## Applying the Tinker Standard

Justice Fortas acknowledged the "special characteristics" of schools in the Tinker decision, but did not spell them out specifically. Several cases after 1969 framed the differences between First Amendment rights in schools and those rights in the broader society. None of these cases reached the Supreme Court. However, a judge deciding a future case that involved similar legal disputes is likely to look to these cases for guidance in interpreting Tinker.

• Could a school--one that had banned the rebel flag and the song "Dixie" as school symbols and at all school events--keep a student from expressing himself by wearing an emblem of the Confederate flag on his jacket sleeve? Yes, if the school already suffered from racial unrest. Brainerd High School in Chattanooga Tennessee had been closed because of racial tension and the police had been called during several racially charged confrontations at school, so there was a "reasonable forecast of substantial disruption" that could arise from the Confederate symbol. *Melton v Young* 1972

But three years later, in Florida, another court noted schools could ban the "misuse" of these symbols, but not ban them entirely, without violating students' rights. It sent the question back to a district court. *Augustus v Escambia* 1975

• Could students exercise their Tinker-protected First Amendment right to free speech by carrying signs and protesting on campus? Yes, if the school, like Canyon del Oro High School, had no rule against carrying signs. The Ninth U.S. Circuit Court of Appeals ruled that the sign-carrying student, Steven Karp, had not violated a school rule in doing so, and carrying a sign was "pure speech" and therefore protected. Karp v

• Are mass demonstrations and leaving class protected forms of speech under Tinker? Not it if the demonstrations or walkouts disrupt school activities, as protesters at John Tyler High School in Tyler, Texas did when nearly 300 African-American left class and protested the racial balance of the newly chosen cheer squad.

• Do students have a right to write distribute an underground paper that appears to advocate drug use and take advertisement from a head shop, a shop that sold drug paraphernalia under Tinker? No. School officials could halt distribution of an off campus student publication such as the *Joint Effort* that encourages actions that endanger the students' health and safety.

• Do student journalists have a right to distribute a survey to high school students at school asking the students about their specific sexual attitudes and personal experience under Tinker? No. The Second Circuit ruled in 1977 that the school acted reasonably when it banned the survey. The school argued the survey could potentially do emotional harm to younger students. The judge wrote that the First Amendment does not protect students from censorship when they are asking questions that could reasonably cause psychological harm.

• Could school officials punish students for the content of a paper the students published and distributed outside of school? No, according to the Second Circuit in *Thomas v. Board of Education, Granville Central School District (1979)*. The judge wrote, "When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends."

• Could school officials demand to see a student newspaper before it was printed? Maybe.

*Tinker* protected the student press from *prior restraint,* from administrative control of the student media. *Prior review* means that the administration looks at it before it is published, checking for content the law allows them to censor, such as material that would damage the youngest readers or incite students to break the law or substantially disrupt the school. The *Trachtman* decision is pretty much an aberration. Virtually no court has relied on a finding of "psychological disruption" sine then, and none in the context of student media.

Some courts ruled that though **prior restraint** was forbidden under *Tinker*, **prior review** was not. The officials said they simply needed to protect the youngest students, some no more than 14 and so looked over the paper before it was published or distributed.

Other courts held that prior review was a form of prior restraint on student expression and violated the First Amendment and the Tinker standard. (Prior review has dangers for the school district. See *Sisley*, below.)