Student Display of Confederate Symbols in Public Schools

by Suzanne M. Alford

Whether it is being removed from atop the South Carolina capitol or remaining a part of the state flag by the vote of Mississippi residents, the Confederate flag continues to be a controversial symbol.[1] For some it is a reminder of the bravery and honor of soldiers who sacrificed their lives for their homeland. For others it is a symbol of slavery, racism, and resistance to school integration.

The battle over this controversial symbol has moved into our nation's schools. Students who resist dress codes or other rules prohibiting the display of the flag or other Confederate symbols have handed school administrators a dilemma: while charged to foster an inclusive environment that facilitates learning, these officials are also bound to respect all students' First Amendment right to freedom of expression.

This paper explores the legal implications of a school board's decision to prohibit the display of Confederate symbols. It examines U.S. Supreme Court decisions on student dress and analyzes Confederate flag cases from several federal circuit courts. It concludes by addressing how this body of law applies to North Carolina schools and by offering guidelines to school administrators who are contemplating a ban on Confederate symbols.

The Display of Confederate Symbols in Public Schools

In the 1950s and 1960s many public officials throughout the South protested racial integration by flying the Confederate flag on public buildings, including schools.[2] Some schools displayed the flag at sporting events, and some administrators hung it in their offices to signal their opposition to integration.[3] In later decades, as racial tension and controversy surrounding the Confederate flag mounted, some school boards officially banned display of the Confederate symbol.[4]

Although the Confederate flag is now seldom officially displayed in schools, student use of the Confederate symbol on clothing, notebooks, and vehicles continues to concern administrators. Some students say they display Confederate symbols to express pride in their Southern heritage, while others display them to express their dislike of racial minorities. Many schools have therefore banned student displays of the Confederate flag in an effort to curb incidents of racial violence and harassment and promote a more friendly environment for all students.

Students in several states, including North Carolina, have been suspended for defying these bans and have subsequently challenged their punishment in federal courts. During the 2000–2001 school year, at least two incidents at North Carolina schools led to legal action. In Mecklenburg County, high school student Amanda Williams was suspended for displaying a Confederate flag in her truck window.[5] In Burke County, three students were suspended for repeatedly wearing T-shirts adorned with Confederate flags.[6] Williams and Toby Carver, one of the suspended Burke County students, have filed complaints against their school districts.

Both Carver and Williams are being represented by the Southern Legal Resource Center (SLRC), "a non-profit South Carolina Civil Rights Public Law firm that specializes in representing the victims of Southern heritage violations."[7] In

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1. Chris Burritt, "S.C. Moves Rebel Flag: Banner's Removal from Atop the State Capitol Draws 1,500 in Protest," *Atlanta Journal and Constitution*, July 2, 2000, 1A; Emily Wagster, "Mississippi Votes to Keep Confederate Flag," *Chattanooga Times/Chattanooga Free Press*, April 18, 2001, A2.

2. "The Confederate flag, since the decision by the U.S. Supreme Court on May 17, 1954 in Brown v. Board of Education, has become a symbol of resistance to school integration and, to some, a symbol of white racism in general" (Smith v. St. Tammany Parish School Board, 316 F. Supp. 1174, 1176 [E.D. La. 1970], internal citation omitted).

3. "The principal of Covington High School displays a Confederate battle flag in his office next to the American flag and the Louisiana State flag" (*id.* at 1176).

4. *See, e.g., id.* at 1175.

5. "Attorney Files Complaint over School Ban of Confederate Flag," Associated Press State & Local Wire, May 25, 2001.

6. "Students Suspended for Wearing Rebel Flag Shirt," *Morning Star*, May 13, 2000, 5B.

7. Press Release, Southern Legal Resource Center, Maryville High Backs Down on Flag Ban (May 5, 1999) *at* http://www.cheta.net/slrc/pr463.htm (last visited March 16, 2002).

addition to providing legal representation, the SLRC suggests that "the best advice an attorney can give to parents of a student wishing to express Southern pride in a school setting may well be to advise them to withdraw the student from public school and either switch to a private school or homeschool."[8] The SLRC advises students to use Confederate symbols "as a means of encouraging Southern solidarity and consciousness and not as a means of antagonizing Blacks or other sensitive liberal or minority groups."[9] It urges students to refrain from wearing inflammatory Confederate memorabilia that may be perceived as offensive and to opt instead for such tasteful and dignified items as lapel pins or scarves.

Organizations on the other side of the issue have expressed outrage at the continued display of the Confederate flag in public spaces. National Association for the Advancement of Colored People (NAACP) President Kweisi Mfume, protesting the flag's display above the South Carolina capitol, calls it the "representative of an era that epitomized everything that was wrong and inhumane in this country."[10] In its database of "hate" symbols, the Anti-Defamation League classifies the Confederate flag as a "general racist symbol." The database notes that "[a]lthough the flag is seen by some Southerners simply as a symbol of Southern pride, it is often used by racists to represent white domination of African-Americans."[11] While the NAACP and the Anti-Defamation League do not specifically address the controversial issue of students wearing Confederate symbols to school, their general statements about the flag show that the banner continues to be perceived by many as a symbol of racism and oppression.

The Law Governing Student Display of Confederate Symbols

School administrators considering a ban on student displays of Confederate symbols must be careful not to violate students' First Amendment rights to freedom of speech. The U.S. Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[12] While the amendment refers explicitly only to Congress, Supreme Court decisions have expanded its application to states and to public schools.[13]

Several cases brought by students challenging bans on Confederate symbols on First Amendment grounds have been tried in Federal Circuit Courts of Appeal. The Fourth Circuit, which hears federal cases originating in North Carolina, has not yet addressed such a case. Consequently, there is no binding precedent governing the manner in which North Carolina school districts may limit student displays of Confederate symbols. However, several U.S. Supreme Court decisions on cases from other federal circuits can provide guidance to North Carolina school administrators responding to student displays of Confederate symbols.

Supreme Court Case Law on Student Expression

The Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District* sets forth the most appropriate and commonly used test in student Confederate flag cases.[14] In *Tinker*, the Court held that an Iowa school district violated a student's constitutional right to freedom of speech by suspending him for wearing a black armband to protest United States involvement in Vietnam. The Court found that the student's armband was "closely akin to 'pure speech' . . . which is entitled to comprehensive protection under the First Amendment."[15]

The Court created a strict test to determine whether or not a school may prohibit student expression of a viewpoint. It held that in order to prohibit student expression of a viewpoint, school officials must be motivated "by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Rather, they must show that "the students' activities would materially and substantially disrupt the work and discipline of the school" or "impinge upon the rights of other students."[16]

Seventeen years later, in *Bethel School District v. Fraser*, the Court distinguished between expression of viewpoint, which is protected under *Tinker*, and an unprotected "vulgar and offensive" manner of speech.[17] The Court held that a Washington state student's "plainly offensive" school assembly speech that used an explicit sexual metaphor was not entitled to First Amendment protection.[18] Finding it "a highly

8. Southern Legal Resource Center, *Advice on Southern Civil Rights for Parents and Activists*, available at http://www.cheta.net/slrc/advice1.htm (last visited March 16, 2002).

9. *Id.*

10. Press Release, National Association for the Advancement of Colored People, NAACP Challenges South Carolina Confederate Flag: Demands Removal of Symbol of Slavery From State Property (Jan. 12, 2001) *at* http://www.naacp.org/news/releases/confederateflag01/20/.shtml (last visited March 16, 2002).

11. *Hate on Display: A Visual Database of Extremist Symbols, Logos and Tattoos*, at http://www.adl.org/hate_symbols/racist_confederate_ flag.html (last visited March 16, 2002).

12. U.S. CONST. amend I.

13. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); and Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

14. *Tinker*, 393 U.S. 504 (1969).

15. *Id.* at 506.

16. *Id.* at 508, 513.

17. *Fraser*, 478 U.S. 675 (1986).

18. *Id.* at 684. The student's speech, which was given to nominate a classmate for a student government office, read in part: "'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is

appropriate function of public school education to prohibit the use of *vulgar and offensive terms in public discourse*," the Court granted school boards the power to determine what "manner of speech" is appropriate within public schools.[19]

Although the Court did not specifically state that those who are offended by a speech determine whether or not it is offensive, in deciding that the sexual metaphor used was offensive it did take into consideration the age and maturity of the students who listened to Fraser's speech.[20] Accordingly, school boards may take into consideration students' responses to speech in determining whether a given speech is "offensive." *Fraser* thus gives schools broad powers to limit the manner in which a student expresses an opinion, while *Tinker* mandates that the opinion itself not be prohibited unless it materially disrupts the school's functioning or infringes on other students' rights.

Two years after *Fraser*, in *Hazelwood School District v. Kuhlmeier*, the Court addressed the issue of school-sponsored student speech, as opposed to the unsponsored student speech that occurs on school grounds.[21] In *Kuhlmeier*, a Missouri school principal refused to allow a journalism class to print articles on teenage pregnancy and divorce in the school newspaper because he found several passages in the articles objectionable.[22] The Court found that the principal did not violate the students' First Amendment rights because schools may limit "the style and content of student speech in *school-sponsored activities* so long as their actions are reasonably related to legitimate pedagogical concerns."[23]

While *Kuhlmeier* specifically addresses the issue of school-sponsored student speech, it also offers insight into a school's ability to limit unsponsored student speech. The Court held that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[24] This assertion appears to give a school broader powers to limit student speech than the standard asserted in *Tinker*, since it allows a school to prohibit speech that is inconsistent with its educational mission but is not a material disruption of school order.

Case Law on Student Display of Confederate Symbols

Even though there are no reported North Carolina cases in which students have challenged school bans on Confederate symbols, trends are discernible from case law in other federal jurisdictions. Cases involving student display of Confederate symbols are usually tried under the *Tinker* test, meaning that school officials may prohibit students from wearing the symbols only if they show that allowing their display would create a material disruption of the school's function or be an invasion of other students' rights. Despite this demanding test, schools often emerge victorious in legal challenges to their bans, particularly in schools with a history of racial violence or tension.

In the 1972 case of *Melton v. Young*, the Sixth Circuit applied the *Tinker* test of substantial disturbance and ruled in a school district's favor.[25] The Brainerd [Tenn.] High School had experienced several incidents of racial violence and disruption stemming from racial integration, two of which were so severe that the school was temporarily closed. Many of the disruptions resulted from the school's official use of the Confederate flag and the playing of "Dixie" as a pep song. The school board responded to the disruptions by adopting a policy under which Brainerd would no longer officially display the Confederate flag and would cease playing "Dixie" at school functions. Board policy also prohibited student displays of "provocative symbols on clothing" and ordered that "all displays of the [Confederate] Flag and Soldier" be removed from the school grounds and banned from any event in which the school participated.[26] Rod Melton, a student at Brainerd, wore a jacket to school with a Confederate flag patch on the sleeve, even though he was aware of the school's new policies. After refusing to remove the patch or cease wearing the jacket, Melton was suspended for wearing a "provocative symbol"; he subsequently sued, alleging that the district had violated his First Amendment rights.[27]

The court applied the *Tinker* test of substantial disruption and held that, considering the tense situation at Brainerd, the school was justified in suspending Melton. Because repeated disruptions and incidents of violence had earlier resulted from the school's official use of Confederate symbols, it was highly likely that Melton's display of the flag would create a material disruption.[28] That history of controversy surrounding the Confederate symbol was crucial to the court's analysis.

Twenty-eight years later, in 2000, the Tenth Circuit applied the *Tinker* test in a manner deferential to schools to reach a

a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.D.B. vice-president. . . ." *Fraser*, 478 U.S. at 687 (Justice Brennan, concurring).

19. *Id.* at 683 (emphasis added).

20. *Id.* ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.")

21. *Kuhlmeier*, 484 U.S. 260 (1988).

22. Id. at 263–64. The principal objected to the pregnancy article because he thought that anonymous students featured in it could be easily identified and because the subject matter was inappropriate for some of the school's younger students. He objected to the divorce article because it included negative comments about a student's father and the newspaper did not provide the father with an opportunity to respond.

23. *Id.* at 273 (emphasis added).

24. *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

25. *Melton*, 465 F.2d 1332 (6th Cir. 1972).

26. *Id.* at 1333–35

27. *Id.* at 1334.

28. *Id.* at 1335.

similar result in *West v. Derby Unified School District*.[29] In *West*, a Kansas middle school student was punished for drawing a Confederate flag on a piece of paper in response to a dare during math class. The drawing violated a district policy on "Racial Harassment and Intimidation."[30] The district adopted the policy in response to incidents of racial violence at the local high school prompted by white students wearing Confederate flag shirts and black students wearing "X" shirts; during the same period, there were several incidents involving middle school students who drew Confederate flags on their arms and notebooks. The district's policy stated that

> [S]tudents should not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications, or *any item that denotes* Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, *Confederate flag*s or articles, Neo-Nazi or any other "hate" group.)[31]

West was suspended for three days for violating the policy, even though the district did not dispute the fact that he did not intend to harass or intimidate anyone with the drawing.

Applying the *Tinker* test, the court held that "based upon recent past events, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone."[32] The *West* decision is notable because there had been no recent incidents of racial violence at the middle school, much less any incidents of racial violence caused by the display of Confederate symbols. The court explained that "the fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one."[33]

The court's ruling that a student could be punished under *Tinker* in the absence of an intent to harass others was also an important part of the *West* decision. West argued that due process was violated when the school suspended him for violating a harassment policy, even though the district acknowledged that he did not intend to harass others. The court held, however, that under *Tinker* the district could suspend the student for disruptive speech without showing that he intended to harass others or disrupt the functioning of the school.[34] The court reasoned that an intent requirement for a suspension for disruptive speech would force school administrators to institute "trial-like procedures" to determine the student's intent and could overwhelm an administration trying to keep order in the school.[35] Therefore, the court held, if displaying a Confederate symbol could cause a substantial and material disruption of the school's functioning, it is irrelevant whether the student displays it to express pride in his heritage or to harass another person.

While some courts have interpreted *Tinker* as affording schools broad powers to prohibit student displays of Confederate symbols, the Sixth Circuit recently applied *Tinker* to hold in favor of a student. In *Castorina v. Madison County School Board*, two Kentucky students came to school wearing Hank Williams Jr. concert T-shirts with Confederate flags on the back.[36] School administrators informed the students that they were in violation of the school's dress code, which prohibits clothing "that is obscene, sexually suggestive, disrespectful, or which contains slogans, words or in any way depicts alcohol, drugs, tobacco or [has] any illegal, immoral or racist implication."[37] The students refused to turn the shirts inside out and subsequently were suspended.

The court applied the *Tinker* test to conclude that even if a school needs to prohibit "racially divisive symbols," it cannot enforce a "viewpoint-specific ban" that targets only Confederate symbols.[38] The court noted that in *Tinker* the school had prohibited black armbands worn to protest United States involvement in Vietnam but permitted students to wear other controversial political symbols, such as the Iron Cross. The *Tinker* Court found that prohibition of one particular controversial viewpoint but not others is unconstitutional unless it is necessary to prevent a substantial and material disruption.[39] Similarly, in *Castorina* the Sixth Circuit observed that the students wore the shirts to express a particular viewpoint—pride in their Southern heritage—and that the school discriminated against their viewpoint but not against others, as some students were allowed to wear clothing with an "X," a symbol in support of Malcolm X.[40]

The court also found that, as in *Tinker*, there was evidence that the students did not disrupt the school's functioning by wearing shirts decorated with the Confederate flag. The court therefore overturned the district court's issuance of summary judgment for the school district and remanded the case for trial, noting that if the lower court found that students at the school had been allowed to wear "X" shirts but not Confederate symbols, it "would be required to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker*."[41]

29. *West*, 206 F.3d 1358 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 71 (Oct. 2, 2000).
30. *Id.* at 1360.
31. *Id.* (emphasis added in court's opinion).
32. *Id.* at 1366.
33. *Id.*
34. *West*, 206 F3d. at 1363–64.
35. *Id.*
36. Castorina ex rel. Rewt, 246 F.3d 536 (6th Cir. 2001).
37. *Id.* at 538.
38. *Id.* at 544.
39. *Tinker*, 393 U.S. at 511.
40. *Castorina*, 246 F3d. at 541–42.
41. *Id.* at 544. A court renders a finding of *summary judgment* when it concludes that defendant and plaintiff agree on the facts of the case and that

The courts in *Melton*, *West*, and *Castorina* all relied on the *Tinker* test of substantial disruption to determine whether a school had infringed on a student's right to freedom of speech. As evidenced by *Melton* and, especially, *West*, the *Tinker* test can be applied in a manner that is very deferential to schools.

While most courts use the *Tinker* test, at least one federal court has applied *Fraser*'s "vulgar and offensive" test instead. In *Denno v. School Board of Volusia County, Florida*, the Court of Appeals for the Eleventh Circuit used *Fraser*'s standard of "offensive" speech to uphold the suspension of a high school student for displaying a miniature Confederate flag.[42] The student, Wayne Denno, showed a miniature Confederate battle flag to a small group of friends while describing his hobby, reenacting Civil War battles. An assistant principal approached and ordered Denno to put away the flag. As Denno attempted to explain the historical importance of the flag, the assistant principal escorted him to the principal's office and suspended him on the way, asserting that the flag was offensive. The Eleventh Circuit upheld the student's suspension, finding that it could not "conclude that pre-existing law dictates or truly compels the conclusion that the *Tinker* standard should apply in the instant case to the exclusion of the *Fraser* standard."[43] Thus, the Eleventh Circuit condoned the administrator's use of the *Fraser* test of offensiveness, as opposed to the *Tinker* test, in evaluating student display of Confederate symbols.

Moreover, the Court held that "it would not be unreasonable for a school official to believe that such displays [of Confederate flags] have uncivil aspects akin to those referred to in *Fraser*, in that many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed."[44] Therefore, in a case in which a student's display of a Confederate symbol does not cause disruption and so cannot be prohibited under the *Tinker* test, *Denno* allows schools in the Eleventh Circuit to turn to *Fraser* to ban Confederate symbols if they are deemed to be intrinsically offensive.

Banning Confederate Symbols in North Carolina Schools

Given the ever-present threat of litigation, school administrators and school boards considering whether to ban Confederate symbols from their schools need to consider several issues. Confederate symbol cases are likely governed by *Tinker*, which allows schools to prohibit students' symbolic speech if the speech would substantially disrupt the school's work or infringe upon the rights of other students.[45] Even though the *Tinker* test provides administrators with an appropriate basis for prohibiting Confederate symbols, the outcome under the *Tinker* test will vary according to the facts of each case. Indeed, *Tinker* raises the question of what exactly constitutes a material and substantial disruption of the "work and discipline of the school."

The Supreme Court offers some guidance in defining what constitutes the "work" of a school. In *Fraser*, the Court stated that schools must teach students how to interact in our complex republic: "'[Public education] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'"[46] The Court has further held that public school "is a principal instrument in awakening the child to cultural values."[47] Thus, a school's "work" includes teaching the civility and respect for others that good citizenship requires. A school could, therefore, argue that Confederate symbols, which could be perceived as racist or offensive, interfere with its "work" of teaching tolerance and civility and may justly be prohibited.

North Carolina statutes can also provide insight into what constitutes a school's "work." One state statute mandates that each local board of education "shall develop a local school administrative unit safe school plan designed to provide that every school in the local school administrative unit is safe, secure and orderly, *that there is a climate of respect in every school, and that appropriate personal conduct is a priority for all students and all public school personnel.*"[48]

It appears that under this statute the "work" of a school includes fostering an atmosphere in which students of all races are respected and feel welcome. Administrators could argue, therefore, using the *Tinker* test, that Confederate symbols substantially disrupt this atmosphere if students complain that the symbols threaten them or make them feel unwelcome. Schools could also utilize the dictum in the Supreme Court's *Kuhlmeier* decision, which stated that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,'" to argue that Confederate symbols are not consistent with their goal of fostering a "climate of respect."[49]

When applying the *Tinker* test of material disruption, administrators must also consider whether they plan to prohibit students from wearing Confederate symbols only in

only questions of law are in dispute. By overturning the lower court's summary judgment in *Castorina*, the Sixth Circuit orders the lower court to revisit the facts of the case.

42. *Denno*, 218 F.3d 1267 (11th Cir. 2000).

43. *Id.* at 1274.

44. *Id.*

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

46. *Fraser*, 478 U.S. at 681, quoting Charles A. Beard and Mary R. Beard, *A New Basic History of the United States* (1968), 228.

47. Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954).

48. N.C. GEN. STAT. § 115c-105.47 (a) (emphasis added).

49. *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

certain circumstances or at all times. To prohibit Confederate symbols on a case-by-case basis, administrators must have reason to believe that the symbol would cause a material disruption in each particular instance, whereas to enact an outright ban they must have reason to believe that such symbols would cause a material disruption in all circumstances. Thus, if the administrator can conceive of a circumstance in which a student display of a Confederate symbol would *not* be a material disruption (such as a picture of a Confederate flag on the cover of a report on the Civil War), a complete and total ban on such symbols is inappropriate.

If school officials wish to enact an outright ban on Confederate symbols but cannot justify it under *Tinker*, they may turn to *Fraser*, which apparently could justify such a prohibition by labeling the symbols as offensive per se.[50] However, administrators should note that, while this line of defense has been upheld in the Eleventh Circuit, a court with jurisdiction over North Carolina might reach a different conclusion. *Fraser*, as noted above, was intended to prohibit vulgar and patently offensive forms of speech but cannot be used to censor the content of students' speech. A Confederate flag, however, is not, strictly speaking, offensive *as a form of speech*; that is, a flag, in and of itself, is not offensive. (A school would certainly allow students to display other flags, such as the American or North Carolina flag.) It is the meaning, or symbolic content, of the Confederate flag that makes it offensive to some viewers. Thus, a ban on student display of Confederate symbols appears to be more appropriately justified by the *Tinker* test than by the *Fraser* test.

Moreover, the *Fraser* test, because it prohibits lewd or offensive speech regardless of whether it expresses a viewpoint, is a less appropriate basis for designing a policy banning controversial political symbols. In its *Fraser* decision, the Court explained that "unlike the sanction imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."[51] Like the black armbands in *Tinker*, a Confederate flag is an inherently political symbol that voices a viewpoint. Therefore, while some may consider the message voiced by the Confederate flag to be offensive, it is *political* speech and thus falls beyond the scope of *Fraser*.

In addition to facing challenges to their bans of Confederate symbols on First Amendment grounds under *Tinker* and *Fraser*, school officials should be prepared to confront legal challenges based on civil rights arguments. Section 601 of Title VI of the Civil Rights Act of 1964 prohibits "discrimination on the grounds of race, color, or national origin" in "any program or activity receiving Federal financial assistance." A "local educational agency," or school board, falls under the statute's definition of a federally funded program.[52] Thus, North Carolina public schools that receive any amount of federal funding are statutorily prohibited from discriminating on the basis of national origin.

School administrators therefore need to be prepared to defend their prohibitions of Confederate symbols against civil rights claims that their policy discriminates against white southerners on the basis of national origin. The Supreme Court has held that the term *national origin* in the Civil Rights Act of 1964 can be roughly equated with *ancestry*. It noted that an earlier version of the bill included the term *ancestry* and that the "deletion of the word 'ancestry' from the final version was not intended as a material change, . . . suggesting that the terms 'national origin' and 'ancestry' were considered synonymous."[53] By equating *national origin* with *ancestry*, southern white students could argue that they are being discriminated against because of their ancestry if they are not allowed to display Confederate symbols, which could be considered expressions of their heritage. For several reasons, however, such an argument is likely to fail in court.

First, while the Supreme Court held that in the Civil Rights Act of 1964 "national origin" was synonymous with *ancestry*, it did so in the context of refuting the argument that "national origin" included a requirement of American citizenship. Moreover, the Court went on to define "national origin," stating that the term "on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[54] Thus, white southern students arguing discrimination based on their southern "national origin" could not rely on a regional definition of "national origin" (i.e., Southern American) but rather may have to show that their ancestors hailed from a different country, namely, the Confederate States of America. Since the United States Government has never considered the Confederacy a sovereign nation, it would be extremely difficult to persuade the Supreme Court to draw this conclusion.

Second, the legislative history of the Civil Rights Act of 1964 shows that the act was not intended to be used in this manner. Congress believed that such legislation was necessary because of continued discrimination against African Americans: "Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our

50. As the court did in *Denno*, 218 F.3d at 1274.

51. *Fraser*, 478 U.S. at 685.

52. 42 U.S.C. §§ 2000d and 2000d-4a (1999). The U.S. Code defines "local educational agency" as "a public board of education or other public authority legally constituted within a State for either administrative control or discretion of, or to perform a service function for, public elementary or secondary schools in a city, county, township. School district, or other political subdivision of a State" (20 U.S.C. § 8801 [2000]).

53. Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 86, 89 (1973).

54. *Id.* at 88.

population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens."[55] Thus, legislative history shows that Congress intended the act to improve the civil rights of disadvantaged minorities who faced rampant discrimination, not white southerners who wished to display Confederate symbols.

Third, judicial interpretations of the act also show that its use has not been expanded to groups who have not traditionally faced discrimination, such as white southerners. The Supreme Court has noted that Title VI is "a statute intended to protect racial minorities."[56] Similarly, a district court refused to expand the definition of "national origin" under Title VI to include "Appalachians." The court held: "There is no indication that 'national origin' was intended to include Appalachians who do not possess a national origin distinguishable from that of other citizens of the United States."[57] White southern Americans, like Appalachian whites, share the same national origins as other white Americans born in the United States and, therefore, are not entitled to special protection under Title VI.

Fourth, even if a court were to accept white southern Americans as a group protected under Title VI because of their national origin, the southern white students would then have to show that the school enacted its ban with the intention of discriminating against them. The Supreme Court has held that Section 601 of Title VI "prohibits only intentional discrimination."[58] It is, therefore, insufficient for white southerners to show that a ban on Confederate symbols has a disparate impact on them; rather they must show that a school board intended to discriminate against them. School officials can easily refute such an allegation if they have a legitimate, nondiscriminatory reason for enacting the ban, such as student safety or fostering an inclusive learning environment.

Conclusion

Cases involving the student display of Confederate symbols may be decided on a variety of bases, including the *Tinker* test, the *Fraser* test, and Title VI of the Civil Rights Act of 1964. The *Tinker* test, however, is the most appropriate test for determining whether a school may prohibit such inherently political symbols. Under *Tinker*, a school may only prohibit students from displaying Confederate symbols if the symbols are likely to create a substantial or material disruption of the school's work and discipline or infringe upon the rights of other students.

School administrators faced with the increasingly complex goals of fostering inclusive and diverse learning environments may find that *Tinker* affords them broad powers to ban Confederate symbols. Such officials should, however, be cautious in exercising this power, not only for legal reasons but also because of policy considerations. The right of individuals to express unpopular ideas is fundamental to the United States, and the decision to prohibit a student from expressing his or her viewpoint through the display of Confederate symbols is necessarily in tension with this fundamental right. While administrators may rightfully wish to create an inclusive school atmosphere that values diversity, they should give serious consideration to whether prohibiting the display of Confederate symbols is the best way to achieve that goal. ■

55. House Report No. 914, USCCAN 2393.

56. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 590 (1983).

57. Bronson v. Board of Education of the City School District of Cincinnati, 550 F. Supp. 941, 959 (S.D. Ohio 1982).

58. Alexander v. Sandoval, 121 S. Ct. 1511, 1516 (2001).