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Few American symbols create as much anger and hostility as the Confederate flag, and for good reason. Once used as the flag of the Confederate States of America, the flag has been used ever since as the banner of white supremacy groups and other racists. Yet the Confederate flag can also be used as a non-racist form of expression and it therefore deserves protection under the First Amendment. A review of a few key court decisions provides us with direction to understand when it should be permissible for public school students to wear a Confederate flag, specifically when wearing the flag would not result in “substantial and material disruption” and would not be seen as a school-endorsed activity.

Any analysis of this issue begins with the two Supreme Court cases cited by nearly every court that addressed this issue: Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) and Bethel School Dist. v. Fraser, 478 U.S. 675 (1986). In Tinker, the Court held that wearing armbands as a sign of protest of the Vietnam War was protected. While acknowledging that students’ First Amendment rights are not “automatically coextensive with the rights of adults in other settings,” the Court found no evidence that the behavior would lead to even potential “*substantial* disruption of or *material* interference with school activities” and that the “fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.” In Fraser, however, the Supreme Court eroded the students’ rights of expression when it found that a student’s use of sexually explicit phrases while speaking at a school assembly was not protected. The Court held that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” The Court distinguished this speech from the “nondisruptive, passive expression of a political viewpoint” in Tinker and held that offensive, vulgar, or lewd speech, particularly non-political comments made at a school-sponsored activity which teenage students were required to attend, can be prohibited.

Unfortunately, the Tinker/Fraser cases have created some confusion. For example, how does one determine whether there will be “substantial disruption” or “material interference” under Tinker? What is considered offensive, lewd, or vulgar under Fraser? Does Fraser only apply when such speech is presented in a school-sponsored event? Does Fraser even require Tinker’s reasonable anticipation of disruption? While civility is important, isn’t opinion and dissent equally important? Can a court take the position that the Confederate flag is always “vulgar” no matter what the circumstance? Not necessarily.

In Phillips v. Anderson County Sch. Dist. Five, 987 F.Supp. 488 (D.S.C. 1997), the Court held that the suspension of a middle school student for wearing a “confederate flag jacket” was appropriate because (using the Tinker analysis) it would “result in a substantial and material disruption of and interference with the education process.” The school was 25% African-American and there were nearly a half dozen prior incidents involving racial tension and physical violence, including a situation where a Confederate flag was involved. The Court held that the school did not have to wait to see if actual disruption would occur because it had prior incidents (whether inside or outside the school) to justify its concerns. Interestingly, even though the school did not prohibit the wearing of Black Power Flag shirts, Martin Luther King, Jr. shirts or

even shirts with swastikas, the Court found that there was no evidence that such attire would cause disruption, and therefore it did not object when such attire was not prohibited. Similarly, in West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) and B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp. 2d 740 (E.D. Mo. 2007), prior incidents of racial violence led to reasonable conclusions that wearing the flag would produce “material” or “substantial” disruption. However, while the Court in West gave deference to Fraser when it noted that the Confederate flag was a symbol of racial prejudice and “likely to promote feelings of hatred and ill will,” the Court in B.W.A. distanced itself from Fraser when it explained that the flag is a historical and political symbol that can be viewed as both “a symbol of southern heritage or a symbol of slavery and white supremacy.”

A case most on point is Castorina v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001), where the Court held that wearing a T-shirt with a picture of country music star Hank Williams, Jr. on front and two confederate flags on back was protected. The Court explained that a T-shirt commemorating a country singer and pride in one’s southern heritage is protected speech. Moreover, the Court found no evidence of potential disruption or that the activity could be considered school-sponsored. The fact that other politically oriented and controversial clothing was not similarly banned made the suspension appear not as limiting the manner of speech (as in Fraser), but as limiting the content of speech (as the school attempted in Tinker) which is prohibited.

Not everyone who wears the Confederate flag is a racist; thus banning the flag under all circumstances would be a violation of our First Amendment rights. Such a ban could then be expanded to include other types of offensive behavior. Should displaying the Iranian flag in a public school now also be prohibited? If there is no substantial evidence demonstrating that wearing the flag would cause “substantial” or “material” disruption and that it is not (or cannot even be reasonably considered) a school sponsored activity, then wearing the flag should be permitted. As the granddaughter of a Holocaust survivor, I personally object to many of the uses of the Confederate flag; however, I personally believe that there are legitimate forms of expression using the flag. In this country we protect our freedom of expression. The Civil War was all about freedom and protecting the rights of all. The Confederate flag deserves that same protection.