

IN DEFENSE OF THE “HAZARDOUS FREEDOM” OF CONTROVERSIAL STUDENT SPEECH

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“It is the State which educates its citizens in civic virtue, gives them a consciousness of their mission and welds them into unity.”

—Benito Mussolini, *The Political and Social Doctrine of Fascism*†

“A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by a natural tendency to one over the body.”

—John Stuart Mill, *On Liberty*‡

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† Benito Mussolini, *The Political and Social Doctrine of Fascism*, in *FASCISM: AN ANTHOLOGY* 44 (Nathanael Greene ed., 1968).

‡ JOHN STUART MILL, *ON LIBERTY* 158 (George Routledge & Sons 1915) (1859).

I. INTRODUCTION

Examples of controversial student speech and the complaints and disciplinary action that it elicits abound in American public schools. Consider the situation in Ft. Lauderdale, where Nova High School officials threatened to suspend a student for wearing a t-shirt that was “offensive” to other students.¹ The offending t-shirt featured a picture of President Bush and the caption “International Terrorist.”² Or, consider the case in St. Louis, where high school students received ten-day suspensions for creating a “hot or not” website that ranked their female peers’ appearances.³ From the political to the puerile, controversial student speech usually offends someone. And, as a result, school officials are often tempted to censor it.

As a general rule, censorship of speech for its offensive nature violates the First Amendment’s “bedrock principle” that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁴ Even within the public school context, the Supreme Court’s holdings confirm that “the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”⁵ Indeed, since the Court’s seminal Vietnam-era decision in *Tinker v. Des Moines Independent School District*, students have enjoyed substantial First Amendment rights.⁶

In *Harper ex rel. Harper v. Poway Unified School District*, however, a split panel of the Ninth Circuit recently concluded that schools may proscribe controversial student speech merely *because of* its offensiveness.⁷ The opinion came in the case of Chase Harper, a public high school student whom school officials prohibited from attending class while he wore a t-shirt proclaiming “HOMOSEXUALITY IS SHAMEFUL.”⁸ The Ninth Circuit affirmed the denial of a preliminary injunction against the school, concluding that the school would likely prevail against Harper’s First Amendment challenge to its action.⁹ The court justified this conclusion without finding that the speech created a substantial disruption to the educational setting, the mainstay standard established by *Tinker* and applied by

¹ Robert Nolin, *T-shirt Forces Change in Code: ACLU Aids Nova Senior’s Free Speech*, S. FLA. SUN-SENTINEL, Apr. 23, 2005, at 1B.

² *Id.*

³ Michael Beder, *MySpace or SchoolSpace?*, ST. LOUIS POST DISPATCH, May 24, 2006, at A1.

⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁵ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

⁶ 393 U.S. at 506 (“[I]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

⁷ 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). For an explanation of the procedural developments that led to the Supreme Court ultimately vacating this decision, see discussion *infra* note 16.

⁸ *Harper*, 445 F.3d at 1170–73.

⁹ *Id.* at 1177.

courts since.¹⁰ Instead the court concluded that the school could prohibit Harper’s t-shirt because it intruded on other students’ rights.¹¹

To support this departure from established student speech jurisprudence, Judge Reinhardt’s majority opinion drew on language from *Tinker* stating that schools can regulate student speech when it “colli[des] with the rights of other students.”¹² Past courts have not relied on this language to condone suppression of student speech,¹³ and many have noted its imprecision and inscrutable scope.¹⁴ Yet, without deciding which “rights of other students” this language defends, the Ninth Circuit concluded that it at least protects minority students from offensive, psychologically harmful speech regarding their “core identifying characteristics.”¹⁵

Though the Supreme Court recently vacated the decision on procedural grounds,¹⁶ *Harper* demands attention because it is the first case to rely on *Tinker*’s enigmatic “rights of other students” language. At least two courts—including the Southern District of California when it addressed *Harper*’s First Amendment claim on its merits—have already followed suit.¹⁷

Harper also deserves special attention because its reading of *Tinker* has intuitive appeal. We remember what high school was like, especially for students who were outsiders. We remember that despite the “sticks and

¹⁰ *Id.*

¹¹ *Id.* at 1175.

¹² *Id.* at 1177 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)) (internal quotation marks omitted).

¹³ See *infra* notes 79–90 and accompanying text.

¹⁴ See *infra* notes 100–02 and accompanying text.

¹⁵ *Harper*, 445 F.3d at 1178.

¹⁶ *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 127 S. Ct. 1484 (2007). The Ninth Circuit’s decision, from which Harper appealed and sought certiorari, was itself an interlocutory appeal of the district court’s denial of a preliminary injunction. See *Harper*, 445 F.3d at 1173. After Harper filed his motion for certiorari, the district court dismissed his claims as moot, permitted his sister Kelsey to intervene, and granted summary judgment for the defendants on her claims that were not moot. See Order Dismissing Tyler Chase Harper as a Plaintiff; Denying Plaintiff’s Motion for Summary Judgment; and Granting in Part and Denying in Part Defendants’ Motion for Summary Judgment, *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, No. 04CV1103 JAH(POR) (S.D. Cal. Jan. 24, 2007). Kelsey Harper appealed this final judgment to the Ninth Circuit. See Plaintiffs’ Notice of Appeal, *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, No. 04CV1103 JAH(POR) (S.D. Cal. Feb. 5, 2007). In this procedural context, the Supreme Court thus concluded that “vacatur of the prior judgment is also appropriate to ‘clea[r] the path for future relitigation of the issues between the parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.’” 127 S. Ct. at 1484 (quoting *Anderson v. Green*, 513 U.S. 557, 560 (1995)).

¹⁷ See Order Denying Plaintiffs’ Motion for Reconsideration, *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, No. 04CV1103 JAH(POR) (S.D. Cal. Feb. 12, 2008); *Zamecnik v. Indian Prairie Sch. Dist.* No. 204 Bd. of Educ., No. 07 C 1586, 2007 WL 1141597 (N.D. Ill. Apr. 17, 2007) (relying on *Tinker*’s students’ rights language to deny an injunction that would prohibit a school district from forbidding “be happy, not gay” t-shirts).

stones” adage offered by teachers and parents, words did hurt.¹⁸ We sense, as the Ninth Circuit did, that hurtful words distract a student from her learning. And thus, for those who value education as the equalizing force in our democracy, we fear that leaving schools open to students’ hurtful words will reduce schools to perpetuating inequality rather than overcoming it.

Yet the First Amendment routinely protects speech that public intuition rejects;¹⁹ indeed it must if it is to shield minority rights from domination by the majority. And it self-consciously does so even when speech is considered “harmful.” When the Supreme Court initially pronounced students’ First Amendment rights, for instance, it recognized that the students’ freedom of speech amounted to a “hazardous freedom.”²⁰ The Court was not flip in this regard. It acknowledged the risks inherent in students’ speech but defended their First Amendment rights in spite of those risks.²¹ It did so because of what stands to be sacrificed if students’ First Amendment rights are compromised.

Most theories regarding the purpose of recognizing students’ First Amendment rights begin with the complex role public education plays in American democracy. Many consider public schooling a necessity if Americans and American democracy are to thrive,²² but public education also has the ominous potential to threaten democracy rather than enrich it.²³ Democratic self-government depends on the independence of individual decisionmaking from state control. And, though few would suggest that American public schools are organs of state thought-control, they do give states influence over the minds of their citizens. Normally this influence is benign. State-approved curricula ensure that students receive the quality of education they deserve and need to succeed. Likewise, moral and civic education within those curricula ensure that students have the wherewithal to participate in a democratic society. But state influence may not always be so innocuous.²⁴ In making curricular choices and requiring students to abide by them, states affect what students learn and how they perceive

¹⁸ The complete aphorism is “Sticks and stones may break my bones, but words will never hurt me.” See THE CONCISE OXFORD DICTIONARY OF PROVERBS 240 (John Simpson & Jennifer Speake eds., 1992).

¹⁹ See Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988) (describing the “counterintuitive” nature of the First Amendment).

²⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

²¹ *Id.*

²² See, e.g., CTR. ON EDUC. POLICY, WHY WE STILL NEED PUBLIC SCHOOLS 13 (2007), available at <http://www.cep-dc.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=11&documentFormatId=777>.

²³ See discussion *infra* Part IV.

²⁴ The selection of history textbooks provides an apt illustration: American school systems, like their counterparts in more totalitarian societies, have often selected history textbooks that arguably are based on biased or selective accounts of history. See generally JOSEPH MOREAU, SCHOOLBOOK NATION: CONFLICTS OVER AMERICAN HISTORY TEXTBOOKS FROM THE CIVIL WAR TO THE PRESENT (2003).

themselves and the world. In light of this reality, the *Tinker* Court established students’ First Amendment rights as one safeguard to prevent benign state influence over students’ minds from creeping into harmful state indoctrination.

This Comment argues that permitting schools to regulate offensive student speech without an objective showing of educational harm—as the *Harper* court would—endangers the role students’ First Amendment rights play in mitigating the democratic perils of public education. As such, there is good reason to reject *Harper* on a normative level. In addition, on a doctrinal level, *Harper*’s reading of *Tinker*’s protection of “the rights of other students” fails because it contravenes *Tinker*’s theoretical premises.

In reaching this conclusion about what the students’ rights language does not mean, this Comment also proposes a new understanding of what it could mean. The language may operate as a general First Amendment “savings clause,” incorporating First Amendment doctrine from other areas into the school context.

Before analyzing how *Harper* departs from *Tinker*, Part II provides a brief survey of the landscape of students’ First Amendment rights, as defined by the Supreme Court and since interpreted by the lower courts. This discussion highlights the numerous murky areas that persist.

Part III then elaborates on the Ninth Circuit’s opinion in *Harper* and next explores the meaning of *Tinker*’s protection of the “rights of other students.” Neither commentators nor courts have considered the meaning of this language in considerable depth. This Part concludes that *Tinker*’s language does not extend as far as the Ninth Circuit would have it. In pronouncing that certain students have the right to be free from offensive, presumably harmful speech, *Harper* parts ways with *Tinker*’s theoretical premises. First, it distorts *Tinker*’s “rights of other students” language while purporting to give it effect. Whatever the students’ rights language means, its contours must reflect *Tinker*’s explicit refusal to sacrifice student speech on the basis of any nebulous harm it purportedly causes.²⁵ In reading *Tinker*’s “rights of other students” language to insulate students from offensive speech about their “core identifying characteristics,” *Harper* violates this principle. It invites schools to pick and choose what speech they subjectively consider “harmful” and to suppress it. *Harper* thus violates *Tinker* in a second manner: it indirectly gives schools the power to suppress the expression of ideas they oppose by characterizing those ideas as harmful.²⁶

Part III also proposes interpreting the students’ rights language as a First Amendment “savings clause,” which would incorporate general First Amendment doctrine into the school context. Based on this understanding,

²⁵ *Tinker*, 393 U.S. at 508.

²⁶ *Cf. id.* at 511 (“[S]chool officials cannot suppress ‘expressions of feelings with which they do not wish to contend.’” (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966))).

the students' rights language would not authorize repression of Harper's speech because the First Amendment does not exclude speech purely because of the psychological impact on its audience.²⁷

Finally, Part IV considers the normative question that *Harper* triggers: if *Tinker*'s "rights of other students" language does not protect students from offensive or demeaning speech in the schools, should it be revised to do so? Part IV answers this question by considering the various theoretical arguments for protecting students' First Amendment rights in the first place. Recognizing that students' First Amendment rights largely serve a prophylactic role—to prevent state education from creeping into indoctrination—this Part concludes that the law should not permit schools to regulate students' speech purely because it is deemed offensive and therefore categorically "harmful."

II. THE LANDSCAPE OF STUDENTS' FIRST AMENDMENT RIGHTS

Until recently, the entire doctrine of students' First Amendment freedom of speech derived from a trilogy of Supreme Court cases beginning in 1969 and ending in 1988. In 2007, the Supreme Court added an ostensibly narrow postscript to this doctrine with its decision in *Morse v. Frederick*.²⁸ Section A briefly reviews the precedent this series established and examines the Court's theoretical approach to students' First Amendment rights. Section B then summarizes the numerous areas of confusion that emerged among the lower courts in the years since 1988 and that went unaddressed by the Court in *Morse*.

A. Students' First Amendment Rights in the Supreme Court

The high water point for students' First Amendment rights came in the first case directly on the question that the Supreme Court decided,²⁹ *Tinker v. Des Moines Independent Community School District*.³⁰ The case arose after several students decided to wear black armbands to their Des Moines

²⁷ See, e.g., *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

²⁸ 127 S. Ct. 2618 (2007). *Morse* was decided after the Ninth Circuit's decision in *Harper*, but its holding may have implications for the viability of the Ninth Circuit's reasoning in that case and thus for other courts' adoption of that reasoning.

²⁹ The Court did consider students' free speech rights in *West Virginia State Board of Education v. Barnette*, in which it held that students cannot be forced to recite the Pledge of Allegiance. 319 U.S. 624 (1943). The holding of that case, though, rested in part on parents' interest in the moral and religious education of their children, rather than purely on students' individual First Amendment rights. See Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 240 (2004). As a result, *Tinker* represents the earliest Supreme Court decision addressing students' free speech rights based purely on the students' capacity as individuals, not on their capacity as their parents' children. *Id.*

³⁰ 393 U.S. 503 (1969).

public schools to protest the growing hostilities in Vietnam.³¹ Aware of the students’ intent to wear the armbands to school, the Des Moines school principals adopted a policy prohibiting the armbands and threatening suspension for any violation of the policy.³²

In an 8-1 decision, the Supreme Court found the ban to be a violation of the students’ freedom of speech.³³ The Court articulated a sweeping statement of students’ First Amendment rights: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁴ Even so, the *Tinker* Court recognized that schools have the power to restrict that freedom when it conflicts with the schools’ “comprehensive authority . . . to prescribe and control conduct in the schools” in order to accomplish their educational mission.³⁵ According to *Tinker*, this restriction is constitutional only when the student expression “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”³⁶

Tinker articulates a rich theoretical justification for students’ First Amendment liberties and provides a baseline doctrinal standard for protecting those liberties.³⁷ From a theoretical perspective, the Court grounded students’ First Amendment rights in an understanding of the tension between a school’s role in nurturing students’ self-development and its omi-

³¹ *Id.* at 504.

³² *Id.*

³³ *Id.* at 506.

³⁴ *Id.* The Court goes on to suggest that “[t]his has been the unmistakable holding of this Court for almost 50 years,” relying heavily on *Barnette*, 319 U.S. 624, for the proposition that schools must be constrained by the Bill of Rights if children are to become independent thinkers with the capacity and the affinity to participate in the country’s democracy. *Tinker*, 393 U.S. at 506–07.

³⁵ 393 U.S. at 507.

³⁶ *Id.* at 513 (citing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)). The *Tinker* Court relied heavily on *Blackwell* and another case from the Fifth Circuit, *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), in establishing this standard. For a discussion of these Fifth Circuit opinions and the Court’s incorporation of them into *Tinker*, see *infra* Part III.A.1.

³⁷ Though the Court thoroughly explained the theoretical groundwork for students’ free speech rights, it did not provide an equally robust articulation of its standard for when those rights are outweighed by the school’s interest in “prescrib[ing] and controll[ing] conduct in the schools.” *Tinker*, 393 U.S. at 507. In concluding that speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech,” the Court gave short shrift to elaborating on what will constitute a material disruption, what will suffice as substantial disorder, and which particular rights of others will defeat students’ free speech rights. *Id.* at 513.

The heavy theoretical focus of the majority opinion may perhaps be explained as a response to Justice Black’s dissent and the traditional view of children’s role in society relative to authority. See *id.* at 524–26 (Black, J., dissenting). The irony, however, is that Justice Black’s theoretical perspective appears to have won the day based on the Court’s subsequent decisions in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), both of which more closely reflect Justice Black’s dissent than they do the majority opinion in *Tinker*. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527 (2000).

nous potential to “strangle the free mind at its source,”³⁸ in an attempt to “foster a homogeneous people.”³⁹ *Tinker* established students’ First Amendment rights as a prophylactic device barring schools from engaging in state-sponsored indoctrination. To the extent that students contribute to the discourse in schools and other students hear those ideas, the Court reasoned, schools are barred from treating students as “closed-circuit recipients of only that which the State chooses to communicate.”⁴⁰ *Tinker* envisions the scope of “education” to include spontaneous dialogue among students, not just top-down inculcation by the State.⁴¹

In the late 1980s, the Supreme Court decided two cases that retreated from *Tinker*’s broad protection of students’ First Amendment rights. In the first, *Bethel School District No. 403 v. Fraser*, the Court held that school officials did not violate Matthew Fraser’s First Amendment rights when they suspended him for the “obscene”⁴² speech he gave nominating a classmate for student government.⁴³ The Court reaffirmed *Tinker*, but distinguished the case at hand in several ways. First, the speech in *Fraser* was not “political” speech as it was in *Tinker*.⁴⁴ Second, the case implicated the state’s interests in “protecting minors from exposure to vulgar and offensive spo-

³⁸ *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637) (internal quotation marks omitted).

³⁹ *Id.* at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)) (internal quotation marks omitted). In describing this tension, the Court foreshadowed what some commentators have called the “First Amendment problem” of public education. See, e.g., Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002) (“[The First Amendment] problem is, simply, that by means of the public educational process, the state is able to engage in a dangerous form of political, social, or moral thought-control that potentially interferes with a citizen’s subsequent exercise of individual autonomy.”).

⁴⁰ *Tinker*, 393 U.S. at 511.

⁴¹ *Id.* at 511–12. One commentator has suggested that the Court’s approach consequently reflects a dialectical vision of education akin to John Dewey’s progressive theory of education, such that the relationship between student and state is “reciprocal rather than inculcative.” William B. Senhauser, Note, *Education and the Court: The Supreme Court’s Educational Ideology*, 40 VAND L. REV. 939, 955–56 (1987).

⁴² *Fraser*, 478 U.S. at 686. This characterization was not unanimous, though. Justice Brennan, who concurred in the judgment on the basis that speech may have been substantially disruptive under *Tinker*, found “it difficult to believe” that the Court could describe the speech as “obscene,” “vulgar,” “lewd,” or “offensively lewd.” *Id.* at 687 (Brennan, J., concurring).

⁴³ *Id.* at 677–78 (majority opinion). The actual speech Matthew Fraser gave is 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 (Brennan, J., concurring) (quoting Fraser’s speech).

⁴⁴ *Id.* at 685.

ken language”⁴⁵ and in “teaching students the boundaries of socially appropriate behavior”⁴⁶ and “the shared values of a civilized social order.”⁴⁷ Third, the speech occurred during a school assembly, and the sanction allowed the school to “disassociate itself” from the speech in order to “make the point . . . that vulgar speech and lewd conduct is [sic] wholly inconsistent with the ‘fundamental values’ of public school education.”⁴⁸ The Court later clarified that *Fraser* “rested on the [speech’s] ‘vulgar,’ ‘lewd,’ and ‘plainly offensive’ character,” rather than its propensity to disrupt schoolwork, and therefore established a distinct standard apart from *Tinker*.⁴⁹

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court further chipped away at *Tinker*, this time in the context of a principal’s censorship of several articles in a high school newspaper.⁵⁰ The Court held that school officials were “entitled to regulate [the newspaper] in any reasonable manner” because the question of what student speech a school must tolerate—the question of *Tinker*—is different from the question of what student speech the school must “affirmatively . . . promote.”⁵¹ The Court thus found that rather than be subject to the rule of *Tinker*, school officials may control the “style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁵²

After nearly twenty years of silence on the subject, the Court once again spoke on students’ First Amendment rights in *Morse v. Frederick*.⁵³ And, once again, the Court further constricted their scope. In *Morse*, the Court considered whether a principal violated a high school student’s First Amendment rights by suspending him for carrying a banner stating “Bong Hits 4 Jesus” at a school event.⁵⁴ Upholding the constitutionality of the principal’s action, Chief Justice Roberts’s majority opinion articulated an entirely new justification for the suppression of student speech: school officials may prohibit student speech that they reasonably regard as encouraging illegal drug use.⁵⁵ Chief Justice Roberts reached this conclusion in three steps. First, he noted that “[d]rug abuse can cause severe and permanent

⁴⁵ *Id.* at 684.

⁴⁶ *Id.* at 681.

⁴⁷ *Id.* at 683.

⁴⁸ *Id.* at 685–86.

⁴⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n.4 (1988). Justice Brennan had suggested in his *Fraser* concurrence that the decision in *Fraser* represented an application of the *Tinker* substantial disruption standard rather than a departure from it. *Fraser*, 478 U.S. at 688–90 (Brennan, J., concurring).

⁵⁰ 484 U.S. at 262.

⁵¹ *Id.* at 270–71.

⁵² *Id.* at 273.

⁵³ 127 S. Ct. 2618 (2007).

⁵⁴ *Id.* at 2619.

⁵⁵ *Id.* at 2622.

damage to the health and well-being of young people,” citing sociological data to underscore the prevalence and danger of teen drug use.⁵⁶ He then reaffirmed the resultant governmental interest in stemming student drug abuse to avert this harm, which the Court had articulated in other constitutional contexts.⁵⁷ Last, he noted that student speech “celebrating” drug use interferes with the government’s ability to accomplish this goal.⁵⁸

As this brief overview suggests, the Court’s perspective and tone in *Fraser*, *Hazelwood*, and *Morse* shifted dramatically from that in *Tinker*. In *Tinker*, students were the protagonists of the Court’s opinion, and protecting their voices within the school setting was one of its principal objectives. In its subsequent opinions, however, the Court treated school officials as the protagonists and focused on facilitating their “comprehensive authority . . . to prescribe and control conduct in the schools”—an authority that *Tinker* recognized but limited.⁵⁹ Together, *Hazelwood*, *Fraser*, and *Morse* confirm that students in fact do leave some of their First Amendment rights at the schoolhouse gate.⁶⁰ As the next Section suggests, however, significant confusion persists on specifically which of their rights students must check at the door.

B. *The Murky Areas of Students’ First Amendment Rights*

In the two decades since *Hazelwood*, lower courts have disagreed on how to interpret and reconcile the Court’s initial trilogy of student free speech cases.⁶¹ When the Court finally spoke again in *Morse* in 2007, not only did it fail to resolve these areas of confusion, it added additional uncertainty to the scope of students’ free speech rights.

As a result, the extent of students’ rights to engage in controversial speech is unclear. A general consensus acknowledges four areas of student speech from the Supreme Court’s school precedents: (i) vulgar, lewd, obscene, and plainly offensive speech, the suppression of which is governed by *Fraser*; (ii) school-sponsored speech, governed by *Hazelwood*; (iii) speech reasonably regarded as encouraging illegal drug use, governed by

⁵⁶ *Id.* at 2628.

⁵⁷ *Id.* (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)). *Vernonia School District* upheld a school policy for random drug testing of student athletes, concluding that the policy did not violate students’ Fourth Amendment rights, in part due to the school district’s “important—indeed, perhaps compelling” interest in deterring student drug abuse. 515 U.S. at 661–65.

⁵⁸ *Morse*, 127 S. Ct. at 2628 (“Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”).

⁵⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

⁶⁰ The Court later moderated *Tinker*’s unqualified statement explicitly, stating that “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.” *Vernonia*, 515 U.S. at 655–56 (quoting *Tinker*, 393 U.S. at 506).

⁶¹ See *infra* notes 63–79 and accompanying text.

Morse; and (iv) all other student speech, governed by *Tinker*.⁶² Despite this generally accepted taxonomy, uncertainty continues to plague judicial review of the constitutionality of student speech restrictions.

First, courts and commentators have long disagreed about the extent to which *Tinker* and its progeny permit schools to engage in “viewpoint discrimination,” that is, the regulation of speech based on the viewpoint it expresses.⁶³ Viewpoint discrimination generally violates the First Amendment,⁶⁴ yet some courts have suggested that *Tinker* itself implicitly accepted the permissibility of viewpoint discrimination⁶⁵ in holding that a school can regulate student speech whenever it creates a substantial educational disruption or interference with the rights of others.⁶⁶ Other courts have argued that the First Amendment’s general viewpoint-neutrality principle still con-

⁶² Prior to *Morse*, courts generally agreed on three categories of student speech. See, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992). To these three, *Morse* added the fourth—a narrow category for speech reasonably regarded as advocating illegal drug use. See 127 S. Ct. at 2629.

⁶³ See Tobin, *supra* note 29, at 232–38 (discussing the circuit split on whether the *Hazelwood* holding requires viewpoint neutrality).

⁶⁴ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 196 (1983) (“[The Court has] invalidated almost every content-based restriction that it has considered in the past quarter-century.”); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that even when a state regulates a category of “low-value” speech that may be constitutionally proscribable, it may not make distinctions within that category on the basis of content); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

⁶⁵ See, e.g., *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1184 (9th Cir. 2006) (“[T]he Court in *Tinker* held that a school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive.”), *vacated as moot*, 127 S. Ct. 1484 (2007). The opinion that *Tinker* permits viewpoint discrimination originates in *Tinker*’s statement that “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” *Tinker*, 393 U.S. at 511. By implication, the argument goes, the Court suggested that a viewpoint-discriminatory regulation suppressing only that one particular opinion may be permitted if it is necessary to avoid such interference. See, e.g., Kristi L. Bowman, *Public School Students’ Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 202 (2007).

On the other hand, because the Court found that the school officials had no reason to expect that the armbands would materially and substantially interfere with the work of the schools, *Tinker*, 393 U.S. at 509, its holding did not directly address the constitutionality of a policy designed to respond to such a threat. Consequently, some courts have applied *Tinker* as only one bar to school regulation of student speech, finding that when a threat of disruption does exist, the school must address it in a viewpoint-neutral manner, in keeping with the baseline First Amendment prohibition of viewpoint discrimination. E.g., *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1282 (11th Cir. 2004). In other words, if black armbands protesting the war threatened disruption but expression in favor of the war did not, the viewpoint-neutrality standard would require that the school, in order to regulate the former, regulate the latter as well and prohibit all political expression regarding the war.

⁶⁶ *Tinker*, 393 U.S. at 514.

trols in student speech cases, providing an independent barrier to school regulation of student speech in addition to the *Tinker* standard.⁶⁷ Though the Court dodged the explicit question in *Morse*, it suggested that school officials can suppress at least some student speech on account of its viewpoint. School officials under *Morse* need not impose a blanket ban on *all* student speech about drug use in order to prohibit pro-drug messages.⁶⁸

Second, it is unclear whether *Morse*'s approach is *sui generis*, applying only to speech encouraging illegal drug use. Justice Alito's concurring opinion announced his view that it is: he read the majority opinion to provide a new avenue for regulating student speech only insofar as the speech communicates a pro-drug message.⁶⁹ Yet the Court's opinion could be read to stand for and invite a much broader principle for restriction. The school officials in *Morse* argued that they could restrict pro-drug speech because it interfered with their "educational mission" of discouraging student drug abuse.⁷⁰ The Court's three-step analysis, described above,⁷¹ appears to accept this argument. In essence, the Court authorized the restriction of student speech precisely because the speech interfered with the school's "educational mission" of discouraging student drug abuse by imparting an anti-drug message to its students.⁷² The majority did not endorse the school officials' "educational mission" argument expressly. But neither did it deny that its analysis could apply to other student speech that interferes with a school's interest in inculcating its students with a certain message.⁷³ *Morse* at least invites the argument that when a school's educational mission involves imparting one message to avert a recognized and substantial harm, it may restrict student speech that expresses a contrary message and interferes with that goal.⁷⁴ Some courts—including the district court in *Harper* when

⁶⁷ See, e.g., *Holloman*, 370 F.3d at 1282.

⁶⁸ See *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (acknowledging but dismissing Justice Stevens's accusation in his dissent that the majority was inviting school officials to engage in viewpoint discrimination); see also *id.* at 2645 (Stevens, J., dissenting) (describing the majority opinion as "trivializ[ing]" the general prohibition against viewpoint discrimination).

⁶⁹ See *id.* at 2637 (Alito, J., concurring) (joining the majority opinion on the understanding that its holding does not "necessarily justify" additional speech limitations based on the "special characteristics of the public schools").

⁷⁰ See *id.* (Alito, J., concurring) (rejecting, on behalf of himself and Justice Kennedy, this "educational mission" argument).

⁷¹ See *supra* notes 53–58 and accompanying text.

⁷² See *supra* notes 53–58 and accompanying text.

⁷³ The Court's emphasis on the harms associated with drug abuse may at least suggest that if its holding reflects the "educational mission" argument, this argument would generalize only to other topics where the state has a recognized governmental interest in affecting student behavior.

⁷⁴ To the extent *Morse* can support this argument at all, it likely would at least require the concession that schools cannot define their educational missions so broadly as to permit blanket suppression of political and religious speech. See *Morse*, 127 S. Ct. at 2629 (expressing the Court's unwillingness to allow the schools a broad prerogative to regulate political and religious speech).

it considered the case on its merits—have already read *Morse* to stand for exactly this principle.⁷⁵

Third, despite the general consensus described above, courts still disagree about which case’s standard applies in certain circumstances. For instance, there is disagreement over whether *Fraser* was simply an application of *Tinker* or whether it created an independent standard based only on the lewd and plainly offensive nature of the student’s speech.⁷⁶ Fourth, courts and commentators have disagreed on whether *Fraser*’s permissiveness toward school regulation of “plainly offensive” speech extends to speech that is offensive based on its content or the ideas it communicates, rather than merely the manner of its expression.⁷⁷ Likewise, they disagree about whether *Fraser* extends to independent student speech, rather than merely school-sponsored speech.⁷⁸ Fifth, some courts and commentators

⁷⁵ See Order Denying Plaintiffs’ Motion for Reconsideration, Harper *ex rel.* Harper v. Poway Unified Sch. Dist., No. 04CV1103 JAH(POR), slip op. at 8–9 (S.D. Cal. Feb. 12, 2008) (applying *Morse* to conclude that a school has a “legitimate pedagogical concern” in “promoting tolerance” and therefore can restrict intolerant student speech); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 218 (D. Conn. 2007) (citing *Morse* for the proposition that schools may establish “reasonable, ex ante policies regarding the forms of expression considered appropriate in light of the school’s educational mission”).

⁷⁶ This disagreement persists despite the Court’s own conclusion in *Hazelwood* that *Fraser* established a standard independent from *Tinker*. Compare, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 281 (1988) (Brennan, J., dissenting) (interpreting *Fraser* as an application of *Tinker*), and *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1283–84 (11th Cir. 2000) (Forrester, J., concurring in part and dissenting in part) (same), with *Hazelwood*, 484 U.S. at 271 n.4 (noting that *Fraser* relied on the “‘vulgar,’ ‘lewd,’ and ‘plainly offensive’ character” of the speech in question, rather than on its propensity to cause a material and substantial disruption under *Tinker*).

⁷⁷ See David L. Hudson & John E. Ferguson, *The Courts’ Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002) (“The majority of courts have cited *Fraser* in such a way as to give public school officials free reign to censor vulgar, lewd, or plainly offensive student speech. Some courts have gone a step further and prohibited student speech that contains offensive ideas.”). Compare, e.g., Joan E. Schaffner, *Dispelling the Misconceptions Raised by the Davis Dissent*, 12 HASTINGS WOMEN’S L.J. 141, 169 (2001) (“[I]t was the vulgarity and crudeness of the words themselves used by the student in *Fraser*, unrelated to the message conveyed, that [were] deemed both offensive and inappropriate in an educational environment.”), with *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (finding a student t-shirt that was critical of Christianity to be “offensive” under *Fraser* because it “promote[d] disruptive and demoralizing values which are inconsistent with and counter-productive to education”). *Morse* demonstrates the Court’s wariness of definitions of “offensive” that turn on the content of the message—because such definitions may encompass political and religious speech—but it did not forthrightly reject any definition that incorporates content considerations. *Morse*, 127 S. Ct. at 2629 (“[T]he broader rule that Frederick’s speech is proscribable because it is plainly ‘offensive’ . . . stretches *Fraser* too far . . . After all, much political and religious speech might be perceived as offensive to some.”).

⁷⁸ See Hudson & Ferguson, *supra* note 77, at 191–97 (describing the majority of courts as applying *Fraser* to any vulgar, lewd, or plainly offensive student speech, though a minority require that such speech occur in a school-sponsored context). Compare, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (concluding that school officials may regulate vulgar, lewd, obscene, or plainly offensive student speech regardless of whether it is spoken in a school-sponsored context), with *McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415, 1426 (W.D. Okla. 1992) (concluding that *Fraser* applies only if the speech is school-sponsored).

have suggested that *Fraser* and *Hazelwood* essentially overruled *Tinker*, replacing its speech-protective standard with a much more flexible standard.⁷⁹

The Ninth Circuit in *Harper ex rel. Harper v. Poway Unified School District* introduced even more confusion by resurrecting dormant language from the *Tinker* decision. In purporting to give effect to *Tinker*'s "rights of other students" language, however, the Ninth Circuit applied the Supreme Court's most expansive protection of student free speech rights in a manner that renders it meaningless.

III. *TINKER*'S ENIGMATIC STUDENTS' RIGHTS LANGUAGE AND WHY THE NINTH CIRCUIT GOT IT WRONG IN *HARPER*

In *Harper*, the Ninth Circuit considered the free speech rights of Chase Harper, a public high school student whom school officials forbade from attending class because of an "inflammatory" t-shirt he wore to school.⁸⁰ The incident occurred the day after the school's "Day of Silence," a student-organized event promoting "tolerance of others, particularly those of a different sexual orientation."⁸¹ Harper's t-shirt the following day read "BE ASHAMED, OUR SCHOOL HAS EMBRACED WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.⁸² The school's principal asked Harper to remove the shirt, believing that it could lead to physical conflict at the school and that "it was not healthy for students to be addressed in such a deroga-

⁷⁹ See, e.g., *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994), *superseded by statute on other grounds* ("Since *Tinker* . . . the Supreme Court has cast some doubt on the extent to which students retain free speech rights in the school setting."); J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 707 ("[*Hazelwood*] eviscerates the Supreme Court's decision in *Tinker*."); S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 135 (1995) ("Arguably, the *Hazelwood* Court overruled *Tinker*—at least in part."). But see *Barber ex rel. Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 856 (E.D. Mich. 2003) ("The *Kuhlmeier* Court clearly announced that it was not overruling *Tinker*."); Chemerinsky, *supra* note 37 (arguing that though the *Fraser* and *Hazelwood* decisions embody Justice Black's rationale in his dissenting opinion in *Tinker*, and though students increasingly *do* leave more of their free speech rights at the schoolhouse gates, the *Tinker* standard still prevails with regard to independent student speech that is not vulgar, obscene, or plainly offensive).

⁸⁰ *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1172 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). For an explanation of the procedural developments that led to the Supreme Court ultimately vacating this decision, see discussion *supra* note 16.

⁸¹ *Harper*, 445 F.3d at 1171 (internal quotation marks omitted). During the day, participating students wore duct tape over their mouths and refused to speak in class to symbolize the effect intolerance has on homosexual students. *Id.* at 1171 n.3. Harper's complaint alleged that he believed the purpose of the day was not to promote tolerance but to "endorse, promote, and encourage homosexual activity." *Id.* at 1171 n.2.

⁸² *Id.* at 1171. Harper wore a similar t-shirt on the Day of Silence itself, though apparently no staff saw the t-shirt that day. *Id.*

tory manner.”⁸³ Harper refused to remove the shirt and spent the rest of the day in the school conference room.⁸⁴

Harper subsequently filed a lawsuit in federal district court against the school district and school officials, alleging violations of his rights of free speech and free exercise of religion, as well as violations of the Establishment Clause, the Due Process Clause, and the Equal Protection Clause.⁸⁵ He then filed a motion seeking a preliminary injunction to enjoin the school from continuing to violate his constitutional rights.⁸⁶

The district court dismissed all but Harper’s First Amendment claims and refused to grant a preliminary injunction. The court found it unlikely that Harper would prevail on the merits because the record justified the school’s belief that Harper’s speech would cause a “substantial disruption of . . . school activities.”⁸⁷ The Ninth Circuit affirmed the denial of a preliminary injunction, but in doing so, it substituted its own analysis for that of the district court.⁸⁸ Though it also relied on *Tinker*, the Ninth Circuit chose to “rely on a different provision—that schools may prohibit speech that ‘intrudes upon . . . the rights of other students.’”⁸⁹

The majority interpreted *Tinker*’s protection of the “rights of other students” (what I hereinafter call *Tinker*’s “students’ rights language”)⁹⁰ to include the right of minority students to be free from the harms associated with certain offensive speech.⁹¹ Rather than rely on school officials’ testimony regarding the harms they expected the t-shirt to inflict, the court took judicial notice of a variety of sociological and psychological reports suggesting that speech such as Harper’s can affect students psychologically and educationally.⁹² The majority concluded that homosexual students have a right to be free from offensive speech that inflicts these harms, and thus that

⁸³ *Id.* at 1172.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1173.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1175 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)) (internal quotation marks omitted).

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting *Tinker*, 393 U.S. at 508).

⁹⁰ *Tinker*, 393 U.S. at 508. The *Tinker* opinion describes this speech inconsistently—as speech that “intrudes,” *id.*, or “impinge[s],” *id.* at 509, upon other students’ rights, and as speech that involves “invasion of,” *id.* at 513, or “collision with,” *id.* at 508, other students’ rights. In all cases, however, the focus is on the effect of the speech on other students’ rights. For that reason, I adopt the “students’ rights” shorthand.

⁹¹ *Harper*, 445 F.3d at 1178.

⁹² See *id.* at 1180–81 (taking as a “self-evident proposition” that it is “harmful to gay teenagers to be publicly degraded and called immoral and shameful,” and concluding that that proposition is sufficient, at least in the case’s current procedural context, to conclude that the school’s prohibition of the speech was constitutional).

school officials, under *Tinker*, may ban such speech because it intrudes on this right.⁹³

The majority never clearly defined the “student right” upon which Harper’s t-shirt intruded. Presumably, *Harper* either recognizes an individual right to be free from the *psychological* harm that offensive speech inflicts, or it recognizes an individual right to be free from the *educational* harm that offensive speech inflicts. Notably, however, psychological harm is an element, and the direct result of the speech, in either scenario. The first, however, seeks to avoid the psychological harm itself, while the second seeks to avoid psychological harm only because of its nexus to educational harm. Portions of the opinion seem to recognize a right to be free from psychological harm per se. For instance, the majority notes that *Tinker*’s students’ rights language encompasses students’ rights to “be secure and to be let alone,”⁹⁴ and concludes that “[b]eing secure . . . involves freedom . . . from psychological attacks that cause young people to question their self-worth and their rightful place in society.”⁹⁵ The *Harper* court thus appears to countenance banning student speech purely because of the psychological harm it presumably inflicts.

On the other hand, the opinion ultimately does not protect all students from speech that might cause them to doubt themselves. The Ninth Circuit’s holding protects only minority students who “have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior” and those for whom offensive speech may “damage their sense of security *and* interfere with their opportunity to learn.”⁹⁶ At least here, then, the court does not suggest that students have an inherent right to be free from all offensive and psychologically harmful speech.⁹⁷ Instead, the protected right ostensibly depends on the propensity of the speech-inflicted psychological harm to evolve into educational harm. It is clear, however, that despite the court’s characterization, the protected right is not simply the “opportunity to learn.”⁹⁸ If it were, nonminority students could invoke it as well.⁹⁹

⁹³ *Id.* at 1178–79.

⁹⁴ *Id.* at 1178 (quoting *Tinker*, 393 U.S. at 508) (internal quotation marks omitted).

⁹⁵ *Id.*

⁹⁶ *Id.* (emphasis added).

⁹⁷ In a footnote that appears to be a concession to Judge Kozinski’s critique of its unprincipled distinction between minority and nonminority students, the majority suggested that perhaps nonminority students, too, could be protected from speech that interferes with their opportunity to learn. *See id.* at 1183 n.28.

⁹⁸ *Id.* at 1178.

⁹⁹ Judge Kozinski’s dissent criticized this line-drawing:

[I]f interference with the learning process is the keystone to the new right, how come it’s limited to those characteristics that are associated with minority status? Students may well have their self-esteem bruised by being demeaned for . . . any one of the infinite number of characteristics that will not qualify them for minority status.

In actuality, then, *Harper* does not recognize a student right in principle to be free from either psychological harm or educational harm. That the Ninth Circuit sacrifices student speech in order to protect such an unprincipled and selectively inclusive right alone makes its holding suspect. However, as the remainder of this Part argues, even if the court had articulated a more coherent student right protecting against all psychologically or educationally harmful peer speech, *Tinker*’s students’ rights language could not sustain it.

A. What *Tinker* Meant

The students’ rights language has puzzled courts since *Tinker*. The Supreme Court has declined to elaborate on its meaning,¹⁰⁰ and multiple courts have noted its opacity.¹⁰¹ Few courts, if any, have even mentioned the standard without also invoking *Tinker*’s substantial disruption standard.¹⁰² Courts generally include the students’ rights language when stating *Tinker*’s holding, but they decide the case based on *Tinker*’s substantial dis-

Id. at 1201 (Kozinski, J., dissenting). At the same time, though, his dissent recognized the necessity of the minority/nonminority distinction so as not to essentially “rip[] the heart out of *Tinker*.” *Id.* at 1200 n.11.

¹⁰⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.5 (1988) (articulating a separate standard for reviewing school-sponsored student speech—and thus bypassing *Tinker*—in declining to review the Eighth Circuit’s conclusion that *Tinker*’s students’ rights standard only applies in situations where the school could face liability for students’ tortious speech).

¹⁰¹ *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.) (noting that the “precise scope” of *Tinker*’s students’ rights standard is not clear); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 808 (2d Cir. 1971) (“The phrase ‘invasion of the rights of others’ is not a model of clarity or preciseness.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))).

¹⁰² *See Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (“In fact, the Court is not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school’s regulation of student speech.”). The *Harper* court is correct, however, in noting that *Tinker* does treat the two in the disjunctive. *Harper*, 445 F.3d at 1177. The Second Circuit has perhaps come the closest to permitting a restriction of student speech on the students’ rights standard alone in *Trachtman v. Anker*, although even it arguably incorporated some elements of the material disruption standard in its holding. 563 F.2d 512 (2d Cir. 1977).

In *Trachtman*, the court upheld a high school’s prohibition of a voluntary sex questionnaire, finding the restriction justified in light of “the probability that [the questionnaire] would result in psychological harm to some students.” *Id.* at 519. While the school officials argued that the prohibition was justified because subjecting students to “psychological pressures” that engender “emotional harm” is an invasion of students’ rights, *id.* at 516, the Second Circuit refrained from discussing *Tinker*’s students’ rights language explicitly, focusing instead on the school’s interest in restricting speech that results in “harmful consequences” to students, *id.* at 520.

In reaching its holding, the Second Circuit noted that *Tinker* applied although “this case involve[d] a situation where the potential *disruption* is psychological rather than physical.” *Id.* at 517 (emphasis added). This reference to *Tinker*’s disruption standard, especially in the absence of explicit discussion of the students’ rights standard, suggests that the Second Circuit’s holding was not purely based on the latter. In any event, other courts have regarded *Trachtman* as an application of the students’ rights standard. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 795 F.2d 1368 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260.

ruption standard alone, without analysis of the speech's effect on other students' rights.¹⁰³ Even *Tinker* treated the students' rights language as an afterthought in some ways, omitting it in some of its most general statements of the conditions under which student speech may be regulated.¹⁰⁴ Moreover, because the district court that originally upheld the armband ban evaluated the regulation under a standard granting school officials wide discretion to regulate speech,¹⁰⁵ it is likely that little evidence existed as to the effect of the armbands on other students' rights.¹⁰⁶ Notably, though, the Supreme Court remanded the case to the district court only to determine the appropriate remedy, not to consider the ban's constitutionality based on its effect on other students' rights.¹⁰⁷ Perhaps as a result of *Tinker*'s casual treatment of the students' rights language, some have gone so far as to conclude that it is merely dicta.¹⁰⁸

Thus, like the substantial disruption mainstay,¹⁰⁹ the boundaries of the largely uncharted students' rights language are unclear.¹¹⁰ *Tinker* does, however, yield some clues as to its scope: first, the precedent from the Fifth

¹⁰³ See, e.g., *Nixon*, 383 F. Supp. 2d at 974 (“[T]he *Tinker* line of cases focus[es] on whether or not material disruptions have occurred or whether or not they are reasonably likely to occur [rather than whether the speech invades the rights of other students].”).

¹⁰⁴ The *Tinker* Court makes several general statements regarding the conditions that will permit school regulation of student speech that inexplicably omit the students' rights standard. See, e.g., *Tinker*, 393 U.S. at 509 (“Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of the appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.” (quoting *Burnside v. Byars*, 363 F. 2d 744, 749 (5th Cir. 1966))); *id.* at 511 (“Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”). Of course, in other places, the Court includes the students' rights standard. See, e.g., *id.* at 513 (“[A student] may express his opinions, even on controversial subjects . . . if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.” (quoting *Burnside*, 363 F.2d at 749)).

¹⁰⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (D. Iowa 1966) (“School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court.”), *aff'd per curiam*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503.

¹⁰⁶ The Court stated that the lower court did not make any finding that the banned speech would have materially and substantially interfered with schoolwork or discipline and that its own independent examination of the record “fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” *Tinker*, 393 U.S. at 509. By implication, it seems the lower court only considered the speech's disruptive effect and not its effect on the rights of other students.

¹⁰⁷ *Id.* at 514.

¹⁰⁸ See, e.g., *Trachtman v. Anker*, 563 F.2d 512, 520–21 (2d Cir. 1977) (Mansfield, J., dissenting) (describing the majority opinion as “relying upon dicta” because of its focus on the students' rights language).

¹⁰⁹ See *supra* note 37 and accompanying text (discussing *Tinker*'s focus on a theoretical argument for the protection of student free speech rather than an elaboration of the exceptions' contours).

¹¹⁰ See *supra* notes 101–02 and accompanying text.

Circuit that the Court used in fashioning the *Tinker* doctrine; second, the opinion’s text and specifically the disjunctive between the substantial disruption standard and the students’ rights standard; and third, the theoretical basis of the Court’s opinion and its highly protective approach to student speech. Together these clues resolutely refute the meaning the Ninth Circuit gave the students’ rights language.

I. Justice Fortas’s Adoption of the Fifth Circuit Precedent.—The doctrinal standard that *Tinker* articulated—that school officials may censor student speech only when they may reasonably forecast that the speech will cause “substantial disruption of or material interference with school activities”¹¹¹ or an “invasion of the rights of others”¹¹²—comes directly from two Fifth Circuit decisions issued on the same day three years prior. In *Burnside v. Byars*¹¹³ and *Blackwell v. Issaquena County Board of Education*,¹¹⁴ the Fifth Circuit considered the constitutionality of school officials’ prohibition of “freedom buttons” that black students in both schools distributed and wore to advocate equal voting rights and the end of racial segregation. The *Burnside* court recognized that school officials need broad discretion in order to operate their schools effectively, but it concluded that this discretion does not authorize school officials to enact unreasonable rules or regulations.¹¹⁵ The court concluded that the only student speech restrictions that are reasonable are those necessary for the “maintenance of order and decorum within the educational system.”¹¹⁶ It then rejected the school’s ban on freedom buttons, finding that they did not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”¹¹⁷

Justice Fortas relied heavily on *Burnside* in drafting *Tinker*’s majority opinion, notably adopting its “material and substantial interference” language as his own.¹¹⁸ In fashioning this rule, Justice Fortas distinguished *Burnside* from *Blackwell*, where the Fifth Circuit upheld the ban on the freedom buttons.¹¹⁹ There, the Fifth Circuit found ample evidence that the buttons created “commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline, and

¹¹¹ *Tinker*, 393 U.S. at 514.

¹¹² *Id.* at 513.

¹¹³ 363 F.2d 744 (5th Cir. 1966).

¹¹⁴ 363 F.2d 749 (5th Cir. 1966).

¹¹⁵ *Burnside*, 363 F.2d at 749.

¹¹⁶ *Id.* at 748.

¹¹⁷ *Id.* at 749.

¹¹⁸ See *Tinker*, 393 U.S. at 511 (“[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”).

¹¹⁹ See *Blackwell*, 363 F.2d at 754.

decorum.”¹²⁰ The “collision with the rights of others” that the Fifth Circuit described referred to the fact that students distributing the buttons accosted other students, forcibly pinning buttons on them regardless of whether they wanted to wear them.¹²¹

While the *Tinker* Court articulated its own theoretical rationale for the protection of students’ First Amendment rights, it lifted its doctrinal standard from these two cases without meaningful elaboration.¹²² Thus, when the *Tinker* Court considered speech that creates “collision with the rights of others,” it did so in the context of *Blackwell* and the Fifth Circuit’s use of the phrase to refer to physically confrontational speech. Even so, a persuasive argument can be made that the Court did not intend the students’ rights language to pertain only to situations where the speech infringes on a student’s “right to be free from direct physical confrontation,” as Harper argued on appeal.¹²³ Indeed, because physically confrontational speech crosses the line into conduct, or at least mixes expressive and nonexpressive elements, school officials would not need to overcome the First Amendment’s special protection in order to prohibit it.¹²⁴ Because school officials could prohibit this conduct under general First Amendment doctrine without an express exception to *Tinker*, the students’ rights language arguably does not refer merely to a right to be free from physical confrontation.¹²⁵

Yet Justice Fortas’s concurring opinion to a denial of certiorari less than a month after *Tinker* provides some inferential evidence that he intended the students’ rights language to refer to precisely this right.¹²⁶ In this

¹²⁰ *Id.*

¹²¹ *Id.* at 751.

¹²² While the Court did not further elaborate on the Fifth Circuit’s holdings to articulate its independent assessment of why these alone should be the only conditions that permit regulation of student speech, it did clarify the point that school officials may lawfully regulate student speech prior to an actual disruption to the work of the schools. *Tinker*, 393 U.S. at 514. The Fifth Circuit’s decisions evaluated the regulations from an ex post perspective, determining whether they were reasonable based on the actual disruption (or lack of disruption) that the speech caused. See *Burnside*, 363 F.2d at 748–49; *Blackwell*, 363 F.2d at 753–54. Indeed, the *Burnside* opinion suggests that the restriction would have been reasonable only if “decorum had been . . . disturbed by the presence of the ‘freedom buttons.’” 363 F.2d at 748. The Supreme Court clarified that school officials need not wait for the disruption to occur if they may reasonably forecast that it will. *Tinker*, 393 U.S. at 514.

¹²³ Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

¹²⁴ See *Sill v. Pa. State Univ.*, 318 F. Supp. 608, 616 (M.D. Pa. 1970) (“Consequently, when ‘speech’ and ‘non-speech’ elements are combined in the same course of conduct, the non-speech element can justify incidental regulations on First Amendment freedoms.” (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968))), *aff’d*, 462 F.2d 463 (3d Cir. 1972).

¹²⁵ Moreover, based on the principle that each exception announced by the *Tinker* Court must except different kinds of speech in order to avoid rendering one standard redundant, *see infra* Part III.A.2, the students’ rights language cannot refer merely to circumstances where students are physically accosted as part of the speech. This speech would easily qualify as an interference with the work of the schools and therefore would be independently proscribable under the substantial disruption standard.

¹²⁶ See *Barker v. Hardway*, 394 U.S. 905, 905 (1969) (Fortas, J., concurring).

opinion, Justice Fortas concluded that college officials did not violate several students’ First Amendment rights by suspending them for participating in a “violent demonstration.”¹²⁷ Justice Fortas drew a direct comparison to *Tinker*. Unlike the students in *Tinker*, the suspended students engaged in an “aggressive and violent demonstration” that amounted to a “violent and destructive *interference with the rights of others*.”¹²⁸ By explicitly invoking the students’ rights language here, Justice Fortas suggested that he understood the students’ rights language to recognize a right to be free from physically confrontational speech.¹²⁹

Of course, this does not suggest that Justice Fortas understood the students’ rights language as protecting only this right. But it does suggest that he understood the students’ rights language to exclude certain student speech from First Amendment protection, even though such speech would already be excluded under general First Amendment principles in any other context.¹³⁰

2. *The Structure: Students’ Rights Versus Substantial Disruption.*—A comparison of the students’ rights standard to its correlate, the substantial disruption standard, similarly refutes the Ninth Circuit’s reading of the students’ rights language in *Harper*. Because the Supreme Court included both standards as alternative bases for permitting censorship of student speech,¹³¹ the two standards cannot protect identical interests without rendering one exception redundant and meaningless. While this principle does not resolve the meaning of the students’ rights language, it nonetheless excludes the interpretation suggested by *Harper*.

As described above, *Harper* arguably interprets the students’ rights language to permit schools to restrict offensive speech based on its potential to inflict educational harm indirectly through the psychological harm it inflicts directly.¹³² Yet the substantial disruption standard itself accomplishes this goal: any student speech that materially and substantially interferes with the “work of the schools” can be restricted.¹³³ *Tinker* itself does not expressly require a physical disruption or threat of violence to constitute a substantial disruption. Rather, as the Third Circuit noted in *Saxe v. State College Area School District*, speech that substantially interferes with an individual student’s education may constitute a material and substantial dis-

¹²⁷ *Id.*; see also *Barker v. Hardway*, 283 F. Supp. 228, 232–33 (S.D. W. Va. 1968) (describing the violent nature of the protest), *aff’d*, 399 F.2d 638 (4th Cir. 1968).

¹²⁸ *Barker*, 394 U.S. at 905 (Fortas, J., concurring) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

¹²⁹ See *id.*

¹³⁰ For a discussion of why Justice Fortas’s apparently redundant understanding of the students’ rights language may make sense, see *infra* Part III.B.

¹³¹ *Tinker*, 393 U.S. at 513.

¹³² See *supra* notes 94–99 and accompanying text.

¹³³ *Tinker*, 393 U.S. at 508.

ruption of the work of the schools: “The primary function of a public school is to educate its students; conduct that substantially interferes with that mission is, almost by definition, disruptive to the school environment.”¹³⁴

Unlike the Third Circuit, however, some have suggested that *Tinker*’s material disruption standard requires some kind of physical disruption.¹³⁵ Indeed, Justice Black’s statement in dissent that the armbands “did divert students’ minds from their regular lessons” might suggest that the *Tinker* Court did not consider nonphysical interference to be sufficient.¹³⁶ But *Tinker* was not necessarily this myopic. While Justice Black described the armbands as distracting, the majority found that they “caused discussion outside of the classrooms, but no interference with work and no disorder.”¹³⁷ Instead the majority perceived the armbands’ effect on other students as a positive and educational one,¹³⁸ rather than one that amounted to a material and substantial interference with the work of the schools.¹³⁹ The Court described “personal intercommunication among the students,” such as that achieved by the armbands, as “not only an inevitable part of the process of attending school” but also “an important part of the educational process.”¹⁴⁰ Thus, to the extent that the armbands were a diversion, the majority embraced it as part of the salutary and necessary “personal intercommunication among the students”¹⁴¹ that makes education more than just the “regular lessons”¹⁴² the state chooses to teach. In other words, the *Tinker* majority concluded that the students’ speech promoted, rather than interfered with, the work of the schools. That the Court reached this conclusion in *Tinker*’s factual context does not discount then-Judge Alito’s conclusion in *Saxe* that

¹³⁴ 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.).

¹³⁵ See, e.g., Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 99 (1996) (“The *Tinker* Court apparently believed that only a palpable disruption—a physical disturbance or disorder—could affect the school’s function.”).

¹³⁶ *Tinker*, 393 U.S. at 518 (Black, J., dissenting).

¹³⁷ *Id.* at 514 (majority opinion).

¹³⁸ The conflict between the educational philosophies of the majority and Justice Black on this point is stark. While the majority embraced student expression as “an important part of the educational process,” *id.* at 512, Justice Black denied this role of student expression as part of the educational process: “It may be that the Nation has outworn the old-fashioned slogan that ‘children are to be seen not heard,’ but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.” *Id.* at 522 (Black, J., dissenting); see Chemerinsky, *supra* note 37, at 530–35 (contrasting Justice Fortas’s and Justice Black’s philosophies of education and the role of student expression).

¹³⁹ The Court may also have rejected upholding the regulation based on its distracting effect because evidence suggested that the principals banned the students’ expression not for their disruptive potential but instead based on the principals’ own “urgent wish to avoid the controversy which might result from the expression.” *Tinker*, 393 U.S. at 509–10. The Court at least intimates that the school officials’ proffered explanation is a disingenuous *ex post* justification for a one-sided, viewpoint-discriminatory prohibition of expression. *Id.* at 510–11.

¹⁴⁰ *Id.* at 512.

¹⁴¹ *Id.*

¹⁴² *Id.* at 518 (Black, J., dissenting).

some student expression can cause a material and substantial interference with the work of the schools via nonphysical means.¹⁴³

If *Tinker*'s substantial disruption standard permits schools to regulate speech whenever it materially and substantially interferes with the work of the schools (and “work of the schools” is understood to mean educating students), and if *Harper* attempts merely to create a protection for students' opportunity to learn, then *Harper*'s open-ended reading of the students' rights language is unnecessary.¹⁴⁴ The substantial disruption language itself already fills the space that *Harper* suggests the students' rights language is meant to fill. And, arguably, it is on sounder constitutional ground when it does so. Whereas *Harper* finds the school's prerogative to censor in order to protect another student's educational opportunity in that student's asserted right to education (the purported “right” under the students' rights language),¹⁴⁵ the substantial disruption standard finds the school's prerogative in the state's interest in establishing an effective educational system.¹⁴⁶ The substantial disruption approach may be normatively attractive if the goal is to protect educational opportunity for *all* students. Because the Supreme Court has never recognized a constitutional “right to education”¹⁴⁷ but has routinely recognized the state's interest and authority in establishing an effective system of public education,¹⁴⁸ the substantial disruption standard provides a sounder constitutional basis for achieving this goal.

¹⁴³ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

¹⁴⁴ See Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 630 (2002) (“To the extent students have a right to receive an education, the *Tinker* disruption standard provides a sufficient remedy.” (footnote omitted)).

¹⁴⁵ See *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (justifying the suppression of offensive speech targeted at a minority's “core identifying characteristic[s]” because it “interfere[s] with [minority students'] opportunity to learn”), *vacated as moot*, 127 S. Ct. 1484 (2007).

¹⁴⁶ See *Tinker*, 393 U.S. at 507 (“[E]mphasiz[ing] the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”).

¹⁴⁷ The Supreme Court has suggested that substantive due process does not protect an individual right to education. See *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1200 n.3 (10th Cir. 2003) (“While the Supreme Court has made clear the right to a public education is not a fundamental right, the Supreme Court has not decided whether a state created property right like the right to a public education triggers substantive due process guarantees.” (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 37, 40 (1973))); see also *Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) (“[T]he right to an education [is] not guaranteed, either explicitly or implicitly, by the Constitution, and therefore could not constitute a fundamental right.” (citing *Rodriguez*, 411 U.S. at 35–37)).

The state's interest in educating its citizens and in doing so with broad discretion, on the other hand, is well established. See, e.g., *Tinker*, 393 U.S. at 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”).

¹⁴⁸ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278–79 (1988); *Tinker*, 393 U.S. at 507; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

The substantial disruption standard also provides a coherent limiting principle, unlike the arbitrary one *Harper* reads into the students' rights language. While *Harper* defines the scope of proscribable speech through the requirement that the speech be directed at a minority student on the basis of a core identifying characteristic,¹⁴⁹ the substantial disruption standard differentiates speech not on the basis of its target or its content, but only on its educationally disruptive effect. Moreover, because *Tinker's* substantial disruption language requires that the educational interference be material and substantial, it differentiates and protects student speech that might indeed be offensive to some but that does not seriously compromise a school's educational purpose or other students' opportunities to learn.

Under the substantial disruption standard it would be difficult, but not impossible, for a school to restrict merely psychologically harmful speech. To satisfy the substantial disruption standard, a school must "reasonably believe" that the speech poses a "threat of substantial disruption" before prohibiting it.¹⁵⁰ In the case of *Harper*, for instance, there is reason to question whether the t-shirt actually would create a substantial disruption.¹⁵¹ The shirt's likelihood of inflicting psychological harm and of that harm then escalating into educational harm is unclear.¹⁵² But if school officials can suppress speech for its psychologically-thus-educationally disruptive impact, they should at least be required to show that they reasonably believed it would have such an impact. Otherwise the law invites them to use their power for illicit ends.

3. *The Theoretical Bases of Tinker and the "Hazardous Freedom" of Student Speech.*—*Tinker's* theoretical premises for protecting students' First Amendment rights provide the most meaningful constraint on the students' rights language. Though *Tinker's* theoretical framework cannot define the students' rights language, it resolutely excludes the interpretation *Harper* suggests. Two of *Tinker's* theoretical premises are especially relevant: first,

¹⁴⁹ *Harper*, 445 F.3d at 1178.

¹⁵⁰ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

¹⁵¹ I will not attempt to answer the question whether *Harper* itself could be justified on this rationale since—both because of the case's procedural context and the Ninth Circuit's reliance on general academic studies rather than specific testimony of the school officials—the record does not provide sufficient facts to determine the disruptive impact of Harper's speech.

¹⁵² This is particularly true given the supportive environment the school created by the Day of Silence the day prior. As Judge Kozinski notes in his dissent, "[c]onfronting—and refuting—such views in a public forum may well empower homosexual students, contributing to their self-esteem." *Harper*, 445 F.3d at 1200 (Kozinski, J., dissenting). Moreover, if a school official suppresses speech because he presumes it to be psychologically harmful to minority students, such action itself may undermine minority students' dignity. Such action may communicate to minority students that their identities are defined exclusively by their minority status. See, e.g., *Barber ex rel. Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 857 (E.D. Mich. 2003) ("[I]t is improper and most likely detrimental to our society for government officials, particularly school officials, to assume that members of a particular ethnic group will have monolithic views on a subject.").

its recognition that the First Amendment embraces risky speech, and its conclusion that this characteristic is fundamental to the First Amendment’s democratic value;¹⁵³ and second, its regard for the “fixed star” the Court established in *Barnette* that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion,”¹⁵⁴ even when those prescriptions are aimed at public school students.¹⁵⁵ These premises reflect general First Amendment jurisprudence requiring a “compelling interest” justification for speech regulation and a principle of viewpoint neutrality, although *Tinker* modifies both in recognition of the “special characteristics of the school environment.”¹⁵⁶

First, *Tinker* recognizes that student speech, like all speech, creates risk. When that risk is only an “undifferentiated fear or apprehension of disturbance,” however, “our Constitution says we must take [it].”¹⁵⁷ Not only must we tolerate this risk, *Tinker* tells us, we must embrace it, as this “sort of hazardous freedom . . . is the basis of our national strength and of the independence and vigor of Americans.”¹⁵⁸

From this premise, the Court derived its material and substantial interference standard and set out the cost-benefit analysis for us: the risks and potential costs that attend student speech are worth bearing unless the school can “reasonably . . . forecast” that the harm (in the form of a “substantial[] interfere[nce] with the work of the school or impinge[ment] upon the rights of other students”) will occur.¹⁵⁹ Whatever the students’ rights language means, its contours must reflect this solicitude for the “hazardous freedom” the First Amendment protects.

The reason why the First Amendment cannot permit casual repression of student speech is bound up with the second theoretical premise of *Tinker*: school officials, as an arm of the state, cannot repress student speech merely because they disagree with its content or because it expresses “feelings with

¹⁵³ *Tinker*, 393 U.S. at 508.

¹⁵⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁵⁵ *Tinker*, 393 U.S. at 511 (“In our system, 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.”).

¹⁵⁶ *Id.* at 506. *Tinker* modifies the typical compelling interest requirement to the extent that it essentially defines what will constitute a compelling interest, rather than leaving that question open to school officials and the courts that subsequently evaluate their actions. It modifies the general viewpoint-neutrality principle by suggesting that when the state has this compelling interest in regulating student speech (as defined by *Tinker*), some viewpoint regulation may be permissible. *See id.* at 511 (“Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”).

¹⁵⁷ *Id.* at 508.

¹⁵⁸ *Id.* at 508–09.

¹⁵⁹ *Id.* at 509.

which they do not wish to contend.”¹⁶⁰ If school officials could invoke the specter of “harm” as a sufficient basis for restricting student speech, this second theoretical premise would be effectively nullified: supposed harm would be the “open sesame” that permits school officials to regulate any and all speech with which they do not wish to contend.

Viewed in light of these premises, the Ninth Circuit’s interpretation of the students’ rights language fails. It demonstrates neither an appropriate level of solicitude for the “hazardous freedom” of student speech, nor an appropriate level of suspicion that school officials may attempt to repress speech with which they do not wish to contend. As discussed above,¹⁶¹ the Ninth Circuit interpreted the students’ rights language to protect minority students’ “right” to be free from “verbal assaults on the basis of a core identifying characteristic”¹⁶² and suggested that it might also protect nonminority students from “some verbal assaults [based] on the[ir] core characteristics,” though it did not decide that question.¹⁶³

The ambiguous “right” the court protects¹⁶⁴ suggests that *Harper*’s students’ rights language does not respect either of *Tinker*’s theoretical premises. First, even if the students’ rights language protects a student from psychological or educational harm (which, I have suggested, is far from clear), *Harper* would not require that school officials “reasonably . . . forecast” that specific student speech will inflict those harms before they regulate it.¹⁶⁵ Instead, the court’s blanket rule presumes that every offensive comment pertaining to a minority student’s “core identifying characteristic” inflicts harm and therefore is proscribable. Such an approach directly flouts *Tinker*’s theoretical premise that speech cannot be restricted on the basis of “undifferentiated fear or apprehension of disturbance.”¹⁶⁶

Second, the fact that the right *Harper* protects is unclear makes suspect the motivation behind the Ninth Circuit’s interpretation of the students’ rights language. If the right is an educational right, why not announce the right of every student to be free from student speech that will interfere with his or her educational performance? Alternatively, if the right is a psychological right, why should only minority students be free from feelings of self-doubt? The *Harper* court may presume that minority students are affected more by such speech because of the unequal treatment minorities have endured historically and the ongoing effects of racism, homophobia,

¹⁶⁰ *Id.* at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

¹⁶¹ See *supra* notes 90–93 and accompanying text.

¹⁶² *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

¹⁶³ *Id.* at 1183 n.28.

¹⁶⁴ See *supra* notes 94–99 and accompanying text.

¹⁶⁵ *Tinker*, 393 U.S. at 514.

¹⁶⁶ *Id.* at 508.

and ethnocentrism in American society. Under this framework, this historical perspective could influence the evaluation of whether school officials could reasonably forecast the harm. But if educational or psychological harm is the underlying problem, it is incoherent to extend the protection only to minority students when nonminority students may experience the same harms from offensive speech. The selectively inclusive nature of the “right” the Ninth Circuit recognizes reveals that *Harper* ultimately sanctions that which *Tinker* expressly prohibits: school officials restricting speech because it expresses “feelings with which they do not wish to contend.”¹⁶⁷

B. A Suggested Approach: The Students’ Rights Language as a General First Amendment Savings Clause

The previous Section discredits any interpretation of the students’ rights language that authorizes schools to restrict student speech purely because of its presumed psychological impact. This Section offers an alternate understanding of the students’ rights language that reaches the same conclusion.

While courts that have considered the students’ rights language agree that its meaning is unclear,¹⁶⁸ and the Supreme Court has avoided explicating it,¹⁶⁹ the Eighth Circuit developed its own interpretation of the students’ rights language in *Kuhlmeier v. Hazelwood School District*.¹⁷⁰ This interpretation of the students’ rights language authorizes regulation of only “that speech that could result in tort liability for the school” because “[a]ny yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.”¹⁷¹

While this approach rightly demonstrates sensitivity to the students’ rights language’s potential to subsume *Tinker*’s basic speech-protective principle, it presents at least two troublesome implications.¹⁷² First, this ap-

¹⁶⁷ *Id.* at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

¹⁶⁸ See *supra* note 101.

¹⁶⁹ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (finding that because an independent standard governed the student censorship at issue, the Court need not consider the correct interpretation of the students’ rights language).

¹⁷⁰ *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375–76 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260 (1988). This interpretation went unreviewed by the Supreme Court majority on appeal, see *Hazelwood*, 484 U.S. at 273, though the dissenting Justices endorsed it, see *id.* at 289–90 (Brennan, J., dissenting).

¹⁷¹ *Hazelwood*, 795 F.2d at 1376 (“[Because no tort action could have resulted from publication of the censored articles] schools officials were not justified in censoring the two articles based on the *Tinker* ‘invasion of the rights of others’ test.”).

¹⁷² For another critique of the Eighth Circuit’s tort liability standard, see Martha McCarthy, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52, 67 (2002). Professor McCarthy concludes that the students’ rights language should be construed as encompassing

proach implicitly accepts that the scope of the First Amendment's protection of student speech will vary depending on the state in which the student finds himself.¹⁷³ Second, apart from the concern that such an approach would result in unequal treatment of constitutionally protected rights,¹⁷⁴ such an approach also implicitly provides states the opportunity to shave away students' First Amendment rights by passing laws on the substantive rights of other students. Thus, following this understanding of the students' rights language would mean a state could "effectively overrule *Tinker* by granting students an affirmative right not to be offended."¹⁷⁵

In his dissent in *Harper*, Judge Kozinski recommends what appears to be a refinement of the tort liability understanding of the students' rights language that avoids these two problems. He suggests that the students' rights language is meant only to refer to "traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established."¹⁷⁶ This privileging of "traditional rights" may well be troublesome inasmuch as some rights we now understand as fundamental have not always been interpreted as such.¹⁷⁷ But the interpretation he suggests may be more palatable and ultimately more useful if it is understood as a distinction between established and nonestablished rights rather than traditional and nontraditional rights.

At first glance, this may appear to be a nondistinction, and indeed it is if "traditional" and "established" are mere synonyms. Rather than understand Judge Kozinski's interpretation as privileging "traditional" rights, though, we can understand it as suggesting that the Court meant only to incorporate general First Amendment jurisprudence, from outside the context of student speech, into the *Tinker* decision. *Tinker*'s students' rights language, then, would represent a kind of First Amendment "savings clause" to

"a more lenient standard" than the independent tort standard announced by the Eighth Circuit "given the vulnerable captive audience involved and the purpose of public education." *Id.*

¹⁷³ Cf. *Bystrom ex rel. Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 758 (8th Cir. 1987) (Henley, J., concurring) ("First [A]mendment protection is national in scope and should not be made dependent on the vagaries of state tort law."). Indeed, the Supreme Court in *New York Times Co. v. Sullivan* recognized that state law cannot punish speech in a manner that is inconsistent with the First Amendment. 376 U.S. 254, 283 (1964).

¹⁷⁴ While it is "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), those experiments, of course, cannot interfere with the protections afforded individuals by the Bill of Rights, as applied to the states via the Fourteenth Amendment.

¹⁷⁵ *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated as moot*, 127 S. Ct. 1484 (2007).

¹⁷⁶ *Id.*

¹⁷⁷ Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

Tinker,¹⁷⁸ indicating that its mainstay substantial disruption standard should not be read to modify or impair the application of established First Amendment doctrine to student speech.

Such an interpretation makes sense for three reasons. First, because the *Tinker* opinion was so emphatic about the sanctity of student speech rights and the relevance of the “special characteristics of the school environment” to their interpretation,¹⁷⁹ the Court needed to attach the proviso that general First Amendment doctrine applies when it is relevant. In other words, because the Court articulated the *only* compelling interest that would justify restriction of student speech,¹⁸⁰ it needed to clarify that to the extent generally recognized limitations of First Amendment rights depended on other compelling state interests, they were not rendered inoperative in the school setting.

Second, interpreting the students’ rights language as a savings clause also helps to explain why the Supreme Court only periodically included it throughout *Tinker*.¹⁸¹ If it operates only to incorporate established First Amendment jurisprudence into the school context, the students’ rights language was not a fundamental part of *Tinker*’s new standard for regulating student speech. Its inclusion in every statement of the new rule would therefore seem less necessary.

Moreover, the savings clause interpretation coheres with Justice Fortas’s explanation of a denial of certiorari immediately following *Tinker* in terms of the students’ rights language. In that opinion Justice Fortas described students’ physically confrontational and violent speech as constitutionally proscribable “*interference with the rights of others.*”¹⁸² While this speech clearly crossed the line into conduct and therefore could have been

¹⁷⁸ A savings clause is “[a] statutory provision . . . generally used in a repealing act to preserve rights and claims that would otherwise be lost.” BLACK’S LAW DICTIONARY 1344 (7th ed. 1999). By describing the students’ rights language as a “savings clause,” I mean to suggest that it operates to preserve audience rights that are established by general First Amendment jurisprudence, even though they may rest on a governmental interest other than the state’s interest in educating its youth. For instance, in the same year as *Tinker*, the Court articulated the state’s authority to protect listeners from “true threats” and from advocacy of violence or illegal conduct that threatens imminent lawless conduct. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (recognizing a distinction between true threats and constitutionally protected speech); *accord* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (explaining that true threats are excluded from First Amendment protection in part to “protect individuals from the fear of violence”); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment does not protect advocacy of violence or illegal conduct when it is directed to, and likely to produce, imminent lawless conduct).

¹⁷⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The Supreme Court has continued to emphasize the “special characteristics” of schools in understanding the scope of students’ First Amendment rights. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

¹⁸⁰ *See supra* notes 156–59 and accompanying text.

¹⁸¹ *See supra* note 104 and accompanying text (describing the Court’s inconsistent inclusion of the students’ rights language in its various formulations of the standard it announced).

¹⁸² *Barker v. Hardway*, 394 U.S. 905, 905 (1969) (Fortas, J., concurring) (emphasis added) (citing *Tinker*, 393 U.S. 503).

regulated under contemporary First Amendment jurisprudence,¹⁸³ Justice Fortas only cited *Tinker*,¹⁸⁴ suggesting that in his mind, *Tinker* was the keystone precedent for all restrictions of student speech.

Under this interpretation, the students' rights language would not provide an independent basis to regulate Harper's t-shirt because general First Amendment doctrine does not permit speech to be regulated simply because of its psychological impact on the audience.¹⁸⁵ If anything, established First Amendment doctrine suggests the opposite: official regulation that singles out and censors speech purely for the viewpoint it expresses is considered one of the most insidious violations of the First Amendment.¹⁸⁶ In addition to this general doctrine of viewpoint neutrality, established First Amendment law does not permit the state to censor speech because of a private citizen's adverse reaction to it.¹⁸⁷ Thus, if the students' rights language operates to incorporate established First Amendment doctrine into the school context as this Section argues, this language not only fails to justify the school officials' suppression of Harper's t-shirt, it provides an independent reason to distrust such suppression.

IV. THE BIGGER QUESTION: SHOULD SCHOOLS BE PERMITTED TO BAN CONTROVERSIAL STUDENT SPEECH?

Part III answers only the doctrinal question of what *Tinker*'s students' rights language means; this Part addresses the questions that ultimately are at the heart of *Harper*. Regardless of what the students' rights language means, what *should* it mean? If it does not protect students from being "forced to endure speech that they find offensive and demeaning"¹⁸⁸—as Part III argues—should it?

¹⁸³ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (establishing the standard under which the state may constitutionally regulate conduct that contains expressive elements).

¹⁸⁴ *Barker*, 394 U.S. at 905 (Fortas, J., concurring).

¹⁸⁵ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down a law allowing censorship of Internet speech simply because a minor might be in the audience).

¹⁸⁶ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹⁸⁷ In other words, the First Amendment does not exclude speech on the basis of a "heckler's veto." See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (refusing to allow an objecting parent to silence students' voluntary recitation of the Pledge of Allegiance because doing so would recognize a "heckler's veto").

¹⁸⁸ *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1207 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated as moot*, 127 S. Ct. 1484 (2007). While he dissented vigorously from the majority opinion in *Harper*, Judge Kozinski ultimately expressed sympathy for the court's desire to protect students from certain controversial speech that they find "offensive and demeaning":

Perhaps school authorities should have greater latitude to control student speech than allowed them by Justice Fortas' Vietnam-era opinion in *Tinker*. Perhaps Justice Black's concerns, expressed in his *Tinker* dissent, should have been given more weight. Perhaps the narrow exceptions of *Tinker* should be broadened and multiplied. Perhaps *Tinker* should be overruled.

Id. (citation omitted). The analysis in this Part looks to the theories behind students' free speech rights to resolve these questions.

This Part answers these questions in three steps. First, Section A explores why, as a theoretical matter, students enjoy free speech rights at all. Section B examines the inculcative function of public education in a democratic society and considers whether the state's interest in instilling "fundamental values" outweighs the theoretical value of student speech. Finally, Section C concludes by arguing that the law should hesitate before compromising student free speech rights because of their importance in cultivating and defending a democratic society.

A. *Why Protect Student Speech?*

Although courts and commentators disagree on the theoretical values that underlie the First Amendment, explanations of student free speech rights cluster around certain theories.¹⁸⁹ These theories include both negative and positive explanations; the former regard the First Amendment as a protective device *against* governmental overreaching, and the latter regard the First Amendment as a catalytic means *for* individual self-realization, self-government, and autonomy.¹⁹⁰

Negative conceptions of the First Amendment often explain students' free speech rights as a restraint on the state, preventing it from accreting the kind of power over individuals that would undermine the democratic process of self-determination.¹⁹¹ If the state can gain access to the individual's mind by controlling his education, it also can affect the democratic deci-

¹⁸⁹ Compare, e.g., Chemerinsky, *supra* note 37, at 545 (concluding that students must have First Amendment rights because "democratic norms cannot be taught in an institution that suppresses democratic values"), and Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1648 (1986) (same), with Redish & Finnerty, *supra* note 39, at 67–68 (arguing that students' First Amendment rights are necessary to prevent improper state indoctrination and to promote the development of individual "identity free from state interference"), and Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 653, 655 (2005) (same).

¹⁹⁰ Frederick Schauer provides a thorough articulation of the distinction between positive and negative theories of the First Amendment. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY*, 81–86 (1982). He proposes a negative theory himself, suggesting that the special protection the First Amendment gives to speech over conduct is because of the greater harms that come with its regulation. *Id.*

¹⁹¹ See, e.g., *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source."); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education to official guardians . . . [T]heir ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.").

sions that individual makes in the future.¹⁹² The danger of state-run education, then, is first its potential to be an instrument for the state to supplant an individual's independent thoughts with those preferred by the state or to prevent those independent thoughts from developing at all.¹⁹³ Second, state-run education has the potential to affect future substantive political debates. If specific viewpoints are excluded from public schools because they are incompatible with the "community values" that schools attempt to foster, "debate on certain subjects can be skewed to one side . . . [,] and dissent can be removed from future generations."¹⁹⁴ The Supreme Court's protection of student free speech has often reflected an awareness that public education gives the state an opportunity to influence individual thought and thereby preempt future substantive political debates.¹⁹⁵

Others have focused on the First Amendment in public schools for its positive value, suggesting that students must be able to exercise First Amendment rights in school because "democratic norms cannot be taught in an institution that suppresses democratic values."¹⁹⁶ The Supreme Court itself has adopted this approach at times.¹⁹⁷ This perspective emphasizes the positive values associated with students' First Amendment rights, viewing those rights as a crucial component in students' education and their development as self-governing individuals capable of participating in our democratic system.

From the positive perspective, any evaluation of students' First Amendment rights must avoid the theoretical pitfall into which the *Harper* court stumbled. *Harper*'s majority opinion rests on a one-sided conception

¹⁹² For a response to the criticism that this smacks of hyperbole, see *infra* note 214 and accompanying text. Of course, with any state-run educational system, a state will invariably have influence over individuals' minds to the extent that it controls what is taught and how. Such influence is inherent in state-run education. The effects of this influence, however, may be mitigated when students retain some ability to express their own opinions as well.

¹⁹³ See Redish & Finnerty, *supra* note 39, at 67 ("Such thought control threatens the democratic values embodied in the First Amendment [It] is inconsistent with . . . free thought and mental autonomy [And] by selectively instilling in students a predetermined set of normative values and empirical assumptions the state effectively values certain viewpoints over others.").

¹⁹⁴ Justin T. Peterson, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 2005 MICH. ST. L. REV. 931, 954–55.

¹⁹⁵ See *supra* note 179.

¹⁹⁶ Levin, *supra* note 189, at 1648; see also *Rivera v. E. Otero Sch. Dist. R-1*, 721 F. Supp. 1189, 1194 (D. Colo. 1989) ("[T]he mission of public education is preparation for citizenship. High school students . . . must develop the ability to understand and comment on the society in which they live and to develop their own sets of values and beliefs. A school policy completely preventing students from engaging other students in open discourse on issues they deem important cripples them as contributing citizens [S]uch inhibitions on individual development defeat the very purpose of public education in secondary schools.").

¹⁹⁷ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [schools] are educating the young for citizenship is reason for the scrupulous protection of Constitutional freedoms . . . if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

of student speech, emphasizing only the tension that exists between students’ free speech rights and the educational process. For example, the opinion notes that a “balance must be met between the First Amendment rights of students and preservation of the educational process.”¹⁹⁸ But in pitting student free speech rights against the goal of effective education, the court fails to acknowledge a critical premise of positive theories of student free speech: student free speech rights themselves are a crucial component of effective education.¹⁹⁹ While it is clear that student free speech and student learning may occasionally conflict, the Supreme Court in *Tinker* and elsewhere has adopted a positive theory of student free speech, recognizing it as necessary if schools are to achieve their educational and democratic missions.²⁰⁰ Thus, a pure “education v. free speech” binary like the one adopted in *Harper* ignores the “education *via* free speech” paradigm underlying the very existence of student free speech rights in the first place. This paradigm must be given substantial consideration in evaluating whether and how *Tinker* should be revised.

B. Public Education and the Inculcation of “Fundamental Values”

Contrary to First Amendment theories that value student speech as a necessary element in a democratic society is a theory of public education that values school inculcation of “fundamental values.” This theory views one of public education’s paramount roles as the teaching of those “fundamental values” that are central to our democratic order.²⁰¹ This theory underlies the Ninth Circuit’s decision in *Harper*: the majority endorsed the school’s action in part because Harper’s t-shirt conflicted with the school’s ability to inculcate tolerance in its students.²⁰² The importance of the

¹⁹⁸ *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1176 (9th Cir. 2006) (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001)) (internal quotation marks omitted), *vacated as moot*, 127 S. Ct. 1484 (2007).

¹⁹⁹ *See, e.g.*, *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.) (justifying student speech rights based on the eighteen-year-old voting age and the fact that “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble”); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 106–11 (1996) (describing student exercise of free speech rights as “spring training” preparing students for exercise of those rights when they are full participants in American democracy); Joseph Russomanno, *Dissent Yesterday and Today: The Tinker Case and Its Progeny*, 11 COMM. L. & POL’Y 367, 376 (2006) (“Communication between students is an important and inevitable part of the educational process.”).

²⁰⁰ *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (“[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”); *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511–13 (1969); *Barnette*, 319 U.S. at 637.

²⁰¹ *See* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 184–85 (1996).

²⁰² *See Harper*, 445 F.3d at 1186 (“[A] school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission.”).

school's inculcative role was also a major premise underlying the Supreme Court's decision in *Fraser*, which permitted the school to regulate speech when it is vulgar, lewd, and plainly offensive.²⁰³ *Morse* may also embody this theory; one way to understand *Morse* is that it sanctioned the speech restriction precisely because the speech interfered with the school's inculcation of a certain message—there, an anti-drug message.²⁰⁴

Yet, as is the case with the First Amendment generally, there is a substantial difference between regulating the manner of speech, as the school officials did in *Fraser*, and regulating the content of the speech, as the school officials did in *Harper* and would in any case in which speech is punished for the idea it conveys.²⁰⁵ If officials could suppress student speech merely because it conflicted with any “fundamental community value” a school attempts to instill in its students, they would be free to prohibit a wide array of student speech, including political speech. Students' First Amendment rights would cease to exist in any meaningful way because, by its very definition, dissent will conflict with shared community values.²⁰⁶ As a result, the only student speech that the First Amendment would protect would be that which expresses the school's own message.²⁰⁷

²⁰³ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[Public schools are charged with inculcating the] fundamental values necessary to the maintenance of a democratic political system.” (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979))) (internal quotation marks omitted).

²⁰⁴ See *supra* notes 69–74 and accompanying text.

²⁰⁵ See *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977) (“[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.”).

²⁰⁶ Lee Bollinger's theory of the First Amendment provides an alternate basis to reject sacrificing student speech to promote a community's “fundamental values.” See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986). He argues that the First Amendment's ultimate purpose is to promote a more tolerant society. *Id.* at 104–44. By forcing individuals to endure speech they find offensive, the First Amendment “seeks to induce a way of thinking,” a certain intellectual spirit of tolerance and compromise that carries over to individuals' political and personal lives. *Id.* at 140–41. His theory highlights an ironic aspect of *Harper*. While the school justified its suppression of Harper's t-shirt by its objective of promoting “tolerance of others,” it was decidedly *intolerant* in its stance toward Harper. See *Harper*, 445 F.3d at 1170–73. Not only does this offend Bollinger's theory of the First Amendment, it also exposes the bias in the school's purported justification for the censorship.

²⁰⁷ Based on this approach, school officials likely could have banned the black armbands at issue in *Tinker*. Contemporary observation suggests that dissent over foreign wars can be seen as unpatriotic and thus in conflict with a school's goal of instilling patriotic values. See, e.g., Bill Carter & Felicity Barringer, *A Nation Challenged: Speech and Expression; In Patriotic Time, Dissent Is Muted*, N.Y. TIMES, Sept. 28, 2001, at A1. Likewise, it is arguable that West Virginia could have forced students to recite the pledge of allegiance for the same reason. See *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1283 (11th Cir. 2000) (Forrester, J., dissenting in part) (“Many, however, would consider patriotism a fundamental value, yet the Court held that arguably unpatriotic speech in *Tinker* was protected by the First Amendment.”).

C. *Is "Offensiveness" a Reason to Censor Student Speech?*

Based on this understanding of the theories behind students' free speech rights and the countervailing state interest in regulating "offensive" student speech, we can now approach the question whether regulation of offensive speech is normatively attractive. This Section argues that for one practical, immediate reason and for one theoretical, prospective reason, it is not.

First, as a practical matter, even assuming that proscribing student speech that conflicts with community values is a worthy goal, empowering states to accomplish it presents pernicious implications for a democratic society. The inescapable problem with regulating offensive speech is the dilemma of who determines what is offensive and how. Boards of education are arms of the state, and as such, they are subject to the will of the majority.²⁰⁸ The First Amendment recognizes that there is no point above the fray from which the determination of "offensiveness" can be made, which is why, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox."²⁰⁹ Today, the school board might determine that speech expressing disapproval of homosexuality is offensive and contrary to the school's mission of instilling tolerance; tomorrow, the school board might determine that speech expressing dissent for the war in Iraq or opposition to President Bush is unpatriotic and contrary to the school's mission of instilling patriotism.²¹⁰

Such a result undermines the theoretical purpose for protecting student speech in the first place, regardless of whether one defines that purpose in negative or positive terms. In the first sense, permitting the majority to regulate speech by classifying it as "offensive" is a short step from permitting the state to treat students as "closed-circuit recipients of only that which the State chooses to communicate."²¹¹ As Judge Kozinski warned in his *Harper* dissent, "[h]aving public schools . . . define civic responsibility and then ban opposing points of view . . . may be an invitation to group-think."²¹² In the second sense, if externally derived notions of offensiveness restrict student speech, rather than teach students the value of their individual liberties, schools instead "teach youth to discount important principles of our government as mere platitudes."²¹³

²⁰⁸ See *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) ("The 'educational mission' of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.").

²⁰⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²¹⁰ Note that these results cannot be distinguished by the fact that the latter is political speech. The court in *Harper* expressly recognized Harper's t-shirt as political speech. 445 F.3d at 1176.

²¹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

²¹² *Harper*, 445 F.3d at 1196 n.7 (Kozinski, J., dissenting).

²¹³ *Barnette*, 319 U.S. at 637.

Second, as a theoretical matter, permitting public schools to regulate student speech purely for its offensive nature sets the stage for public education to creep from the relatively benign domain of influencing student thought into the menacing domain of controlling it. Some may consider this prediction to smack of hyperbole or paranoia. But as the state inches closer and closer to that line, incrementally extending its influence over individuals' minds in the process, those minds become more and more anesthetized to intrusions on their autonomy. To be effective, defense of individual liberty must be prophylactic.²¹⁴ The Supreme Court recognized this in *Tinker*, and the law should continue to do so now. As a result, if students' speech is to be regulated, it must be not because of its characterization as offensive and degrading but only because of its potential to create an actual and substantial educational disruption.

V. CONCLUSION

Even in the context of student speech, the "freedom to differ is not limited to things that do not matter much"; instead, it extends to "the right to differ as to things that touch the heart of the existing order."²¹⁵ When a student's dissent goes to the heart of the existing order and offends our shared community values, there is an undeniable (and understandable) instinctual desire to suppress it, particularly when we sense the speech may be hurtful to other students. Yet the First Amendment embraces the "hazardous freedom" that speech creates, knowing that even in—perhaps especially in—the school setting, that hazardous freedom is crucial to the vitality and the continuing endurance of a democratic society.

This is not to say that the free speech rights of one student should be allowed to imperil other students' education. *Tinker* recognized this writ large: its substantial disruption standard encompasses disruption to the work of the schools—educating students—in any form that this disruption may take. Thus, if school officials can reasonably anticipate that a t-shirt like that worn by Chase Harper would substantially disrupt and interfere with the school's ability to achieve its educational purpose, they should have the authority to ban it. Granting the school permission to restrict speech in this manner, however, is quite different from doing so through the Ninth Circuit's interpretation of the students' rights language. While the Ninth Circuit's interpretation of the students' rights language is limited in *Harper*, the premise underlying it is unbounded.

According to the Supreme Court, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American

²¹⁴ See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 135 (1984) ("[T]he 'tyrannical concentration' of power precedes the tyrannical exercise of that power, so that the danger of concentration may not be clear to the people at the time their trusted representatives are concentrating it." (citation omitted)).

²¹⁵ *Barnette*, 319 U.S. at 642.

schools.”²¹⁶ Curtailing those rights requires due regard for what hangs in the balance. Undoubtedly, students learn more when they are in safe and secure learning environments. But the law cannot blithely permit schools to censor controversial student speech in the hopes of creating such an environment without fundamentally endangering the democratic character of public education. While students’ First Amendments rights do amount to a “hazardous freedom,” the hazards that attend curtailing those rights are even more ominous for a democratic society.

²¹⁶ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

