Missouri Law Review

Volume 75
Issue 3 *Summer 2010*

Article 14

Summer 2010

Silencing the Rebel Yell: The Eighth Circuit Upholds a Public School's Ban on Confederate Flags

Lucinda Housley Luetkemeyer

NOTE

Silencing the Rebel Yell: The Eighth Circuit Upholds a Public School's Ban on Confederate Flags

B.W.A. v. Farmington R-7 School District, 554 F.3d 734 (8th Cir. 2009).

LUCINDA HOUSLEY LUETKEMEYER*

I. INTRODUCTION

Forty years ago, United States Supreme Court Justice Abe Fortas called the public school classroom the "marketplace of ideas"[1] in his majority opinion in the landmark student speech case *Tinker v. Des Moines Independent Community School District*. Justice Fortas emphasized the importance of protecting students' constitutional freedoms within school and cautioned that school officials could not constitutionally confine student speech "to the expression of those sentiments that are officially approved."[2] In the decades since *Tinker*, students have challenged school regulation of many types of speech, including the expressive conduct of wearing clothing that depicts the Confederate flag. The Confederate flag waves with symbolism and ignites passion from those who fight to display it and those who fight to banish its display. As a result, many of America's public schools have chosen to ban the display of the Confederate flag based on administrators' assertions that it leads to disruption and compromises school safety.[3] Confederate flag bans have been and continue to be the subject of great controversy, and in recent

* B.J., B.A., University of Missouri-Columbia, 2008; J.D. Candidate, University of Missouri School of Law, 2011; Senior Lead Articles Editor, *Missouri Law Review*, 2010-2011. I am grateful to Professor Christina Wells for her advice and guidance and to the members of the *Missouri Law Review* for their tireless editing. Special thanks go to my family – especially to my father, John Housley, whose legal career inspired me to go to law school; and to my husband, Tony Luetkemeyer, who with good humor suffered through many discussions related to this Note.

1. 393 U.S. 503, 512 (1969).

2. *Id.* at 511.

3. *See* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002); Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008); Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 538 (6th Cir. 2001); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1247 (11th Cir. 2003) (per curiam); Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000); Bragg v. Swanson, 371 F. Supp. 2d 814 (S.D. W. Va. 2005).

years courts have been forced to confront the thorny issue of whether public schools may legally ban the flag's display.[4]

In 2009, the United States Court of Appeals for the Eighth Circuit heard for the first time a case challenging the constitutionality of a public school's ban on the display of Confederate flags.[5] When the Eighth Circuit faced this situation in *B.W.A. v. Farmington R-7 School District* (*B.W.A. v. Farmington*), it attempted to balance the competing interests of protecting students' free speech rights and avoiding future disruption and danger to the learning environment. In doing so, the court adhered to the reasoning established by its sister circuits and set a precedent within the Eighth Circuit that shifts away from *Tinker*'s original protections to allow suppression of a particular mode of student political speech, even when that exact mode of expression has never caused a disruption.

II. FACTS AND HOLDING

In *B.W.A. v. Farmington R-7 School District*, three Farmington, Missouri, high school students were suspended during the 2006-2007 school year after they wore clothing displaying the Confederate flag.[6] The school district's student dress code, adopted in 1995, prohibited "[d]ress that materially disrupts the education environment."[7] After a series of race-related disruptions in the district during the 2005-2006 school year, the district superintendent informed administrators that the dress code extended to a ban on clothing that depicted the Confederate flag.[8]

At the time of the students' suspension, the racial composition of Farmington High School was predominantly white, with approximately 1,100 students in attendance, and only fifteen to twenty of those students were black.[9] Leading up to the ban on Confederate flag clothing, there were approximately eleven verbal or physical confrontations between black and white students, including several incidents of hate speech or racial slurs in the Farmington district between May 2005 and April 2006.[10] Ten of these incidents involved Farmington students.[11]

The first racially charged incident that led to the ban on Confederate flag clothing occurred in May 2005, when a white elementary school student urinated on a black fourth grader while allegedly saying, "[T]hat is what black

4. *See supra* note 3.

5. B.W.A. v. Farmington R-7 School District, 554 F.3d 734, 741 (8th Cir. 2009).

6. *Id.* at 736.

7. *Id.* at 737 n.4.

8. *Id.* at 737.

9. *Id.* at 736 n.2.

10. B.W.A. v. Farmington R-7 Sch. Dist. (*Farmington I*), 508 F. Supp. 2d 740, 743-45 (E.D. Mo. 2007).

11. *Farmington*, 554 F.3d at 736.

people deserve."[12] The black student then withdrew from the Farmington school district and began attending another school.[13] Another disturbance occurred when several white students, one wielding a baseball bat, went to the house of a black student and made racist comments, such as "anything that is not white is beneath them."[14] After the black student's mother attempted to separate the students, one of the white students hit her in the eye, and a fight ensued between her son and the other students.[15] The black student received threats that his house would be burned down, resulting in the police being called to the scene.[16] Subsequently, this black student also withdrew from the school district.[17]

A third racial skirmish occurred during a basketball tournament at a neighboring school district, where a heated altercation broke out during a game between Farmington High School students and Festus High School students.[18] During the confrontation, Farmington students allegedly made racial slurs against two black players from Festus, a school with a greater population of African-American students than Farmington.[19] Festus students reported that a Confederate flag was hanging in the hall near the locker rooms during the basketball game.[20] After the incident, the two Festus students complained to the Missouri State High School Activities Association and to the United States Department of Justice's Office of Civil Rights, and both entities investigated the incident.[21] As a result of the confrontation during the game, Farmington and Festus no longer play each other unless their athletic conference requires it.[22]

After the district banned Confederate flag clothing in response to these events, additional racial disruptions occurred at Farmington High School, including when a white student wrote racial slurs, including the n-word, in his notebook, and when another student announced to his teacher that the "n*gg*rs [are] here" in response to the arrival of a visiting track team.[23]

During a "Spirit Week" the following school year, B.W.A., a fourteen-year-old Farmington High School student, wore a Confederate flag baseball cap to school, emblazoned with the words, "C.S.A., Rebel Pride, 1861."[24] A teacher directed B.W.A. to remove the hat and put it away for the remainder

12. *Id.*; *Farmington I*, 508 F. Supp. 2d at 743.
13. *Farmington I*, 508 F. Supp. 2d at 744.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 736 (8th Cir. 2009).
19. *Id.* at 736 & n.3.
20. *Id.* at 736.
21. *Id.*
22. *Id.*
23. *Id.* at 737.
24. *Id.*

of the day.[25] The next day, B.W.A. wore a T-shirt bearing the image of the Confederate flag and a belt buckle with the flag and the words "Dixie Classic."[26] The assistant principal instructed B.W.A. to remove the belt buckle and turn his shirt inside out, but B.W.A. refused to do so and was subsequently suspended.[27] He withdrew from school that day.[28] In response to B.W.A.'s suspension and withdrawal, community members and parents protested the school's actions by gathering across the street from the high school and displaying a Confederate flag.[29] Students reported to school officials that the protests were offensive and distracting and would lead to future disruptions.[30] The school was the target of race-related vandalism, which resulted in property damage.[31] Additionally, one black student withdrew from the high school because he was "uncomfortable due to the racial tension."[32]

Several months after B.W.A. left the district, another Farmington High student, R.S., wore a Confederate flag shirt to school with the words, "The South was right[.] Our school is wrong."[33] R.S. was suspended for refusing to remove the shirt.[34] The next day, R.S. wore a similar shirt and was sent home to change.[35] A few days later, a third student, S.B., wore a shirt to school "containing the Confederate colors" which read, "Help support B.[W.A.]. Once a rebel, always and forever a rebel. We love B.[W.A.]."[36] S.B. too was sent home after refusing to change, and again the school was subjected to racially charged vandalism and reports from students that they feared future disruptions.[37]

After he was suspended, B.W.A. sued the Farmington School District under 42 U.S.C. § 1983, claiming that the school and its officials violated his First Amendment rights.[38] R.S. and S.B. joined the lawsuit as plaintiffs.[39] The three plaintiffs sought an injunction prohibiting the school from banning the display of the Confederate flag and a declaratory judgment that the three students possessed a First Amendment right to wear the Confederate flag to school.[40] The students also claimed that district officials violated Missouri's

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 737-38 & n.6.
38. *Id.* at 738.
39. *Id.*
40. *Id.* *See also* Complaint Violation of Civil Rights Pursuant to 42 U.S.C. § 1983 Preliminary Injunction, Permanent Injunction, and Declaratory Judgment,

"strip search" statute, found at Missouri Revised Statute section 167.166.7, when they instructed the students to remove their Confederate flag clothing.[41] The statute prohibits district officials from requiring students to remove items of clothing unless that item is worn in a way that promotes disruptive behavior.[42] The school district responded by filing a motion for summary judgment, arguing that its actions were constitutional because officials were reasonable in their belief that displaying the Confederate flag would result in a material and substantial disruption.[43] The United States District Court for the Eastern District of Missouri granted the defendants' motion for summary judgment and dismissed the claims of the students.[44]

On appeal, the Eighth Circuit affirmed the ruling of the district court, holding that the Farmington School District did not violate the students' First Amendment rights when it prohibited them from wearing clothing depicting the Confederate flag.[45] The court based its decision on the fact that the high school and community at large recently experienced several race-related disruptions and school officials reasonably believed that displaying the rebel flag would cause material and substantial disruption to the educational process.[46] When school officials reasonably suspect material and substantial disruption, they may constitutionally restrict the free speech rights of students, including prohibiting the display of the Confederate flag.[47]

III. LEGAL BACKGROUND

This section first will analyze the history of United States Supreme Court decisions regarding student speech, detailing the establishment of certain general constitutional protections for student speech and the latitude given to school officials to restrict certain student speech. Next, this section will explain recent and relevant circuit court cases dealing with Confederate flag bans in school districts as a basis for analyzing the Eighth Circuit's decision in the instant case. Finally, this section will outline and discuss Missouri's "strip search" statute as it relates to the present case.

B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp. 2d 740, 743-45 (E.D. Mo. 2007) (No. 4 06CV01691JCH), 2006 WL 3856298.

41. *Farmington*, 554 F.3d at 741.
42. MO. REV. STAT. § 167.166.7 (2000).
43. *Farmington*, 554 F.3d at 738.
44. *Id.*
45. *Id.* at 741.
46. *Id.*
47. *Id.*

A. *United States Supreme Court Cases Regarding First Amendment Rights of Public School Students*

Four United States Supreme Court decisions have dealt with the issue of student speech in public elementary and secondary schools, including the landmark 1969 case of *Tinker v. Des Moines Independent Community School District*.[48] In *Tinker*, the Supreme Court upheld the right of three students to wear black armbands in protest of the Vietnam War when their conduct was viewed as nondisruptive.[49] The Supreme Court next addressed student free speech in the 1986 case of *Bethel School District No. 403 v. Fraser*, which centered around a student's lecture at a school rally,[50] and again two years later in *Hazelwood School District. v. Kuhlmeier*, which dealt with censorship of articles in a high school newspaper.[51] Most recently, the Supreme Court addressed student free speech in the 2007 case of *Morse v. Frederick*, where a student was disciplined for displaying a banner with the words "BONG HiTS 4 JESUS" at a school event.[52] Since *Tinker*, the Supreme Court has not ruled on the constitutionality of student clothing bans. Nevertheless, the rules of law established by the Supreme Court in *Tinker*, *Fraser*, and *Kuhlmeier* have found particular application to Confederate flag clothing cases decided in various circuits[53] and therefore warrant further discussion.

In *Tinker*, the Supreme Court established the standard for student First Amendment cases: school administrators are prohibited from banning certain speech unless they can show facts that lead them to a reasonable forecast of "substantial disruption of or material interference with school activities."[54] The First Amendment must be "applied in light of the special characteristics of the school environment."[55] The Supreme Court held that school officials must be able to demonstrate that their prohibition of particular speech "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[56] *Tinker* remains relevant today, as the rule first articulated in the case and modified

48. 393 U.S. 503, 514 (1969); *see also* 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, 887 (2001).

49. *Tinker*, 393 U.S. at 514.

50. 478 U.S. 675 (1986).

51. 484 U.S. 260 (1988).

52. 551 U.S. 393, 397 (2007).

53. *See, e.g.*, West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972); Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 488, 492 (D.S.C. 1997).

54. *Tinker*, 393 U.S. at 514.

55. *Id.* at 506.

56. *Id.* at 509.

by the Supreme Court in the later cases of *Fraser* and *Kuhlmeier*, defines the basic structure of the free speech rights of students.[57]

The Supreme Court's first student speech case is also its most liberal in favor of student speech rights; *Tinker* "embraced a more libertarian vision of education that saw public schools as platforms for student free speech."[58] *Tinker* not only set the stage for American student speech jurisprudence, but it also established the "disruption standard" that has been applied in some form to all student speech cases that have followed. The Court held that in order to restrict students' speech, school officials must show "that the students' activities would materially and substantially disrupt the work and discipline of the school."[59] The seven-justice majority held that the symbolic political speech exhibited by the students wearing black armbands did not reach this level of disruption and, therefore, the students' speech was protected.[60] In reaching its decision, the Court in *Tinker* highlighted a concern for deterring viewpoint-based discrimination, emphasizing that "the prohibition of expression of one particular opinion . . . is not constitutionally permissible."[61]

Nearly twenty years later, in its next student speech case, *Bethel School District No. 403 v. Fraser*, the Supreme Court modified its view of students' First Amendment rights when it held that a school was constitutionally allowed to suspend a student who gave a speech laden with sexual innuendo at a school assembly.[62] The speech at issue in *Fraser* was a high school student's lecture at a school assembly, which contained what the Court called an elaborate, graphic, and explicit sexual metaphor.[63] In upholding the school's decision to punish the student, the Court relied on *Tinker* and its disruption standard, but also developed a balancing test, holding that the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[64]

Though *Fraser* did not overrule *Tinker*, it plainly departed from the previous case's more libertarian emphasis of student speech and, in doing so, "emphasized the communitarian role of education."[65] *Fraser* gave school officials the discretion to curtail not only obscene speech, but also speech that is vulgar, lewd, or plainly offensive.[66] The deference to school officials dem-

57. Dedman, *supra* note 48, at 887-88.

58. Kenneth W. Starr, *From* Fraser *to* Frederick*: Bong Hits and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 662-63 (2009).

59. *Tinker*, 393 U.S. at 513.

60. *Id.* at 514.

61. *Id.* at 511.

62. 478 U.S. 675, 685 (1986).

63. *Id.* at 677-78.

64. *Id.* at 681.

65. Starr, *supra* note 58, at 663.

66. *Id.*

onstrated by the Court's holding in *Fraser* was absent from the Court's analysis in *Tinker*, but established a rule that allowed school officials to enjoy greater flexibility in suppressing speech deemed indecent or offensive.[67] The Court broadened the meaning of "disruption" beyond the *Tinker* standard of physical disorder to add the type of disruption caused by certain words and behavior inconsistent with social decency.[68] By focusing on the offensive nature of the speaker's words rather than the potential or actual disruption his speech has on his fellow students, the Supreme Court in *Fraser* "narrowed its view of students' [F]irst [A]mendment entitlements."[69]

Two years later, the Supreme Court heard the case of *Hazelwood School District v. Kuhlmeier*, and, for the first time, the Court heard a student speech question regarding curriculum.[70] The Court applied the principles established in *Fraser* to hold constitutional a school's censorship of certain articles in the school newspaper, which were produced as part of the school's journalism classes.[71] One article suppressed from publication discussed teenage pregnancy at the high school, and another covered divorce and was critical of certain parents.[72]

In upholding the censorship of the two articles, the Court held that a school does not have to tolerate student speech that is "inconsistent with its 'basic educational mission.'"[73] Thus, *Hazelwood* created and designated a new category of student speech as outside the realm of *Tinker*: "school sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[74] The *Hazelwood* Court applied the *Tinker* disruption test to allow the school to regulate the content of a publication which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[75]

The Supreme Court's very recent case dealing with student speech, *Morse v. Frederick*, also known as the "Bong Hits" case, held that "schools may regulate some speech 'even though the government could not censor similar speech outside the school.'"[76] The holding in *Morse* was not based on *Tinker*, and so far it is unclear what exactly its application will be to school

---

67. *Id.* at 671.

68. *Id.* at 672.

69. Sara Slaff, Note, *Silencing Student Speech:* Bethel School District No. 403 v. Fraser, 37 AM. U. L. REV. 203, 205 (1987).

70. 484 U.S. 260 (1988).

71. *Id.* at 260.

72. *Id.* at 263.

73. *Id.* at 266.

74. *Id.* at 271.

75. *Id.* at 281 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

76. 551 U.S. 393, 406 (2008) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

speech cases unrelated to the advocacy of illegal drug use. As the *Morse* Court cautioned, its holding was a narrow one: a public school can proscribe student speech that the school "reasonably regard[s] as promoting illegal drug use."[77]

B. Confederate Flag School Cases Across the Circuits

Tinker and its progeny began a "judicial crusade" in the circuit courts to recognize student speech.[78] Among the types of expression vying for constitutional recognition was the right to display Confederate flag memorabilia or don flag-related clothing in a public school setting. James Dedman noted in his study of Confederate flags in the classroom that "[i]n the last few years, students disciplined for display of the rebel flag have brought forth a flurry of litigation. Presaging similar cases, the U.S. Supreme Court denied certiorari in several flag-related cases in 2000."[79] Before the Eighth Circuit heard the instant case of *B.W.A. v. Farmington*, the Third, Sixth, Tenth, and Eleventh Circuits considered challenges to Confederate flag clothing bans and relied upon the legal framework established in *Tinker* and *Fraser* to judge the constitutionality of such bans.[80]

The first time a federal court heard a challenge to a ban on Confederate flag clothing was the 1972 case of *Melton v. Young*.[81] In *Melton*, a Tennessee high school student was suspended for fastening a Confederate flag emblem to his jacket in violation of school district policy.[82] The Sixth Circuit found that the school had become "racially polarized" due to an ongoing controversy over the use of the song *Dixie* and the Confederate flag as school symbols at various events.[83] This tension spilled over into the town, prompting a city-wide, four-night curfew.[84] After these events, the school district adopted a dress code banning the use, wear, or display of the Confederate flag.[85] After a student sued to enforce his right to wear the flag, the Sixth Circuit upheld the district's ban, holding that it was reasonable for the district to ban the emblem due to the past race-related violence and tension at the school.[86] The court relied on *Tinker* to hold that the existence of substantial disorder at the school due to the display of the Confederate flag made it reasonable for

77. *Id.* at 408.

78. Slaff, *supra* note 69, at 211-12.

79. Dedman, *supra* note 48 at 878.

80. *See* cases cited *infra* note 92.

81. 465 F.2d 1332 (6th Cir. 1972); Michael Henry, *Student Display of the Confederate Flag in Public Schools*, 33 J.L. & EDUC. 573, 574 (2004).

82. *Melton*, 465 F.2d at 1334.

83. *Id.* at 1333.

84. *Id.*

85. *Id.* at 1333-34.

86. *Id.* at 1334.

school officials to ban the flag to prevent future disruption.[87] However, the *Melton* court noted that it was faced with a troubling case – one which presented the challenge of balancing "the exercise of the fundamental constitutional right to freedom of speech, and . . . the oft conflicting, but equally important, need to maintain decorum in our public schools."[88]

After *Melton*, twenty-five years lapsed before a federal court heard another case about Confederate flag clothing in a public school.[89] In the 1997 case of *Phillips v. Anderson County School District Five*, a federal district court in South Carolina held that a school district acted constitutionally when it prohibited a student from wearing a jacket fashioned to look like the Confederate flag.[90] The district court held that although the flag did not cause any disruption in this particular incident, the school's history of disorder resulting from the display of the flag made it reasonable for district officials to ban its display due to a fear of substantial interference with schoolwork.[91]

Phillips ended the quarter-century dearth of Confederate flag clothing cases in federal courts and opened the floodgates of litigation regarding the rebel flag in schools. Since the late nineties, there have been a host of cases in federal courts dealing with student displays of the Confederate flag at school;[92] in most, courts have relied on *Tinker*, *Fraser*, or other circuit decisions to find in favor of the school board.[93] The judicial affirmation of school policies banning the Confederate flag in the name of *Tinker* and *Fraser* led some scholars and critics to denounce the judicial interpretation of these First Amendment cases and to label the decisions as endorsing viewpoint discrimination violative of students' constitutional rights.[94] Nevertheless, the various circuit decisions regarding Confederate flag bans in schools are important to note, largely due to their influence and persuasiveness across circuits.

---

87. *Id.* at 1335.

88. *Id.* at 1334.

89. Henry, *supra* note 81, at 575.

90. 987 F. Supp. 488 (D. S.C. 1997).

91. *Id.* at 493.

92. Henry, *supra* note 81, at 574; *see, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002); Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008); Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003) (per curiam); Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000); Bragg v. Swanson, 371 F. Supp. 2d 814 (S.D. W. Va. 2005).

93. Henry, *supra* note 81, at 575-76.

94. *See* Dedman, *supra* note 48, at 914-15; David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 208 (2002); Justin T. Peterson, Comment, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at its Source?*, 3 MICH. ST. L. REV. 931, 959 (2005); John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 595-601 (2009).

In the few circuit court opinions ruling in favor of student plaintiffs, courts have generally based their decisions on the absence of prior racial tensions at the school caused by the Confederate flag.[95] Federal courts have invalidated bans on Confederate flags in schools in two cases: in 2001 with the Sixth Circuit decision of *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, and again in 2005 in the West Virginia district court case of *Bragg v. Swanson*.[96]

In *Castorina*, the court heard the case of two high school students who were suspended for wearing shirts purchased at a Hank Williams concert; the shirts contained Confederate flags and the message "Southern Thunder" on the back.[97] The school suspended the students for violating the dress code, which banned clothing containing "racist implications."[98] The students claimed that they wore the shirts not out of racist motives, but to show pride in their southern heritage and to celebrate Hank Williams's birthday.[99] The Sixth Circuit reversed the trial court's grant of summary judgment for the school district and remanded the case for further findings of fact regarding any prior racial tensions at the school.[100] The court relied on and compared the case directly to *Tinker*, emphasizing the plaintiffs' claim that the school engaged in impermissible viewpoint discrimination by allowing students to wear Malcolm X shirts while prohibiting them from wearing or displaying Confederate flag insignia.[101] The court held that the school district could not "single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed."[102] Lauded as a victory for proponents of Confederate flags in schools,[103] *Castorina* departed slightly from previous flag cases to hold "that a school board may ban racially divisive symbols when there has been actual racially motivated violence and when the policy is enforced without viewpoint discrimination."[104]

In *Bragg v. Swanson*, a federal district court in West Virginia invalidated a school's ban on the Confederate flag after it was determined that the school principal banned the display of the flag because she experienced racial disruptions involving the flag at two high schools where she previously worked, not due to racial incidents at the principal's immediate school.[105] Prior to the principal's arrival at the school, the rebel flag was allowed, worn

95. *See Castorina*, 246 F.3d at 538; *Bragg*, 371 F. Supp. 2d at 826-27.

96. *See generally Castorina*, 246 F.3d 536; *Bragg*, 371 F. Supp. 2d 814.

97. *Castorina*, 246 F.3d at 538.

98. *Id.*

99. *Id.*

100. *Id.* at 544.

101. *Id.* at 541.

102. *Id.* at 542.

103. *See generally* Southern Legal Resource Center, SLRC Case Law, http://slrc-csa.org/site/caselaw/caselaw.php (last visited Sept. 2, 2010).

104. *Castorina*, 246 F.3d at 543-44.

105. Bragg v. Swanson, 371 F. Supp. 2d 814, 817 (W.D. W.Va. 2005).

by approximately seventy-five percent of students, and there were no complaints or incidents due to its display.[106] The court applied the *Fraser* standard to find that "the display of the flag is not *per se* and patently offensive"[107] and held that though the principal was "understandably influenced" by previous negative flag-related incidents, those occurrences at other schools were "plainly insufficient to warrant a flag ban [presently]."[108] Noting the existence of a "sea of interpretations about what the flag represents," the court in *Bragg* reasoned that "there are a variety of innocent flag uses that would be silenced by the broadly worded policy" prohibiting the display of the flag.[109]

The *Bragg* court noted that the high school allowed students to wear clothing with other "content-specific expressions," including Malcolm X shirts.[110] Though the court did not discuss viewpoint discrimination at length, it included a footnote which cited the Sixth Circuit's opinion in *Castorina* and expressed the opinion that the flag ban in this case was "troubling from another standpoint" because the record of students being allowed to wear Malcolm X shirts showed the policy to be unevenly implemented in a viewpoint-specific manner.[111] The court concluded by cautioning that its opinion should not be read to offer "a safe haven for those bent on using the flag in school as a tool for disruption, intimidation, or trampling upon the rights of others."[112] Finally, the court noted that should disruption occur, or be reasonably forecast by school officials, "the very ban struck down today might be entirely appropriate."[113]

Seven years after its decision cautioning against viewpoint discrimination in *Castorina*, the Sixth Circuit heard another Confederate flag ban case, this time upholding a ban on the rebel flag's display.[114] In *Barr v. Lafon*, the court upheld a school district's ban on "racially divisive symbols,"[115] including the Confederate flag, where there had been numerous prior incidents of racial disruption, including fights between white and African-American students, racist graffiti, and "hit lists" with student names.[116] The student plaintiffs argued that the ban was unconstitutional because none of the past disruptions were caused by the wearing of Confederate flag clothing.[117] The Sixth Circuit held that plaintiffs' contention that the rebel flag had to cause the

106. *Id.* at 819-24.
107. *Id.* at 822-23.
108. *Id.* at 827.
109. *Id.*
110. *Id.* at 819.
111. *Id.* at 828 n.10.
112. *Id.* at 829.
113. *Id.*
114. Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008).
115. *Id.* at 560 (internal quotations omitted).
116. *Id.* at 557.
117. *Id.* at 565.

prior disruptions was a misapplication of *Tinker*.[118] Relying on the previous Sixth Circuit cases of *Melton* and *Castorina*, the court held that *Tinker* and its progeny do not require the banned form of expression itself to have been the source of past incidents, but instead require an inquiry into "'whether the banned conduct would likely trigger disturbances such as those experienced in the past.'"[119] The court held that the district officials were reasonable to anticipate disruption based on the display of the flag due to the increasing racial tensions within the school.[120]

Though most of the Confederate flag cases are factually similar in that they address student speech as manifested through clothing, courts have also addressed other types of Confederate flag displays in schools, including a sketch of the flag on a piece of paper[121] and the act of showing fellow students a small Confederate flag replica while discussing Southern history.[122] These cases have also yielded federal court decisions that endorsed a ban on the display of the Confederate flag in favor of school officials.[123]

In the first case, *West v. Derby Unified School District No. 260*, the Tenth Circuit upheld a school's punishment of a student who drew the flag, ruling that it was reasonable for school officials to anticipate disruption and interference with the rights of other students due to past incidents at the school.[124] The court in *West* rejected the plaintiff's argument that no disruption had resulted from his display of the flag, holding that the district had the authority to act anyway.[125] The court held 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."[126] However, the court cautioned school officials against banning student speech merely because of its content, reiterating *Tinker*'s holding that "school officials' 'undifferentiated fear or apprehension' of a disturbance is not enough to overcome a student's right to freedom of expression."[127] In the second case, *Denno ex rel. Denno v. School Board of Volusia County*, the United States Court of Appeals for the Eleventh Circuit upheld a school's suspension of a student for showing his classmates a

118. *Id.*

119. *Id.* (quoting D.B. *ex rel.* Brogdon v. Lafon, 217 F App'x. 518, 525 (citing Castorina *ex. rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 542 (6th Cir. 2001); Melton v. Young, 465 F.2d 1332, 1332 (6th Cir. 1972))).

120. *Id.* at 567.

121. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1363 (10th Cir. 2000).

122. Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1270 (11th Cir. 2000).

123. *West*, 206 F.3d at 1362; *Denno*, 218 F.3d at 1278.

124. *West*, 206 F.3d at 1366.

125. *Id.* at 1366-67.

126. *Id.* at 1366.

127. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

small Confederate flag during a conversation about Civil War history.[128] The court applied *Fraser*'s balancing test to determine "that the school's interest in teaching the boundaries of socially acceptable behavior outweighed the student's freedom to advocate controversial views."[129]

Until *B.W.A. v. Farmington*, the Eighth Circuit had not heard a case dealing with the constitutionality of public school bans on Confederate flags. The court had, however, applied *Tinker* to rule in favor of students' First Amendment rights in a clothing-ban case. In 2008, the Eighth Circuit heard *Lowry ex rel. Crow v. Watson Chapel School District*, in which Arkansas high school students sued their school after being punished for wearing black armbands to school in protest of the dress code.[130] The Eighth Circuit, citing *Tinker*, held that the students' punishment was an unconstitutional violation of their free speech rights due to the nondisruptive nature of their protest.[131]

In sum, courts have consistently upheld Confederate flag bans when school officials are reasonable in their belief that such speech is likely to "appreciably disrupt the appropriate discipline in the school."[132] Such bans have even been upheld when the previous racial incidents cannot be tied to display of the Confederate flag.[133] Nevertheless, flag bans and the opinions upholding them have been met with considerable opposition by First Amendment scholars for their perceived inconsistent and muddled application of Supreme Court precedent[134] and by Southern heritage groups for their perceived viewpoint discrimination.[135]

C. Missouri's "Strip Search" Statute

In 2004, the Missouri legislature enacted Missouri Revised Statutes section 167.166, which prohibits strip searches by public school employees.[136] The law permits strip searches of students if the search is conducted by or under the authority of a commissioned law enforcement officer.[137] The law also provides general guidelines on punishment for violation of the statute and procedures in the case of a lawful strip search.[138] The last subdivision of the law includes language reminiscent of *Tinker* and is relevant to recent Con-

128. *Denno*, 218 F.3d 1270-71.

129. Henry, *supra* note 81, at 576 (citing *Denno*, 218 F.3d at 1275).

130. 540 F.3d 752, 756 (8th Cir. 2008).

131. *Id.* at 758-59.

132. Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003) (quoting *Denno*, 218 F.3d at 1271) (internal quotations omitted).

133. *Id.* at 1249.

134. Dedman, *supra* note 48, at 880; Hudson & Ferguson, *supra* note 94, at 206-07; Peterson, *supra* note 94, at 957.

135. Southern Legal Resource Center, *supra* note 103.

136. MO. REV. STAT. § 167.166 (Supp. 2009).

137. § 167.166.1.

138. § 167.166.5.

federate flag cases, as it prohibits employees, volunteers, school board officials, and administrators from directing a student to remove an "emblem, insignia, or garment . . . as long as such emblem, insignia, or garment is worn in a manner that does not *promote disruptive behavior*."[139] The statute does not mention free speech or the First Amendment.

IV. INSTANT DECISION

In *B.W.A. v. Farmington R-7 School District*, the Eighth Circuit ruled for the first time on the constitutionality of a public school's ban on Confederate flags. Though decades earlier the Eighth Circuit heard two of the most famous school speech cases, *Tinker* and *Kuhlmeier*, before they were appealed to the Supreme Court, it had never before heard a case regarding the Confederate flag in schools.[140] The court's unanimous opinion in the instant case, written by Judge Lavenski Smith, relied on *Tinker*, *Fraser*, and various circuit court decisions to uphold the school district's ban on Confederate flag clothing.[141]

Judge Smith began the decision by explaining the *Tinker* standard for student speech: schools can constitutionally limit student speech in certain circumstances, namely when they reasonably "forecast substantial disruption of or material interference with school activities."[142] The court dismissed the students' argument that the school district engaged in viewpoint discrimination and rejected the notion that the district erred by citing past racial incidents unrelated to the Confederate flag as grounds for the ban.[143] The court cited with specificity the "substantial" race-based disruptions which occurred at the high school and throughout Farmington, "some of which involved the Confederate flag," to hold that the school district's ban did not violate the students' First Amendment rights.[144] The panel of judges used the framework established in *Tinker* to hold that, based on the circumstances, Farmington school personnel were reasonable in their anticipation of a "'substantial disruption' resulting from any display of the Confederate flag."[145]

The instant court listed in detail the previous race-tinged incidents among Farmington students and concluded that "[those] incidents provide[d] substantial evidence of actual and potential disruptions likely related to the flag symbol."[146] The court noted that its instant decision was in accordance

---

139. § 167.166.7 (emphasis added).

140. Hazelwood Sch. Dist. v. Kuhlmeier, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967) (en banc), *rev'd*, 393 U.S. 503 (1969).

141. B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 738-41 (8th Cir. 2009).

142. *Id.* at 738 (quoting *Tinker*, 393 U.S. at 514) (internal quotations omitted).

143. *Id.* at 739.

144. *Id.*

145. *Id.* (citing *Tinker*, 393 U.S. at 514).

146. *Id.*

with other circuits that previously addressed the issue.[147] As evidence of this, the court cited the Eleventh Circuit's decision in *Scott v. School Board of Alachua County*, which allowed school officials to ban speech if they reasonably believe it is likely to cause an appreciable disruption of appropriate discipline at school,[148] and the Sixth Circuit's decision in *Melton v. Young*, which upheld a ban on the Confederate flag after a history of racial tensions and flag-based turmoil in the school.[149] In rejecting the plaintiffs' argument that the district should have waited until their wearing of the flag caused a disruption, the Eighth Circuit noted that "no other circuit has required the administration to wait for an actual disruption before acting,"[150] citing *Barr v. Lafon*[151] and *West v. Derby Unified School District No. 260*.[152]

While noting that the First Amendment protects student speech, as articulated in *Tinker*,[153] the court cited the Supreme Court's second student speech case, *Bethel v. Fraser*, to qualify the rights of public school students as "not automatically coextensive with the rights of adults in other settings."[154] The court held that contrary to the students' argument in this case, "viewpoint discrimination by school officials is not violative of the First Amendment if the *Tinker* standard requiring a reasonable forecast of substantial disruption or material interference is met."[155] Referencing its recent decision in *Lowry v. Watson Chapel School District*,[156] the court cautioned that schools cannot suppress speech solely out of discomfort with the unpopular viewpoint, but noted that the instant case "contains sufficient evidence beyond ordinary discomfort and unpleasantness of unpopular viewpoints."[157]

The court briefly discussed the student plaintiffs' reliance on *Morse v. Frederick*,[158] in particular their citation of the concurring opinion of Justices Samuel Alito and Anthony Kennedy in that case, where the justices warned school officials that suppressing speech for its perceived offensiveness bordered on impermissible viewpoint discrimination.[159] The court in the instant

147. *Id.*

148. *Id.* (citing Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003)).

149. *Id.* at 739-40 (citing Melton v. Young, 465 F.2d 1332, 1333 (6th Cir. 1972)).

150. *Id.* at 740.

151. *Id.* (citing 538 F.3d 554, 565 (6th Cir. 2008)).

152. *Id.* (citing 206 F.3d 1358, 1366 (10th Cir. 2000)).

153. *Id.* (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

154. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)) (internal quotations omitted).

155. *Id.* (citing *Tinker*, 393 U.S. at 511).

156. *Id.* (citing Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752, 760 (8th Cir. 2008)).

157. *Id.* at 741.

158. *Id.*

159. *See generally* Appellants' Brief at 16, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734 (2009) (No. 07-3099), 2008 WL 1840952.

case dismissed any reference to *Morse* as inapplicable, noting that the narrow question before the Supreme Court dealt with student speech advocating illegal drug use and that *Tinker* should apply instead.[160]

Finally, the court addressed the plaintiffs' argument that the school district violated Missouri's "strip search" law when it directed the students to remove their Confederate flag items of clothing.[161] The Eighth Circuit recognized that because no Missouri appellate court had interpreted the strip search statute, the court had the duty to determine what the highest court in Missouri would do if faced with the question.[162] Citing well-settled principles of statutory interpretation established in Missouri case law, the court looked at the plain and ordinary meaning of the words of the statute in order to avoid an unreasonable or unjust result.[163] The court found the "overarching statutory purpose" of the Missouri law is to prohibit strip searches by school officials, except those done under the authority of law enforcement officers, unless there is a weapon or dangerous substance on the student which poses an immediate danger.[164] The court recognized that the law does not bar school officials from removing garments, emblems, or insignia that are worn in a disruptive way, but that it does not explicitly refer to the First Amendment or free speech.[165] The court noted that the law is "protective of students' right to wear apparel that also functions expressively."[166]

Noting the district court's finding that the plain language of the law allowed school officials to remove clothing worn in a way that promotes disruption, the court affirmed the finding that Farmington school officials could have reasonably determined that the students' wearing of the Confederate flag emblem was done disruptively.[167] The court cited the "prominent display" of the rebel flag by B.W.A. in the tumultuous school environment at the time and B.W.A.'s statement that he knew some of his classmates would view the flag on his hat as a racist symbol as evidence of the reasonableness of the school district's action.[168]

Because district officials could reasonably forecast a substantial disruption due to past incidents of race-related violence and tension, the Eighth Circuit held that the Farmington School District did not violate the students' First Amendments rights or the Missouri strip search statute when it banned

160. *Farmington*, 554 F.3d at 741 (noting that the "narrow holding [of *Morse*] is inapposite to our case, and we, therefore, apply *Tinker*").

161. *Id.*

162. *Id.*

163. *Id.* at 742 (citing Neske v. City of St. Louis, 218 S.W.3d 417, 424 (Mo. 2007); State *ex rel.* Killingsworth v. George, 168 S.W.3d 621, 623 (Mo. App. E.D. 2005)).

164. *Id.* (citing MO. REV. STAT. § 167.166.2 (2000)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

the Confederate flag in school.[169] The force of the decision was bolstered by its unanimity: all three of the judges who heard the case agreed that it is constitutionally permissible for school officials to restrict the First Amendment rights of students, including banning the display of the Confederate flag, when they reasonably suspect material and substantial disruption.[170]

V. COMMENT

In its decision in *B.W.A. v. Farmington*, the Eighth Circuit has fallen in line with the Third, Fifth, Sixth, Tenth, and Eleventh Circuits in their view regarding the constitutionality of Confederate flag bans in public schools. Though the court's decision in the instant case is not particularly surprising, given the outcome of similar cases across its sister circuits, the case is noteworthy for several reasons. First, the Eighth Circuit decision is the most recent in an increasingly long line of Confederate flag ban cases in which the court found in favor of the school district's regulation of student speech. Second, this ruling and the others before it raise nuanced and complicated questions regarding the competing policy goals of student safety and preservation of the learning environment and the important and sacred right to free speech. The opinion extends to the Eighth Circuit the rule also put in place by the Eleventh and Sixth Circuits that a school may ban certain types of student speech, even when the instant mode of expression has never been the source of any prior disruptions. Finally, the decision marks the first time a court interpreted Missouri's "strip search" statute.

The impact of the Eighth Circuit decision favors school officials by holding that the threat of disruption from the display of the Confederate flag outweighs students' free speech rights. When faced with uncharted territory, the Eighth Circuit based its decision on the precedent established in its sister circuits rather than interpreting *Tinker* and its progeny in favor of broader student speech rights, as some critics have urged.[171] As more and more circuits decide similar cases in favor of school districts, questions arise regarding continued judicial unwillingness to protect certain types of student speech. Those questions revolve around the issues of viewpoint discrimination and the correct interpretation of *Tinker*.

The issues raised by the judicial affirmation of school bans on Confederate flags are complicated and nuanced. The increasingly loud opposition to such decisions is amplified by unlikely pairings of flag-ban foes: groups such as the American Civil Liberties Union (ACLU) have fought for students' right to display the flag, along with Southern heritage groups such as Sons of

169. *Id.*

170. *Id.*

171. *See* Dedman, *supra* note 48, at 887-88; Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 826 (2009).

Confederate Veterans and the Southern Legal Resource Center.[172] Though such groups fall on squarely opposite sides of the political spectrum, they are unified by their concern that student free speech is eroding and *Tinker*'s original principles are slowly unraveling with each decision upholding such bans.

Though the Eighth Circuit's recent decision is in line with the precedent established by other circuits in similar cases, it raises questions regarding whether *Tinker*'s original rule – that the government could punish student speech only if it was proven to be actually disruptive of school activities[173] – is still followed by the circuits in practice. Though *Tinker* has never been overruled, some scholars argue that its holding has been "tremendously undermined"[174] and "greatly altered."[175] Part of this argument derives from the fact that many instances of speech disallowed by school officials "involve threats that are no more disruptive than the armbands in Tinker [sic] itself."[176] If that is true, courts are undoubtedly interpreting *Tinker* in a drastically different way than the Supreme Court intended when it decided the case in 1969.[177] In the same vein, some have argued that the later Supreme Court and circuit court cases that narrow the protection of student speech threaten to transform students into what *Tinker* warned against: "'closed-circuit' recipients of state-selected communication."[178]

The key factor in determining whether the Eighth Circuit was justified in upholding the school district's ban on Confederate flags is whether the Confederate flag clothing was reasonably likely to lead to disruption due to past racially tinged incidents, as the district argued, or whether students' free speech rights were ignored because none of the previous harassment could be directly linked to the wearing of the Confederate flag, as the plaintiffs insisted. The district was able to convince the panel of judges that the former was true, based on precedent set by other circuits[179] in cases such as *Barr v. Lafon*, which held that the banned type of speech does not itself have to have been the source of past disruption, only that it would likely trigger similar disturbances.[180]

---

172. The Associated Press, *Confederate T-Shirts Spark Debate*, FREEDOM FORUM, Apr.15, 2001, http://www.freedomforum.org/templates/document.asp?documentID=13680.

173. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

174. Chemerinsky, *supra* note 171, at 831.

175. Mark Yudof, Tinker *Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995).

176. R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 714 (2009).

177. *Id.* at 714-15.

178. Slaff, *supra* note 69, at 222 (citing *Tinker*, 393 U.S. at 511).

179. *See* Barr v. Lafon, 538 F.3d 554, 568 (6th Cir. 2008); Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 544 (6th Cir. 2001); Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972).

180. *Barr*, 538 F.3d at 568.

The Supreme Court's recent denial of certiorari to the Eleventh Circuit case of *Barr v. Lafon*[181] may indicate that the high Court is satisfied with lower court decisions that schools can constitutionally ban Confederate flag clothing even when previous disruptions cannot be tied to displays of the flag. Nevertheless, the instant case illustrates the competing policy interests district officials and judges must balance: the risk of violating students' free speech rights and thereby potentially engaging in viewpoint discrimination, versus the risk of failing to ban certain expressions and thereby potentially causing a dangerous or detrimental disruption in the educational environment.

The facts of the instant case were uniquely compelling due to the litany of past racially tinged events which led the school to ban racially divisive symbols. As a result, the Eighth Circuit's decision in favor of the school district was in line with persuasive precedent in its sister circuits.[182] Decisions which uphold a ban on the display of the Confederate flag where there is evidence of substantial disruption are rightly decided; indeed, school officials act permissibly when they ban the flag based on the prevention of disruption and harm rather than because they desire to suppress unpopular speech. But under the standard articulated in *Barr v. Lafon* and followed by the instant court, the evidence of substantial disruption seems inadequately tied to the flag's display. By allowing the flag to be banned based on previous race-related tensions, none of which involved the display of a Confederate flag on Farmington school property or by a Farmington student,[183] the court turned a tenuous connection between the Confederate flag and past events into what it called "[e]vidence of disruptions related to the Confederate flag or race."[184] In doing so, it used the dubious nexus between the Confederate flag and race relations to preemptively ban the display of the flag, a move which could be viewed by some as viewpoint discrimination.

Some commentators insist that the increased regulation of student speech in the name of classroom safety has resulted in public schools becoming "bastions of hegemony, designed to standardize thought and ostracize dissent."[185] Others have pondered whether *Fraser* and later cases interpreting *Tinker* permit censorship of speech that is not disruptive, but instead is disdained by administrators.[186] The substantial disruption standard of *Tinker* offers students some protection from censorship, and was the high water mark of student speech rights.[187] The move by the Eighth Circuit in the instant

181. *Barr*, 538 F.3d 554, *cert. denied*, 130 S. Ct. 63 (U.S. Oct. 5, 2009).

182. *See* cases cited *supra* note 3.

183. The one incident involving a flag's display occurred when a student reported seeing the Confederate flag hanging in the hallway of a neighboring high school during an evening basketball game. B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 736 (8th Cir. 2009).

184. *Id.* at 739.

185. Hudson & Ferguson, *supra* note 94, at 182.

186. Dedman, *supra* note 48, at 887.

187. *Id.* at 887-88.

case, and previously by other circuits, to allow the suppression of certain types of student speech even when that mode of expression had never caused a disruption, demonstrates how subsequent decisions have weakened the protective *Tinker* standard.

The possibility that speech may be censored by school officials because it is controversial or distasteful, rather than when it truly presents a threat of substantial disruption, is referred to as the "heckler's veto" or, in the case of schools, the "headmaster's veto."[188] Scholars have noted that the ambiguous and selective interpretation of *Tinker* and *Fraser* "enables school officials to invoke the most advantageous of either, or both, to justify their actions, thereby escaping a lawsuit,"[189] and that lower courts have selectively siphoned parts of each case to fit their "desired ends."[190] The cases interpreting *Tinker* have not clarified the extent to which *Tinker* allows schools to engage in such a veto, and this failure to outlaw the heckler's veto creates the untenable risk that schools may be purposefully discriminating based on students' viewpoints.[191] Confederate flag cases such as the instant decision illustrate the concern that school officials can censor student speech with impunity, not worrying that they will be liable for violating the students' constitutional rights.[192] Though each case is analyzed on a fact-specific and individual basis, regulation of student speech in favor of the school district has been the consistent result.[193]

Schools undoubtedly have broad authority to regulate student speech in instances where officials reasonably anticipate disruption from certain types of expression.[194] Evidence of substantial disruption would normally be a sufficient guarantee to ward against any worry of viewpoint discrimination because it would show that "the school has acted for the permissible purpose of preventing harm rather than for the impermissible purpose of suppressing disfavored messages."[195] However, when the past incidents are obviously race based, but not necessarily related to the display of the Confederate flag, concerns about viewpoint discrimination begin to emerge. For many, the Confederate flag is synonymous with racism,[196] so to this segment of the

188. *Id.* at 879-80.

189. *Id.* at 879.

190. Hudson & Ferguson, *supra* note 94, at 208 (internal quotations omitted).

191. Taylor, *supra* note 94, at 579.

192. Dedman, *supra* note 48, at 879-80.

193. *Id.* at 880.

194. Chemerinsky, *supra* note 171, at 829 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-73 (1998)).

195. Taylor, *supra* note 94, at 578.

196. Dedman, *supra* note 48, at 880-81 ("To some, the flag represents the cultural and historical roots of self-proclaimed Southerners. To others, it serves as a bitter reminder of slavery and institutional racism. . . . Despite acknowledging that malefic groups have co-opted the emblem, its defenders maintain that to them it remains an innocuous symbol of heritage.").

population, there may very well be no cognizable difference between expressing oneself through the display of the flag on a belt buckle and the angry utterance of a racial epithet. However, others view the Confederate flag as a symbol of personal history and Southern pride,[197] and these people might oppose the comparison of the flag's passive display to incidents of racial violence.

While there were indeed adverse race relations in Farmington and at the school, there is little evidence that the display of the Confederate flag was the cause of any of this tension before the school suspended B.W.A.[198] The Eighth Circuit seemed to allow Farmington school officials to ban the flag based on the disruption which occurred when community members protested the student's suspension when they displayed the flag across the street from the school, and not due to any actual disruption that occurred as a result of the student wearing the flag to school.[199] In reaching this conclusion, the Eighth Circuit implicitly likens the display of a Confederate flag in class to violent acts of racism, despite the opinion's lack of discussion of various meanings and interpretations of the Confederate flag. While using the Confederate flag to convey a message of racism is indeed abhorrent, the court simultaneously dismisses the possibility that the flag could be displayed for a variety of other reasons and makes a leap in logic by listing each of the past incidents of racial tension[200] and concluding that those incidents of disruption were "likely related to the flag symbol."[201]

After the litany of racially tinged events, Farmington school administrators were put in an admittedly difficult position, as the Confederate flag ban was instituted against that backdrop of racial tensions among students in the district. Administrators understandably worried about the effects potentially racist speech could have on an already vulnerable student body and naturally were concerned about maintaining an educational atmosphere free of disruption and racism. District officials chose a ban on Confederate flags as one step toward creating the peaceful and safe atmosphere they desired, and this somewhat prophylactic act is not on its face unreasonable. Yet a ban on the Confederate flag assumes that the flag itself is purely a symbol of racism and that its display is perceived as quite dangerous to students. It is not easy to determine whether district officials acted impermissibly in banning the flag, but the Eighth Circuit's treatment of the case ignored many of the nuances involved in student speech cases.

The spectrum of case law regarding the constitutionality of Confederate flag bans includes cases that clearly merit a ban on the flag's display,[202] and

197. *Id.*

198. *See supra* note 183.

199. B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 737 (8th Cir. 2009).

200. Examples of these past racial incidents involve violence, verbal slurs, and the drawing of swastikas, among other confrontations and disruptions. *See id.* at 739.

201. *Id.*

202. *See, e.g.*, Barr v. Lafon, 538 F.3d 554, 560 (6th Cir. 2008).

others which do not.[203] When no violence precedes the ban, such as was the case in *West v. Derby Unified School District No. 260*, the facts clearly do not merit a ban on display of the flag.[204] On the other hand, other hypothetical cases are more difficult and present additional nuances, such as where the flag ban was preceded by some racial tension and violence coupled with possibly innocuous displays of the flag, or pure racial tension but none related to display of the flag. The instant case falls into the latter category and is illustrative of the problematic standard used by courts in analyzing the constitutionality of these bans. The standards used, including *Fraser*'s balancing test and the judiciary's continued erosion of *Tinker*'s original protections, are highly problematic because of their potentially malleable judicial construction. The standards are so easily manipulated to fit a set of facts that it often results in greater deference to school officials than is perhaps deserved, and the extremely fact-based analysis allows for outcomes to be too easily manipulated by schools and courts.

The decision in the instant case is troubling because the Eighth Circuit held that outright viewpoint discrimination is constitutional as long as the *Tinker* disruption standard is met.[205] The Supreme Court has held that viewpoint discrimination and content-based regulations are presumed to be unconstitutional.[206] Viewpoint discrimination occurs when the government attempts to suppress a particular viewpoint because of its distaste for that perspective. The Supreme Court has held such content-based restrictions to be impermissible: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[207] When the *B.W.A.* court held that "viewpoint discrimination by school officials is not violative of the First Amendment if the *Tinker* standard requiring a reasonable forecast of substantial disruption or material interference is met," [208] it was either being careless in its wording or making a significant admission that student speech is given much less protection in other First Amendment cases than the authors of *Tinker* intended.

The instant case has several implications for future policy, including the risk that student speech will be unjustifiably silenced when administrators can succeed in convincing judges that they reasonably believed a certain type of speech could be disruptive. This raises obvious questions regarding school

---

203. *See, e.g.*, Castorina *ex rel.* Rewt v. Madison County Sch. Bd. 246 F.3d 536, 538 (6th Cir. 2001); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1363 (10th Cir. 2000).

204. *West*, 206 F.3d 1358.

205. *See supra* note 155 and accompanying text.

206. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992); Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

207. *Mosley*, 408 U.S. at 95.

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

restriction of student speech beyond that of Confederate flags. The Confederate flag ban cases illustrate the problems with current student speech jurisprudence and the increasing erosion of students' First Amendment protections. Other examples of courts upholding student speech restrictions abound, including decisions banning speech regarding social and moral choices, such as T-shirts with messages for or against homosexuality,[209] and speech viewed as disrespectful, such as clothing that rallies against the school administration. Based on the Eighth Circuit's finding that the previous disruptions do not need to be directly linked to the wearing of the Confederate flag, the possibility exists that administrators who simply do not like a certain symbol or message could ban it and cite previous general disruptions as evidence of what *could* happen. Though school officials' reasonable forecast of future disruption must be based on empirical evidence, each case is judged on its own individual facts, nearly always resulting in the regulation of student speech rather than the protection of it.

A final concern presents itself: whether regulation of this type of student speech is antithetical to the goals of a broad education that prepares students to be citizens. Constitutional law scholar Erwin Chemerinsky, who has written extensively on the issue of student speech in the post-*Tinker* era,[210] argues that the three Supreme Court cases interpreting *Tinker*, *Hazelwood*, *Bethel*, and *Morse*, are "troubling" because they fail to recognize the vital role of student First Amendment rights in schools.[211] Chemerinsky correctly notes the paradox inherent in the discussion: when schools censor or regulate student speech, it is "antithetical to teaching the importance of speech."[212] He writes, "At the very least, there is dissonance, if not hypocrisy, in teaching students that free speech matters when school officials themselves provide virtually no protection for student speech."[213] For these reasons, as Chemerinsky and others intimate, the federal judiciary should consider reviving student speech protection such as that first established in *Tinker*. Indeed, safeguarding student speech advances the main goals of the First Amendment: encouraging *Tinker*'s "marketplace of ideas" and providing a necessary democratic function in society.[214]

Though it was perhaps less obvious in the written decision than in questions asked during oral argument, the panel of judges who heard *B.W.A.* rec-

209. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1182-83 (9th Cir. 2006).

210. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111 (2004); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000).

211. Chemerinsky, *supra* note 171, at 835-36.

212. *Id.* at 835.

213. *Id.* at 826.

214. *Id.* at 837-38 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969)).

ognized the tensions and competing policy goals inherent in making such a decision. In their exchange with counsel during oral argument, the court seemed hesitant to embrace the arguments of either side and expressed concerns about the implications of viewpoint discrimination.[215] One of the judges asked plaintiff's counsel whether the case was "just political correctness gone awry" and wondered aloud whether the case was less about the Confederate flag and more about discriminating against certain viewpoints.[216]

Nevertheless, the court's opinion does not reflect a reluctance to side with school officials, and the decision to find in favor of the school district indicates that the judges took comfort in deciding the case consistently with other circuits. The Eighth Circuit jurists undoubtedly realized that if they would have decided the case in favor of the students, they would have been the first circuit to revert back to the original reading of *Tinker*. Doing so would have effectively ignored the later interpretations of *Tinker* and its progeny by other circuits. In holding the way it did, however, the court set a precedent within the Eighth Circuit that shifted away from *Tinker*'s original protections to allow suppression of a particular mode of student speech even when that mode of expression has never caused a disruption.

VI. CONCLUSION

The Eighth Circuit's decision in *B.W.A. v. Farmington R-7 School District* marks the first time the circuit has ruled on a case challenging the constitutionality of a Confederate flag ban in a public school. The affirmation of the school district's ban on Confederate flag displays is in accordance with the other circuits, which have consistently upheld rebel flag bans when school administrators reasonably believed the speech will disrupt the learning environment.[217] The court in *B.W.A.* was faced with the unenviable task of determining the appropriateness of the actions taken by Farmington, Missouri school officials who were placed between the proverbial "rock and a hard place" by having to choose between the possibility of quashing legal student speech or allowing a potentially dangerous disruption to occur. The case established that when school officials reasonably suspect material and substantial disruption to the learning environment, they may constitutionally restrict the free speech rights of students, including prohibiting the display of the Confederate flag, even if the flag has not yet been the cause of any actual disruption.

---

215. Audio Recording: Oral Argument, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734 (8th Cir. 2009) (No. 07-3099) (Sept. 22, 2008) (http://www.ca8.uscourts.gov/oralargs/oaFrame.html).

216. *Id.*

217. *See supra* notes 92-93 and accompanying text.

In deciding the case in favor of the school, the Eighth Circuit became the latest court to serve as an example of the federal judiciary's gradual weakening of *Tinker*'s protections for student speech. The Eighth Circuit reached its decision upholding B.W.A.'s suspension without evidence that the student's flag emblem would cause disruption to the educational environment or affect the school as previous violence and race-related tensions had done. In reaching its decision, the Eighth Circuit might have been well within the precedent set by its sister circuits, but it arguably opened up the possibility of future weakening of student speech by headmasters who find such speech disagreeable.