cause disruption within the school.[80] In other words, if anti-African-American shirts cause a relentless stream of problems, but pro-African-American shirts never do, a viewpoint neutrality requirement would "push schools toward a Hobson's choice" between allowing all the shirts (even the ones causing problems) or prohibiting all the shirts (even the ones that never disrupt anything).[81] As Taylor put it, "[d]oes it really make sense to say that the First Amendment would permit schools to restrict non-disruptive speech in order to keep the playing field level?"[82] If not, a viewpoint neutrality requirement would mean that "schools may only regulate disruptive speech where all competing viewpoints on a particular subject are roughly equal in their disruptive potential."[83]

The Confederate flag cases thus have already produced circuit splits on several significant and difficult legal questions. And of course, the flag cases are just one small corner of the iceberg of student speech issues that courts have encountered. For example, courts are also split on the basic question of how much of a risk of disruption must exist before a school can invoke *Tinker* and censor students' speech. Most courts have adopted an approach that is very deferential to school officials and merely requires them to demonstrate a

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[77] *Id.* at 267-68 ("[T]he focus on racial expression in this case is justifiable. When a school has identified a class of speech that, because of its content, is subject to a well-founded fear of conflict, it should be able to prescribe clear rules that students are capable of following to the degree necessary to maintain order.").

[78] B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 740-41 (8th Cir. 2009).

[79] *See, e.g.*, Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488, 494 (D.S.C. 1997) (finding "no evidence that a Black Power Flag shirt, a Martin Luther King, Jr. shirt, or a shirt with a swastika had ever been the cause of a disruption" at the school); *cf.* A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 225-26 (5th Cir. 2009) (analyzing viewpoint discrimination argument as an equal protection claim and finding that school's actions satisfied rational basis scrutiny).

[80] John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 577 (2009).

[81] *Id.* at 579.

[82] *Id.* at 580.

[83] *Id.*

"reasonable" forecast or prediction that disruption might occur.[84] Others impose a more demanding standard, requiring that the school show a "well-founded" and "specific and significant" fear of disruption.[85]

The litigation of these issues consumes a significant amount of time and effort for plaintiffs, schools, and courts alike. In most instances, the disputes involve questions that in some sense seem too petty to justify the resources and attention being devoted to them. Is it really sensible to have years of litigation undertaken to determine whether schoolgirls in Texas can carry purses adorned with Confederate flag emblems?[86] More than four decades have now passed since the *Tinker* ruling, and it is far from clear that the steady stream of fights over student expression has produced benefits worth the costs.

III. JUDGING THE INTELLECTUAL SERIOUSNESS OF STUDENT SPEECH

If the constitutional protection of student speech rights has gone off track, the difficult question is what can be done to improve the situation. It becomes tempting, of course, to think that free speech rights simply should not extend to students. Justice Clarence Thomas has reached that conclusion, arguing that *Tinker* was a mistake that should be overruled.[87] Thomas relies heavily on historical analysis, contending that evidence about discipline in public schools in the nineteenth century indicates that the original understanding of the First Amendment did not include speech rights for students.[88] But he also decries the adverse effects that he feels *Tinker* has wrought on the schools, claiming it contributed significantly to student defiance of teachers and widespread degeneration of respect for school authority.[89] In Thomas's view, if parents do not like the restraints that a public school puts on their children's expression, they can complain to the school board or legislature, move to another school district, send their children to a private school, or homeschool them.[90] Asking a judge to override the school officials' decisions should not be an option.

Some scholars have reached the same conclusion. NYU sociologist Richard Arum blamed court decisions like *Tinker* for encouraging students and

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[84] *See* Sean R. Nuttal, Note, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1296 & n.83 (2008) (citing cases to show "the overwhelming majority of lower-court decisions over the last forty years" have read *Tinker* as "requiring deference to school officials' reasonable predictions").

[85] Saxe v. State College Area Sch. Dist., 240 F.3d 200, 211-12 (3d Cir. 2001); *accord* Newsom *ex rel.* Newsom v. Albemarle Cty. Sch. Bd., 354 F.3d 249, 255 (4th Cir. 2003).

[86] *See* A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 217 (5th Cir. 2009).

[87] Morse v. Frederick, 551 U.S. 393, 410-22 (2007) (Thomas, J., concurring).

[88] *Id.* at 411-12 ("In short, in the earliest public schools, teachers taught, and students listened.").

[89] *Id.* at 421.

[90] *Id.* at 420.

parents to feel entitled to undermine and scorn school authorities.[91] Likewise, the late University of Georgia law professor Anne Proffitt Dupre condemned courts for tilting the balance between order and liberty too far toward the latter in cases about students' speech rights.[92]

Overruling *Tinker* and putting students entirely outside the scope of the Constitution's protection for freedom of speech would be an extreme step, and surely not one that courts should undertake without first trying less drastic measures. Striking the right balance between the interests of schools and students is difficult, but courts should be striving to identify and enhance the positive effects of protecting student speech while minimizing the adverse consequences.

Toward that end, I propose that courts should begin to treat the intellectual seriousness of a student's speech as one of the factors influencing the extent to which the speech receives constitutional protection. This sort of inquiry is an ingredient in some other areas of First Amendment analysis. In particular, the Supreme Court has long held that lack of intellectual merit is an important consideration in defining the category of speech that falls outside the First Amendment's scope because it is obscene. In *Roth v. United States*, the Court observed that works of art, literature, and science could be sexually explicit and yet deserve constitutional protection.[93] The Court later crafted a test for obscenity cases that explicitly takes into account whether a work has "serious literary, artistic, political, or scientific value."[94] Obviously, people often vigorously disagree and debate about literature, art, politics, and scientific theories. But while personal tastes and preferences vary, the obscenity test sensibly recognizes that we generally can distinguish works that reflect serious thinking from those that are essentially mindless.[95]

Although intellectual seriousness has never explicitly been a factor in the constitutional analysis applied in student speech cases, there are hints sprinkled through the cases that judges instinctively realize the relevance of this consideration. For example, *Tinker* was an attractive vehicle in which to recognize the free speech rights of students because it involved dignified, serious expression about a significant political controversy. Justice Fortas's majority opinion emphasized that the case did not relate to relatively shallow matters like "regulation of the length of skirts or the type of clothing, to hair style, or

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[91] RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY (2003).

[92] ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS (2009).

[93] Roth v. United States, 354 U.S. 476, 487 (1957).

[94] Miller v. California, 413 U.S. 15, 24 (1973).

[95] *See* Pope v. Illinois, 481 U.S. 497, 500-01 & n.3 (1987) (recognizing that the proper question is whether some reasonable people would find serious value in the allegedly obscene work, not whether a majority of the population would do so).

deportment."[96] Unlike many other sorts of controversial expression that would only degrade the school's environment for learning, the *Tinker* armbands seemed to reflect the sort of critical thinking and engagement in current events that schools ideally would be encouraging.[97] Indeed, Justice Fortas's opinion portrayed the school as having missed an opportunity to encourage student thinking and learning. Fortas noted, for example, that the armband controversy had inspired a student to write an article about the Vietnam War for the student newspaper, but school officials talked him out of doing it.[98] The school was so worried about steering clear of any potential controversy that it was discouraging good, thoughtful students from getting excited and wanting to know more about national issues.

Protecting students' freedom of expression thus could enrich a school's intellectual atmosphere in some circumstances, but it also posed a risk of having the opposite effect. In his passionate dissent in *Tinker*, Justice Black foresaw that not all students would be content to engage in solemn, contemplative sorts of protests like wearing the armbands. He lamented that giving freedom of speech to students would leave public schools at the mercy of "the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."[99]

Cases like *Fraser* and *Morse* involved the sort of unsophisticated, boorish expression that Black feared. Indeed, the central theme running through Warren Burger's majority opinion in *Fraser* was that even if the lewd student speech at issue posed no real threat of disrupting school activities, it was simply too crassly juvenile to deserve protection. Burger pointed out the "marked distinction" between Matthew Fraser's smirking double entendres and the genteel political message of the armbands in *Tinker*.[100] Likewise, Burger emphasized that schools must teach students the "habits and manners of civility."[101] In perhaps the opinion's most revealing sentence, Burger noted, with more than a bit of condescension, that a school aiming to teach "essential lessons of civil, mature conduct" need not tolerate the lewdness "indulged in by this confused boy."[102] Fraser's speech was no grave threat to anyone. It was silly vulgarity adjudged to be too low-brow to deserve constitutional shelter.

Morse v. Frederick also turned largely on the inanity of the speech at issue. Joseph Frederick admitted that his "BONG HiTS 4 JESUS" message was

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[96] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507-08 (1969).

[97] *See* Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.").

[98] *Tinker*, 393 U.S. at 510 & n.5.

[99] *Id.* at 525 (Black, J., dissenting).

[100] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986).

[101] *Id.* at 681 (quoting CHARLES A. BEARD ET AL., NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[102] *Id.* at 683.

"meaningless and funny."[103] Even the dissenters who would have protected the speech described it as "silly" or "stupid" nonsense.[104] In his concurring opinion, Justice Alito noted that the Court's ruling should not be construed as supporting "any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[105] The Supreme Court thus essentially established that students still have a right to speak out in favor of drugs if they do so in a serious and intelligent way.

One nevertheless might recoil at the idea of making intellectual merit an explicit factor in the constitutional analysis of student speech. The First Amendment simply guarantees freedom of speech, not freedom of speech when a person has something reasonably smart to say. At first blush, it may seem dangerous to give school teachers and administrators the power to pick and choose what speech they find most clever or insightful. But if letting schools judge the intellectual merits of student expression poses serious problems, we have much reason for concern, because schools do this all the time. They grade both the style and the content of student expression. One student's critique of *The Great Gatsby* will get an A grade while another student earns only a C for his less sophisticated thoughts about the book's themes. One student's answers on a history or social studies test will be praised while another's will be deemed a failing effort. As one scholar put it, "the state as educator is not in the business of putting all ideas on a level playing field."[106]

Justice John Paul Stevens made a similar point in one of the Supreme Court's decisions about religious freedom in schools. In a case about students seeking access to university facilities for religious activities, Justice Stevens saw no reason a school should be unable to evaluate the seriousness and educational merit of various groups' activities.[107] He offered an example, saying that it should be obvious that "if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first."[108] Flashing a bit of wit, Justice Stevens suggested that the university might decide that "a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom."[109] Regardless of what one thinks about the value of studying

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[103] Morse v. Frederick, 551 U.S. 393, 402 (2007) (quoting Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006)).
[104] *Id.* at 444, 445 (Stevens, J., dissenting).
[105] *Id.* at 422 (Alito, J., concurring) (quoting *id.* at 445 (Stevens, J., dissenting)).
[106] Taylor, *supra* note 80, at 628.
[107] Widmar v. Vincent, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring).
[108] *Id.* at 279.
[109] *Id.*

Disney's cinematic works versus Shakespearean drama, Stevens rightly recognized that educational significance is a legitimate consideration in First Amendment analysis in the school setting. And as Stevens noted, "[j]udgments of this kind should be made by academicians, not by federal judges."[110]

Schools are unique environments in another important sense. States have compulsory education laws,[111] and schools have special legal duties to protect students.[112] Courts therefore should show much "greater sensitivity to the effect of the regulated speech on its student audience than that ordinarily accorded to the targets of speech in our general First Amendment jurisprudence."[113] In other words, we normally want to protect controversial expression rather than awarding a "heckler's veto" to those offended or upset by it.[114] But the government's obligation to worry about how one person's speech may adversely affect others is substantially heightened in the school environment. Courts have emphasized this point frequently in cases about the Confederate flag, for example, noting that the flag's display can be limited within schools in ways that would never survive constitutional scrutiny in other contexts.[115] When someone gets up on a soapbox on a public sidewalk to deliver a racist rant, those hurt by the message can at least walk away, but children do not always have that option when the speech comes from fellow students within their schools.

Enabling school officials to consider the intellectual or educational merit of student speech would give them more leeway to make distinctions and restrict speech in contexts where its potential harm outweighs its value but without imposing absolute bans on expression about particular topics. Again using the Confederate flag controversies as an example, there surely are students who have sincere interests in Southern history and pride in having Southern heritage. The Confederate flag poses a dilemma, however, because it is both a symbol of Southern heritage and a symbol of racism.[116] If a student simply demands to wear a shirt or hat emblazoned with the flag's image, it often will be quite difficult to know what message the student really aims to communicate. Rather

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[110] *Id.*

[111] *See, e.g.*, MO. REV. STAT. § 167.031 (2000 & Supp. 2009).

[112] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(5) (Proposed Final Draft No. 1, 2005) (asserting that schools have a special relationship with and duty to protect its students).

[113] Barr v. Lafon, 538 F.3d 554, 567 (6th Cir. 2008).

[114] Rosenbaum v. City & Cnty. of San Francisco, 484 F.3d 1142, 1159 (9th Cir. 2007) (defining "heckler's veto" as "an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience").

[115] *See, e.g.*, *Barr*, 538 F.3d at 568; West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1365 (10th Cir. 2000).

[116] Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1248-49 (11th Cir. 2003) (describing how plaintiffs' experts planned to testify that the Confederate battle flag stands for decentralized government and Southern pride, while defendant's expert planned to testify that the flag has racist connotations, and concluding that "[t]he problem, of course, is that both of them are correct" because the flag evokes different ideas and emotions for different people).

than simply banning the flag, the school should be steering the student toward endeavors that advance both the school's educational mission and the student's desire to express his views.

For example, the student in *Denno v. School Board of Volusia County*, a case decided by the Eleventh Circuit, claimed that he had a strong interest in Civil War history and that he participated in Civil War reenactments and living history presentations in his spare time.[117] His complaint alleged that he showed a small Confederate flag to several friends during an outdoor lunch break as they quietly conversed about Civil War reenactments and historical issues relating to Southern heritage.[118] When a school administrator approached and asked the student to put away the flag, the student tried to explain the flag's historical significance but the administrator responded by repeatedly telling the student to "shut up."[119] Again, that is what the student alleged. The case was dismissed before reaching the summary judgment or trial stage, so the school was never required to dispute the student's description of the incident.[120] But assuming the student's account was at least basically true, even if somewhat slanted in his favor, this would have been a perfect opportunity for the school to have based its handling of the matter on whether the student really had a genuine and substantial intellectual interest in historical issues surrounding the Civil War and the Confederate flag. Rather than suspending the student, the school could have offered him the opportunity to make an academic presentation about his reenactment activities and the historical issues of Southern heritage in which he professed to have such a deep interest. The student could be encouraged to read some of the in-depth studies of the flag's origins and the historical and contemporary controversies surrounding it.[121] The student could be permitted to display the flag for purposes of the presentation, and the school could even encourage him to include in the presentation an exploration of the flag's origins and some analysis of the contemporary debates surrounding the flag's use. Even if the school maintained a ban on displays of the flag outside the context of such presentations, the result would still be a "win-win" of sorts, with the school

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[117] Denno v. Sch. Bd. of Volusia Cnty., 218 F.3d 1267, 1270 (11th Cir. 2000).
[118] *Id.*
[119] Denno v. Sch. Bd. of Volusia Cnty., 959 F. Supp. 1481, 1483 (M.D. Fla. 1997), *aff'd in part & rev'd in part*, 182 F.3d 780 (11th Cir. 1999), *aff'd on panel reh'g*, 218 F.3d 1267 (11th Cir. 2000).
[120] *See Denno*, 218 F.3d at 1270 (noting that the posture of the case required the court to accept the facts alleged in the student's complaint).
[121] *See, e.g.*, ROBERT E. BONNER, COLORS AND BLOOD: FLAG PASSIONS OF THE CONFEDERATE SOUTH (2004); DEVEREAUX D. CANNON, THE FLAGS OF THE CONFEDERACY: AN ILLUSTRATED HISTORY (1997); JOHN M. COSKI, THE CONFEDERATE BATTLE FLAG: AMERICA'S MOST EMBATTLED EMBLEM (2005); HAL MARCOVITZ, THE CONFEDERATE FLAG (2003); K. MICHAEL PRINCE, RALLY 'ROUND THE FLAG, BOYS: SOUTH CAROLINA AND THE CONFEDERATE FLAG (2004). For instance, students might be interested to learn that what we think of today as "the Confederate flag" was a battle flag that was actually never the national flag of the Confederate States of America. *See* COSKI, *supra*, at 1.

advancing its educational mission and the student having the opportunity to express and expound in detail on the thoughts about Southern history that purportedly inspired his possession of the flag.

Some schools and judges have instinctively recognized that educational value and intellectual seriousness must be ingredients in the determination of what student speech to prohibit or permit. For example, the evidence in one of the Confederate flag cases, *West v. Derby Unified School District No. 260*, showed that school officials sensibly considered the circumstances when enforcing its policy banning Confederate flag images.[122] Administrators explained that the school's policy would not be violated by students having history books containing pictures of the Confederate flag or any other possession of Confederate flag images relating to legitimate educational purposes, just as a student would not be punished for putting swastikas on something made as part of a class's study of World War II or the Holocaust.[123] But in other instances, courts have feared that schools will lack common sense in this regard. For example, one judge condemned a school's policy banning Confederate flags as being so broadly worded that it would prohibit possession of books like *The Red Badge of Courage* that might have Confederate flags depicted on their covers.[124] Contrary to that sort of dubious assumption about schools' ability to draw sensible lines, I think we could safely trust school officials to have the good sense to distinguish between students with genuine interests in classic literature and those using Confederate flags to instigate trouble or exacerbate racial tension.

Of course, any discretion given to schools or courts can be abused. Assessing the intellectual merit of expression is obviously a subjective endeavor, and therefore it may be tempting for educators or judges to let their personal views about the speech affect their judgments about its constitutionality. For example, a high school principal who happens to be a Democrat may inevitably tend to think a message criticizing George W. Bush is more intellectually serious than a message mocking Barack Obama. Likewise, a teacher who is a conservative evangelical Christian may be particularly inclined to see intellectual merit in student speech expressing opposition to abortion or homosexuality. This sort of preferential treatment is certainly a serious risk, but it is a problem already under the *Tinker* disruption and *Fraser* offensiveness standards. For example, a school official or judge who is personally disgusted by the Confederate flag will surely tend to foresee a greater risk of disruption posed by the flag than a teacher or judge who has no strong feelings about the flag.[125] Treating intellectual merit

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[122] West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1231 (D. Kan. 1998), *aff'd*, 206 F.3d 1358 (10th Cir. 2000).

[123] *Id.*

[124] Bragg v. Swanson, 371 F. Supp. 2d 814, 828 (W.D. W. Va. 2005).

[125] *See* Defoe *ex rel.* Defoe v. Spiva, 674 F.3d 505, 508 (6th Cir. 2011) (Boggs, J., dissenting from denial of rehearing en banc) (claiming that judges have effectively favored "nice symbols" like the

as one of the factors considered in constitutional analysis of student speech therefore poses a risk of bias and favoritism, but the risk is not appreciably more severe than it is under the existing legal standards.

Intellectual seriousness can be introduced as an explicit factor in the constitutional analysis without establishing any specific formula determining how much weight this factor should receive in any given case. Courts can simply declare that the intellectual seriousness of student speech is a relevant consideration in applying the existing standards, such as determining the degree of disruption risk that a school is obligated to tolerate under *Tinker* or in drawing the line at which vulgar speech loses its constitutional protection as in *Fraser*. The weight that should be assigned to the intellectual seriousness factor can be worked out on a case by case basis without the need for establishing any hard and fast rules.

Courts should apply the intellectual seriousness criterion with a strong preference for deferring to school administrators and teachers. As the Supreme Court has emphasized, education should be "primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[126] A careful balance must be struck in order to avoid paying an excessive price for maintaining constitutional protection of student speech. Striking that balance should be primarily the task of educators, and courts "should avoid too quickly second-guessing, from the quiet confines of a judge's chambers, the complex and difficult decisions made on a daily basis by teachers and school administrators."[127] Ensuring that some serious thought underlies student expression is a task particularly well suited for those responsible for fostering the intellectual development of students while they are at school.

IV. CONCLUSION

Constitutional protection of student speech has been a mixed blessing. There is still something quite inspiring about the notion that young people have worthwhile thoughts to share, and that the Constitution guarantees their right to do so. At the same time, courts have struggled to figure out what limits on student expression should be permitted, and much of the litigation has involved student speech that is disappointingly mindless. The Supreme Court's seminal ruling in *Tinker* concerned students who wore armbands to express a serious message about an important national issue. Judges and school officials understandably may struggle to keep a straight face when asked to apply the same legal standards to claims that the First Amendment entitles a student to

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Tinker armbands over "naughty symbols" like the Confederate flag), *cert. denied*, 132 S. Ct. 299 (2011); Barr v. Lafon, 553 F.3d 463, 464 (6th Cir. 2009) (Boggs, J., dissenting from denial of rehearing en banc) (arguing that *Tinker*'s standard tempts schools and courts to "export their degree of approbation of symbols into the degree to which they could 'reasonably forecast' disruption").

[126] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[127] Governor Wentworth Reg'l Sch. Dist. v. Hendrickson, 421 F. Supp. 2d 410, 425 (D.N.H. 2006).

wear a shirt expressing his interest in "Coed Naked Band"[128] or being a "Redneck sports fan."[129]

Treating intellectual seriousness as a significant factor in the constitutional analysis would make the right to free expression stronger in those situations where student speech truly makes a valuable contribution to a school's ultimate goal of training young thinkers. It would encourage students who want to communicate controversial messages to do the work necessary to establish that they have a sincere understanding of the issues involved and are not just eager to complain and defy school authorities. And it would simultaneously help to shift responsibility for application of student speech rights away from federal judges and toward school teachers and administrators. In all of these ways, it would ultimately solidify the constitutional protection of student speech and help to fulfill the noble promise of decisions like *Tinker*.

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[128] Pyle *ex rel.* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 158 (D. Mass. 1994) ("This case is a reminder that it is easy to assume a tempest in a teapot is trivial, unless you happen to be in the teapot."), *question certified*, 55 F.3d 20 (1st Cir. 1995).

[129] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 271 (3d Cir. 2002) (Rossen, J., concurring and dissenting) (describing such a message as "not much of an expression of an idea").