
ARTICLES

THE CIVIL RIGHTS ROOTS OF *TINKER'S* DISRUPTION TESTS

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INTRODUCTION

This spring marks the fortieth anniversary of *Tinker v. Des Moines Independent Community School District*,¹ the landmark student speech case decided in 1969 in which the Supreme Court held that three students were protected by the First Amendment when they wore black armbands in their Des Moines, Iowa public schools to protest the Vietnam War.² *Tinker* was quite a departure from what came before it; prior to *Tinker*, it was not a foregone conclusion that students had any affirmative free speech rights in public schools.³ Looking at Supreme Court precedent alone, it would seem as though the *Tinker* tests were created out of whole cloth: the substantial or material disruption, reasonable anticipation of such disruption, and rights of others tests did not have much of a basis in earlier Supreme Court decisions.⁴ But, the district court in *Tinker* had employed the first two of these tests.⁵ For authority, it had looked to the Fifth Circuit's decisions six weeks prior in two cases involving high school students' speech about civil rights: *Burnside v. Byars*⁶ and *Blackwell v. Issaquena County*.⁷

Burnside and *Blackwell* arose out of separate Mississippi communities, yet the speech in the two cases was largely the same: at the height of the Civil Rights Movement, groups of high school

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

2. *Id.* at 523–24.

3. See, e.g., Richard L. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 568–69, 580 (1970) (“A notable departure from this tradition of judicial timidity is [*Tinker*] Implicit in this decision was a view of the purposes and methods of education different from that traditionally expressed by American courts. . . . [In *Tinker*,] there is none of the familiar rhetoric about the disciplinary purposes of education.”).

4. *Id.* at 509, 513.

5. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

6. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

7. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).

students in the Deep South wore buttons to school protesting the denial of voting rights to African-Americans. In one case, wearing buttons was the full extent of the conduct; in the other case, the students wore buttons and also distributed them in a reportedly aggressive manner that interrupted the school day. These two cases were consolidated at the appellate level and decided by the same panel of the Fifth Circuit in 1966.⁸ Without citation to any supporting authority, the Fifth Circuit applied an actual disruption test in both *Burnside* and *Blackwell*, finding disruption in one case but not in the other and protecting the non-disruptive student speech under the First Amendment.⁹ Although the Fifth Circuit did not make explicit reference to the civil rights protest cases, *Burnside* and *Blackwell* grew out of a regional social context in which both violent and non-violent civil rights protests occurred with regularity, and a legal context in which the constitutionality of arresting and convicting nonviolent protesters for offenses such as breach of the peace increasingly was challenged.¹⁰

Aside from *Tinker*'s citations to *Burnside* and *Blackwell*, those two cases—the roots of *Tinker*'s disruption tests—have largely been lost to history.¹¹ Accordingly, Part I of this Article scrutinizes *Burnside* and *Blackwell*, sketching the social context and civil rights struggles out of which these cases emerged, tracing the events that preceded litigation, and examining the district courts' opinions and the Fifth Circuit's creation and use of the actual disruption test in the public school context.¹² Part II considers lower courts' applications of—and

8. *Blackwell*, 363 F.2d at 749; *Burnside*, 363 F.2d at 744; see Consolidated Brief for Appellees at 1, *Burnside*, 363 F.2d 744, *Blackwell*, 363 F.2d 749 (Nos. 22,681, 22,712) (noting that the Fifth Circuit granted Appellants' Motion To Consolidate on Appeal on August 9, 1965).

9. See *Burnside*, 363 F.2d at 748 (finding students' non-disruptive behavior did not warrant the exclusion of "freedom buttons" from the school); *Blackwell*, 363 F.2d at 753 (finding students' behavior disruptive and protecting the school's interest in prohibiting such behavior).

10. See generally DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 541–55 (5th ed. 2004) (1970) (discussing racial protest and the courts' reaction to such protests during the Civil Rights Movement); RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 3 (2006) (noting that "[r]ules operate in cultural contexts, and a careful observer should never lose sight of this fact" in a discussion of the risks and potential rewards of comparative legal scholarship). See C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW, at xii–xiii (2002), for a discussion of the link between legal rights and social practices.

11. My research in the legal literature reveals a lack of in-depth examination of either *Burnside* or *Blackwell*. Both are, of course, cited regularly as part of citations to *Tinker*. A notable exception is ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS (2009).

12. Understanding more about the context of cases and the actors involved can "provide a rich background against which to understand the cases," "reflect the primal force of politics" and "generate a better understanding of the cases

retreat from—this actual disruption test in the student speech context, and analyzes the presence of *Burnside* and *Blackwell* in the *Tinker* district court opinion and in various drafts of the *Tinker* Supreme Court opinion. Struggles for students' speech rights and battles waged by the Civil Rights Movement rarely are seen as intertwined strands of history, but this Article demonstrates that the student free speech rights articulated in *Tinker* are built upon the struggles of the Civil Rights Movement.

I. THE FIFTH CIRCUIT'S ACTUAL DISRUPTION TEST

The facts giving rise to *Burnside* and *Blackwell* occurred in a political and social context that may today seem alien to most Americans, especially those under the age of fifty. For many reasons, students' advocacy of voting rights in 1964 and 1965 in Mississippi had the potential to be highly volatile. *Brown v. Board of Education*¹³ had been decided only a decade earlier.¹⁴ Southern support for segregation

themselves." CIVIL RIGHTS STORIES 1 (Myriam E. Gilles & Risa L. Goluboff eds., Foundation Press 2008). The "relationship between legal pronouncements and social and political realities . . . is rarely direct. Indeed, many of the great civil rights 'victories' may contain less than meets the eye." *Id.*; see also Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 199 (1995) (discussing the virtues of narratives); Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1311–13, 1316, 1359 (2004) (examining the significance of legal narratives and how they impact constructions of social reality).

13. 347 U.S. 483 (1954).

14. In 1954, the Supreme Court declared de jure school segregation unconstitutional in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). One year later, when *Brown* was again before the Court, it held that school segregation by law should be brought to an end "with all deliberate speed." See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (considering the manner in which relief must be accorded to the parties under its previous ruling). Government officials' and community leaders' reactions to *Brown I* and *Brown II* were intense, especially across the South. Nineteen U.S. Senators signed the Southern Manifesto, a statement that described *Brown* as an "unwarranted exercise of power by the Court" and "commend[ed] the motives of those States which have declared the intention to resist forced integration by any lawful means." 102 CONG. REC. 4255, 4460 (1956). Similarly, during a brief special session requested by Governor George Wallace, the Alabama legislature unanimously approved a resolution calling for a federal constitutional convention with the purpose of limiting the authority of the federal government over public elementary and secondary schools. *Solons Back Wallace on School Plan*, CLARION-LEDGER, Sept. 22, 1964, at 1A. An editorial from the Jackson, Mississippi *Daily News* warned:

Human blood may stain Southern soil in many places because of this decision but the dark red stains of that blood will be on the marble steps of the United States Supreme Court building. White and Negro children in the same schools will lead to miscegenation. Miscegenation leads to mixed marriages and mixed marriages lead to mongrelization of the human race.

Immediate Reaction to the Decision, *Brown v. Board of Education*, Landmark Supreme Court Cases, <http://www.landmarkcases.org/brown/reaction.html> (last visited March 31, 2009) (quoting Editorial, *Bloodstains on White Marble Steps*, DAILY NEWS (Jackson, Miss.), May 18, 1954). See generally RICHARD KLUGER, SIMPLE

remained so strong that the first public elementary and secondary schools in Mississippi were not integrated until 1964, and even then all integration statewide involved a total of only sixty African-American students attending White schools in four different districts.¹⁵ Federal troops were required to protect nine African-American students as they integrated the nearby Little Rock, Arkansas Central High School in 1957,¹⁶ and federal marshals were needed to quell hundreds of rioters on the University of Mississippi ("Ole Miss") campus in fall 1962 when James Meredith became the first African-American student to enroll at the state's flagship public university.¹⁷ In June 1963, Mississippi NAACP leader Medgar Evers was murdered outside his home in Jackson, Mississippi.¹⁸ Two months later Martin Luther King, Jr., gave his "I Have a Dream" speech on the steps of the Lincoln Memorial.¹⁹ Crosses still were burned on occasion in Mississippi.²⁰ And all across the Deep South, restaurant sit-ins, boycotts of businesses and public services such as transportation systems, and other protests disputing the systems and practices of racial discrimination disrupted business as usual.²¹ In C. Vann Woodward's words, African-Americans "were in charge of their own movement now, and youth was in the vanguard."²²

JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR RACIAL EQUALITY (rev. ed. 2004) (1975), for a comprehensive history of *Brown*.

15. *Desegregation Has Increased in Dixie*, CLARION-LEDGER, Oct. 4, 1964, at 12A. Tom Brady, a Mississippi trial court judge, wrote *Black Monday*, described by John Hope Franklin as "a bitter tirade against [*Brown*] . . . arguing that blacks were not capable of becoming equal citizens." JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 492 (7th ed. 1994) (1953). The slow rate of desegregation was hardly unique to Mississippi. Charles Ogletree notes that "[b]y 1964, only one-fiftieth of all southern black children attended integrated schools." CHARLES OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 128 (2004).

16. OGLETREE, *supra* note 15, at 129.

17. WILLIAM DOYLE, AN AMERICAN INSURRECTION: THE BATTLE OF OXFORD, MISSISSIPPI, 1962, at 74-76 (2001). Considering the level of hysteria and violence at these riots, it is miraculous that only two people died there and one or both may have been killed by a stray bullet.

18. Martha Neil, *45 Years After Medgar Evers' Murder, His Work Continues*, A.B.A. J., June 12, 2008, http://abajournal.com/news/45_years_after_medgar_evers_murder_his_work_continues. A few months later in November 1963, President John F. Kennedy was assassinated in Houston, Texas. John Solomon, *Scientists Cast Doubt on Kennedy Bullet Analysis*, WASH. POST, May 17, 2007, at A3.

19. MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 102-06 (James Melvin Washington, ed., Harper San Francisco 1992).

20. *See Four Crosses Are Burned at Pascagoula*, CLARION-LEDGER, Sept. 26, 1964, at 3A. Pascagoula, Mississippi, is on the Gulf Coast.

21. *See generally* BELL, *supra* note 10, at 541-55 (discussing protest activities occurring during the Civil Rights Movement).

22. WOODWARD, *supra* note 10, at 170.

A. *Burnside v. Byars in the District Court: Students Wearing Voting Rights Buttons Create a "Disturbance"*

Controversy and violence erupted in many local communities when civil rights advocates sought to register African-Americans to vote or demonstrated public support for such initiatives. During the summer of 1964, the Council of Federated Organizations ("COFO") documented over 1000 arrests, 65 bombings or burning of buildings, and at least 6 murders in retaliation for civil rights activism.²³ In Philadelphia, Mississippi these struggles occurred in the streets and in the schools.

In summer 1964, President Lyndon B. Johnson signed the Civil Rights Act into law.²⁴ During what became known as "Freedom Summer," COFO mobilized hundreds of civil rights volunteers from the North, mostly Whites, to register African-American voters throughout the South.²⁵ The number of registered African-American voters in this region nearly doubled between 1960 (1.1 million) and 1964 (more than two million).²⁶ Many volunteers became targets of the massive resistance led by factions of the local White community. One of these incidents was memorialized decades later in the movie "Mississippi Burning"²⁷: on June 21, 1964, three Student Nonviolent Coordinating Committee ("SNCC") volunteers—Michael Schwerner, Andrew Goodman, and James Chaney—were arrested for speeding while in Philadelphia, Mississippi to visit the site of an African-American church that had been burned to the ground.²⁸ After being released from jail that evening, the three young men disappeared.²⁹ Almost six weeks later, their mutilated, decaying bodies were found by FBI agents in a newly-constructed earthen dam near Philadelphia.³⁰ All three young men had been shot.³¹ The FBI's investigation of these murders would take several months, involve 258

23. *See id.* at 184 (disclosing the casualty statistics that resulted from the Mississippi Summer Project).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

25. Inventory of the Ruth Schein/1964 Mississippi Freedom Summer Project Collection, <http://www.nypl.org/research/manuscripts/scm/scmgmfspxml> (last visited April 2, 2009).

26. *Strong Negro Vote Big Aid to Lyndon*, CLARION-LEDGER, Sept. 27, 1964, at 1A.

27. *See* Rita Kempley, *"Burning": Potent but Problematic*, WASH. POST, Dec. 9, 1988, at C1 (reviewing the plot and cast of "Mississippi Burning").

28. Mike Smith, *Federal, State Grand Juries Push CR Murder Inquiries*, CLARION-LEDGER, Sept. 23, 1964, at 1A. Schwerner, age twenty-four, and Goodman, age twenty, were both White and from New York. *Id.* Chaney, age twenty-one, was African-American and from nearby Meridian, Mississippi. *Id.*

29. *Grand Jury Continuing in Biloxi*, CLARION-LEDGER, Sept. 24, 1964, at 1A.

30. *Id.*

31. *Id.*

federal agents, and cost nearly \$770 thousand—an expense amplified because of local obstruction of the investigation.³² Several of the twenty-one men eventually indicted by the federal grand jury in connection with the murders were local law enforcement officials, including the county sheriff.³³

About six weeks after the bodies of Chaney, Schwerner, and Goodman were found, the African-American principal of the segregated, African-American high school in nearby Philadelphia learned that “a number” of students were wearing buttons at his school bearing the words “One Man One Vote” and “SNCC.”³⁴ The principal announced that these buttons could not be worn at school because the buttons “didn’t have any bearing on [the students’] education, would cause commotion, and would be disturbing [to] the school program by taking up time trying to get order, passing them around and discussing them in the classroom and explaining to the next child why they are wearing them.”³⁵ Soon thereafter, on Monday, September 21, 1964, three or four students wore SNCC buttons at school and were sent home when they refused to remove them.³⁶ The next day, the students returned to school without the buttons.³⁷ Then, on Thursday, September 24, a larger demonstration took place involving thirty to forty students wearing SNCC buttons; a teacher described this event as causing “a commotion.”³⁸ The main newspaper in the state, Jackson’s *Clarion-Ledger*, reported that “some 50 [students were] suspended” as a result of wearing these buttons.³⁹

Previously, students had worn buttons referring to the Beatles and to their own romantic relationships (“His” and “Hers”).⁴⁰ Nonetheless, when the students were disciplined for wearing the SNCC buttons, the principal’s letter to the parents stated “[i]t is

32. *FBI Director Tells Expense of Neshoba Murder Probe*, CLARION-LEDGER, May 18, 1965, at 1A.

33. William L. Chaze, *Federals Won’t Cooperate: No Indictments in Neshoba*, CLARION-LEDGER, Feb. 5, 1965, at 1A. With this background, it may not seem surprising that the federal investigators were instructed to not share information with local officials until the federal prosecutions had finished, even when the Neshoba County grand jury subpoenaed FBI officials. *Katzenbach Believes Data Will Result in Indictments*, CLARION-LEDGER, Sept. 28, 1964, at 1A. The Neshoba County grand jury did not issue any indictments and placed blame for its lack of indictments at the feet of the “federals” due to their failure to share information. Chaze, *supra*.

34. *Burnside v. Byars*, 363 F.2d 744, 746 (5th Cir. 1966).

35. *Id.* at 746–47 (internal formatting omitted).

36. *Id.*

37. *Id.* at 747.

38. *Id.*

39. *Sue for School Button-Wearing Permit in State*, CLARION-LEDGER, Oct. 2, 1964, at 1B.

40. *Burnside*, 363 F.2d at 746 n.2.

against the school policy for anything to be brought into the school that is not educational.”⁴¹ Although the principal’s statement clearly was an inaccurate reflection of school policy, it is difficult to see how he—an African-American in Philadelphia, Mississippi—could have acted otherwise. If he had permitted a substantial number of African-American students to wear SNCC buttons in school, the reaction from the African-American community probably would have been privately mixed, but publicly quiet. And, the White community likely would have reacted with hostility at best and violence visited upon the principal and his family at worst.⁴² The state of Mississippi still funded White supremacist organizations, and clearly law enforcement in the Philadelphia area was no friend to African-Americans.⁴³

Yet despite the risks of retaliation from the White community and a potentially hostile judiciary, two African-American parents filed suit on September 25, 1964 on behalf of their children and the class of affected children, seeking to overturn the suspensions as resulting from an unconstitutional policy.⁴⁴ The Complaint alleged that the principal suspended the students pursuant to a school board policy “which provides for the expulsion and/or suspension of all students who display freedom insignia upon their clothing” and that the suspensions violated the students’ First Amendment speech rights as well as their Fifth, Thirteenth, Fourteenth, and Fifteenth Amendment rights.⁴⁵ The handwritten notes of the district court judge suggest that he viewed the complaint as alleging racial discrimination—a charge for which he saw no supporting evidence.⁴⁶ On October 21 of the same year the district court, the Honorable

41. *Id.* at 747 n.4.

42. See KLUGER, *supra* note 14, at 300–01 (noting that a White federal district court judge who found in favor of plaintiffs in a voting rights case was subjected to “vicious mail” and “obscene phone calls,” and that “[o]n the street, the whites cut him dead,” “[y]oungsters taunted his wife, and grown-ups would occasionally block her passage,” “[s]omeone planted a flaming cross on [his] lawn,” and concrete was thrown at his home); *id.* at 381 (describing White school administrators’ control over African-American teachers); *id.* at 394 (discussing the lack of support for the filing of *Brown* among the African-American community in Topeka); *id.* at 396 (indicating that “white anger the suit would likely arouse”); see also WOODWARD, *supra* note 10, at vi (describing African-Americans’ ambivalence towards civil rights struggles).

43. See WOODWARD, *supra* note 10, at 173 (“[Mississippi’s] Negroes lived in constant fear and its whites under rigid conformity to dogmas of white supremacy as interpreted by a state-subsidized Citizens Council.”).

44. *Sue for School Button-Wearing Permit in State*, *supra* note 39.

45. Complaint at 2, *Burnside v. Byars*, No. 1252(E)(C) (S.D. Miss. Oct. 21, 1964) (order denying preliminary injunction), *rev’d*, 363 F.2d 744 (5th Cir. 1966). The United Press International described the complaint as initiating a free speech case. *Sue for School Button-Wearing Permit in State*, *supra* note 39.

46. Handwritten notes of Judge Mize, *Burnside v. Byars*, No. 1252(E)(C) (S.D. Miss. Oct. 14, 1964).

Sidney Mize presiding,⁴⁷ heard plaintiffs' motions for a temporary restraining order as well as a preliminary injunction and denied both.⁴⁸ Judge Mize delivered an oral opinion from the bench on that day, finding that the buttons had created a disturbance, the restriction of the buttons was reasonable, and the restriction was "reasonably necessary to maintain proper discipline in the school."⁴⁹ The order denying the preliminary injunction was entered into the record a few weeks later.⁵⁰

The day after the district court opinion was issued, the news was first-page, above-the-fold in the *Clarion-Ledger*.⁵¹ The headline read "Philly School Upheld In Federal Court Here: May Forbid Students With Freedom Buttons."⁵² Despite the region's White hostility to the Civil Rights Movement, the article was an example of standard professional journalism, presenting a fairly neutral recounting of the facts of the dispute and the court's opinion.⁵³

B. Blackwell v. Issaquena County Board of Education in the District Court: Students' Voting Rights Button-Wearing and Accompanying Action Is "Insubordinate"

Civil rights activism and accompanying controversy in Mississippi was not confined either to the town of Philadelphia or to its schools. Around the same time as the three civil rights workers' murder near Philadelphia, at least fifteen bombings related to "racial tensions"

47. The federal district court judge, the Honorable Sidney Mize, who ordered James Meredith admitted to "Ole Miss" (under the direction of the Fifth Circuit on remand), ordered three of the four integrated school districts to admit African-American students into White schools and decided one of the civil rights student speech cases, *Burnside v. Byars*. Before his tenure on the federal bench, Judge Mize had served on the local school board for eight years. *Mize Funeral Set Tuesday*, CLARION-LEDGER, Apr. 27, 1965, at 1A. Interestingly, Judge Mize's hostility to integration was well-known and documented in at least one of his judicial opinions. See Thomas Jackson, *The Fight Against Integration*, AM. RENAISSANCE, Mar. 2006, at 7 (recalling Judge Mize's negative reaction to the Supreme Court's stance in favor of integration).

48. *Burnside v. Byars*, No. 1252(E)(C) (S.D. Miss. Oct. 21, 1964) (order denying preliminary injunction), *rev'd*, 363 F.2d 744 (5th Cir. 1966).

49. Consolidated Brief for Appellees, *supra* note 8, at 8. Neither the district court archives nor the Fifth Circuit archives have any record of the oral opinion; aside from the quotations provided in the parties' appellate briefs, it appears lost to history.

50. *Burnside v. Byars*, No. 1252(E)(C) (S.D. Miss. Oct. 21, 1964) (order denying preliminary injunction), *rev'd*, 363 F.2d 744 (5th Cir. 1966).

51. William Chaze, *Philly School Upheld in Federal Court Here: May Forbid Students with Freedom Buttons*, CLARION-LEDGER, Oct. 9, 1964, at 1A.

52. *Id.*

53. *Id.*

occurred in McComb, a small town in southwestern Mississippi.⁵⁴ Across the state, thirty-six African-American churches were bombed or burned during 1964.⁵⁵ During October 1964, eighteen congressmen wrote an open letter to the President expressing grave concern about the political climate in the Deep South. The AP described the letter as communicating that “law and order in Mississippi have broken down in a wave of violence, terror and intimidation.”⁵⁶ The letter said, “[t]here is no protection afforded those engaged in civil rights activity,” and called for “a massive permanent increase” in the number of FBI agents assigned to the area as well as a federal grand jury to investigate “the possible connections between law enforcement officials and the bombings and other acts of violence in southwest Mississippi.”⁵⁷

About 150 miles north of the McComb area devastated by bombings, Rolling Fork, Mississippi was another community in which African-American students wore SNCC voting rights buttons to their segregated, African-American public high school. The Rolling Fork students had worn these buttons previously without comment,⁵⁸ but on Friday, January 29, 1965, the principal asked some of the students to remove their buttons toward the end of the day after he became aware they were talking loudly in the hallway during class time, presumably about the buttons.⁵⁹ The weekend passed and about 150 students wore SNCC buttons to school on Monday, February 1.⁶⁰ Some of these students also distributed buttons in the hallway and pinned buttons on their classmates—activities reportedly resulting in “a general breakdown of orderly discipline.”⁶¹ The principal

54. William L. Chaze, *McComb's Mob, Bombings like Bus Line, Puzzling*, CLARION-LEDGER, Sept. 27, 1964, at 3D. An incident in late September, 1964 was typical: an African-American family's home was bombed and in response, a group of African-Americans gathered at the site, described in the *Clarion-Ledger* as “a mob that easily could have developed into a riot” and “a milling, angry crowd of about 300 Negroes.” *Id.* The local authorities attempted to disperse the mob and made numerous arrests. *Id.* U.S. Attorney General Nicholas Katzenbach remarked “[t]here have been a number of bombings. Negro homes have been bombed and then Negroes have been arrested, creating a very dangerous situation.” *Katzenbach Believes Data Will Result in Indictments*, *supra* note 33.

55. Austin Scott, *No Clear-Cut Wins Seen for CR Cases*, CLARION-LEDGER, May 17, 1965, at 5A.

56. *Congressmen Ask Federal Action for Mississippi*, CLARION-LEDGER, Oct. 6, 1964, at 3A.

57. *Id.*

58. Consolidated Brief of Appellants on Appeal at 6, *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) (Nos. 22,681, 22,712).

59. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 750–51 (5th Cir. 1966); Consolidated Brief for Appellees, *supra* note 8, at 3–4.

60. *Blackwell*, 363 F.2d at 751–52.

61. *Id.* at 751.

informed the students they could not wear the buttons at school because the students and their buttons “were creating such confusion in the classrooms and in the corridor.”⁶² (Also on February 1, almost 300 miles to the northeast, Dr. Martin Luther King, Jr. and nearly 300 marchers in Selma, Alabama were arrested and jailed because of their nonviolent protest of Selma’s refusal to register African-American voters.)⁶³

The next day, Tuesday, February 2, nearly 200 students⁶⁴ wore SNCC buttons to school in Rolling Fork and were again informed that they could not wear the buttons in school.⁶⁵ The day after that, 127 students⁶⁶ wore the buttons to school and those who declined to take off the buttons were summarily suspended for not following school rules.⁶⁷ Before driving the suspended students home, a bus driver went into the school building and started handing out a box full of SNCC buttons, at one point entering a classroom where class was in session.⁶⁸ At the same time, some students threw buttons into the school through open windows and others tried to pin buttons on their classmates.⁶⁹ More students were suspended for wearing SNCC buttons in the days that followed.⁷⁰ About three weeks later, around 300 students of all ages were still suspended, not attending school because the ban on SNCC buttons remained in place.⁷¹ At that point, the school district suspended them for the rest of the year.⁷² As in *Burnside*, the principal of this African-American high school was African-American himself, and like the principal in *Burnside*, this

62. *Id.* at 751, 751 n.3.

63. The nearly fifty children who participated in this march on February 1 and carried “freedom signs” were taken into custody but not charged. *Selma Arrest of King Part of CR Drive Plan: Also Will Seek Seating in Alabama Legislature*, CLARION-LEDGER, Feb. 2, 1965, at 1A. The following day, hundreds more marched in the streets of Selma to protest Dr. King’s arrest. Several hundred of these were students absent from school for the purpose of protesting; local law enforcement agents took the students into custody and charged them with juvenile delinquency. *Hundreds Arrested in Voter Campaign*, CLARION-LEDGER, Feb. 3, 1965, at 1A. More than 2000 African-Americans were taken into custody over the course of a few days in Selma. *President Indignant over Voting Denials*, CLARION-LEDGER, Feb. 5, 1965, at 1A.

Dr. King was a notable figure by 1965, having only the prior year become the youngest person ever honored with a Nobel Peace Prize. OGLETREE, *supra* note 15, at 138–39.

64. Consolidated Brief for Appellants on Appeal, *supra* note 58, at 7.

65. *Blackwell*, 363 F.2d at 751; Consolidated Brief for Appellants on Appeal, *supra* note 58, at 7.

66. Consolidated Brief for Appellants on Appeal, *supra* note 58, at 7.

67. *Blackwell*, 363 F.2d at 751.

68. *Id.* at 752.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

principal likely faced potentially violent retaliation from the local White community if he was seen as nurturing support for voting rights, especially among impressionable children.

Several days later on April 1, 1965, a small group of Rolling Fork, Mississippi parents represented by the NAACP filed suit.⁷³ They contested the suspension of their children for wearing SNCC buttons, disputed the segregation of the school system, and sought a preliminary injunction on both counts.⁷⁴ The district court did not hear the preliminary injunction motion until May 10. The next day, it denied the motion as it applied to the 125 then-still-suspended students.⁷⁵ The two-page opinion identified the issue squarely as a disciplinary problem:

[T]he children seek to defy the school authorities and ignore their instructions and be given a decisive voice in the management of the school. That is not and never has been the law and will never be even good common sense so long as public schools continue to merit their cost of operation.⁷⁶

The district court determined that the school rule was not “unreasonable or oppressive” and emphasized the importance of courts deferring to school authorities in student discipline matters.⁷⁷ It did not decide the case based on the disruption created but on the “insubordination” of violating a rule.⁷⁸ Thus, the students’ disobedience was the district court’s focus, whether that disobedience had negatively affected the school environment or not. Students’ ability to engage in non-disruptive speech about some of the most important political issues of the day remained at the school’s mercy. Interestingly, two days after issuing that decision upholding the school’s disciplinary decisions, the district court granted plaintiffs’ motion for a preliminary injunction regarding the other claim in the case, thus enjoining the system of de jure school segregation in Rolling Fork.⁷⁹

73. Consolidated Brief for Appellants on Appeal, *supra* note 58, at 9.

74. Consolidated Brief for Appellees, *supra* note 8, at 5–6.

75. *Blackwell v. Issaquena County Bd. of Educ.*, No. 1096(W), slip op. at 1 (S.D. Miss. May 11, 1965), *aff’d*, 363 F.2d 749 (5th Cir. 1966); Consolidated Brief for Appellants on Appeal, *supra* note 58, at 10. The record does not explain the discrepancy between the numbers of students suspended for the duration of the school year: 125 or 300. Presumably some students were allowed to return to school without their SNCC buttons.

76. *Blackwell*, No. 1096(W), slip op. at 2.

77. *Id.*

78. *Id.*

79. Consolidated Brief for Appellees, *supra* note 8, at 10. Although the district court’s decision in *Burnside* upholding the school’s right to restrict students from wearing SNCC buttons made front-page, above-the-fold news in the *Clarion-Ledger*, news about the filing of *Blackwell* and the district court’s denial of the preliminary

During this time, the broader Civil Rights Movement continued to make progress, but not without meeting wild resistance in the streets which made the use of school authority to suppress students' clamor for civil rights look almost *de minimis* by contrast. On March 7, 1965, Alabama police used billy clubs, tear gas, and nightsticks to injure more than 600 unarmed voting rights marchers as they marched in Selma, Alabama; this event was later to become known as "Bloody Sunday."⁸⁰ Eighteen days later, Dr. King and hundreds of other protesters completed what should have been a four-day march from Selma to the state capitol in Montgomery.⁸¹

C. *The Fifth Circuit: Burnside and Blackwell Consolidated*

In both *Burnside* and *Blackwell*, plaintiffs appealed the district courts' denial of injunctive relief. Because the cases presented the same legal issue, the Fifth Circuit granted plaintiffs' motion to consolidate the two cases.⁸² Thus, the two appeals were briefed and argued together, and decided by the same panel.

1. *The actual disruption test emerges: one case affirmed, one case reversed*

On appeal before the Fifth Circuit, the students presented two arguments contending the district courts committed reversible error. First, the students argued that the district court did not consider their free speech rights when evaluating whether the schools' regulations were reasonable.⁸³ Second, they contended that student speech could only be restricted under the clear and present danger test, which had not been satisfied in either case.⁸⁴ By contrast, the school districts rejected the notion that the students had any free speech rights in public schools whatsoever and instead framed the issue as merely "a matter dealing with the question of reasonableness of school authorities in maintaining proper discipline within the school."⁸⁵ The parties' arguments framed the clash between the old approach and

injunction was absent from that same paper. Review by author of the Clarion Ledger Feb. 1–5, 1965; Apr. 23–27, 1965; May 11–19, 1965.

80. Letter from a Birmingham Jail (April 16, 1963), *in* KING, *supra* note 19, at 83; We Shall Overcome—Selma-to-Montgomery March, <http://www.nps.gov/nr/travel/civilrights/al4.htm> (last visited April 2, 2009).

81. We Shall Overcome—Selma-to-Montgomery March, *supra* note 80.

82. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 752 (5th Cir. 1966); *see also* Consolidated Brief for Appellees, *supra* note 8, at 1 (noting that the two cases had been consolidated for briefing and presentation). This consolidation increased judicial efficiency and also made it easier for the NAACP to provide legal support in both cases.

83. Consolidated Brief for Appellants on Appeal, *supra* note 58, at 11.

84. *Id.* at 16.

85. Consolidated Brief for Appellees, *supra* note 8, at 8.

the new, between students as obedient subjects of the school who could be disciplined for insubordination regardless of the validity of the rule they were violating, and students as citizens in a political body, entitled to limited protection for their peaceful protest and legitimate dissent even within the schoolhouse gates.

With these cases, the Fifth Circuit was entering new territory. The Supreme Court had held in 1943 in *West Virginia Board of Education v. Barnette*⁸⁶ that students could not be required to participate in the flag salute in public schools. The analysis in *Barnette*, however, was convoluted and the Court did not make clear in its opinion whether *Barnette* was a free speech case, a free exercise case, some sort of political establishment case, or whether it fit into multiple categories.⁸⁷ Furthermore, *Barnette* involved a student's right to refrain from engaging in compelled speech, quite a different question from the freedom to affirmatively express one's own possibly controversial opinions.⁸⁸ Regardless of these limitations, though, *Barnette* did provide authority for the limited proposition that elementary and secondary students could be constitutional rights-holders, a disputed issue at that point in time.⁸⁹

86. 319 U.S. 624 (1943).

87. See Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 197 (2007) (noting that *Barnette* was decided without use of clear test); Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 341-42 n.56 (2008) (arguing deductively that *Barnette* was a free speech case even though "the Court did not expressly ground its decision in the Free Speech Clause"); see also *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (describing *Barnette* as "decided exclusively upon free speech grounds" despite absence of explicit free exercise analysis), *superseded in part by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993). The Religious Freedom Restoration Act did not disturb *Smith's* characterization of *Barnette*, rather it reinstated the "compelling interest test" to determine whether a law ostensibly neutral on religion nevertheless imposes a substantial burden on a person's exercise of religion. Religious Freedom Restoration Act, Pub. L. No. 103-141.

88. *Barnette*, 319 U.S. at 631-34. An Arizona district court applied *Barnette* in a case involving Jehovah's Witness children who declined to stand for the singing of the national anthem and were suspended for insubordination. But, the district court went further than merely applying *Barnette*; it overturned the suspensions in part because "it appears that the conduct of the pupils involved here was not disorderly and did not materially disrupt the conduct and discipline of the school, and since there is a lack of substantial evidence that it will do so in the future." *Sheldon v. Fannin*, 221 F. Supp. 766, 775 (D. Ariz. 1963). The test in this case may have influenced the Fifth Circuit's decision in *Blackwell* and *Burnside*, but it was not cited in either decision.

See also Theodore F. Denno, *Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM L. REV. 35, 41, n.39 (1969) (describing *Barnette* as a situation involving a "very limited sectarian interest" in contrast with "the right of the 'general' student" in *Tinker*).

89. *Barnette*, 319 U.S. at 637 ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for

Thus laying in place an important and controversial premise,⁹⁰ the Fifth Circuit agreed with the students' foundational claim that they held First Amendment affirmative speech rights in public schools.⁹¹ The Fifth Circuit then moved quickly to limit the scope of those rights, turning to two non-student Supreme Court cases to support the claim that free speech rights "can be abridged by state officials if their protection of legitimate state interests necessitates [such] an invasion."⁹² The Fifth Circuit also set forth basic principles for analyzing the validity of a restriction on students' speech: "The interests which the regulation seeks to protect must be fundamental and substantial if there is to be a restriction of speech"⁹³ and the state has "a legitimate and substantial interest in the orderly conduct of the school."⁹⁴

Turning to the specific speech in *Burnside* and *Blackwell*, the Fifth Circuit determined that merely wearing a political button was not "inherently distract[ing]" speech inclined to "break down the regimentation of the classroom such as carrying banners, scattering leaflets, [or] speechmaking."⁹⁵ Furthermore, in *Burnside*, because the other students in the school expressed only "mild curiosity" in the SNCC buttons, prohibiting the buttons was not necessary to maintain order. Thus, the speech restriction in *Burnside* was "arbitrary and unreasonable," an unjustifiable infringement on the students' First Amendment rights.⁹⁶ Making clear the factual distinction between *Burnside* and *Blackwell*, the Fifth Circuit reiterated that "the mere presence of 'freedom buttons' is [not] calculated to cause a disturbance sufficient to warrant their exclusion from school premises unless there is some student misconduct involved."⁹⁷

citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

90. Denno, *supra* note 88, at 36 (stating, "[i]t is reasonable to assert that prior to the *Tinker* decision the primary freedom in public schools had been that of administrators from judicial interference").

91. *Burnside v. Byars*, 363 F.2d 744, 747–48 (5th Cir. 1966).

92. *Id.* at 748 (citing *Dennis v. United States*, 341 U.S. 510 (1951), and *Whitney v. California*, 274 U.S. 357, 376 (1927)).

93. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966).

94. *See id.* (emphasizing that "[t]he proper operation of public school systems is one of the highest and most fundamental responsibilities of the state"). Further, in *Burnside*, the court defined the state interest as "maintaining an educational system." *Burnside*, 363 F.2d at 748.

95. *Burnside*, 363 F.2d at 748.

96. *Id.* As such, the district court abused its discretion in denying plaintiffs' motion for a preliminary injunction. *Id.* at 748–49.

97. *Id.* at 748.

It was this factual distinction that would allow the Fifth Circuit to reach opposite outcomes in these two cases. Accordingly, in *Blackwell*, the Fifth Circuit looked to the students' conduct in aggressively distributing the buttons as the source of "a complete breakdown in school discipline."⁹⁸ The court emphasized the need for schools to be able to discipline "the distribution, pinning, and throwing of buttons," the "discourteous remarks to school personnel," "the deliberate absence of a student from class," and the "loud conversation in halls and corridors which c[ould] be heard in classrooms."⁹⁹ Only because the students' conduct was "so inexorably tied to the wearing of the buttons that the two are not separable" did the Fifth Circuit determine that the prohibition of the buttons, and thereby the message, was reasonable and the limitation of the students' First Amendment rights constitutional.¹⁰⁰ Yet, even while the Fifth Circuit upheld the schools' actions in *Blackwell*, it cautioned school officials to "be careful in their monitoring of student expression in circumstances in which such expression does not substantially interfere with the operation of the school."¹⁰¹ Consistent with *Burnside*, nowhere in *Blackwell* did the Fifth Circuit hold that a school must be able to prohibit the mere wearing of a button—even a civil rights button worn in the Deep South during the mid-1960s.¹⁰² Derrick Bell's description of the social context emphasizes the radical nature of the Fifth Circuit's approach: "From the viewpoint of a great many Whites, there really were no peaceful, nondisruptive civil rights protests. Each represented a most threatening challenge to an important aspect of the local status quo."¹⁰³

2. *Noteworthy aspects of these two cases and their context*

Before turning to the cases that incorporated *Burnside* and *Blackwell* in the few years after they were issued, three aspects of these two cases deserve mention. First, the closest the Fifth Circuit came to considering the disruptive potential of other students' reactions to the specific message expressed by the speakers was the court's explicit references to "freedom buttons" in *Burnside* and *Blackwell*. In hindsight, the buttons' disruptive potential seems much greater than

98. *Blackwell*, 363 F.2d at 753.

99. *Id.* These were the disruptive activities, the "unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum." *Id.* at 754.

100. *Id.*

101. *Id.*

102. *Id.* at 753.

103. BELL, *supra* note 10, at 555.

the court implied: in *Burnside*, African-American students were wearing voting rights buttons in a community where the murdered bodies of three voting rights workers had been unearthed six weeks earlier—after the murders were covered up by White local law enforcement officials.¹⁰⁴ Furthermore, the bombings and other race-motivated violence across the state of Mississippi at that time make clear that those three murders were not isolated incidents of racial violence and the community out of which *Blackwell* arose presumably was racially charged as well.¹⁰⁵ Perhaps the court considered the disruptive potential lessened somewhat because the schools were entirely segregated, and while that might have reduced the potential for immediate disruption, it could not negate it entirely—it would be impossible to completely isolate the students, teachers, and principal from the unstable and explosive racial context in which they lived.

But more importantly in a precedential sense, the Fifth Circuit's lack of emphasis on the disruptive potential of the specific message led to a stronger focus on the time, place, and manner of the conduct alone. Because *Tinker* did not adopt that same focus, the decision in *Tinker* led to a series of difficult and problematic questions including uncertainty about how student speech restrictions square with the First Amendment's general presumption against viewpoint discrimination,¹⁰⁶ and the role of the so-called heckler's veto in assessing the level of actual or anticipated disruption.¹⁰⁷ Indeed, it was the presence of disruptive *conduct* by the speakers themselves in *Blackwell* but not *Burnside* that led the Fifth Circuit to different conclusions in these two cases—not the message itself or the responsive speech or conduct of others.

104. See *supra* notes 25–39 and accompanying text.

105. See *supra* notes 54–58 and accompanying text.

106. See Bowman, *supra* note 87, at 202, for a discussion of these issues. See also *id.* (stating that “the focus of . . . [*Tinker*’s] disruption test and the Court’s subsequent language clarifying that test are consistent with the idea that one particular perspective *could* cause a level and type of disruption sufficient to justify quashing it in what would amount to viewpoint discrimination”); John Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 234 (2007) (arguing that *Tinker* does not require regulation on students’ speeches to have “viewpoint-neutral effects”).

107. Berkman, *supra* note 3, at 591–92; Taylor, *supra* note 106, at 231; see also John Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. (forthcoming Mar. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1137909 (“[F]orty years of applying *Tinker* have not made clear the degree to which *Tinker* allows schools to engage in a heckler’s veto, and the lack of a clear judicial commitment to the no-heckler’s-veto principle creates unacceptable high risks that schools may be engaging in purposeful viewpoint discrimination.”).

Second, aside from citing one another, *Burnside* and *Blackwell* relied on no other authority for the actual disruption test.¹⁰⁸ The Fifth Circuit's focus on conduct and actual disruption in these two cases could have been influenced by any number of cases or common-sense approaches. Speculating about what the judges would have known or learned through their own research is difficult, but one area of law almost certainly familiar to the Fifth Circuit judges would have been the Supreme Court's recent decisions in civil rights protest cases occurring in non-school settings within the Fifth Circuit's boundaries. Between December 1961 and February 1966 the Supreme Court reversed convictions of four individuals charged with violating Louisiana's breach of peace statute for activities the Court described as non-violent civil rights protests.¹⁰⁹ In all four cases, the Court emphasized the non-disruptive nature of the protesters' actions, by which it often seemed to mean non-violent.¹¹⁰ This approach was not new: the Court had used disruption and violence as touchstones in other protest cases as well.¹¹¹

To the extent the Fifth Circuit understood *Burnside* and *Blackwell* as civil rights protest cases which happened to occur in schools, employing a focus on disruption would have been logical. The two Fifth Circuit judges and the district court judge sitting by designation in *Burnside* and *Blackwell* also would have been aware of the Fifth Circuit's intensely controversial decisions supporting voting rights and school desegregation, and the riots and violent protests staged in response to those decisions and their implementation.¹¹² Compared

108. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966).

109. See *Brown v. Louisiana*, 383 U.S. 131, 133 (1966) (citing *Cox v. Louisiana*, 379 U.S. 536 (1965), *Taylor v. Louisiana*, 370 U.S. 154 (1962), and *Garner v. Louisiana*, 368 U.S. 157 (1961)).

110. See *id.* ("In each, the purpose of the participants was to protest the denial to Negroes of rights guaranteed them by state and federal constitutions and to petition their governments for redress of grievances. In none was there evidence that the participants planned or intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants.")

111. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (stating that petitioners had peacefully expressed their grievances); *Cox*, 379 U.S. at 549 (reversing defendant's conviction because students' actions did not constitute a breach of peace, and thereby, students themselves were not violent). By contrast, the Court was much less likely to even grant certiorari to, let alone reverse, cases with similar legal issues but with facts including disruption or disorder. *BELL*, *supra* note 10, at 549.

112. See JACK BASS, *UNLIKELY HEROES* 19 (Univ. Ala. Press 1990) (1981) (noting that civil rights cases comprised just less than three percent of the Fifth Circuit's case load around this time, but these cases were some of the Circuit's most high-profile). See generally *supra* notes 13-20 and accompanying text; *infra* Part (II)(A) (discussing the elementary, secondary, university-level school desegregation decisions). The Fifth Circuit's voting rights cases included *Hamer v. Campbell*, 358 F.2d 215 (5th Cir.

to the public reaction to some of those decisions, the practical consequences of allowing limited, silent, peaceful student speech about civil rights through *Burnside* and *Blackwell*'s actual disruption test must have seemed much less dramatic.

Finally, the *Clarion Ledger* was generally aware of the Fifth Circuit's activities and often covered its new decisions; on July 22, 1966, it reprinted an Associated Press story describing a Fifth Circuit decision issued the same day as *Blackwell* and *Burnside* holding "that Negroes must be represented on jury lists at least in proportion to their population."¹¹³ Coverage of the Fifth Circuit's opinions in the student speech cases was absent from Mississippi's principal newspaper, however, which instead prominently featured a portrait of life in an unchanging South. A photograph of two genteel White women who, the caption explains, are leading "the second annual Workshop for Dynamic Living," captured approximately one-fourth of the front page the day after *Blackwell* and *Burnside* were decided.¹¹⁴

Thus, the story of *Burnside* and *Blackwell* is not merely a tale of students who broke the school's rules. Rather, it is a story of African-American students allied with their parents against the oppression of dominant White society in the form of the school, speaking out in the Deep South in pursuit of racial justice, seeking the rights accorded to citizens. This is the legal and social foundation on which *Tinker* was built.

1966); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964); *United States v. Dogan*, 314 F.2d 767 (5th Cir. 1963); and *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959), *rev'd* 364 U.S. 339 (1960).

Circuit Judge Gewin participated in fewer of these cases than most of his colleagues, and Circuit Judge Thornberry even less, but both of these judges who decided *Burnside* and *Blackwell* eventually became known as part of the Circuit's "liberal wing" on school desegregation cases. See BASS, *supra* note 112, at 160, 304 (noting that "[Gewin] eventually joined in what became the liberal wing of the court in important school cases in the early 1970s" and that "Thornberry identified with the liberal bloc on the Fifth Circuit"). Two years after deciding *Burnside* and *Blackwell*, Gewin wrote the Circuit's en banc decision in *Miller v. Amusement Enterprises*, interpreting broadly the public accommodations provision of the Civil Rights Act of 1964. 394 F.2d 342, 344 (5th Cir. 1968).

113. *Jury List Must Include Names of Negro Citizens*, CLARION-LEDGER, July 22, 1966, at 1A.

114. *Dynamic Living*, CLARION-LEDGER, July 22, 1966, at 1A. The caption is dwarfed by the accompanying picture of Mrs. J.H. Bowden and Miss Scott Young, who appear perched on the edge of a reflecting pool with their legs crossed demurely at the ankle. Columns frame the pastoral background. *Id.* Specifically, the caption noted: "Miss Young, who will be a freshman music major at Belhaven [College] beginning in September . . . was among the top five beauties [at Murrah High School] and was selected most dignified and most talented in dramatics," and Mrs. Bowden is "an assistant professor of speech at Belhaven." *Id.*; see also KLUGER, *supra* note 14, at 394 (claiming that in Topeka, Kansas, and presumably elsewhere, newspapers "gave very little coverage to black affairs in general.").

II. THE ROAD FROM “ACTUAL DISRUPTION” TO “SUBSTANTIAL AND MATERIAL DISRUPTION OR REASONABLE ANTICIPATION THEREOF”

In *Burnside* and *Blackwell* the Fifth Circuit concluded that students held limited First Amendment free speech rights in schools and those rights could be curtailed if the students’ speech caused actual disruption of the educational environment.¹¹⁵ This test did not ask whether school officials had reasonably anticipated that speech about a certain issue would cause disruption when enacting a prior restraint-type of regulation (eventually, that consideration would be part of *Tinker*’s ultimate holding), but examined only the actual impact of the speech on the school environment with a focus on the speakers’ conduct.¹¹⁶ The actual disruption test affected the development of the law within the Fifth Circuit and beyond its borders; twelve cases nationwide cited *Burnside* and *Blackwell* before the Supreme Court decided *Tinker* in February 1969.

Of those twelve cases, five arose out of public high schools and the remaining seven began in colleges or universities, where student protest already was a more common occurrence than in high schools.¹¹⁷ Many courts took liberties with the Fifth Circuit’s test, restricting its scope even as they purported to apply it, and others cited it for general principles such as the importance of deferring to school authorities, which was in fact not its primary focus. Only rarely was the Fifth Circuit’s test applied in a manner true to the original. In this nearly three-year window after the *Burnside* and *Blackwell* decisions and before *Tinker*, a mere two out of twelve cases overturned schools’ disciplinary decisions; both of those involved institutions of higher education.

A. *A Retreat from Actual Disruption in Secondary School Cases*

Throughout the 1960s, high school students were involved in civil rights protests across the South, some of which resulted in litigation challenging the arrest and conviction of protesters—but those protests rarely occurred on high school campuses.¹¹⁸ As a result of

115. See *supra* notes 95–97 and accompanying text.

116. See *supra* notes 98–100 and accompanying text.

117. The following five cases were filed on behalf of students of public school: *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967), *rev’d*, 393 U.S. 503 (1969); *Brown v. Geer*, 296 F. Supp. 595 (S.D. Miss. 1969); *Scoville v. Bd. of Educ.*, 286 F. Supp. 988 (N.D. Ill. 1968), *rev’d*, 425 F.2d 10 (7th Cir. 1970); *Akin v. Bd. of Educ. Unified Sch. Dist.*, 68 Cal. Rptr. 557 (Cal. Ct. App. 1968).

118. See *supra* note 63 and accompanying text; see also *Edwards v. South Carolina*, 372 U.S. 229, 231 (1963) (discussing the involvement of high school students in protests in public spaces).

those circumstances and other factors,¹¹⁹ the body of reported pre-*Tinker* high school student speech decisions is very small. Of the five cases citing *Burnside* and *Blackwell*, three involved students' violation of school rules regarding appearance, such as hairstyle or facial hair, one involved an underground newspaper, and the last was *Tinker*. Until the Supreme Court decided *Tinker*, all of the trial and appellate courts deciding these five cases upheld the discipline and quashed the students' speech claims. Then, in *Tinker*, the Supreme Court reversed the district and appellate courts' decisions below. *Tinker* also caused an appellate court to reverse one of the other four high school student speech cases.

The Fifth Circuit was home to two cases in which male students were suspended or denied enrollment because of their "long" haircuts reminiscent of the Beatles' shaggy coifs. Not surprisingly, in both of those cases, *Davis v. Firmont*¹²⁰ and *Ferrell v. Dallas Independent School District*,¹²¹ courts purported to apply the circuit rule as stated in *Burnside* and *Blackwell*.¹²² *Burnside* and *Blackwell* were also employed as persuasive authority in a California state court case with similar facts, *Akin v. Board of Education*,¹²³ in which a court upheld the suspension of a student for wearing a beard.¹²⁴ Yet, in all three of these grooming-related cases, a school principal's vague recollection of disruption when other students in previous years sported "long" hair or beards was sufficient to justify the existence and enforcement of the rule, regardless of any actual disruption resulting from the grooming choice in question.¹²⁵ Despite their claimed reliance on the *Burnside/Blackwell* standard, these courts evaluated the reasonableness of the regulation not by the restrictive *Burnside/Blackwell* test of actual disruption, but rather by a test

119. See *supra* notes 113–117 and accompanying text.

120. 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969).

121. 392 F.2d 697 (5th Cir. 1968).

122. *Davis*, 269 F. Supp. at 527 (noting that the lower court in *Davis* cited only *Burnside* for the proposition that the disruption of the school environment justifies discipline). The court also noted that a hairstyle does not constitute expression, and even if it did, it can be regulated by reasonable state rules. *Id.*; see also *Ferrell*, 392 F.2d at 703 (citing both *Burnside* and *Blackwell*).

123. 68 Cal. Rptr. 557 (Ct. App. 1968).

124. *Id.* at 559. *Akin* cites both *Burnside* and *Blackwell* for the actual disruption standard. *Id.* at 562.

125. *Davis*, 269 F. Supp. at 528–29; see *Ferrell*, 392 F.2d at 699, 700–01 (observing that the principal's opinion was "that the length and style of the boys' hair would cause commotion, trouble, distraction and a disturbance in the school" based on past events at the school); *Akin*, 68 Cal. Rptr. at 562–63 (holding that even though the student's beard did not cause disruption at a private school, and another student wore a beard at a different public school without causing disruption, the principal's recollection of past disruption was sufficient).

implicitly more in line with the one the Supreme Court eventually would employ in *Tinker*, focusing on whether disruption reasonably could be anticipated.¹²⁶

Burnside also was cited as persuasive authority in *Scoville v. Board of Education of Joliet Township High School District 204*,¹²⁷ an Illinois case in which students circulated copies of a sixty-page underground newspaper/literary journal.¹²⁸ The district court found that the journal was not disruptive but the school could prohibit its distribution on school grounds because the journal encouraged students to disobey school rules, employed “inappropriate and indecent language,”¹²⁹ and criticized school policies as “propaganda”—all particularly undesirable actions inside the schoolhouse gate.¹³⁰ So, despite not satisfying the *Burnside/Blackwell* test, the court held the newspaper could be prohibited for other reasons.¹³¹

Finally, in *Tinker*—the case factually most similar to *Burnside* and *Blackwell* because of the students’ serious political speech—the district court also invoked the *Burnside/Blackwell* focus on disruption. However, it explicitly broadened the test to one in which schools also could prohibit student speech if school officials reasonably anticipated that the speech would cause such a disruption.¹³² As part of a larger organized protest effort, five students (three later became the *Tinker* plaintiffs) had worn black arm bands to school to protest

126. See *Akin*, 68 Cal. Rptr. at 562–63 (examining experts’ opinions and concluding that it is possible that male students that grow beards could cause disruption in school). More recently, some cases involving students’ hairstyles have been litigated as political or religious expression, but plaintiffs in those three early cases made no such claims.

127. 286 F. Supp. 988 (N.D. Ill. 1968), *rev’d*, 425 F.2d 10 (7th Cir. 1970).

128. *Id.* at 990.

129. *Id.*

130. *Id.* at 989–90, 992. “[A]lthough we are in a period when the rights of the minor vis-à-vis the state are being closely reexamined, . . . the Supreme Court has recently affirmed the right of the state to protect its younger citizens from certain forms of speech which would, if the audience were adult, be protected by the First Amendment.” *Id.* at 992 (citing *In re Gault*, 387 U.S. 1 (1967) and *Ginsberg v. New York*, 390 U.S. 629 (1968)). The Seventh Circuit reprinted the journal; although the journal was disrespectful of authority, it did not contain language that was obscene or an incitement to riot. *Scoville v. Bd. of Educ. of Joliet Twp. High Sch. Dist. 204*, 425 F.2d 10, 13–14 (7th Cir. 1970).

131. Later, after the Supreme Court decided *Tinker*, the Seventh Circuit applied *Tinker* to reverse the district court’s decision in *Scoville* and overturn the student discipline. *Scoville*, 425 F.2d 10, 13 (7th Cir. 1970).

132. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (“[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”).

the Vietnam War and call for a truce.¹³³ The students and their parents knew this act would violate a newly enacted rule the school district instituted based on its concern about the escalating violence and confrontation of Vietnam protests and protest responses across the country.¹³⁴ Before their suspension, the students were subjected to a few hostile remarks in school hallways, but those incidents seemed to be the limits of any actual disruption of the school environment caused by the armbands.¹³⁵

The district court in *Tinker* deferred to school officials' expertise and set forth what it seemed to think was a fairly common-sense conclusion: the topic of the Vietnam War was so controversial, and such a common focus of student protest in colleges and universities, that high school officials reasonably could expect that student speech opposing the war would cause a substantial or material disruption of the educational environment.¹³⁶ It further concluded that the three student-plaintiffs' black armbands fell into this category and, thus, their suspensions from school were not unconstitutional, despite the limited disruption caused by the armbands.¹³⁷ Accordingly, the district court dismissed the case for failure to state a claim for which relief could be granted.¹³⁸ The Eighth Circuit affirmed the dismissal by a divided panel, and then affirmed again in a summary opinion of the court en banc.¹³⁹ It was not until *Tinker* reached the Supreme Court that the substantial and material disruption or reasonable

133. *Id.* at 504.

134. *Id.* at 510 n.4.

135. *Id.* at 508. According to the dissent, the students' arm bands caused somewhat greater disruption and distraction in the schools, including evidence that a lesson in Mary Beth Tinker's mathematics class was "wrecked" when she entered into class with the armband. *Id.* at 517-18 (Black, J., dissenting).

136. *Id.* at 513 (majority opinion) ("When [the student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, [the student] may express his opinions, even on controversial subjects like the conflict in Vietnam . . ."); see Michael R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 81 (1998) (discussing the effects of the anti-Vietnam protest). "[B]y the time anti-Vietnam activists began to mobilize, civil rights struggles in the South, as well as campaigns on behalf of other racial minorities and women, had habituated Americans to social protest, making it part of the cultural climate of the 1960s. Bold willingness to question and resist the government was nothing new, nor were such dramatic techniques of protest as marching, sit-ins, picketing, civil disobedience, and provoking arrest." *Id.*

137. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972-73 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

138. See *id.* at 973 (holding that school's regulation did not deprive plaintiff of constitutional right to freedom of speech, thus denying nominal damages and injunction against school).

139. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

anticipation thereof tests for student speech became a definitive part of constitutional law.¹⁴⁰

Thus, in all five pre-*Tinker* high school student speech cases citing *Burnside* and *Blackwell*, including *Tinker* itself at the trial and appellate levels, the discipline was upheld. Although these other courts purported to apply the Fifth Circuit's actual disruption test, in reality their opinions bore much more similarity to the district court opinions in *Burnside* and *Blackwell* which considered students to be mere disobedient subjects. Thus, the courts conveyed support for students' free speech rights and students' citizenship in principle, while continuing to grant great deference to schools, ultimately rejecting students' actual claims.¹⁴¹

*B. Higher Education Begins To Emerge as Distinct from the
Elementary/Secondary Context*

The five cases discussed above are part of a small but critical mass of cases brought in the late 1960s and early 1970s which started to establish a body of free speech case law applicable specifically to public high school students. In the three years before *Tinker*, the *Blackwell/Burnside* rule also was invoked in seven cases arising out of higher education institutions—two more cases than those arising out of public secondary schools. For the most part, the courts deciding the higher education cases were no more willing than the courts deciding the high school cases to overturn schools' disciplinary decisions on the merits. Thus, deference to educational institutions

140. In the few years after *Tinker* was decided, courts and scholars debated whether *Tinker* had created a "reasonable anticipation" test because the plain language of the majority opinion did not explicitly say as much. The Court never spoke on this matter again, but a consensus eventually emerged (whether based on judicial interpretation or practical necessity) that *Tinker* does stand for a reasonable anticipation test. See, e.g., *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 973 (S.D. Ohio 2005) (concluding that student speech at issue "falls well short of the *Tinker* standard for reasonably anticipating a disruption of school activities").

141. In *Ferrell*, a debate between the Fifth Circuit majority and a dissenting captured the essence of the controversy primed for the Supreme Court in *Tinker*. The majority wrote: "The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed." *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 703 (5th Cir. 1968). Judge Tuttle, dissenting in *Ferrell*, wrote: "[B]oth in . . . [*Blackwell*] and upon the record before us here, we find courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder, resistance or improper and even violent action by those supporting the status quo. It seems to me it cannot be said too often that the constitutional rights of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very rights he seeks to assert." *Id.* at 705 (Tuttle, J., dissenting).

was common in both sets of cases, yet the college students' protests arose out of a somewhat different history.

Even as far back as the late 1920s, college campuses had been the site of civil rights protests at Fisk and Howard Universities.¹⁴² During the 1960s, civil rights protests became especially common on college and university campuses across the country, whose students were a prominent force of the Civil Rights Movement. College and university students took the lead in the Greensboro, North Carolina lunch counter sit-ins;¹⁴³ they were the "S" in SNCC;¹⁴⁴ they gathered by hundreds and thousands to protest racial injustice and the Vietnam War on the campuses of Columbia,¹⁴⁵ Berkeley, and countless other universities. Sometimes the protesters were peaceful but their messages provoked violent reactions in those who disagreed; sometimes the protests were disruptive because of the time, place, and manner in which they occurred; and sometimes the protesters themselves turned violent. Regardless, protests on college campuses were of a radically different nature than even the unwelcome button-pinning and button-throwing in *Blackwell*.

Perhaps not surprisingly given this increased level of campus protest, during this time college and university students were contesting their suspension or expulsion for civil rights protests by actively asserting their procedural due process rights. Accordingly, when disciplinary decisions were reversed, such reversals were more likely to be based on procedural due process grounds rather than because students' activities passed the *Burnside/Blackwell* actual disruption test.¹⁴⁶

142. The Rise and Fall of Jim Crow: Fisk University Student Protests (1925–1927), http://www.pbs.org/wnet/jimcrow/stories_events_fisk.html (last visited April 3, 2009).

143. FRANKLIN & MOSS, *supra* note 15, at 495; WOODWARD, *supra* note 10, at 169.

144. See *supra* note 141 and accompanying text. See generally CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S, at 9–18 (1995) (recounting the events that led up to the birth of SNCC); WOODWARD, *supra* note 10, at 169 (discussing SNCC's formation). SNCC was founded on the campus of Shaw University.

145. See, e.g., MARK D. NAISON, WHITE BOY: A MEMOIR 80–96 (2002) (describing the reaction and the subsequent demonstration of the black community of Columbia University after King's death).

146. See, e.g., *Esteban v. Cent. Mo. State College*, 290 F. Supp. 622, 632 (W.D. Mo. 1968) (after the students were granted process in the form of a hearing, the school arrived again at the same disciplinary decision as it reached before the hearing; this time, because adequate process had occurred, the district court upheld the school's disciplinary decision); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 171 (W.D. Mo. 1968) (college students were suspended after staging a demonstration in the cafeteria to protest the quality of the food; their suspensions were overturned due to inadequate process); *Buttny v. Smiley*, 281 F. Supp. 280, 288–89 (D. Colo. 1968) (college students were suspended after protesting CIA recruitment and disrupting the career services office; their suspensions were upheld as based on constitutional

Of the seven higher education cases focusing exclusively on student speech after *Burnside* and *Blackwell* were decided but before the Supreme Court decided *Tinker*, five involved students' political protests and four of those five grew out of students' civil rights protests at African-American colleges in the South.¹⁴⁷ Courts upheld the schools' disciplinary actions in all four of these civil rights protest cases.¹⁴⁸ These decisions regularly cited *Blackwell* and *Burnside*, emphasizing deference to school authorities: *Zanders v. Louisiana State Board of Education*¹⁴⁹ cited *Burnside* and *Blackwell* for the proposition that "[w]ithin our own circuit, the hesitancy of the judiciary in questioning the wisdom of specific rules involved recently has been expressed";¹⁵⁰ *Evers v. Birdsong*,¹⁵¹ from Mississippi, cited *Blackwell* and the *Tinker* district court for the principle that university officials "must be given wide discretion in anticipating and preventing interruptions in the class room and student activities for

rules and resulting from appropriate procedural due process); *Esteban v. Cent. Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (students were suspended for their participation in mass demonstrations resulting in property damage; their suspensions were overturned due to inadequate process); *Due v. Fla. A. & M. Univ.*, 233 F. Supp. 396, 402 (N.D. Fla. 1963) (students' suspensions were upheld where students received adequate process); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174, 182 (M.D. Tenn. 1961) (Tennessee college students were suspended for participating in Mississippi freedom rides; their suspensions were overturned due to inadequate process); *Dixon v. Ala. State Bd. of Educ.*, 186 F. Supp. 945, 947-48, 949, 952 (C.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir. 1961) (college students were expelled for participating in civil rights demonstrations on and off campus; their suspensions were overturned due to inadequate process); *see also* *Greene v. Howard Univ.*, 271 F. Supp. 609, 612-13 (D.D.C. 1967) (because Howard University is a private corporation, it was not bound by the due process principles articulated in *Dixon* and could provide notice of the procedures it intended to follow in its academic catalogue).

In 1960, an Alabama district court affirmed a university's suspension of nine "ring leader[]" students who led civil rights demonstrations on campus and in the local community. *Dixon*, 186 F. Supp. at 947-48, 949, 952. The Fifth Circuit reversed, holding that students had due process rights of notice and a hearing. *Dixon*, 294 F.2d at 159. Within a decade, *Dixon* was cited outside the circuit as "generally accepted as correct" and "[t]he leading case involving . . . a disciplinary proceeding." *Barker v. Hardway*, 283 F. Supp. 228, 236 (S.D. W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (per curiam); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 197 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969). The U.S. District Court for the Western District of Missouri called for oral argument and entered a general order regarding college and university student discipline due process rights, anticipating that these questions "are likely to be presented in a substantial number of future cases." *Scoggin*, 291 F. Supp. at 163.

147. *Zanders v. La. State Bd. of Educ.*, 281 F. Supp. 747, 750-52 (W.D. La. 1968); *Evers v. Birdsong*, 287 F. Supp. 900, 901-03 (S.D. Miss. 1968); *Jones*, 279 F. Supp. at 195-96; *Barker*, 283 F. Supp. at 230-32.

148. *Zanders*, 281 F. Supp. at 762-63, 767; *Evers*, 287 F. Supp. at 906; *Jones*, 279 F. Supp. at 204; *Barker*, 283 F. Supp. at 236.

149. 281 F. Supp. 747.

150. *Id.* at 758 n.26.

151. 287 F. Supp. at 900.

which the school is operated.”¹⁵² Outside the Fifth Circuit, *Barker v. Hardaway*,¹⁵³ from West Virginia, echoed this latter comment¹⁵⁴ and *Jones v. State Board of Education*,¹⁵⁵ from Tennessee, cited *Blackwell* and *Burnside* for the tenet that “provided the procedural requirements are met, it is always within the province of school authorities to prohibit by regulations acts calculated to undermine school discipline and to punish when these regulations have been violated.”¹⁵⁶ As in the secondary school cases, deference to school officials and maintenance of social order were guiding principles for the courts. Their society may have been in a racial uproar, but these courts were not going to contribute to it by carving out any more room for dissent.

In the fifth protest case, *Soglin v. Kauffmann*,¹⁵⁷ students were suspended after they interfered with on-campus interviews conducted by Dow Chemical.¹⁵⁸ Not surprisingly, *Soglin* cited *Burnside*. But rather than using *Burnside* to support the principle of deference to school administrators as the other courts had, the district court cited *Burnside* to emphasize the limitations of school’s authority.¹⁵⁹ In this way, with its focus on balancing students’ rights and schools’ need for order, and its skepticism of the school’s decision, *Soglin* was a natural precursor to *Tinker*. After reviewing numerous equal protection and due process cases with student plaintiffs over the previous twenty years, the district court in *Soglin* noted prophetically:

Underlying these developments in the relationship of academic institutions to the courts has been a profound shift in the nature of American schools and colleges and universities, and in the relationships between younger and older people. These changes seldom have been articulated in judicial decisions but they are increasingly reflected there. The facts of life have long since undermined the concepts, such as *in loco parentis*, which have been invoked historically for conferring upon university authorities virtually limitless disciplinary discretion.¹⁶⁰

152. *Id.* at 905.

153. 283 F. Supp. at 228.

154. *Id.* at 235.

155. *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 190 (M.D. Tenn. 1968), *aff’d*, 407 F.2d 834 (6th Cir. 1969).

156. *Id.* at 198. The district court in *Jones* also analogized the facts of the instant case to those in *Blackwell* in which “[t]he record showed an unusual degree of commotion, boisterous conduct, collision with the rights of others, and undermining of authority as a result of the wearing of these buttons.” *Id.* at 204.

157. 295 F. Supp. 978 (W.D. Wis. 1968), *aff’d*, 418 F.2d 163 (7th Cir. 1969).

158. *Id.* at 982.

159. *Id.* at 987.

160. *Id.* at 987–88.

The district court then invalidated the students' suspensions as impermissibly based on an unconstitutionally overbroad "misconduct" provision and the Seventh Circuit affirmed on appeal.¹⁶¹ The Supreme Court would decide *Tinker* within a year of the Seventh Circuit's decision in *Soglin*.

The final two higher education cases to cite *Burnside* and *Blackwell* were from the Fifth Circuit and identified *Burnside* and *Blackwell* as the circuit rule. Curiously, in *Dickey v. Alabama State Board of Education*,¹⁶² the district court applied the general principle of *Burnside* and ordered that an expelled student be readmitted because no disruption would result from the readmission rather than analyzing whether the alleged offense had created an actual disruption.¹⁶³ In a similarly creative manner, the district court in *Moore v. Student Affairs Committee of Troy State University*¹⁶⁴ used *Burnside* and *Blackwell* to support the school's claim in a search and seizure case that "[r]egulations and rules which are necessary in maintaining order and discipline" in a school program "are always considered reasonable."¹⁶⁵

Perhaps unknown to any of the litigants or judges in these cases, the district court judge in *Burnside* had commented in his oral opinion:

If this regulation were in an institution of higher learning, there might be some weight to be given to the argument that has been made that this is an individual and constructive method of raising discussions that could be and ought to be to aid education in a college or university where the students have reached higher maturity.¹⁶⁶

While this statement eventually would become an accurate reflection of the division between elementary/secondary and higher education student speech cases, only one of the many courts hearing these seven higher education cases shortly before *Tinker* adopted a similar approach.

In sum, all twelve of these student speech cases (those from colleges and universities as well as those from high schools) were working their way through the courts more or less at the same time.

161. *Id.* at 996.

162. 273 F. Supp. 613 (M.D. Ala. 1967), *appeal held in abeyance*, 394 F.2d 490 (5th Cir. 1968), *vacated as moot sub nom.*, *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

163. *Id.* at 618–19.

164. 284 F. Supp. 725 (M.D. Ala. 1968).

165. *Id.* at 728 (quoting *Dickey*, 273 F. Supp. at 617–18) (emphasis omitted).

166. Consolidated Brief for Appellants on Appeal, *supra* note 58, at 16 n.14 (quoting decision of District Court Judge Mize in *Burnside*).

Even though the language of the actual disruption test was widely cited, courts remained inclined to exercise substantial deference to school administrators' decisions, whether the administrators were punishing speech retroactively or quashing it prospectively.¹⁶⁷ Thus, even after *Burnside* and *Blackwell*'s significant steps forward, students' speech rights were extremely limited in reality.

Parties in four of the twelve cases discussed above petitioned the Supreme Court for certiorari.¹⁶⁸ The Court granted these petitions in two cases: *Tinker* (by a 5-4 vote)¹⁶⁹ and *Jones*,¹⁷⁰ eventually deciding *Tinker* and reversing the grant in *Jones* without hearing the case.

C. *Not Inevitable: Tinker v. Des Moines in the Supreme Court*¹⁷¹

Scholars and lawyers today often seem to speak about *Tinker* as though it sprung fully-formed from the Court, much like Athena from Zeus's head, and as though it could not have turned out any other way. To challenge this accepted understanding, this Part returns again to the months and days before *Tinker* was decided, reexamining the parties' arguments, considering the memoranda from a law clerk to the author of the majority opinion, evaluating drafts of the *Tinker* opinion, and examining the effect of the last-minute addition of *Burnside* and *Blackwell* to *Tinker*.

1. *Revisiting the parties' arguments*

Compared to many of the other student speech cases in the pipeline, *Tinker* presented especially strong facts for the students. As in *Burnside* and *Blackwell*, the students in *Tinker* were engaged in serious, political speech as opposed to litigating their "right" to sport

167. See Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 65-75 (1996) (discussing the competing theories of the purpose of education and the proper levels of deference to school officials in each model, and highlighting the Court's new approach to these questions in *Tinker*).

168. *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 197 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. granted*, 396 U.S. 817 (1969), *cert. dismissed*, 397 U.S. 31 (1970), *reh'g denied*, 397 U.S. 1018 (1970); *Barker v. Hardway*, 283 F. Supp. 228, 236 (S.D. W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 905 (1969); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *cert. granted*, 390 U.S. 942 (1968).

169. Docket Sheet, No. 21, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, in William O. Douglas Papers, Box 1428, Folder OT—1968 Administrative, Dockets #1-199, Manuscript Division, Library of Congress.

170. 279 F. Supp. at 197.

171. Iowa historian John W. Johnson wrote a book-length historical treatment of the *Tinker* case and the players involved. THE STRUGGLE FOR STUDENT RIGHTS: *TINKER V. DES MOINES* AND THE 1960S (1997).

Beatles-style haircuts or something similarly frivolous.¹⁷² And, unlike the speech in *Blackwell* and in many of the civil rights demonstrations in colleges and universities, the *Tinker* speech did not disrupt the educational environment in a significant way.¹⁷³ This lack of disruption might have enhanced the Court's willingness to grant certiorari in *Tinker*, but at the very least it simplified the issue for the Court.¹⁷⁴

As they had done in the courts below, the *Tinker* plaintiffs argued in the Supreme Court for a clear and present danger standard under which students' speech seldom could be restricted by schools.¹⁷⁵ They further maintained that their speech was constitutionally protected under that test.¹⁷⁶ The students' brief compared their actions to those of the students in *Burnside*, arguing not only that both sets of actions were "dignified, peaceful gesture[s]" of respectfully dissenting citizens, but also that neither situation caused actual disruption of the educational process.¹⁷⁷ By contrast, the school district argued that the Court should employ the actual or reasonably anticipated disruption test under which it won in the district court.¹⁷⁸ The school district also contended that its decisions to discipline its students were entitled to significant deference from the courts, yet this credibility-based claim was undercut by the school district's own brief which was laden with conspiracy theory language.¹⁷⁹

172. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969); see *supra* notes 119–120 and accompanying text (discussing two cases in which students were suspended or not allowed to enroll because of their respective hairstyles).

173. *Id.* at 508.

174. Three years before deciding *Tinker*, the Court had noted in a civil rights protest case:

Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed in the demonstration. Perhaps the time and method were carefully chosen with this in mind. Were it otherwise, a factor not present in this case would have to be considered.

Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations.

Brown v. Louisiana, 383 U.S. 131, 142 (1966).

175. Brief for Petitioners at 22, *Tinker*, 393 U.S. 503 (No. 1034).

176. *Id.*

177. *Id.* at 19.

178. Brief for Respondents at 26, *Tinker*, 393 U.S. 503 (No. 1034).

179. See *id.* at 18–19 ("When Reverend Tinker has four children, ages 15, 13, 11 and 8 going to their respective schools each with a black arm band, is it more reasonable to conclude they were doing this as a matter of conscience in the exercise of their constitutional rights, or is Reverend Tinker, the Secretary for Peace and Education, through his children, undertaking to infiltrate the school with his propaganda?").

2. *The Court's creation of Tinker's disruption tests*

Between the parties' briefs (followed by oral argument) and the Court's written opinion, there is, as always, a gap in the official record. Yet, the archived personal papers of several Supreme Court justices provide insight into the Court's process of creating the *Tinker* opinion. Two types of documents in these files are particularly valuable for the purpose of tracing the steps in the creation of *Tinker's* tests and the eventual incorporation of the tests used in *Burnside*, *Blackwell*, and the *Tinker* district court: first, memoranda from a law clerk¹⁸⁰ to Justice Fortas, the author of the majority opinion, and second, Fortas's drafts of the opinions, some of which were circulated among the Justices. Taken together, these documents reveal that the *Tinker* tests were hardly a foregone conclusion.

The first post-oral argument document in Justice Fortas's *Tinker* files is a lengthy memorandum from law clerk Martha Field¹⁸¹ dated November 27, 1968.¹⁸² Regarding the question of the test to be applied, Field cautioned against "lay[ing] down any definitive rule in this opinion" in part because the substantial and material interference standards at issue in *Blackwell*, *Burnside*, and *Tinker* below "are meaningless, because their meaning changes with their application."¹⁸³ She recommended:

It seems to me that the best that can be done is to show that the same basic tests apply for regulation of the First Am [sic] rights in the schools as anywhere else (regulation must be justified by substantial state interest), though different interests are of importance in the schools (greater importance of order) so that the application of the broad standard may lead to different results. . . . At the same time the Court can make clear that it is a legitimate interest on the part of the schools to maintain sufficient order in the classroom so that educational functions are not

180. A fascinating literature about the role of Supreme Court law clerks has been emerging in recent years. See, e.g., David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (reviewing two recent books on the same topic).

181. Field would go on to become a professor at Harvard Law School and the second woman to be awarded tenure there.

182. Notably, the memorandum presented the argument that wearing the armbands was protectable speech that could be distinguished from other rule-violating student conduct. It then established that the First Amendment was applicable to schools through the Fourteenth Amendment and, in support of free speech, quoted various passages from the Court's decisions emphasizing the importance of schools as creating future citizens. Memorandum from Martha Field to Justice Fortas 4-5 (Nov. 27, 1968), in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1666, Yale University Library Manuscript Collections.

183. *Id.* at 10.

interfered with, and that where there is likelihood that a form of “speech” by the students would disrupt this order, the school can regulate that speech.¹⁸⁴

In what appears to be a slightly later document (two pages stapled in the middle of another copy of the November 27, 1968 memorandum), Field expanded on this argument, noting that the substantial and material disruption test “would have some meaning” “[f]or purposes of this case” but because lower courts would find it difficult to apply, “[t]he Court should therefore lay down some guidelines for how to arrive at a calculation of which interests are substantial and what constitutes sufficient evidence of substantial interference with them.”¹⁸⁵ Had the Court taken this approach and been able to produce meaningful guidelines, it could have averted many of the uncertainties that have plagued student speech doctrine for the past four decades.¹⁸⁶

Field also appeared sympathetic to the school district’s position that it should be able to maintain order in its classrooms. But, raising a concern seemingly alien to the lower courts in *Tinker* and the courts deciding the other student speech cases, she speculated that the “breadth of discretion” the school district claimed for itself was easily abused: “school officials can hypothesize the requisite likelihood of disorder for anything that they don’t like, for whatever reason, including reasons that violate the First Amendment, and administer a highly discriminatory system.”¹⁸⁷ Furthermore, Field noted the unobtrusive nature of the *Tinker* armband protest and analogized it to the students who wore freedom buttons in *Burnside*, in neither

184. *Id.* at 10–11. At a few points, Field suggested that a school district may restrict student speech when the restriction is supported by a compelling state interest: “[t]his means that the same test of validity under the First Amendment applies in the schools as anywhere else. In schools, however, unlike other places, the State does have a compelling interest in the orderly operation of the classroom.” *Id.* at 5. Spelling out this idea, she focused on two issues: “the danger that the state is trying to avert must be a substantial danger, and it must be likely that it will result in the absence of the regulation.” *Id.* at 8. Field also noted that the school district’s written rationale for the regulation was generated after the students were disciplined, but that in her opinion none of the school district’s reasons “constituted a sufficient justification for the regulation.” *Id.* at 9.

185. Memorandum from Law Clerk Marty to Justice Fortas 10 (Nov. 27, 1968), in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1666, Yale University Library Manuscript Collections.

186. Much of the student speech literature discusses these difficulties. See Bowman, *supra* note 87, at 198 (asserting that despite the Court’s precedent, student speech doctrine is not clearly defined); Dupre, *supra* note 167, at 54 (discussing the Court’s jurisprudence of discipline and order); Richard W. Garnett, *Can There Really Be Free Speech in Public Schools?*, 12 LEWIS & CLARK L. REV. 45 (2008); Taylor, *supra* note 107, at 587–91 (discussing unanswered questions about *Tinker* and substantial disruption).

187. Memorandum from Martha Field to Justice Fortas, *supra* note 182, at 7.

situation, she suggested, were other students' rights affected by the protesters' behavior.¹⁸⁸ This theme, linked to the idea of non-disruption and also a regular focus of civil rights protest cases,¹⁸⁹ would carry through to the final version of the majority opinion in *Tinker*, becoming the "rights of others" test¹⁹⁰ courts and scholars have found to be cryptic ever since.¹⁹¹

In addition to Field's insightful memoranda, Justice Fortas's papers also contain drafts of the majority opinion at various stages in its development. These drafts reveal that although *Burnside* and *Blackwell* eventually formed the foundation of the Court's test in *Tinker*, early drafts took a different direction. The document which appears to be the earliest typed draft of the majority opinion contains no references to *Burnside* or *Blackwell* and, accordingly, the specific rule of the case is not the same as the published version of *Tinker*.¹⁹² The rule in this earliest draft swept broadly:

There can be no doubt that the school authorities would have been entirely justified in prohibiting students from engaging in any form of expression or any activity which disrupted or interfered with the operation of the school or the conduct of classes, or which significantly threatened the safety or order of students or faculty.¹⁹³

Later in that same draft, another iteration of the rule emerged:

Persons who are lawfully on [school] premises, at times and in circumstances which are within their right, may express their views on issues of public importance provided that the form of expression does not disrupt or interfere with the purpose or function of the school and the orderly conduct of its activities . . . including the safety and discipline of other members of the school community.¹⁹⁴

On one hand, in this first available draft of *Tinker*, school officials were given a wide berth to quash the speech of students, employees,

188. *Id.* at 5.

189. See BELL, *supra* note 10, at 585–88 (discussing balancing school protest rights and, more specifically, *Grayned v. Rockford*, 408 U.S. 104 (1972)).

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

191. *Barnette* also employed the "rights of others" language, but the dispute about the meaning of that phrase has occurred in the cases and articles discussing students' affirmative speech rights, not their rights to refrain from speaking. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *amended by* 2006 U.S. App. LEXIS 13402 (9th Cir. May 31, 2006) (concluding that a student's t-shirt condemning homosexuality impinged on the rights of other students); Bowman, *supra* note 87, at 201–07 (discussing the rights of others test).

192. Ten-page typed draft of majority opinion in *Tinker* 6, in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1667, Yale University Library Manuscript Collections.

193. *Id.*

194. *Id.* at 7–8.

or permitted visitors presumably on the showing of any disruption or interference. Yet at the same time, arguably like *Burnside* and *Blackwell*, this draft also limited schools' authority to restrict speech by emphasizing the form of the speech as the element giving rise to disruption and the one for which the student speakers would be held accountable—not the message and not the reaction of other individuals in the school environment.¹⁹⁵

But those were not the tests for which *Tinker* would become well-known; only after *Burnside* and *Blackwell* were incorporated into a late draft of the *Tinker* opinion would the so-called *Tinker* tests emerge. In the near-final draft—which, for the first time, articulated the disruption and rights of others tests—*Tinker* changed in at least three significant ways.

First, the addition of *Burnside* and *Blackwell* caused the *Tinker* tests to become more nuanced. The primary test was no longer whether disruption or interference had occurred at all, in which case the speech could be quashed, but rather, quoting *Burnside*, whether speech “materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school”¹⁹⁶ (if not, the speech was permitted). As in the earlier draft of the opinion, this test sought to balance students' rights and interests in expressing their opinions with the school's interest in maintaining order and delivering education. Yet, adding the key words from *Burnside* and *Blackwell* to this version of *Tinker* both strengthened students' speech rights and made the test more subject to manipulation. Ideally, the “substantial and material” language would have led to a greater number of fair results despite having less predictability than a more bright-line test. But, the lack of consistency among the past forty years of student speech cases and the growing number of open questions about student speech doctrine¹⁹⁷ demonstrate that this test does not seem to consistently produce either predictability or fairness.

Second, a “reasonable anticipation of substantial and material disruption” rule functionally equivalent to the rule employed by the

195. In 1960s civil rights protest cases, lower courts usually placed “[t]he responsibility for disturbances or disruption . . . on the protesters, even though disorder was frequently the result of action by police or hostile spectators.” BELL, *supra* note 10, at 553; *see also* Berkman, *supra* note 3 at 591-92.

196. Ten-page incomplete typeset and formatted draft of majority opinion in *Tinker*, in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1668, Yale University Library Manuscript Collections.

197. *See Morse v. Frederick*, 551 U.S. 393 (2007) (Breyer, J., concurring) (discussing qualified immunity and noting the lack of clarity that permeates the realm of student speech doctrine).

district court in *Tinker* emerged in this draft as well.¹⁹⁸ This was an important addition because many of the twelve cases after *Burnside* and *Blackwell* grappled with situations similar to *Tinker* in which a student's speech was silenced before any disruption had occurred. If courts recognize (as they do) that it is important for schools to maintain order, then schools must be able to act in advance of actual disruptions and not always wait to see whether speech produces the disruptive effect school officials think it will. The Fifth Circuit's actual disruption rule was so student-protective that it had not permitted proactive restriction. So, the Court built upon the actual disruption test and again balanced the interests of the students and the school, requiring the anticipation of substantial and material disruption to be "reasonable," not merely based on an "urgent wish to avoid . . . controversy."¹⁹⁹ (As with the actual disruption test discussed immediately above, the malleability of "reasonableness" has led to a host of problems.)

Third, by changing the opinion in these ways the Supreme Court adopted the test used by the district court below and advocated by the school district on appeal—not the test put forth by the students. Scholars and students of *Tinker* regularly lose sight of the fact that it was the Court's decision to overturn the school's disciplinary decision using the school district's own test that gave rise to this celebrated student speech victory. The school district had counted on the Court continuing to defer substantially to school districts' decision making, whether school districts were adopting rules, implementing rules, or disciplining students for violating those rules. But in *Tinker*, the Court diverged from that path and carved out a space for protected student protest, not trusting school administrators across the country to make the same decision.²⁰⁰ This was a substantial shift, one Richard

198. Fifteen-page typed draft of majority opinion in *Tinker* 8, in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1667, Yale University Library Manuscript Collections. "[I]n order for the State in the person of school officials to justify suppression of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies expression of an unpopular viewpoint. Certainly, where there is no finding and no showing that the exercise of the prohibited right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* (citing *Burnside*). This fairly final draft elaborated more on reasonable anticipation: "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 7.

199. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969).

200. See Denno, *supra* note 88, at 58, 60–62 (commenting that "[a] rather clear line of recent cases indicates that the traditional deference paid to educational officials in their handling of student expression is at an explicit end" and discussing this shift in the *Tinker* case specifically); Dupre, *supra* note 167, at 60–61 (discussing

Berkman described as based on the thesis “that First Amendment rights in the classroom are actually essential to an effective educational process in a democracy rather than a source of disruption of that process.”²⁰¹

3. *Justice Black’s dissent and earlier prophetic statement*

In response to Justice Fortas’s majority opinion, Justice Black issued a fiery dissent, rejecting the majority opinion on the basis that students do not have First Amendment rights in public schools.²⁰² Three years earlier in a civil rights protest case, Justice Black had speculated that an “inevitabl[e]” consequence of reversing the breach of the peace conviction of four African-Americans for peacefully occupying and refusing to leave a segregated public library in Louisiana would be “paralyz[ing] the school[s]” ability to control their educational environments.²⁰³ The *Tinker* majority may not have connected its decision with the substance of its civil rights roots as overtly, but in his slippery slope declaration a few years earlier, Justice Black had identified the link spot on.

CONCLUSION

In a 1968 article in the *Saturday Review*, education professor and higher education historian Lewis Mayhew stated that there may be “good reason to believe that the present wave of student unrest [is] qualitatively different from those [of] earlier times.”²⁰⁴ Summarizing

the lack of deference the Court accorded the school in *Tinker*, and how this approach represented a significant departure from the cases and social assumptions that came before)).

201. Berkman, *supra* note 3, at 581.

202. *Tinker*, 393 U.S. at 522 (Black, J., dissenting). According to the *New York Times*, Justice Black “spoke extemporaneously for about 20 minutes” from the bench when the opinion in *Tinker* was delivered. He concluded “I want it thoroughly known that I disclaim any sentence, any word, any part of what the Court does today.” Fred P. Graham, *High Court Upholds a Student Protest*, N.Y. TIMES, Feb. 25, 1969, at A1.

203. *Brown v. Louisiana*, 383 U.S. 131, 165 (1966) (Black, J., dissenting).

204. *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 173 (W.D. Mo. 1968) (quoting SATURDAY REV., Aug. 17, 1968, at 57) (alteration in original).

Medieval students rioted, dumped garbage on passersby, wrote erotic or ribald poems and read them on church steps and in other sanctuaries of the Establishment, coerced their professors and occasionally killed one. Colonial college students rioted about food, stole, took pot shots at university presidents, protested infringement of their private lives, and gradually forced colleges to modify stringent rules regarding personal conduct. Nineteenth century college students took sides over the Civil War and demanded a voice in academic governance. Twentieth century signed the Oxford Peace Pledge, joined in the Spanish Civil War, rioted over food, violated the Eighteenth Amendment, and experimented with sex. . . . At least an important portion of student protest replicates those of the past simply

student protest from medieval times through the 1960s, he surmised that “[s]tudents have always been difficult to live with and have frequently assumed postures which bothered adults and disturbed institutions.”²⁰⁵ Whether or not the students’ unrest in the 1960s was different, though, the judicial response to students’ non-disruptive protest certainly was. What changed in *Burnside*, *Blackwell*, and *Tinker* was that schools were no longer always unquestioned authority figures disciplining insubordinate, unruly students. Students became free to engage in peaceful, non-disruptive protest even inside their schools. By arriving at this result, the Court recognized students’ citizenship, legitimized their dissent, and channeled that dissent into a direction which promoted respect for the rule of law.

Standing on the shoulders of the Civil Rights Movement and in fact relying directly on two civil rights student speech cases, *Tinker* quickly gave rise to a large body of student speech law²⁰⁶ extensively tailored within American constitutional doctrine,²⁰⁷ unusual in the international context,²⁰⁸ and increasingly full of uncertain questions.²⁰⁹ Forty years later, even as student speech doctrine becomes increasingly unpredictable, *Tinker* remains nourished by the moral stature of its roots in the Civil Rights Movement.

because the process of growing up is, after all, a human process that has not changed much in quite a few years.

Id. (alterations in original).

205. *Id.*

206. Roughly forty student speech cases were decided in the year following the Court’s decision in *Tinker*. Paul G. Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37, 38–39, nn.3–8 (1970) (citing student speech cases decided between 1967 and 1970). In the eight years following *Tinker*, the watershed case was cited in nearly 500 decisions. John E. Nichols, *The Tinker Case and Its Interpretation*, 52 JOURNALISM MONOGRAPHS 1, 2 (1977).

207. See, e.g., Scott A. Moss, *Students and Workers and Prisoners—Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 U.C.L.A.L. REV. 1635, 1641 (2007).

208. The body of student speech law appears unique to the United States. See, e.g., THE EDUCATIONAL RIGHTS OF STUDENTS: INTERNATIONAL PERSPECTIVES ON DEMYSTIFYING THE LEGAL ISSUES (Charles J. Russo et al. eds., 2007) (providing an overview of thirteen countries’ laws related to students’ rights).

209. “Supreme Court precedents have left lower courts with vague standards for evaluating student speech, often resulting in conflicting decisions, many of which simply defer to the decisions of school administrators.” BELL, *supra* note 10, at 588. The school district’s attorney in *Hazelwood*, decided twenty-five years after *Tinker*, expressed the opinion that “the *Tinker* case had been abused. The original basis for *Tinker* was good but some lower courts had expanded *Tinker*” extensively. Anne Proffitt Dupre, *The Story of Hazelwood School District v. Kuhlmeier: Student Press and the School Censor* 247, in EDUCATION LAW STORIES (Michael A. Olivas & Ronna Greff Schneider eds., 2008).