Chapter Five: Student Religious Expression

A. Overview of the Constitutional Limits of Student Expression: *Tinker*

Questions involving students' religious expression often arise at the intersection of the Free Speech and Establishment Clauses. Student religious expression that is initiated by students is generally viewed as private speech and therefore free speech principles govern.[1] To the extent that student religious expression is viewed as speech, courts will come to the conclusion that the speech does not violate the Establishment Clause and that the speech is protected as speech at least as great as nonreligious speech.

Student religious expression that is uncontroversially speech will fall into one of four boxes created by the Supreme Court: *Tinker, Fraser, Hazelwood,* and *Morse*. Accordingly, I begin with a brief overview of the Supreme Court's free speech jurisprudence and its application to the public school context. The seminal case here is *Tinker v. Des Moines Independent Community School District*.[2] Section B of this chapter then examines the other three boxes. Section C of this chapter then examines how courts have applied *Tinker* and its progeny specifically to religious expression.

The First Amendment's Free Speech Clause prohibits state actors, such as public secondary schools, from "abridging the freedom of speech."[3] The Supreme Court, interpreting the Free Speech Clause, has extended protection not only to written and spoken words,[4] but also to symbolic speech.[5] In deciding whether expressive conduct is sufficiently imbued with communicative elements to implicate the First Amendment, courts have traditionally asked two questions: whether "[a]n intent to convey a particularized message was present" and "[whether] the likelihood was great that the message would be understood by those who viewed it."[6] If the conduct is "inherently expressive,"[7] then the state regulation is justified only "if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression" and "if the incidental restriction on [expressive conduct] is no

greater than is essential to the furtherance of that interest."[8] If, however, the regulation is related to the suppression of speech, then the court must decide whether the state action is justified under strict scrutiny.[9]

Free speech protection has been extended to the public school context. As the Court in *Tinker v. Des Moines Independent Community School District* observed, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[10] Nevertheless, courts have also recognized the principle that public school student expression is "not automatically co-extensive with the rights of adults in other settings."[11]

Applying these principles in *Tinker*, where students wore black armbands to protest U.S. involvement in the Vietnam War,[12] the Court ruled that schools cannot restrict student speech unless the speech "materially and substantially interfere[s]" with classroom activities or the school environment.[13] Schools need not wait for disruption to occur before restricting speech, but they do bear the burden of proving that their actions are based on a reasonable forecast of disruption.[14] Moreover, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[15]

In concluding that the speech at issue in *Tinker* was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the [students'] part,"[16] the Court noted that the school could not prohibit student speech simply because it represented an unpopular viewpoint. Rather, unless the school can show that the speech "'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[17]

Accordingly, *Tinker* permits student speech that does not "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'" or "'collid[e] with the rights of others.'"[18] This speech is permitted whether the student is "in the cafeteria, or on the playing field, or on the campus during the authorized hours."[19] But, *Tinker* does not protect "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ."[20]

Applying these standards to various situations and noting that the free speech rights of students are often in tension with a public school's authority to manage the school safely, the Court has devised relatively distinct

categories of situations that serve as useful guidelines for school officials. Each category is examined below.

B. Common Public School Situations

1. The Fraser Rule: Schools Are Given Greater Latitude in Restricting Student Speech When the Student Presents the Speech in a Lewd, Vulgar, or Offensive Manner

The Supreme Court has endorsed the view that public secondary schools may constitutionally restrict student speech and discipline students for speech that is presented in a lewd, vulgar, or offensive manner. In *Bethel County School District No. 403 v. Fraser,*[21] a public high school student "delivered a speech nominating a fellow student for a student elective office at a voluntary assembly that was held during school hours as part of a school-sponsored educational program in self-government, and that was attended by approximately 600 students, many of whom were 14-year-olds."[22] During that speech, student Fraser used "an elaborate, graphic, explicit sexual metaphor" to describe the other student.[23] Some students responded to the speech by hooting and yelling; others "by gestures [that] graphically simulated the sexual activities pointedly alluded to in [the student's] speech;" while "other students appeared to be bewildered and embarrassed by the speech."[24] One teacher reportedly had to forgo class instruction and use class time to discuss the speech with the class.[25] After the student admitted to giving the speech, the school informed him that he was "suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises."[26]

The Supreme Court held that the school "acted entirely within its permissible authority in imposing sanctions upon [student] Fraser in response to his offensively lewd and indecent speech."[27] In distinguishing the speech at issue from the political speech in *Tinker*, the Court observed that "a high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[28] Given that observation, the Court noted that "it was perfectly appropriate for the school to dissociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[29]

2. Hazelwood: Schools Are Given Greater Latitude in Restricting Student Speech When an Outside Observer Could Perceive the Student Speech As Being Sponsored by the School

Schools have the authority to regulate "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[30] Accordingly, school-sponsored speech, such as the expressive content of a school newspaper, becomes an area in which the expressive rights of students and the authority of schools are likely to clash.

The seminal case delineating the free speech rights of students and obligations of public schools in the context of school-sponsored speech is *Hazelwood School District v. Kuhlmeir*.[31] In *Hazelwood*, the Court held that a public school did not violate the free speech rights of high-school-newspaper student-staff members where the principal deleted two pages from the school newspaper that contained one article about an unnamed student's pregnancy and another article about how the divorce of a student's parents affected the student's life. In the principal's view, these stories infringed the privacy rights of the pregnant student, whose identity could not necessarily be kept secret, and those of the divorced parents, who would not have had an opportunity to respond to their daughter's accusations.[32] The school principal was also concerned that the content of the pregnancy article, which dealt with sexual activity and birth control, would be inappropriate for younger members of the school community.[33] With no time to edit or even to cut the two controversial articles, the principal simply cut the two newspaper pages where these stories appeared.[34]

The Court distinguished *Tinker*, which asks whether a school is constitutionally required to *tolerate* peaceful student speech, from *Hazelwood*, which essentially asks whether a public school is required to *promote* particular student speech.[35] In answering the question presented in *Hazelwood*, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[36] In the Court's words:

> *Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn what-*

> *ever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," [*Fraser, *478 U.S. at 685], not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," [*Tinker, *393 U.S. at 509], but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.*[37]

Lower courts have interpreted *Hazelwood* to cover speech that is school-sponsored and "all student speech that is part of the curriculum (e.g., speech in classroom discussions, presentations, or student assignments)."[38]

3. Morse: Schools Are Given Greater Latitude in Restricting Student Speech When an Administrator Could Reasonably Interpret the Speech As Endorsing Illegal Drug Use

Schools may regulate speech at school events when school officials reasonably view the speech as promoting illegal drug use. The seminal case in this category is *Morse v. Frederick*,[39] where the Supreme Court struck down a student's claim that a public school violated his free speech rights when it disciplined him for refusing to put away a banner that said "BONG HITS 4 JESUS" at an Olympic torch parade that students, school board members, and faculty were attending during the school day.

As a threshold matter, *Morse* reaffirms the previous three public school speech cases—*Tinker*, *Fraser*, and *Hazelwood*—explaining that those cases make clear that student free speech rights may be restricted as free speech principles are "applied in light of the special characteristics of the school environment."[40] Nonetheless, the Court reaffirmed that those cases have no applicability to *Morse* because the speech was not disruptive,[41] the speech was not lewd,[42] and "no one would reasonably believe that Frederick's banner bore the school's imprimatur."[43]

The Court thus created a new category for permitting public school officials to restrict student speech—where the content seems to endorse illegal drug use. In drawing the conclusion that public schools may essentially engage in content discrimination, at least in this limited context, the Court cited the significant public policy behind preventing illegal drug use in the schools,[44] and determined that school officials may constitutionally regulate speech at a school event when those officials reasonably view the speech as "promoting illegal drug use."[45]

C. Applying *Tinker* and its Progeny to Student Religious Speech

1. Overview

Student religious speech can take a variety of forms. In cases of conflict, common forms of religious speech involve religious garb: T-shirt-messages, religious jewelry, dress codes, and other grooming policies. Cases involving T-shirts are generally viewed as speech cases and therefore straightforward applications of *Tinker* and its progeny. Section 2 below examines these cases. By contrast, cases involving dress codes and grooming policies are more complicated because they often invoke the Court's jurisprudence concerning the extent to which religion-neutral rules that incidentally burden religion are constitutionally permissible. When dress codes are viewed as speech, courts have generally applied the *O'Brien* test, which assesses public school regulations as constitutionally permissible where the regulation is within the school's power to promulgate and is narrowly tailored to an important school interest unrelated to speech.[46] Under that test, the public school will generally prevail because it can usually articulate a substantial interest unrelated to speech for promulgating and enforcing a dress code. Section 3 examines the dress code cases.

2. Students Can Wear T-shirts Emblazoned with Religious Messages or Engage in Other Speech Unless the School Can Articulate Particular Facts Showing That the Speech Did or

Would Cause a Substantial Disruption or Material Interference with Classroom Activities

"[C]ourts uniformly treat T-shirt speech as governed by the *Tinker* decision so long as the speech cannot be considered vulgar, lewd, or offensive under *Bethel County School District No. 403 v. Fraser*."[47] Accordingly, the safe course for a public school is to permit a student to wear a T-shirt that says "Jesus Loves You," unless the school could prove a reasonable forecast of a substantial disruption.[48] This principle does not apply in cases where the public school has adopted an otherwise valid uniform policy. In those cases, the school may prohibit all students from wearing T-shirts and need not satisfy the *Tinker* test.

The substantial disruption part of *Tinker* seems to be getting some play in the context of student religious speech directed towards gay students. One court has regulated such speech more strictly by interpreting *Tinker*'s language "interfering with the rights of others" as permitting schools to regulate speech that could be offensive or derogatory to other students. In particular, in *Harper v. Poway Unified School District*,[49] a high school student wore a T-shirt that read on the front "Be Ashamed, Our School Embraced What God Has Condemned" and "Homosexuality is Shameful 'Romans 1:27'" on the back.[50] The Ninth Circuit concluded that the school could regulate the shirt under *Tinker* because it interfered with the rights of gay and lesbian students.[51]

The Seventh Circuit side-stepped the "interfering with the rights of others" language from *Tinker* and looked for a more nuanced resolution of the conflict arising from a student's religious speech about sexual orientation. In *Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204 Board of Education*,[52] that court reversed a lower court's refusal to issue a preliminary injunction against a public school for prohibiting a high school student from wearing a shirt that read "'My Day of Silence, Straight Alliance' on the front and 'Be Happy, Not Gay,' on the back."[53] The student wore the shirt on the "Day of Truth," a pro-Christian event held the day after the "Day of Silence," a day intended to protest anti-gay discrimination. Upon seeing the shirt, "[a] school official had the phrase 'Not Gay' inked out," because the official viewed it as a derogatory comment about gay people and that school rules

provide that students "may comment favorably about their own group but may not make a derogatory comment about another group."[54] In the court's view, the student had the right to a preliminary injunction because wearing that shirt was not disruptive or disorderly under *Tinker*,[55] was not "lewd, indecent, or offensive" under *Fraser*,[56] and did not advocate the consumption of illegal drugs[57] under *Morse v. Frederick*.[58] The ruling was limited, however, to allowing the pro-Christian, anti-gay student to stencil the words "'Be Happy, Not Gay'" back on his T-shirt and allowing him to wear that shirt on the Day of Truth. The court refused to issue a broader preliminary injunction against the public school for forbidding the student from making "'negative comments'" about homosexuality. And the court cautioned the district court "to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity." [59]

At least one court dealing with similar issues has concluded that the "interfering with the rights of others" language from *Tinker* does not have as much bite as the Ninth Circuit gave it in *Harper*.[60] In *Nixon v. Northern Local School District Board of Education*,[61] a district court concluded that a public school district violated a student's free speech rights under *Tinker* when it prohibited him from wearing a black T-shirt with white lettering that read: "INTOLERANT/Jesus said . . . I am the way, the truth and the life./John 14:6" on the front of the shirt and "Homosexuality is a sin!/Islam is a lie!/Abortion is murder!/Some issues are just black and white!" on the back of the shirt.[62] Noting that *Tinker* prohibits schools from banning speech out of "'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,'"[63] the court concluded that the students' free speech rights had been violated because, unlike the confederate flag T-shirt cases, where school districts could articulate facts that reasonably forecast substantial disruption,[64] there was no actual disruption or disturbance and the school could not offer any "evidence of any history of violence or disorder in the school that would justify a reasonable likelihood of disruption, beyond the mere fact that there are groups of student and/or staff that could likely find the shirt's message offensive."[65]

3. Religion-Neutral Regulations of General Applicability, Such As Dress Codes and Grooming Policies, Are Constitutionally Valid Even Where the Regulation Burdens Religion

The starting point in analyzing any religion-neutral rule or regulation of general applicability, such as a school dress code or grooming policy, must be *Employment Division, Department of Human Resources v. Smith*.[66] In *Smith*, the Court concluded that the Free Exercise Clause did not prohibit states from denying unemployment benefits to claimants who had lost their jobs for work-related misconduct based on the sacramental use of peyote in violation of state drug laws. In that context, the Court reaffirmed the principle that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'[67]

Applying *Smith* to the dress code context, public schools may generally enforce dress codes forbidding headgear, for example, without running afoul of the Establishment or Free Exercise Clauses. This is so even though such policies would burden, for example, some male Jewish students who wear yarmulkes, some female Muslim students who cover their hair with hijabs, or some male Sikhs whose religion requires them to cover their long uncut hair typically by wearing turbans.[68]

Public schools that feel uncomfortable with applying neutral dress codes in a manner that incidentally burdens religion may provide religious exemptions in dress codes.[69] Courts that have dealt with the issue have unanimously held that express religious exemptions to school hair and clothing policies do not violate the Establishment Clause.[70] But if a school regulation, such as a dress code, discriminated among yarmulkes, hijabs, turbans, or other types of religious garb, reviewing courts may very well consider the dress code not to be religion-neutral and would strike it down on those grounds.

There are a few sources of law that might lead to greater protection of students' free exercise claims in the dress code context. For example, some state constitutions have been interpreted as more protective of free exercise than *Smith*; those state constitutions allow states to impose substantial burdens on religious exercise only if they can show a compelling interest and

narrowly tailored means. And state Religious Freedom of Restoration Acts (state RFRAs)[71] modeled after the federal Religious Freedom of Restoration Acts (RFRA) might also mandate religious exemptions.[72] Given these possibilities, public school officials should know the law in their state, as some states either have statutory RFRA exemptions or have interpreted their state constitutions to require such results.

Finally, some students might attempt to challenge dress codes without religious exemptions as interfering with both their free exercise rights and some other fundamental right. As one commentator has observed "*every* First Amendment challenge to the restriction of student religious speech carries the theoretical possibility of becoming a hybrid of free speech and free exercise rights."[73] Most circuits to review this question have rejected such claims.[74] But in at least two circuits, these hybrid rights could theoretically warrant greater protection.[75]

Given that religious exemptions do not violate the Establishment Clause and given the potential for litigation, the safest course for a public school to take is to provide religious exemptions for religious garb.

End Notes - Chapter Five

1 *But see* Chapter 1, dealing with student-initiated prayer.

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

3 U.S. Const. amend. I. For purposes of this discussion, I am talking about the free speech rules governing "high-value speech"—speech that gets the greatest protection under the First Amendment. Some speech, such as commercial speech, for example, receives less constitutional protection. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562-63 (1980). Some speech, such as obscenity receives no constitutional protection. Miller v. California, 413 U.S. 15, 23 (1973).

4 *Tinker*, 393 U.S. at 505-06, 508 (1969) (recognizing that pure speech, and even symbolic speech that is so peaceful that it is akin to pure speech, is entitled to comprehensive first amendment protection).

5 Spence v. Washington, 418 U.S. 405, 409-11 (1974). *See, e.g.,* Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (flag burning in protest of Ronald Reagan's presidential renomination is constitutionally protected symbolic speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (students' form of expression—wearing black armbands—constitutes symbolic speech); *cf.* U.S. v. O'Brien, 391 U.S. 367, 376-77, 381-82 (1968) (burning draft card in front of a large crowd to protest Vietnam War constitutes expressive conduct but criminal prohibition limited to noncommunicative conduct is constitutional because prohibition was narrowly tailored to a significant government interest unrelated to the suppression of speech).

6 Spence v. Washington, 418 U.S. 405, 410-11 (1974).

7 In *Rumsfeld v. Forum for Academic and Inst'l Rights, Inc.*, 547 U.S. 47, 65-68 (2006), the Supreme Court clarified previous case law, such as *Spence*, *O'Brien*, and *Johnson*, by stating that the speaker's conduct would only qualify as symbolic speech if in the surrounding circumstances, the message the speaker intended to convey was "overwhelmingly apparent" to the outside observer, and the speaker's conduct was "inherently expressive." The Court further explained that, if additional explanatory speech was necessary, such explanation or additional language would be a strong indication that the conduct at issue was not inherently expressive and therefore not symbolic speech worthy of protection under *O'Brien*. *Rumsfeld*, 547 U.S. at 66. The Court added that "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* The lower federal courts have adopted the *Rumsfeld* test that requires the conduct to be "inherently expressive." *See, e.g.*, Luty v. City of Saginaw, 2009 WL 331621, *3 (6th Cir. Feb. 10, 2009) (police officer did not allege "inherently expressive" conduct that amounted to constitutionally protected under *Rumsfeld*); Wong v. Bush, 542 F.3d 732, 736 (9th Cir. 2008) (requiring that conduct must be "inherently expressive" to qualify as symbolic speech); Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 7 (1st Cir. 2007) (same); Bruner v. Baker, 506 F.3d 1021, 1030 n.7 (10th Cir. 2007) (noting "inherently expressive" requirement).

8 U.S. v. O'Brien, 391 U.S. 367, 377 (1968). In the context of a content-neutral city ordinance requiring musicians to use city sound equipment and labor to help reduce noise pollution, the Court further refined this test in *Ward v. Rock Against Racism*, where it held that state regulations are constitutionally permissible where the regulation (1) is justified "without reference to the content of the regulated speech," (2) is "narrowly tailored to serve a significant governmental interest," and (3) leaves open "ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative

Non-Violence, 468 U.S. 288, 293 (1984)).

9 *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116-20 (1991) (striking down under strict scrutiny content-based NY statute prohibiting criminals from commercially profiting from books about their crimes by reallocating the profits to the victims because statute's purpose of compensating crime victims was poorly connected to state's "undisputed compelling interest in ensuring that criminals do not profit from their crimes").

10 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

11 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

12 *Tinker*, 393 U.S. at 504.

13 *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

14 *See, e.g.*, Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992).

15 *Tinker*, 393 U.S. at 508.

16 *Tinker*, 393 U.S. at 508 ("There is here no evidence whatever of [student-speakers'] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.").

17 *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d at 749).

18 *Id.* at 512 (quoting Burnside v. Byars, 363 F.2d at 749).

19 *Id.* at 512-13.

20 *Id.* at 513.

21 *See generally* Bethel County Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

22 *Id.* at 675.

23 *Id.* at 677-78. In his concurring opinion in *Fraser*, Justice Blackmun provided excerpts from the student's speech as follows:

> 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 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.S.B. vice-president-he'll never come between you and the best our high school can be.

Id. at 687 (quoting App. 47) (internal quotation marks omitted) (Brennan, J., concurring)

24 *Id.* at 678.

25 *Id.*

26 *Id.*

27 *Id.* at 685.

28 *Id.*

29 *Id.* at 685-86.

30 Hazelwood Sch. Dist. v. Kuhlmeir, 484 U.S. 260, 271 (1988) ("These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.").

31 *Id.*
32 *Id.* at 263.
33 *Id.*
34 *Id.* at 263-64.
35 *Id.* at 270-71.
36 *Id.* at 273.
37 *Id.* at 271.
38 John E. Taylor, *Why Student Religious Speech is Speech*, 110 W.Va. L. Rev. 223, 227 n. 16 (2007) (collecting and discussing cases). *See, e.g.*, Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1211-14 (11th Cir. 2004) (concluding that school district did not violate student's free speech rights when it required her to remove the religious words and symbols from a mural project in the public school, because these murals were a closed public forum and related to a curricular activity under *Hazelwood*); DeNoyer v. Merinelli, 1993 U.S. App. LEXIS 30084, at *2-3, *9 (6th Cir. 2003) (prohibiting second grade student from showing videotape of her singing a religious song during a church service as part of a class assignment where students were supposed to present the class with something about themselves did not violate the student's free speech rights because permitting the student to show the video would defeat one of the purposes of the assignment—to get the students comfortable with public speaking); Settle v. Dickson County Sch. Bd., 53 F.3d 152, 153-55 (6th Cir. 1995) (public school could constitutionally restrict student's religious speech rights by rejecting student's research paper on a religious topic where paper did not fit within the confines of the assignment, including being researchable, so long as teacher's motivation for prohibiting topic was not expressly because of its religious nature). For a discussion about whether *Hazelwood* permits viewpoint discrimination see generally Peck v. Baldwinsville Sch. Dist., 426 F.3d 617, 631-33 (2d Cir. 2005), *cert. denied* 547 U.S. 1097 (2006).
39 Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618 (2007). Commentators commonly refer to *Morse* as the "BONG HITS 4 JESUS" case because the school disciplined the student for refusing to put away a banner that stated "BONG HITS 4 JESUS" at an Olympic torch parade.
40 *Id.* at 2627 & n.2 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. at 506).
41 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
42 Bethel County Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
43 *Morse*, 127 S. Ct. at 2627 (distinguishing *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 271 (1988)).
44 *Id.* at 2628.
45 *Id.* at 2625.
46 U.S. v. O'Brien, 391 U.S. 367, 376-77 (1968). In particular, courts may examine dress codes under the *O'Brien* test on the rationale that dress and attire combine speech and nonspeech elements in the same course of conduct. In such cases, the dress code is justified if (1) it is within the school's power to promulgate the code; (2) if the code "furthers an important or substantial [school] interest; (3) if the school's interest in promulgating the code is "unrelated to the suppression of free expression"; and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."
47 John E. Taylor, *Why Student Religious Speech is Speech*, 110 W.Va. L. Rev. 223, 225 & n. 12 (2007).
48 Similarly, school rules prohibiting "gang apparel" could not be applied to students

wearing rosaries or other religious jewelry where students were not involved in a gang and there was no classroom disruption. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 667 (S.D. Tex. 1997).

49 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 549 U.S. 1262 (2007).

50 *Id.* at 1171.

51 *Id.* at 1175.

52 523 F.3d 668, 670 (7th Cir. 2008). This case is related to Zamecnik *ex rel.* Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., 2007 WL 4569720 (N.D. Ill., Dec. 21, 2007) (unreported decision). The case on remand is reported at 2009 WL 973365 (N.D. Ill. Apr. 3, 2009) (unreported decision).

53 *Nuxoll*, 523 F.3d at 670.

54 *Id.*

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

56 Bethel County Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

57 Morse v. Frederick, 127 S. Ct. 2618, 2626-27 (2007).

58 *Nuxoll*, 523 F.3d at 672-76.

59 *Id.* at 670.

60 Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp.2d 965, 974 (S.D. Ohio 2005).

61 *Id.*

62 *Id.* at 967.

63 *Id.* at 974 (quoting *Tinker*, 393 U.S. at 509).

64 *See, e.g.*, West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1362, 1366-67 (10th Cir. 2000) (permitting school racial harassment rule that expressly prohibited the possession of Confederate flags, among other things, and rejecting student's as applied challenge because the school could articulate facts, such as verbal confrontations between white and black students over racial tensions, racial incidents on bus rides and during football games, and even incidents of graffiti stating things such as "KKK" or "Die Nigger" on the school's bathroom walls, interior and exterior walls, and sidewalks); Governor Wentworth Reg'l Sch. Dist. v. Hendrickson, 421 F. Supp. 2d. 410, 411, 421-24 (D. N.H. 2006) (holding that school could prohibit gay student from wearing "No Nazis" patch (swastika inside a red circle with a diagonal line through it), which student referred to as a tolerance patch, to protest the intolerance of the "redneck" student group, because the school had a reasonable forecast of disruption or disorder due to the previous fights and harassment between the gay students and the redneck students); *cf.* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254-57 (3rd Cir. 2002) (concluding that, although the school's articulation of facts related to in-school racial tensions may have permitted it to ban the Confederate flag emblem, the school could not articulate similar facts to show that students' Jeff Foxworthy "You Might Be a Redneck" shirt would cause the same disruption or disturbance). *See generally* Barr v. Lafon, 538 F.3d 554, 568 (6th Cir. 2008); B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp. 2d 740, 749 (E.D. Mo. 2007); Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 488, 493 (D. S. C. 1997).

65 *Nixon*, 383 F. Supp.2d at 973.

66 494 U.S. 872 (1990).

67 *Id.* at 879 (quoting U.S. v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

68 In cases where a school official retains discretion to grant individual exemptions, the official "may not refuse to extend that system to cases of religious hardship with-

out compelling reason." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993). Applying that logic to the dress code context, public schools generally may grant discretionary exemptions without running afoul of the Establishment Clause, unless there is denominational or some other discrimination. *See, e.g.,* Axson-Flynn v. Johnson, 356 F.3d 1277, 1280-83, 1297-99 (10th Cir. 2004) (remanding for determination as to whether school has system of individualized-exemption in place where course instructor who gave a Jewish student an exemption from required improvisational work on Yom Kippur but did not grant religious exemption to Mormon who refused to use a curse word or take God's name in vain during classroom acting exercises).

69 The Supreme Court has recognized that public schools may choose to grant religious exemptions to accommodate religious needs. *See generally* Cutter v. Wilkinson, 544 U.S. 709, 713-14 (2005) (explaining that while "there is room for play in the joints between the Free Exercise and Establishment Clause . . . at some point, accommodation may devolve into an unlawful fostering of religion") (internal quotation marks and citations omitted). Indeed, many mandatory uniform policies contain a bona fide religious exemption provision. *See, e.g.*, Jacobs v. Clark County Sch. Dist., 373 F. Supp.2d 1162, 1185 & n.7 (D. Nev. 2005) (valid religious exemption permissible in school uniform policy), *aff'd*, 526 F.3d 419 (9th Cir. 2008); Wilkins v. Penns Grove-Carneys Point Reg'l Sch. Dist., 123 Fed.App.'x 493, 495 & n.1 (3d Cir. 2005) (religious exemption provision in school uniform policy rationally and legitimately accommodated students' religious beliefs); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 293-94 (5th Cir. 2001) (school uniform policy contained a bona fide religious exemption provision); Isaacs *ex rel.* Isaacs v. Bd. of Educ., 40 F. Supp. 2d 335, 337-38 (D. Md. 1999) (religious exemption from "no hats" policy protected as speech and religious exercise).

70 *See, e.g.*, *Wilkins*, 123 F. App'x 493, 495 & n.1 (finding that school uniform policy did not violate the Establishment Clause because it was "rationally drawn to further the legitimate interest in accommodating students' free exercise of religion").

71 *See, e.g.*, 71 Pa. Stat. Ann. §§ 2401-2407 (2009) (Pennsylvania's Religious Freedom Protection Act).

72 The Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), invalidated RFRA, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), as it applied to state laws, which is why individualized exemptions are not typically required, absent greater state law protection. *See* Cutter v. Wilkinson, 544 U.S. 709, 715 n.2 (2005) (noting that lower courts continue to hold that "RFRA . . . remains operative as to the Federal Government" but further noting that it has not yet ruled on the matter).

73 John E. Taylor, *Why Student Religious Speech is Speech*, 110 W.Va. L. Rev. 223, 245-46 (2007) (citing Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W.Va. L. Rev. 187, 194-97). As Professor Taylor further points out, "[s]ome of these challenges may also implicate the substantive due process right of parents to direct the upbringing of their children that is usually traced to *Pierce v. Society of Sisters*." *Id.* at 246 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).

74 At least three circuits have outright rejected the hybrid approach: *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 243-47 (3d Cir. 2008); *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Stratton*, 249 F.3d 553, 560-62 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993). Other courts have required an independently valid companion claim, thereby often rejecting the hybrid claim: *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001); *Parker v. Hurley*, 514 F.3d 87, 97-99 & n.9 (1st Cir. 2008). *See also* Church of Lukumi

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (criticizing the hybrid approach).

75 *See* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1031-33 (9th Cir. 2004) (endorsing hybrid approach but then striking down the claim); Axson-Flynn v. Johnson, 356 F.3d 1277, 1296-97 (10th Cir. 2004) (same). *See generally* Taylor, *Why Student Religious Speech is Speech*, 110 W.Va. L. Rev. 223, 245-46 & n.89. Those circuits that have yet to review this question could also theoretically endorse the hybrid approach. Furthermore, as Professor Taylor notes, the success rate for hybrid claims (particularly when involving dress codes) in public schools is actually higher than in other contexts outside the public school. *Id.* at 253 n.111.