Don't Push My (Political) Buttons

By **Robert J. Bezemek***

A FABLE

The sun shone bright for a snowy morn in winter 1799, and it so enveloped the three figures seated near the podium that they appeared ill at ease, sweating in their frock coats while trying to shield their eyes from the uncomfortable light. The hall was crowded with scores of students, more than usual, perhaps drawn by the spectacle of Federalist Governor John Jay and Republicans James Madison and Thomas Jefferson come together during a lull in their acrimony to dedicate the new, modern lecture hall on this, the opening of the new term, the first in the history of the University of Pennsylvania, our Republic's first publicly supported university, if you discount North Carolina, as you should, for it has yet to seat its first pupil. Governor Jay was invited Lecturer for the first week of the term.

After introductions by our Chancellor, John Jay stood, the sun glinting off the gold buttons of his waistcoat in the likeness of our beloved Washington, and another on his lapel, which I could not distinguish.

Suddenly, a bookish student unfamiliar to me, but whom I later learned was called "Little Dannie Lundgren," startled the assembly by crying foul over the button on Jay's lapel, a button that I now realize bore the likeness of our Federalist candidate for President, Aaron Burr:

"By what right do you compel us poor students to gaze upon the visage of candidate Burr, when we come hither simply to gain an education. How dare a teacher of the State endorse a candidate for president. I am by this confused, does the State itself take sides to support a seeker of public office of this State. Shouldn't thouest remove thy button lest we be indoctrinated against our will?"

A stir arose, shouts of "seditionist," "hang the scoundrel," "an insult," spewed forth, but Jay remained silent, as if seized by apoplexy. All fell silent as first Jefferson, then Madison arose; eagerly I sat forward, what would two of our Founders, from such opposite poles, have to say to the impudent incendiary? "Young man," Jefferson said, "it is good you are amidst scholars for perhaps you may yet learn a thing or two about our laws. As an opponent of a powerful central government, I would be the first to censor a teacher for using his office to espouse a doctrine upon young captives. But the Honorable Gentleman Jay is merely alerting us to his personal views, in so quiet a way as there be, which we are free to embrace or reject. Surely you are not so naif as to confuse the house of the State with the singular beliefs of the State's servant. If you are so easily vexed then you have not learnt your lessons, for our dear faculty, including the Honourable guest, as with other public servants, do not shed the Bill of Rights when they enter this hall. Their passive views may spark us to debate, even confound us, but at least they inform us that they have views of their own."

"Little Dannie," though rebuked by our Honourable Founder, pushed on — "Surely you would not countenance such politicking in our public schools. I give you credit that our brethren here should comprehend the difference between the state and the teacher, but our younguns have no such sophistication and shall dothless be swayed by the power held by their tutors."

With this, Jay stirred, the color returned to his cheeks and he coughed heavily: "No doubt for some children these buttons will be mere decoration, though for others and their parents or family, they will get the message. But to survive our nation must be a crucible of ideas, not an empty cauldron. Your fear is not well taken — our generation was taught in churches, homes, markets, and assemblies where the visage of King George stared us daily in the face — see how well we were swayed!"

"That is so," interjected Madison, "Our republic will exist only as long as our citizens, including our teachers, are free to exhibit their beliefs. These diverse beliefs shall occupy the attention and conversation of every class of people. No favorable circumstances palliate or atone for the disadvantages of ignorance in the People." "Mr. Lundgren," he went on, "you seek to heighten the evils of the People becoming involved in politics. Your words are poison and should be shunned by this assembly. What are you studying, young man?"

"The law," replied Little Dannie. "God save us," muttered Jefferson.

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It is such a small thing, the political campaign button, but it has been called "the single item most associated with political campaigning...."[1] The campaign button sprouts full-born every spring and fall, and reaches full-flower every four years during presidential campaigns, only to disappear almost as quickly as it arrived. Although varieties seem infinite, most are simple creations of celluloid and lithographed tin. Yet, they have a long and storied heritage. The first American political button can be traced to 1789, when it celebrated the election of George Washington. But it was not until the presidential election of 1860 that political buttons bearing a picture of a political candidate first appeared. It is thus somewhat surprising that more than 200 years after the birth of our nation, the California attorney general has issued a legal opinion that the wearing of political buttons by public school teachers may be banned. Perhaps George Washington and Abraham Lincoln would not be surprised. Washington keenly observed the willingness of politicians to override constitutional authorities.[2] And just as it might be said that it was fear of Lincoln's ideas that led to the secession of Virginia from the Union,[3] it appears that fear about the message of political buttons has led the California attorney general to misstate, misapply, and ignore several legal precedents to support the suppression of speech.

To understand the subject of free speech in the schools, one must start with the two leading United States Supreme Court cases on the subject, *Tinker v. Des Moines School Dist.*[4] and *Hazelwood School Dist. v. Kuhlmeier*.[5] In *Tinker* the Supreme Court prohibited a school district from restricting the right of high school and junior high school students to wear black arm bands in class that expressed their opposition to United States policy in Vietnam. In *Hazelwood*, the court upheld the censorship, by a school principal, of an article published in a newspaper written and edited by a journalism class as part of the school curriculum. In supporting suppression of public employee speech, Attorney General Lungren mistakenly relies on *Hazelwood* and disregards *Tinker*.

In *Tinker* the Supreme Court held that the wearing of arm bands is akin to "pure speech," which is entitled to comprehensive protection under the First Amendment.[6] As the court explained:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.[7]

In upholding the rights of students and teachers to wear symbols of political belief in the classroom, the court recognized that the arm bands were a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance...."[8] In order to justify the prohibition of such expressions of opinion, a district "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 accompany an unpopular viewpoint."[9] The court explained that the "prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible."[10] It is worth noting that the Court explained:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority....Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the state must respect....Students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved....[11]

Twenty years later the Supreme Court nevertheless reaffirmed *Tinker* when it authorized the censorship of a school-run newspaper in *Hazelwood*. Two factors, in the court's view, distinguished *Hazelwood* from *Tinker*. First, the newspaper was not viewed as a "forum for public expression." If it had been a forum for public expression, the district's right to restrict what was published would have been substantially curtailed. But the court concluded that school facilities may be deemed to be public forums only if school authorities have by policy or practice opened their facilities "for indiscriminate use by the general public" or "by some segment of the public, such as student organizations."[12] Second, the court explained that the role of school authorities is different depending on the question at stake:

> The question whether the First Amendment requires a school to tolerate particular student speech — the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses [an] educator's

> ability to silence a student's personal expression...the latter question concerns [an] educator's authority over school-sponsored publications...."[13]

The court in *Hazelwood* decided that the newspaper was an activity that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school...."[14]

In relying on *Hazelwood* the attorney general expressly disregarded the most critical distinction that is identified by the Supreme Court in *Hazelwood*— a different standard is applied to the question of whether a school must *tolerate* teacher speech compared to the question that arises over regulation of school-sponsored publications. The Supreme Court in *Hazelwood* recognized that educators "are entitled to exercise greater control over the second form of student expression to assure...that the views of the individual speaker are not erroneously attributed to the school."[15]

There is a significant difference between a school-sponsored publication and the passive individual expression of political beliefs that the Supreme Court protected in *Tinker* and reaffirmed in *Hazelwood.* The attorney general, in his opinion, explained that he had little difficulty concluding that the wearing of a political campaign button might "reasonably be perceived as bearing the imprimatur of the school district...."[16] One more versed in constitutional law than this attorney general would have greater difficulty reaching such a radical conclusion. A political button is a "benign symbolic expression of the teacher's personal views," according to the decision in *James v. Board of Education.*[17] In striking down restrictions on a teacher wearing a political arm band, the court explained:

> Recently, this country enfranchised eighteen-year-olds. It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue. Under the circumstances present here, there was a greater danger that the school, by power of example, would appear to the students to be sanctioning the very 'pall of orthodoxy,' condemned in *Keyishin*, which chokes freedom of dissent.[18]

It is important to recognize that *Tinker* held that restraints on protected speech can be sustained only by a showing that the speech would "materially and substantially interfere with the requirement of appropriate discipline and the operation of the school."[19] Potential disruption, by itself, does not justify suppression of speech. Attorney General Lungren relied on the *speculative possibility* that students might confuse a teacher's button with the subject matter of their classroom curriculum, or parents *might* question whether the teacher is wearing the button to "influence the children." Certainly *no* such danger is present in colleges where most of the students are emancipated adults of voting age. The attorney general's reliance on *Hazelwood* is misguided because the court in *Hazelwood* specifically distinguished between individual expression of political views (as occurred in *Tinker*) and school-sponsored activity (which occurred in *Hazelwood*). Just as most students (at least by junior high school) probably understand that school authorities do not dictate the personal preferences of their teachers in clothing, choice of automobiles, or newspapers they read, they also comprehend that they and their teachers are entitled to formulate their own political beliefs and choices.

The attorney general concluded that an outright ban on *all* political buttons in the classroom is permissible, in order to avoid the *possibility* that students might confuse the passive expression of views occasioned by a button with the sponsorship of the school. This meat-axe approach to regulating the First Amendment is not permissible under established constitutional standards.

There is a danger that the attorney general's erroneous opinion might be used to justify suppression of speech via political buttons in California colleges that have distinct attributes of public forums. In *Hazelwood* the Supreme Court concluded that the journalism class's newspaper did not amount to a public forum. However, California community colleges, state colleges, and the University of California have, by action of the legislature, been designated public forums by virtue of Ed. Code Secs. 66301 et seq. These statutes provide that public college authorities may not subject any student to disciplinary sanctions on the basis of conduct "that is speech or other communication," which is protected from governmental restriction by the First Amendment when engaged in outside a campus. The wearing of campaign buttons outside a campus is unquestionably pure speech, which may not be regulated. Since college students are free to wear buttons in classrooms pursuant to Sec. 66301, so are faculty.

The Supreme Court recognizes that where a public forum has been created, speech may be regulated only by the least intrusive means. In the California colleges, this means that colleges may satisfy their speculative concerns about "sponsorship" by issuing disclaimers informing students that the wearing of campaign buttons or other indicia of political activity by teachers and staff is not intended to, and does not reflect, the views of the institution. Such disclaimers are already common in handbooks and brochures issued in college settings. After all, colleges customarily invite controversial authors and public figures to lecture on campus, while assuring the community that providing a forum is not an endorsement of the message. And the assumption the attorney general makes about impressionable school students plays no part in colleges, with their older student populations.

Apart from his misunderstanding of the *Tinker-Hazelwood* dichotomy, and his ignorance of California legislation creating a public forum, the attorney general also disregards the limitations imposed by other doctrines. In *Pickering v. Board of Education,*[20] the Supreme Court explained that a teacher's interest in making public comment must be *balanced* against any legitimate state interest. Had the attorney general considered *Pickering*, he would have recognized that it is improper to presume that the passive wearing of a political button is tantamount to an expression of an institutional position on an issue. There is no legitimate basis for concluding that the wearing of a button in the classroom, as opposed to the cafeteria, gives a different message as to who is the originator of the communication. If a district could suppress the wearing of buttons in the classroom, the same arguments could be advanced to support suppression anywhere else on school grounds.

The attorney general's views also present problems of being both vague and overly broad. Given their theoretical underpinnings, these views could logically be relied on to encompass clothing, jewelry, and even hairstyles with a political content. We would see a form of political witch hunts, with faculty scrutinized to ensure that their earrings do not resemble IUDs (pro-abortion?) or crosses (pro-life?) or other symbols. Such a rule would be inconsistent with *Tinker*.

The California Supreme Court has consistently issued decisions that attest "to the strength of 'liberty of speech' in this state."[21] The attorney general's analysis of political button restrictions threatens to chill our fundamental freedom of expression, a right the attorney general should be seeking to preserve. For over 200 years political buttons have flourished. The attorney general's unconvincing, misguided reading of federal and state law should not provide any justification for their suppression in any school setting.

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[1] Sullivan, Edmond B. *Collecting Political Americana*. New York: Crown Publishers, 1980.

[2] Washington's Farewell Address (1796).

[3] Morrison, Samuel Eliot, *Oxford History of the American People*. London: Oxford University Press, 1965, p. 612.

[4] (1969) 393 U.S. 503.

[5] (1987) 484 U.S. 260.

[6] *Idid.* at 506-507. "Pure speech" is that which is devoid of conduct or action such as occurs with picketing or marching (*Cox v. Louisiana* [1965] 379 U.S. 536, 555).

[7] *Ibid.* at 506.

[8] *Ibid.* at 508.

[9] *Ibid.* at 509.

[10] *Ibid.* at 503.

[11] *Ibid.* at 511.

[12] (1987) 484 U.S. 267.

[13] *Ibid.* at 270-271.

[14] *Ibid.* at 271.

[15] Hazelwood, op cit., at 273.

[16] 77 Opinions Attorney General at 62.

[17] (2d Cir. 1972) 461 F.2d 566, 574.

[18] *Ibid.* at 574.

[19] *Ibid.* at 738.

[20] (1968) 391 U.S. 563.

[21] *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908.