

## ***Tinkering With the First Amendment***

The offensive item: a T-shirt, on the front bearing the statement, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED,” and on the back, ”HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27.’” Tyler Chase Harper wore this T-shirt to school on April 22, 2004. Subsequently, a teacher cited him with a dress code violation and the principal asked him to take it off.

In this modern day of political-correctness, anti-gay rhetoric such as this should not be tolerated, and the school acted properly ...didn't it? On the previous day, the then-high school sophomore wore a similar T-shirt bearing the statement, “I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED,” with the same Biblical quotation on the back.

The school's student-run Gay-Straight Alliance designated that day as a “Day of Silence” to promote tolerance of gay students. To show the silencing effect of intolerance, students wore duct tape over their mouths and refused to speak, even during classes.

The previous year, the event created considerable disruption and even resulted in the suspensions of a few protesters. However, on April 21, 2004, Harper's first T-shirt went seemingly unnoticed. Perhaps that is why Harper showed up the second day with the other one.

At any rate, Harper refused to remove the T-shirt despite pleas from his principal, and instead requested suspension. His principal disallowed Harper's return to class, but did not suspend him. Instead, Harper spent the remainder of the day in a conference room doing homework, and was given full attendance credit.

There were no more T-shirts after that, but in June 2004, Harper sued the school, alleging First Amendment and other constitutional claims in *Harper v. Poway Unified School District*, No. 04-57037 (9<sup>th</sup> Cir., April 20, 2006). Among other things, Harper sought to enjoin the school from enforcing its dress code until the matter was fully litigated. The District Court denied the injunction.

This past spring, the 9<sup>th</sup> Circuit upheld the decision, finding that Harper was unlikely to succeed on the merits, and therefore not entitled to a preliminary injunction. Not surprisingly, with respect to Harper's free speech claims, the Court applied *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969), the seminal Supreme Court student speech case that permitted anti-war students to wear black armbands in protest of the Vietnam War. What is surprising however, is the Court's application of the case.

*Tinker* held that schools could suppress student speech if it reasonably threatened “substantial disruption of or material interference with school activities.” It is this test that courts have been applying in the student speech cases since that decision.

However, in *Harper*, in a 2-1 decision, the majority applied a novel analysis, looking to the little used first prong of *Tinker*. It held that Harper was unlikely to prevail on his claims because the speech at issue infringed upon the rights of other students. Since it satisfied the first prong, the 9<sup>th</sup> Circuit found no reason to address the substantial disturbance question.

Essentially, the Court appears to have created “psychological” rights – to be free from disparaging comments. In doing so, it creates a dangerous precedent. Certainly schools have an affirmative duty to prevent discrimination against gay students, especially in California where state law deems them a protected class; but surely that does not include protecting them from offensive remarks, that *might* make them feel inferior. Does the mere voicing of an intolerant opinion constitute the kind of behavior to be suppressed? If speech were to be curtailed simply because it might offend someone, there would be no public discourse.

Notably, the majority conceded that the speech constituted protected political speech, to the extent it was expressed *outside of the public school setting*. Perhaps the stronger argument is that the T-shirt was displayed to a captive audience – students, who were required to be in school. But, as the dissent argues, the school did appear to open the door by permitting the event in the first place, thus inviting the opposition. The school was clearly aware of the potential for conflict, given the previous year’s events. The school was quick to disclaim any official support of the Gay-Straight Alliance’s political message, arguing instead that the organization had the right to promote tolerance. Yet, it suppressed Harper’s rights to challenge that position, for fear of the appearance of condoning that *message*.

This is in no way an easy case, and bear in mind the 9<sup>th</sup> Circuit was merely postulating on the likelihood of Harper’s success on the merits in order to decide the injunction issue. The actual case remains to be litigated, and the Supreme Court would be wise to refrain from addressing the question until it is.

Interestingly, the school didn’t notice anything until a teacher caught a few of Harper’s classmates “off-task.” Ironically, their attention was diverted because they were talking about Harper’s shirt – and isn’t that dialogue really what the First Amendment is all about?