REBEL WITHOUT A CLAUSE: THE RIGHT "RIGHTS OF STUDENTS" IN *NIXON V. BOARD OF EDUCATION* AND THE SHADOW OF FREEDOM UNDER *HARPER V. POWAY*

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INTRODUCTION

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[1]
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> *~W. Va. Bd. of Ed. v. Barnette*

The intriguing problems surrounding free speech often involve the permanent tension between liberty and equality present in every democratic republic.[2] Hate speech regulation is an interesting aspect of that tension in American jurisprudence. The "absolutists" on the side of liberty would even defend a Nazi's right to demonstrate, lest their own speech be trampled one day beneath the boots of thought police.[3] On the other hand, some scholars critique liberty on the basis of its discriminatory impact on minorities and the historically persecuted. These critical theorists contend that speech reinforcing existing prejudices is unworthy of constitutional protection.[4]

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† Juris Doctor candidate, Ave Maria School of Law, 2008. This is written for Anna, who has just started school, and Grace, who soon will. It would not have been possible without the loving support of my wife, Michelle. I would also like to thank Ave Maria School of Law Professor Richard Myers for his insightful comments.

1. W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

2. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1848).

3. *See, e.g.*, NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 254–57 (1992).

4. *See generally* CATHARINE A. MACKINNON, ONLY WORDS 108–10 (1993) (concluding that hate speech and pornography should not be legally protected under the Constitution, and proposing that equality and freedom of expression should balance in favor of protecting the victims rather than the perpetrator of this speech); Richard Delgado, *Words that Wound: A Tort*

This Note considers the gray area between the elementary school and the university.[5] One can safely say that grade school children are still developing the faculties necessary to fully participate in the marketplace of ideas and that protecting their development is more important than ensuring robust speech.[6] On the other hand, robust speech is appropriate in the university because of its unique truth-seeking role and the maturity of postsecondary students.[7] But what about high school students? Do they need to be protected from speech like "Be ashamed, our school has embraced what God has condemned . . . Homosexuality is shameful—Romans 1:27"?[8]

Although the Ninth Circuit's *Harper v. Poway* decision was eventually vacated by the Supreme Court,[9] the rule it articulated raises several fundamental questions when contrasted to other cases, such as *Nixon v. Board of Education*.[10] An adequate analysis of these cases must begin by examining which normative approach is more

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Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 134 (1982) (arguing for a tort cause of action for racial insults); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989) (arguing that racist speech is not remedied by an absolutist first amendment position).

5. *Compare* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007), *and* Zamecnik v. Indian Prairie Sch. Dist., No. 07 C 1586, 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. Apr. 17, 2007), *with* Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001), *and* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005).

6. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 202, 214 (3d Cir. 2001); Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996).

7. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 853–54, 863 (E.D. Mich. 1989). Accordingly, in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, the District Court flatly stated that "[c]ontent-based prohibitions such as that in the UW Rule [which targeted virulent hate speech on college campuses] however well intended, simply cannot survive the screening which our Constitution demands." UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991).

8. *Harper*, 445 F.3d at 1171.

9. The Ninth Circuit considered an interlocutory appeal from a motion to enjoin the Poway Unified School District from further invading Tyler Chase Harper and his sister's right to free speech. *Harper*, 445 F.3d at 1171; 28 U.S.C. § 1291(a)(1) (2000). The three-judge panel affirmed the district court's decision to deny the injunction because the panel predicted success on the merits was unlikely based on a novel reading of the Supreme Court's school speech doctrine. *Harper*, 445 F.3d at 1170–71. Although *Harper*'s approach was vacated for mootness when Chase Harper graduated and is therefore non-binding, it represents an interesting and problematic view of free speech that needs to be addressed. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007). Just weeks after the Supreme Court vacated *Harper*, a high school student in Naperville, Illinois, was not permitted to wear a t-shirt similar to Chase Harper's, although without the religious message. *Zamecnik*, 2007 U.S. Dist. LEXIS 28172, at *18; Lisa Fedorowicz, *Teen Who Wants to Wear Anti-Gay T-Shirt Takes Battle to Court*, CHI. SUN-TIMES, Mar. 22, 2007, at A2.

10. 383 F. Supp. 2d 965 (S.D. Ohio 2005); *see* other cases cited *supra* note 5.

faithful to the Constitution and weighing the reasons for restricting Harper's speech against the reasons for allowing it.[11] A resolution of these conflicting circuit decisions would require the Supreme Court to determine (implicitly, at least) which values are most important to the maintenance of liberal democracy.[12]

This Note argues that educating high school students to exercise and endure liberty is more important to a public high school's fundamental mission than ensuring equality or comfort. Therefore, even political speech that touches on a student's "core identifying characteristic[s] such as race, religion, or sexual orientation" should enjoy the same constitutional protection during the school day that it would in public.[13] Protecting students from psychological injury is important, but the Court has already developed a way for schools to restrict harmful, worthless speech such as racial slurs without engaging in viewpoint discrimination. The existing student speech doctrine permits schools to control slurs by considering them vulgar or plainly offensive under *Bethel School District v. Fraser*.[14] Accordingly, the Court should strike a compromise between the absolutist and critical positions. It should apply the rationale of *Chaplinsky v. New Hampshire*[15] to high schools by holding that speech bearing some value as a step to truth on matters of public concern must be allowed even when it could offend other students "in the most fundamental way."[16] Unless the offensive speech is peripheral to the political message conveyed and its offensiveness clearly outweighs its social value, the speech should be permitted.[17] While the potential for psychological injury might justify broadly

11. Of the major approaches employed to evaluate First Amendment problems, Ronald Dworkin's "moral reasoning" approach is often more useful than Judge Posner's "pragmatic adjudication" approach. This is particularly true here because the scenario is not easily resolved either by resorting to the text of the Constitution or by compiling hard data. MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 175–81 (2001).

12. *See* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS 195–216 (1987) (discussing the problem without using the word "value"). Nevertheless, the term "value" is a useful starting point for a dialogue between divergent thinkers and its common meaning will be used throughout this Note.

13. *Harper*, 445 F.3d at 1178.

14. 478 U.S. 675, 685–86 (1986).

15. 315 U.S. 568 (1942).

16. *Harper*, 445 F.3d at 1178.

17. *See infra* Part II.D.1.

protecting younger students, high schools must prepare young citizens for the privileges and perils of our free and disputatious society.

Parts I.A and I.B summarize the judicial interpretation of the free speech clause as applied in the public square and the public schools and argue that the protections and restrictions elaborated by the Court point to truth-seeking and political progress as the most important values fostered by robust public discourse. Part II compares the student speech cases in the Circuit Courts of Appeals and argues that the Supreme Court should take up the issue of hate speech in the classroom again and apply the approach of *Nixon v. Board of Education* rather than the Ninth Circuit's approach in *Harper v. Poway*, because inculcating civic spiritedness is particularly necessary in compulsory public schools in order to make meaningful public discourse a reality.[18]

I. THE VALUE OF FREE SPEECH

A. *Free Speech in the Public Square*

> Congress shall make no law . . . abridging the freedom of speech . . . .[19]
>
> ~United States Constitution

Prior courts have expanded the scope of the First Amendment's protection well beyond its original interpretation.[20] Today, the free speech clause protects expressive conduct or "symbolic speech" if it evinces an intent to convey a particularized message and is likely to be so understood by those who viewed it.[21] Free speech is so important to liberal democracy that the Court has suspended the general presumption of a statute's constitutionality when it restricts speech.[22] To pass constitutional muster, a speech restriction must be (1) a content-neutral time, place, or manner restriction that targets

18. *See* cases cited *supra* note 5.

19. U.S. CONST. amend. I.

20. *See* JOHN F. WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH 17–71 (2000) (tracing the evolution of First Amendment jurisprudence). A thorough history of the flowering (and perhaps overgrowth) of free speech is beyond the scope of this Note.

21. Texas v. Johnson, 491 U.S. 397, 404 (1989).

22. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

non-communicative aspects of the speech,[23] (2) a viewpoint-neutral restriction reasonably related to furthering the forum's purpose,[24] or (3) a restriction that can pass strict scrutiny, that is, one that is necessary to advance a crucial government interest and narrowly tailored to that end.[25]

The First Amendment applies to state governments through the Due Process Clause of the Fourteenth Amendment; thus, school boards are bound to respect free speech.[26] If a school board wants to restrict speech, however, it need not make the same showing as other state actors because the First Amendment must be read in light of the "special characteristics of the school environment."[27] Even so, the First Amendment retains its fundamental character inside the schoolhouse gates.[28] Therefore, to understand when and why a school may restrict student speech, one must first examine the Court's general free speech doctrine to see why the Constitution protects offensive and controversial speech.

1. *Justices Holmes and Brandeis on Danger and Truth*

> [T]he fitting remedy for evil counsels is good ones.[29]
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> ~*Whitney v. California*

The modern pole star of the Court's free speech doctrine appeared when Justices Holmes and Brandeis broke with the Court's earliest free speech decisions. In *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*, Justice Holmes wrote the majority opinions upholding convictions under the Espionage Act of

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23. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996).

24. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–39 (1995); Volokh, *supra* note 23, at 2444.

25. *See* Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 126 (1989); Volokh, *supra* note 23, at 2419 (arguing that "[i]f the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through a better-drafted law").

26. *See, e.g.*, W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

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

28. *Id.*

29. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

1917.[30] Holmes reasoned that the state may suppress speech that presents a "clear and present danger" of "substantive evils that Congress has a right to prevent,"[31] such as Socialist exhortations with the intent and the "tendency" or "probable effect" of obstructing the draft during a time of war.[32]

In 1918, the Act was expanded to encompass speech critical of government policy, such as "'disloyal, profane, scurrilous or abusive language about the form of government of the United States' or 'any language intended to bring the form of government of the United States . . . into contempt, scorn, contumely or disrepute . . . .'"[33] Under the expanded Act, a jury convicted a man for publishing pamphlets advocating a general strike to protest the Allied decision to send an expeditionary force to quell the Bolshevik Revolution.[34] When the Supreme Court upheld his conviction in *Abrams v. United States*, however, Justice Holmes dissented, setting forth a magnetic principle:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—*that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out*. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[35]

Although Holmes's "marketplace of ideas" has been criticized for being a pie-in-the-sky approach to law—that it wrongfully assumes that people are reasonable, will listen to minority viewpoints, and

30. Debs v. United States, 249 U.S. 211, 212, 216 (1919); Frohwerk v. United States, 249 U.S. 204, 209–10 (1919); Schenck v. United States, 249 U.S. 47, 52–53 (1919).

31. *Schenck*, 249 U.S. at 52.

32. *Debs*, 249 U.S. at 216.

33. JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 18 (1999) (quoting the Espionage Act of 1917, ch. 30, title I, § 3, 40 Stat. 219, *amended by* Act of May 16, 1918, ch. 75, 40 Stat. 553–54) (repealed 1921)).

34. Abrams v. United States, 250 U.S. 616, 616–17, 624 (1919).

35. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).

then apprehend and adhere to the truth—it expresses a viewpoint that has shaped the free speech debate to this day.[36] Political progress in the nineteenth and twentieth centuries has shown that even the oldest and most self-evident principles were open to question and change; therefore, for Holmes, skepticism became the guiding principle of free speech.[37] The majority of the Court, however, did not believe that a laissez-faire bazaar of ideas was a wise policy, and in 1925 and 1927, during the days of the first "Red Scare," the Court granted the Legislature's definition of "clear and present danger" broad deference.[38]

In *Whitney v. California*,[39] the Court's 9–0 decision to uphold the conviction of a Communist Party organizer under the California Syndicalism Act prompted Justice Brandeis to elaborate another famous defense of free speech. Although Brandeis concurred in the result, he disagreed with the rationale:

> [W]e must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.
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> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that *freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth*; [that] discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that *the greatest menace to freedom is an inert people*; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[40]

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36. *See* Fred Rodell, *Justice Holmes and His Hecklers*, 60 YALE L.J. 620, 620–24 (1951).

37. Skepticism can be taken too far, however; if there is no truth, there is no reason to protect speech in order to seek it, so protecting speech will simply become a matter of using ideology to control opinion. *See* James Gordley, *Morality and the Protection of Dissent*, 1 AVE MARIA L. REV. 127, 139 (2003) (citing ROBERT C. POST, CONSTITUTIONAL DOMAINS 157 (1995)).

38. *See* Whitney v. California, 274 U.S. 357, 369–72 (1927); Gitlow v. New York, 268 U.S. 652, 666, 668, 671 (1925); *see also* WEINSTEIN, *supra* note 33, at 21.

39. 274 U. S. 357.

40. *Id.* at 374–75 (Brandeis, J., concurring) (emphasis added).

The Court has repeatedly turned to the principle underlying Justice Holmes's dissent and Justice Brandeis's concurrence in its landmark decisions on the First Amendment. This truth-seeking principle remains the core rationale for limiting the state's power to restrict speech, even in public schools.

2. Chaplinsky *and the Value of Errant Speech as a Step to Truth*

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[41]
>
> ~*Olmstead v. United States*

As the nation continued to change, the Court tried to establish a fair and workable rule that took into account the country's growing ethnic, ideological, and religious diversity.[42] The Court finally turned to Justices Holmes and Brandeis's truth-seeking principle when it decided *Chaplinsky v. New Hampshire*.[43] The case involved a Jehovah's Witness (Chaplinsky) who was convicted for violating a breach of the peace ordinance.[44] Chaplinsky was handing out pamphlets on the street when some of the townsfolk complained to the Marshal that he was "denouncing all religion as a 'racket.'"[45] The Marshal explained to the crowd that Chaplinsky's actions were legal, but warned Chaplinsky that the crowd was "getting restless."[46] Soon enough a fight erupted and the traffic officer at the scene took Chaplinsky to the police station.[47] On the way, they met the Marshal (who was en route to the "riot").[48] The Marshal repeated his earlier warning, and Chaplinsky shouted, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[49]

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41. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

42. For a more thorough history of the Court's free speech decisions, see WIRENIUS, *supra* note 20, at 17–71.

43. 315 U.S. 568 (1942). It should be noted that at this time "the country was beset with war fever, including the administration that had appointed seven of the Justices" who decided the case. WIRENIUS, *supra* note 20, at 75.

44. *Chaplinsky*, 315 U.S. at 569.

45. *Id.* at 570.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 569.

A jury found Chaplinsky guilty of violating Public Law 378, which stated: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ."[50] The Supreme Court upheld his conviction, relying on its rationale in *Cantwell v. Connecticut* that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . ."[51] In doing so, the Court announced a new standard for evaluating whether speech was protected by the First Amendment:

> There are certain *well-defined and narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—*those which by their very utterance inflict injury* or tend to incite an immediate breach of the peace. . . . [S]uch utterances are *no essential part of any exposition of ideas*, and are of *such slight social value as a step to truth* that any benefit that may be derived from them is *clearly outweighed* by the social interest in order and morality.[52]

The Court has not enthusiastically followed *Chaplinsky*'s approach since announcing it.[53] Scholars have criticized its "categorical exclusion methodology" because in practice, it threatens valuable speech.[54] *Chaplinsky* may, in fact, allow judges to inject

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50. *Id.*

51. *Id.* at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

52. *Id.* at 571–72 (emphasis added) (footnotes omitted).

53. WEINSTEIN, *supra* note 33, at 27. The town of Skokie, Illinois tried to use *Chaplinsky*'s rationale to keep the American Nazi Party from demonstrating at the town hall since the town was a predominantly Jewish suburb that was home to many Holocaust survivors; however, the Seventh Circuit rejected this interpretation and the issue did not come before the Supreme Court. Collin v. Smith, 578 F.2d 1197, 1199, 1203, 1210 (7th Cir. 1978); PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE 1–3 (1999). According to the ACLU's former executive director, Ira Glasser, the organization's position in that fight may have been their costliest defense of free speech. STRUM, *supra*, at 82–83.

54. *See* WEINSTEIN, *supra* note 33, at 27–30; WIRENIUS, *supra* note 20, at 72–90. Wirenius devoted an entire chapter to the "curse of *Chaplinsky*." WIRENIUS, *supra* note 20, at 72. He argued that the rule it established is "pure dictum" and called the five page opinion "poor workmanship." *Id.* at 77. More importantly, he attributes the messy state of First Amendment jurisprudence to the pigeonhole approach first postulated by *Chaplinsky*'s fighting words doctrine. *Id.* at 90.

their subjective notions about truth into the debate; however, it is still a reliable guide in certain forums, such as schools, where the price of being mistaken is lower and considerations other than constitutional rights bear substantial weight.[55]

3. *From* Beauharnais *to* Brandenburg*: The Demise of Group Libel*

> If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: "Another such victory and I am undone."[56]
>
> ~*Beauharnais v. Illinois*

Hate speech regulation has roots in a case decided not long after *Chaplinsky*: *Beauharnais v. Illinois*.[57] Beauharnais, the alleged president of a white power organization named the "White Circle League," distributed petitions supporting racial segregation and claiming that blacks were thieves and rapists.[58] A 5–4 Court upheld his conviction under a statute against publication of anything that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes [those citizens] to contempt, derision, or obloquy . . . ."[59] Justice Frankfurter wrote that libel, even though directed at a "designated collectivit[y]," was not "within the area of constitutionally protected speech."[60] Justice Douglas dissented, arguing that libel was historically directed at individuals, and predicted, "Today a white man stands convicted for protesting in unseemly language against our decisions . . . . Tomorrow a Negro will be haled before a court for denouncing lynch law in heated terms."[61] Indeed, history bore out his warning: by the civil rights era, "libel laws had become a powerful weapon in the

55. *But see* WIRENIUS, *supra* note 20, at 13–14. This point is taken up again *infra* Part II.D.2.

56. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (indicating that the remark was reportedly made by King Pyrrhus in 279 B.C. after defeating the Roman army at a great cost to his own—hence the term "Pyrrhic victory").

57. *Beauharnais* was decided on April 28, 1952. *Id.* at 250 (majority opinion). *Chaplinsky* was decided on March 9, 1942. *Chaplinksy*, 315 U.S. at 568.

58. *Beauharnais*, 343 U.S. at 252.

59. *Id.* at 251 (quoting Illinois Criminal Code, Ill. Rev. Stat., 1949, § 224a).

60. *Id.* at 251, 258, 266; WEINSTEIN, *supra* note 33, at 57.

61. *Beauharnais*, 343 U.S. at 284, 286 (Douglas, J., dissenting).

hands of southern officials in their attempts to suppress protest against racial segregation."[62]

The Court's later decisions undermined the group libel doctrine, especially *New York Times v. Sullivan* and *Gertz v. Robert Welch*.[63] After *Sullivan* and *Gertz*, people like Beauharnais could avoid charges of reckless disregard for the truth (and thus libel) simply by citing some misguided interpretation of FBI crime statistics.[64] Accordingly, although the Court has never explicitly overruled *Beauharnais*, the group libel doctrine has done little more than gather dust since it was announced.[65]

The Court put the last nail in *Beauharnais*'s coffin and abandoned the original "clear and present danger" rule in 1969 when it decided *Brandenburg v. Ohio*.[66] A jury convicted Brandenburg under Ohio's Syndicalism Act for shouting slurs against African-Americans, Jews, and the President during a Ku Klux Klan cross-burning rally.[67] The Court struck down Ohio's Syndicalism Act and held that encouraging the commission of a crime is constitutionally protected speech unless the encouragement is intended to and imminently likely to result in some illegal act.[68] The Court held that simply advocating crime or violence is protected communication under the First Amendment, because "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[69] Thus, Ohio's Syndicalism Act impermissibly intruded upon free speech because it "[swept] within its condemnation speech which our Constitution has immunized from governmental control."[70]

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62. WEINSTEIN, *supra* note 33, at 57.

63. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 262–64 (1964) (applying First Amendment protection to charges of libel such that the speech must be malicious or in reckless disregard for the truth to be actionable at law); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) (holding there is no such thing as a false idea).

64. WEINSTEIN, *supra* note 33, at 58.

65. *Id.*

66. 395 U.S. 444 (1969) (per curiam). Perhaps the Court's position on free speech changed between *Abrams* and *Brandenburg* because the civil rights movement drove home Justice Holmes's point about certainty; regardless, the Frankfurter Court's "balancing" cases, which were overruled by *Brandenburg*, are omitted for brevity's sake. *See* WIRENIUS, *supra* note 20, at 56–68.

67. *Brandenburg*, 395 U.S. at 445–46.

68. *Id.* at 448–49.

69. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

70. *Id.*

Because *Brandenburg*'s rationale relied on liberty interests more than truth-seeking,[71] the case is probably the broadest interpretation of free speech to date.

4. *The Modern Approach: Viewpoint Discrimination and Limited Forums*

> In the realm of private speech or expression, government regulation may not favor one speaker over another.[72]
>
> ~*Rosenberger v. Rectors & Visitors*

After *Brandenburg*, the Court began to embrace Holmes's skepticism and the truth-seeking principle by focusing on the nature of the regulation rather than on the nature of the speech.[73] The Court's approach to "viewpoint discrimination" follows from this line of interpretation. In *Rosenberger v. Rectors & Visitors of the University of Virginia*, Justice Kennedy noted that restricting speech on one side of an issue is abhorrent to the Constitution:

> It is *axiomatic* that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but *particular views* taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government *must* abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction . . . .[74]

Nevertheless, the limited purpose of a particular forum may justify reserving it for certain topics or groups.[75] Once a state has opened a forum, it must only "respect the lawful boundaries it has itself set."[76]

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71. *Brandenburg*, 395 U.S. at 448–49.

72. Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995).

73. WEINSTEIN, *supra* note 33, at 35. Weinstein noted child pornography as the exception to the trend of "eliminating categories of unprotected speech." *Id.* at 30; *see* New York v. Ferber, 458 U.S. 747, 766 (1982).

74. *Rosenberger*, 515 U.S. at 828–29 (emphasis added) (citations omitted).

75. *Id.* at 829.

76. *Id.*

Therefore, the state may not exclude speech unless it would be reasonable to do so in light of that forum's purpose, "nor may [the state] discriminate against speech on the basis of its viewpoint."[77] Thus, Justice Kennedy focused on the crucial distinction between content discrimination, which may be permissible if it preserves the purposes of a limited forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[78] For example, banning any speech about abortion is content discrimination, but banning speech claiming abortion is murder is viewpoint discrimination.[79] The difference between content discrimination, which requires a reasonable relation to the forum's purpose to remain constitutionally valid, and viewpoint discrimination, which requires a compelling government interest pursued in the least restrictive manner in order to be constitutionally permissible, is often murkier in practice than on paper.[80]

5. *Hate Speech and Rigging the Marketplace of Ideas*

> These restrictions "raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[81]
>
> ~*Turner Broad. Sys. v. FCC*

Although the line between content and viewpoint discrimination is often blurry, the Court presumes that any content discrimination is unconstitutional if it allows public officials to shape the political landscape.[82] The year before deciding *Rosenberger*, the Court noted in *Turner Broadcasting System, Inc. v. FCC* that "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence" lies at the

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77. *Id.*

78. *Id.* at 829–30.

79. WEINSTEIN, *supra* note 33, at 36.

80. *Id.* at 36–40. For specific examples of valid and invalid content and viewpoint restrictions, see Volokh, *supra* note 23, at 2418–24.

81. Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

82. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227–28 (1983) (noting that "the people, not the government 'are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . .'") (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 (1978)).

heart of the First Amendment and that "[o]ur political system and cultural life rest upon this ideal."[83] Therefore,

> [g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. [Restrictions] of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.[84]

Even restrictions that target bigoted viewpoints are not permitted by the First Amendment because they could skew the political landscape. *R.A.V. v. City of St. Paul* reflects the depth of the Supreme Court's abhorrence for one-sided censorship.[85] Even in light of a cross burning on an African-American family's lawn, the Court held that St. Paul's "fighting words" ordinance was subject to exacting scrutiny since it "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech address[ed]."[86] The Court struck down the ordinance, which prohibited "fighting words" that gave rise to "anger, alarm or resentment on the basis of race, color, creed, religion or gender," because

> [d]isplays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents.[87]

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83. *Turner*, 512 U.S. at 641.

84. *Id.*

85. R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

86. *Id.* at 381. Although the Court said "secondary effects" could be legitimately targeted, it noted that the reaction of a listener is never a secondary effect. *Id.* at 394. Compare this definition of secondary effects with *City of Renton v. Playtime Theaters Inc.*, 475 U.S. 41, 47, 52 (1986), which concludes that an ordinance banning adult theaters legitimately targeted the secondary effects of such establishments on surrounding property values rather than the content of the movies shown.

87. *R.A.V.*, 505 U.S. at 380, 391.

The Court echoed Holmes and Brandeis's truth-seeking rationale when it stated that "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[88] Therefore, the Constitution forbids one-sided restrictions on speech when a citizen speaks his or her mind on matters of public concern, regardless of the psychological injury it may cause a minority listener.[89]

6. *The Critical Theorist's Flawed Objection and the Immoderate Love of Equality*

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it . . . . While it lies there it needs no constitution, no law, no court to save it.[90]
>
> ~Learned Hand

Notable critical theory scholars doubt the wisdom of the Court's interpretation of the free speech clause, but their premises are misguided and their solutions miss the point. Critical theorists object that allowing majority speech that reinforces discriminatory hierarchies effectively censors minority speakers because they fear to speak out in a hostile environment.[91] This objection is well-founded; the majority's stifling influence on free thought—even in the absence of outright censorship—was a central concern of democratic thinkers at least as far back as John Stuart Mill and Alexis de Tocqueville.[92] Tocqueville even went so far as to claim that he knew of no country in which there is so little independence of mind and real freedom of discussion as in America.[93] He praised the European system, where "[t]here is no religious or political theory which one cannot preach

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88. *Id.* at 392.

89. *But see* Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 316, 323 (2000) (noting that speech creating a hostile work environment is protected much less than in public and giving examples of such speech). Nevertheless, there are decisive differences between the workplace and the schoolhouse. *See, e.g.*, U.W.M. Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1166–68 (E.D. Wis. 1991).

90. Learned Hand, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 190 (Irving Dilliard ed., 1952).

91. *See, e.g.*, MACKINNON, *supra* note 4, at 30–31, 57.

92. *See* JOHN STUART MILL, ON LIBERTY 4–5 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859); 1 TOCQUEVILLE, *supra* note 2, at 254–55.

93. 1 TOCQUEVILLE, *supra* note 2, at 255.

freely . . . for there is [no one] so subject to a single power that he who wishes to speak the truth cannot find support enough to protect him against the consequences of his independence."[94] But in discussing the democratic republic, Tocqueville warned that "there is only one authority, one source of strength and of success, and nothing outside it."[95] Modern empirical research suggests that the natural tendency to follow the group and the fear of ostracism have a powerful influence upon opinions, even today.[96] It follows that in democratic republics like America, the opinion of the majority has the potential to stifle dissent more than any law.[97]

But the solution that critical theorists propose is misguided. They suggest that the law should suppress the *doxa* (cultural norms) that have resulted in the conditions that they reject, rather than allow debate and social progress to expose and refute those *doxa*.[98] Restricting one side's rational debate through the coercive power of the state will not stop social influence from stifling or negating minority speech in other, less salutary ways (such as intimidation or

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94. *Id.*

95. *Id.*

96. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 12–13, 165 (2003). Sunstein noted several psychological experiments in which subjects would choose clearly false outcomes when social pressure or special authority suggested those outcomes were true, for example, calling a much shorter line longer and predicting impossible results in simple statistical games based on the reports of confederates. *Id.* at 18–19.

97. 1 TOCQUEVILLE, *supra* note 2, at 254–56. Tocqueville explains the difference between the old tyranny and the wholly new species of tyranny for which he has no name in the following way:

> Under the absolute government of a single man, despotism, to reach the soul, clumsily struck at the body, and the soul, escaping from such blows, rose gloriously above it; but in democratic republics that is not at all how tyranny behaves; it leaves the body alone and goes straight for the soul. The master no longer says: "Think like me or you die." He does say: "You are free not to think as I do; you can keep your life and property and all; but from this day you are a stranger among us. You can keep your privileges in the township, but they will be useless to you, for if you solicit your fellow citizens' votes, they will not give them to you, and if you only ask for their esteem, they will make excuses for refusing that. You will remain among men, but you will lose your rights to count as one. When you approach your fellows, they will shun you as an impure being, and even those who believe in your innocence will abandon you too, less they in turn be shunned. Go in peace, I have given you your life, but it is a life worse than death."

Id. at 255–56.

98. *See, e.g.*, LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH 10–11 (2004) (presenting examples of arguments from critical race theorists, cultural theorists, and feminist scholars for the legal limitations on perceived harmful speech).

avoidance); rather, it will simply limit the scope of debate while endangering habits that are necessary to authentic freedom.[99]

The critical theorists also hold that many laws protecting speech should be abandoned because they are, in fact, weapons used by the dominant group to reinforce the subjection of minority groups.[100] But this solution to unwanted speech is fundamentally flawed in at least two respects. First, the critical theorists misunderstand the Constitution: it is not a *sword* that empowers the white male majority to exercise its hegemony through verbal oppression any more than it empowers minorities to dictate the terms of political discussion. It simply *limits* the power of the state to define orthodoxy and heresy—even on matters that "touch the heart of the existing order."[101]

The critical theorists miss this point because they are blinded by their passion for equality; they cannot see that "[t]o love democracy well, it is necessary to love it moderately."[102] Tocqueville warned that this is a persistent threat to democratic republics. A moderate passion for equality gives rise to the ideal form of democracy—one where freedom and equality blend and all citizens take part in government with equal right and ability, without fear of any single citizen wielding tyrannical power.[103]

Like all passions, the love of equality has a dark side. It is "the chief passion which stirs men" in ages where equality of conditions is a fact.[104] It is both strong and general, so its charms are felt by great and common souls alike, whereas its dangers are only seen by the "perceptive and clearsighted."[105] Tocqueville warned that the passion for equality is "ardent, insatiable, eternal, and invincible."[106] Democratic institutions tend toward equality, but, at times, that passion "for [equality] turns to delirium . . . . It is no use telling them

99. *See* 1 TOCQUEVILLE, *supra* note 2, at 255–56, 258.

100. MACKINNON, *supra* note 4, at 30–31; *see* Laura J. Lederer & Richard Delgado, *Introduction* to THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 12 (Laura J. Lederer & Richard Delgado eds., Hill and Wang 1995) (arguing that first amendment protection of hate speech and pornography has contributed to a "caste system" in our country whereby the victims of this speech are relegated to second class citizens).

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

102. PIERRE MANENT, TOCQUEVILLE AND THE NATURE OF DEMOCRACY 132 (John Waggoner trans., 1996).

103. 2 TOCQUEVILLE, *supra* note 2, at 503.

104. *Id.* at 504.

105. *Id.* at 504.

106. *Id.* at 506.

that this blind surrender to an exclusive passion they are compromising their dearest interests; they are deaf."[107] As conditions approach equality, remaining inequalities stand out and give rise to even more intense envy.[108] Therefore, Tocqueville concluded, democratic societies that are enchanted by equality's charms will prefer to be equal slaves when the love of liberty and the love of equality collide.[109]

Once freed from utopian misconceptions about the ability and desirability of using the state to bring about the perfect equality of conditions, one sees the First Amendment as it truly is. It is not a *sword*, but rather, it is a *shield* that each citizen can raise against the majority's tendency to punish unorthodoxy and that allows the minority to hold and communicate different positions on the important questions in order to raise the level of debate and (ideally) arrive at the best political conclusions.[110]

The second flaw in the critical theorists' approach is that in practice their approach to free speech actually undermines equality. Suppression breeds resentment, as the critical theorists well know.[111] Resentment in the majority leads to more intense discrimination through other channels. The average person will realize that it is inconsistent (if not hypocritical) to argue that the right to equal treatment justifies *you* doing to *another* what you say is wrong for *him* to do to *you*.[112] Also, history supports a prediction that the state's power to suppress speech will eventually be turned against the minority groups advocating its use.[113] Therefore, a better approach to free speech carefully recognizes (that is, embraces without blindly accepting) the wisdom inherent in Holmes and Brandeis's

107. *Id.* at 505.

108. *Id.* at 538.

109. *Id.* at 506.

110. The weakest point of this approach is its assumption that reasonable people will debate without being swept away by irrational forces. But liberty is a preferable good to equality, so while sharing its fault at some level, this approach is still better than the critical theorists'. *See id.* at 504–06 (providing support for the value of liberty outweighing that of equality).

111. *See, e.g.*, Matsuda, *supra* note 4, at 2358 (discussing the suppressive effect of racial speech proclaiming "racial inferiority and deni[al] of the personhood of target members" as well as structural subordination based on "racial inferiority").

112. *See* GEORGE ORWELL, ANIMAL FARM 123 (The New American Library, 16th prtg. 1964) (1946) (the new "Commandment" reads: "ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS").

113. *See* HENTOFF, *supra* note 3, at 254–56 (noting that the Skokie ordinances smothered free expression not only of Nazis, but of all in the community).

understanding of free speech: the best answer to undesirable speech is a good counter-argument.

B. *Free Speech in the Public School*

> Schools cannot teach the importance of the First Amendment and simultaneously not follow it.[114]
>
> ~Erwin Chemerinsky

The Supreme Court has stated that the free speech clause applies to students in public schools, but it must be interpreted in light of the "special characteristics of the school environment."[115] Although the method and extent to which public schools should be inculcating virtue is debatable,[116] the Court has stated that public schools are "the cradle of our democracy"[117] and are necessary for awakening students to cultural values such as dedication to truth and tolerance of dissenting opinion on substantial issues.[118] Accordingly, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," and restrictions that cast a pall of orthodoxy over the schoolhouse must be forbidden.[119]

1. *The Groundbreaking Student Speech Case:* Tinker v. Des Moines

> Clearly, the prohibition . . . of one particular opinion, at least without evidence that it is necessary to avoid material and substantial

114. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 545 (2000).

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

116. *See* BRUCE FROHNEN, THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM 57–59 (1996) (arguing that the "civil religion" of liberal institutions uses genuine religion and tradition to further its own ends); Richard Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 82 (1996) (arguing that "[i]t will not violate the Establishment Clause for the public schools to teach civic virtue, even though the moral teachings advanced may be consistent with the moral views of the religion of secular humanism or with the moral teachings of the Roman Catholic Church").

117. Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952).

118. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

119. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

> interference with schoolwork or discipline, is not constitutionally permissible.[120]
>
> ~*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*

Although the First Amendment's broad scope must be limited when exercised within the confines of the pubic school system, it still retains its fundamental character and purpose: truth-seeking and political progress. In 1969, the Court decided *Tinker v. Des Moines Independent Community School District*, which was brought by a group of high school students who were suspended for wearing black armbands in class to protest American involvement in Vietnam.[121] The Court stated that it was axiomatic that the students shared the First Amendment right to free expression; however, when exercising that right in a public school, it must be applied in light of the "special characteristics of the school environment."[122] The Court concluded that a student's political expression can be censored only if the school shows (1) the expression caused a substantial, material disruption of the school's function, (2) it "invaded" or "collided with" the rights of others, or (3) that the school had a reasonable expectation that such disruption or invasion was imminent.[123] Specifically, the Court held that:

> The school officials banned and sought to punish [the students] for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [the students]. There is here no evidence whatever of . . . interference, actual or nascent, with the schools' work or of collision with the rights of other students to be

120. *Tinker*, 393 U.S. at 511 (emphasis added).

121. *Id.* at 504.

122. *Id.* at 506.

123. *Id.* at 508–09, 513. To illustrate the difference between valid expression and "disruption" *Tinker* cited a pair of prior Fifth Circuit cases. *Id.* at 505 & n.1. In *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) and *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), students were sanctioned by their respective schools for wearing and passing out "freedom buttons." In *Burnside*, the court held that the school could not prohibit the buttons because the students were peaceful while passing out buttons and discussing their message. *Burnside*, 363 F.2d at 748. In *Blackwell*, the exact same freedom buttons could be prohibited because of a "breakdown in school discipline"—the students were blocking hallways, shouting into classrooms during session, pinning buttons on students against their will, and threatening the students who refused to wear them. *Blackwell*, 363 F.2d at 753–54. These cases demonstrate that a substantial disruption occurs when the expressive conduct somehow prevents the school from conducting the business of teaching, but the Court did not explicitly address the "rights of students" prong. *Tinker*, 393 U.S. at 505.

> secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.[124]

The Court concluded that the school had impermissibly restricted the armbands based on the undifferentiated fear that they would cause controversy or discomfort.[125] Such restriction is forbidden by the Constitution because "this sort of hazardous freedom . . . is the basis of our national strength . . . ."[126] Controversial speech must be tolerated regardless of any ill feeling or offense it may have generated so that students do not become "closed circuit recipients" of the position the state chooses to convey on important subjects.[127] Thus, *Tinker* suggests that the truth-seeking role of the free speech clause is also primary in public schools in order to ensure the viability of public debate.

2. *Limiting* Tinker *by Controlling Lewd, Vulgar, and School-Sponsored Speech*

> A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school.[128]
>
> *~Hazelwood Sch. Dist. v. Kuhlmeier*

The Supreme Court has directly addressed the issue of whether and to what extent a school may restrict speech only three times since *Tinker*, and in each instance, it upheld a school's decision to restrict students.[129] None of the decisions squarely relied upon *Tinker*'s material disruption test. In *Bethel School District v. Fraser*, the school's action was upheld on other grounds—Fraser's campaign speech before a captive student assembly was lewd, vulgar, and

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

125. *Id.*

126. *Id.* at 508–09.

127. *Id.* at 511.

128. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (citation omitted)).

129. Although *Harper* relied on the holding in *Tinker* alone, other Supreme Court cases can still shed light on the scope of free speech in the classroom. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

plainly offensive and therefore not protected speech.[130] The speech was no more than a thinly-veiled sexual innuendo.[131] Thus, the Court held that the school was justified in demonstrating that his conduct was "wholly inconsistent with the 'fundamental values' of public school education," regardless of whether it actually caused a material disruption.[132] Similarly, in *Hazelwood School District v. Kuhlmeier*, the Court held that school-sponsored speech may be regulated by any means "reasonably related to legitimate pedagogical concerns," regardless of whether it caused a material disruption.[133]

The Court's restrictions on student expression in *Bethel* and *Hazelwood* also point to truth-seeking as the primary goal of the free speech clause, even in the special circumstances of the school environment. Prohibiting lewd and vulgar speech maintains discipline in the school so that teaching can occur; that is, so that civil instruction and debate is possible.[134] *Hazelwood* also protects the possibility for meaningful political debate in the school environment, and ultimately in society, by controlling which messages the school

130. *Bethel*, 478 U.S. at 685. A careful analysis of *Bethel* could equate "plainly offensive" with a substantial disruption. If conduct is plainly offensive, it would be reasonable to expect that enough people will find it so unsettling that it will cause a disruption in the school's activity. *But see* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 660 (2002) (considering the two concepts as distinct).

131. Fraser's speech reads:

> 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.

Bethel, 478 U.S. at 687 (Brennan, J., concurring).

132. *Id.* at 685–86.

133. *Hazelwood*, 484 U.S. at 273. School-sponsored speech is speech that the school promotes rather than simply tolerates; it "bears the imprimatur of the school." *Id.* at 270–71. For instance, in *Hazelwood*, a school newspaper (which included students' stories about teen pregnancy and divorce) was published as part of a journalism class, subject to editorial review by the instructor, and therefore bore the imprimatur of the school's approval. *Id.* at 263, 266, 268. Likewise, expression that is made on behalf of a school-organized function becomes a permanent part of the school, or is made with school resources can raise an inference that the school has given its approval to the message. *Id.* at 269.

134. *See Bethel*, 478 U.S. at 687–88 (Brennan, J., concurring).

endorses. Even rational adults can be swayed from the "unambiguous evidence of their senses" by a confident messenger with special knowledge or authority.[135] School-sponsored speech carries such authority that it can unfairly skew the students' political landscape if applied to controversial political subjects—which is one reason why the school has a legitimate purpose in dissociating itself from student speech on controversial issues.[136] Although legitimate school restrictions on student speech serve other functions, truth-seeking and educating students who can participate meaningfully in political life still stand out as primary goals of the Supreme Court's student speech doctrine.

The Supreme Court's most recent decision on student speech supports this conclusion. In *Morse v. Frederick*, the Court upheld the punishment of a student who displayed a banner with "BONG HiTS 4 JESUS" emblazoned on it during school participation in an Olympic torch rally.[137] The majority found that the banner was "cryptic"—devoid of substance—yet the principal's decision to treat it as promoting illegal drug use was reasonable.[138] The Court then held that a school's "important—indeed, perhaps compelling interest" in deterring drug use justified restrictions on student speech that promoted drug use.[139] That is, the Court determined that the school's educational mission was fundamentally inconsistent with student speech that promotes drug use.[140]

Justices Alito and Kennedy concurred specifically to assert that the Court's decision in *Morse* did not involve student speech with a substantive political or social content, and that their decision "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."[141] On the other hand, Justices Stevens, Souter, and Ginsburg dissented, arguing that the majority "trivialize[d] the two cardinal principles upon which *Tinker* rests" by "uphold[ing] a punishment meted out on the basis of a listener's disagreement with her understanding (or,

135. SUNSTEIN, *supra* note 96, at 14–19.

136. *Hazelwood*, 484 U.S. at 272.

137. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

138. *Id.* at 2624.

139. *Id.* at 2628 (internal quotation marks omitted) (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661 (1995)).

140. *Id.* at 2628.

141. *Id.* at 2636 (Alito, J., concurring).

more likely, misunderstanding) of the speaker's viewpoint,"[142] and that the danger posed by the "silly" banner did not rise to the level required to be censored under *Tinker*.[143]

Morse supports the understanding of free speech and public education noted above because both sides explicitly or implicitly rely on the notion of free speech as a truth-seeking endeavor, and both sides recognize the public school's unique role in that endeavor. Only Justice Thomas's concurrence argued that *Tinker* should be overruled.[144] Accordingly, truth-seeking and the education of students who can participate in political debate continue to stand out as primary goals of the Court's student speech doctrine.

II. STUDENT SPEECH IN THE LOWER COURTS

A. Tinker *in the Lower Courts*

> As the Supreme Court has emphatically declared, "[i]f 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 offensive or disagreeable."[145]
>
> *~Saxe v. State Coll. Area Sch. Dist.*

Although the circuits have had ample opportunity to decide the boundaries of *Tinker*'s material disruption test, few have ruled on the meaning of its "rights of other students" language.[146] Generally, the courts have read *Tinker* narrowly and with due respect for protected religious and political speech even when it implicates controversial issues. The Third Circuit has found otherwise-protected religious conduct disruptive, and therefore subject to regulation, only in exceptional circumstances—for example, when grade school students tried to proselytize during class time.[147] Similarly, controversial political speech was considered disruptive only when it deprived

142. *Id.* at 2645 (Stevens, J., dissenting).

143. *Id.* at 2650.

144. *Id.* at 2636 (Thomas, J., concurring).

145. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (2001) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

146. *Id.* at 217 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969)).

147. Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 280 (3d Cir. 2003); *see also* Walker-Serrano v. Leonard, 325 F.3d 412, 419 (3d Cir. 2003).

high school students of resources to the extent that classes were cancelled and extraordinary amounts of faculty attention were needed to regulate the effects of the expressive conduct.[148] In fact, the Third Circuit struck down a harassment policy aimed at eliminating an unsafe environment for students.[149] The court noted that harassing speech that interfered with a student's ability to learn could conceivably amount to substantial disruption, but the court held that the policy was overbroad because it lacked any threshold showing of severity or pervasiveness.[150] Therefore, the policy

> could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.[151]

Likewise, a district court in the Sixth Circuit held that a t-shirt that likened President Bush to a terrorist was permissible because it did not interrupt the process of teaching; it was merely offensive to certain individuals.[152] The Sixth Circuit Court of Appeals held that Confederate flag t-shirts would be permissible in the absence of actual or imminent violence despite the school's claims that the t-shirts had "racist implications."[153] Also, the court reasoned, because the school had allowed Malcolm X t-shirts in the past, prohibiting Confederate t-shirts was a targeted ban, and therefore constituted viewpoint discrimination.[154] Other circuits have agreed that the student display of the Confederate flag could be permissible in the absence of imminent material disruption, such as previous violent incidents

148. Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 508 (W.D. Pa. 2006).
149. *Saxe*, 240 F.3d at 217.
150. *Id.*
151. *Id.* (footnote omitted).
152. Barber v. Dearborn Pub. Sch., 286 F. Supp. 2d 847, 849–50, 857, 860 (E.D. Mich. 2003).
153. Castorina v. Madison County Sch. Bd., 246 F.3d 536, 538, 544 (6th Cir. 2001).
154. *Id.* at 544.

motivated by racial tension.[155] Thus, when students peacefully express their opinions on subjects that implicate central elements of a person's identity (such as his or her beliefs about religion, war, and race) the courts of appeals have generally granted such speech First Amendment protection.

B. Harper v. Poway*: The Right to Be Let Alone and Special Vulnerability*

> [The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.[156]
>
> *~Harper v. Poway Unified Sch. Dist.*

The clear exception to this trend is the Ninth Circuit. It directly followed the critical theorists' approach to free speech in deciding *Harper v. Poway Unified School District*. In *Harper*, the principal kept Tyler Chase Harper in the office and did not permit him to return to class when he wore a t-shirt that read: "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.[157] Harper wore the t-shirt in response to a Day of Silence, a demonstration by the student-run Gay-Straight Alliance, in which students covered their mouths with duct tape "to raise other students' awareness regarding tolerance in their judgement [sic] of others."[158]

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155. Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003) (holding that a Confederate t-shirt was permissibly banned in light of prior fights and violent threats between racial groups or gangs, one of which identified itself by wearing Confederate flags); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1365–66 (10th Cir. 2000) (holding that a student was permissibly punished for drawing a Confederate flag in light of prior fights and a tense racial atmosphere).

156. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1197 (9th Cir. 2006) (Kozinski, J., dissenting) (alteration in original) (quoting R.A.V. v. City of Saint Paul, 505 U.S. 377, 392 (1992)), *vacated as moot*, 127 S. Ct. 1484 (2007).

157. *Id.* at 1171. Keeping a student in the office is equivalent to an in-school suspension ("ISS") or "removal from class" according to Poway Unified's Student Handbook, and so it is difficult to understand how the Court can say Harper was not punished for expressing his religious beliefs. POWAY HIGH SCHOOL, STUDENT HANDBOOK 29 (2d ed. 2006–2007), *available at* http://www.powayusd.com/pusdphs/CAMPUS/Student_Handbook.pdf.

158. *Harper*, 445 F.3d at 1172. It follows from *Hazelwood* that the Day of Silence was probably school-sponsored speech, so (provided it was actually promoting homosexuality, as Harper claimed), restricting it would have been much less constitutionally problematic than

Harper sued the school for preventing him from protesting what he saw as the school's promotion of homosexuality. He alleged violations of the Free Speech, Free Exercise, and Establishment Clauses and sought an injunction against the school to prevent further restriction.[159] The school explained that the t-shirt was "inflammatory" and "derogatory" and they detained him in-school to avoid a repeat of problems arising from the prior year's Day of Silence.[160] The district court agreed that the school could reasonably forecast a substantial disruption and used *Tinker* to deny Harper's request for injunctive relief.[161]

The Ninth Circuit denied Harper's subsequent interlocutory appeal, relying upon on the "rights of other students" prong of the *Tinker* test.[162] The court announced a new rule about permissible speech:

> Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to ''be secure and to be let alone.'' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[163]

The court justified such a broad and fluid standard along critical theory lines:

> Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure

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restricting Harper's t-shirt. *See id.* at 1171 & n.2; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). Neither party contended that Harper's t-shirt was school-sponsored.

159. *Harper*, 445 F.3d at 1173.

160. *Id.* at 1172. The prior year's disruption involved a heated discussion where the principal had to physically separate the speakers. *Id.* at 1171–72.

161. *Id.* at 1173, 1175.

162. *Id.* at 1175, 1177.

163. *Id.* at 1178 (citation omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

> and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.[164]

The court supported its claim that Harper's speech would impair other students' performance with data from various surveys, websites, and law review articles.[165]

The court's rationale prompted Judge Kozinski to write a vigorous dissent. He argued that (1) the ruling clearly permitted viewpoint discrimination (but noted that, given the incidents in prior years, an outright ban on the subject would be permissible), (2) Poway had not made a sufficient showing of substantial or imminent disruption, (3) Harper's speech was specially protected because it was in response to the Day of Silence, and (4) the homosexual students' rights would not be imperiled by Harper's t-shirt unless there was "severe and pervasive" harassment that would be "tantamount to conduct."[166] The majority rejected these points as irrelevant given the harm involved.[167]

The Ninth Circuit declined to rehear *Harper* en banc.[168] Judge Reinhardt reiterated that schools "surely" have the authority under *Tinker* to protect students against "verbal persecution."[169] He opined that the dissenting judges did not understand the depth or gravity of harm that Harper's speech inflicted on homosexual students and

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164. *Id.* at 1178.

165. Nicolyn Harris & Maurice R. Dyson, Essay, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 187–89 (2004); Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.P.R. 151, 164 (1999); Amy Lovell, Comment, *"Other Students Always Used to Say, 'Look At The Dykes'": Protecting Students From Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 623–28 (1998); Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 641, 655 (2001); Kelli Kristine Armstrong, Note, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 75–77 (1994); Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 225 (2005); Hatred in the Hallways, http://hrw.org/reports/2001/uslgbt/Final-05.htm#P609_91364 (last visited Sept. 5, 2007); Bullying in Schools: Harassment Puts Gay Youth at Risk, http://www.nmha.org/pbedu/backtoschool/bullyingGayYouth.pdf (last visited Sept. 5, 2007); *see* cases cited *supra* note 5.

166. *Harper*, 445 F.3d at 1193–98 (Kozinski, J., dissenting).

167. *Id.* at 1181–83, 1185 (majority opinion).

168. Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053 (9th Cir. 2006).

169. *Id.*

denied that viewpoint discrimination was at issue.[170] Judge O'Scannlain wrote another powerful dissent in response, echoing Judge Kozinski and arguing that "if displaying a distasteful opinion on a T-shirt qualifies as a psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant."[171] The *Harper* decision was ultimately vacated for mootness by the Supreme Court in order to pave the way for future litigation.[172] But *Harper*'s rationale remains a troubling departure from the Supreme Court's school speech doctrine, especially because it has been adopted by the Seventh Circuit.[173]

C. *We Don't Need No Thought Control:* Chambers *and* Nixon

> [T]he suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control.[174]
>
> ~*U.W.M. Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*

Two district courts reached the opposite conclusion of *Harper*, holding that merely seeing a t-shirt that questions homosexuality's place in society does not invade a student's rights. In *Chambers v. Babbitt*, a student wore a t-shirt reading "Straight Pride."[175] The principal told the student that he could not wear the t-shirt because it was offensive and similar messages had prompted incidents in the prior year.[176] These incidents included a "heated" debate in an after-school Bible study club, defacement of a reputedly homosexual student's car, and fourteen fights, three of which were racially motivated and eleven of unspecified origin.[177] The court held that the school had not shown a sufficient nexus between the incidents and

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170. *Id.*

171. *Id.* at 1054.

172. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484, 1484 (2007), *vacating as moot* 455 F.3d 1052 (9th Cir. 2006).

173. Zamecnik v. Indian Prairie Sch. Dist., No. 07 C 1586, 2007 U.S. Dist. LEXIS 28172, at *29–32 (N.D. Ill. Apr. 17, 2007).

174. U.W.M. Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1174 n.9 (E.D. Wis. 1991).

175. Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1069 (D. Minn. 2001).

176. *Id.*

177. *Id.* at 1070.

the t-shirt to support a reasonable belief of imminent disruption.[178] The court did not seem to think that the rights of any homosexual students were imperiled merely by seeing the words "Straight Pride" on another student's t-shirt.[179]

Similarly, in *Nixon v. Board of Education*, a student wore a t-shirt reading: "INTOLERANT Jesus said . . . I am the way, the truth and the life John 14:6" and "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"[180] The school claimed that the t-shirt could cause a material disruption because the student body may have included Muslims, homosexuals, and young women who had procured abortions. But the court held that "[t]he mere fact that these groups exist[ed] at [the school], and the fact that they could find the shirt's message offensive, falls well short of the *Tinker* standard for reasonably anticipating a disruption of school activities."[181] The court then explicitly considered the "invasion of rights" prong in *Tinker*.[182] After noting that no prior court had addressed the language's meaning, the court examined the phrase's context.[183] The court determined that the t-shirt could not invade anyone's right "to be let alone" merely by displaying a message about the sinfulness of homosexuality.[184] A mere expression of opinion does not qualify as an invasion of another's rights.[185] Like *Chambers*, *Nixon* recognized that protecting student speech is more important than an ephemeral right not to be offended.

D. *The Right "Rights of Students"*

> [T]he First Amendment's primary aim is the full protection of speech upon issues of public concern . . . .[186]
>
> ~*Connick v. Myers*

The question now arises whether one approach better serves the values of educating students for meaningful participation in civil

178. *Id.* at 1072.
179. *Id.* at 1073.
180. Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005).
181. *Id.* at 973.
182. *Id.*
183. *See* cases cited *supra* note 5 and accompanying text.
184. *Nixon*, 383 F. Supp. 2d at 974.
185. *Id.*
186. Connick v. Myers, 461 U.S. 138, 154 (1983).

discourse and encouraging truth-seeking.[187] *Harper* extends so far beyond *Tinker*'s limits on student free speech rights that it ultimately contradicts the authority and rationale upon which *Tinker* rests. A rule holding that a student's right to be left alone includes a right to be free from "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation," particularly when that "assault[]" is directed at historically persecuted minorities, is not faithful to First Amendment precedent, warranted by policy considerations, or theoretically sound.[188] *Nixon*, read in light of *Bethel* and *Chaplinsky*, better supports the values protected by the First Amendment and public education.

1. *Forum Analysis and Viewpoint Discrimination*

Student speech like Harper's t-shirt (expressing a religious opinion on homosexuality and protesting school policy) cannot be restricted given a fair-minded reading of *Tinker* and its progeny.[189] *Hazelwood* extends the First Amendment prohibition of viewpoint discrimination to schools by explicitly limiting *Bethel*'s restriction on plainly offensive speech; it requires the judge to focus on "the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*."[190] In *Bethel*, Jeff Kuhlmeier's political message (to vote for Jeff) was entirely separable from the objectionable method (sexual innuendo).[191] On the other hand, Tyler Harper's political message (Poway United should not "embrace" homosexuality because God has declared it shameful) is not separable from the objectionable method ("derogatory" comments aimed at "core identifying characteristic[s]" of historically persecuted minorities).[192] If the Court is careful enough to say that the First Amendment cannot allow viewpoint discrimination when considering speech with virtually no value as a step toward truth, how could it allow viewpoint discrimination when faced with speech

187. *See supra* Pt. I.A.

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

189. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 512 (1969).

190. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 286 n.2 (1988) (Brennan, J., dissenting).

191. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 680, 685 (1986).

192. *Harper*, 445 F.3d at 1171–72, 1178.

about an important and timely issue like the legal and social recognition of homosexuality? This point remains valid even if Harper's contention that Poway is encouraging homosexuality is ultimately mistaken.[193] By allowing the Gay-Straight Alliance to hold a Day of Silence to protest social customs that keep homosexuals in the closet, school authorities opened the door to debate about the school's role in fostering homosexuality in society.[194]

2. *Strict Scrutiny and Reasonable Relation*

The purpose of public education includes fostering the ability to debate important social issues like homosexuality, including the reasons and extent to which it should be tolerated and endorsed by society and the law.[195] Accordingly, a school must first show a compelling reason to restrict speech like Harper's.[196] The Ninth Circuit claims that protecting students from psychological harm that could "cause young people to question their sense of self-worth" is sufficiently compelling.[197] This position has some facial appeal. *Bethel* itself states that "'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others" and highlighting "society's . . . interest in teaching students the boundaries of socially appropriate behavior."[198]

Nevertheless, the cost of allowing such speech is not sufficiently definite to warrant the chilling effect created by censoring it. Speech like Harper's neither "breaks a hearer's leg nor picks his pocket."[199] And the research cited by the *Harper* majority does not demonstrate

193. *Id.* at 1206 (Kozinski, J., dissenting).

194. *Id.* at 1171 (majority opinion).

195. *See* David A. Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV. 1485, 1493 (1986) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986)) (agreeing with Bollinger that "tolerating offensive speech is not a necessary evil but an affirmative good, because it has valuable educative effects" and that "[t]he purpose of allowing groups like the Nazis to speak is to celebrate, and thereby reaffirm, the value of tolerance and our commitment to it").

196. Volokh, *supra* note 23, at 2418.

197. *Harper*, 445 F.3d at 1178.

198. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

199. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 146 (William Peden ed., W.W. Norton 1954) (1787).

harm in the objectively verifiable way that the law requires.[200] Rather, the *Harper* rule establishes a victim's veto by expanding a minority student's protected rights in proportion to his or her subjective sensitivity.[201] It assumes that minority students are so vulnerable that a few words on another student's t-shirt can pop their self-image like a soap bubble.[202] This is a deeper insult than calling homosexuality shameful. Nat Hentoff disparaged school boards who would paternalistically censor *Huckleberry Finn*:

> But let us suppose it is true that *Huck* had paralyzed those black kids. All the more reason for them to get all the way into understanding *Huckleberry Finn*. Otherwise, what a terrible thing for a child to learn! That he is so fragile, so vulnerable, so without intellectual and emotional resources that a book can lay him low. . . .
>
> . . . .
>
> I asked the students what they thought of the fierce arguments about *Huck Finn* that run throughout my book. . . .
>
> . . . .
>
> None thought the book should be banned. They laughed at the idea. "How are you going to learn anything that way?" several said.[203]

The censorship in *Harper* could not survive strict scrutiny, even assuming that the cost of allowing Harper's speech was clear and weighty and that the school had a compelling interest. Harper's message was hand-written on an otherwise innocuous t-shirt.[204] The

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200. The studies cited *supra* note 165 are fatally flawed. Each relies on a combination of the correlation-causation fallacy and subjective reporting by interested parties. *See, e.g.*, 36 A.L.R. 4TH. 807, §§ 1–4 (1985) (providing an overview of courts' decisions on whether proof of injury to reputation is necessary for recovery).

201. One should note the tendency towards subjective standards of injury in school harassment codes; for instance, the Poway Unified Student Handbook defines "hate behavior" as anything the victim thinks was done on account of his or her protected status. POWAY HIGH SCHOOL, *supra* note 157, at 21. *Saxe* struck down a provision similar to this because it swept in too much protected speech. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); *see supra* note 195 and accompanying text.

202. *Harper*, 445 F.3d at 1180.

203. HENTOFF, *supra* note 3, at 33, 39.

204. *See Harper*, 445 F.3d at 1171, 1192.

school failed to use the least restrictive means available to achieve any legitimate interest that they did have because the words "be ashamed" and "homosexuality is shameful" could have been covered or removed while leaving the core of Harper's protest ("our school has embraced what God has condemned") intact.

From a practical standpoint, the *Harper* rule is too vague for students or administrators to know with any certainty whether speech is prohibited. There is a real danger that the rule's very existence would have a chilling effect on the protected speech of third parties who are not before a court.[205] This is so because of the large gray area created by the subjectivity of *Harper*'s rule. For instance, would "posting criticism of the Day of Silence on [a] Myspace page" or wearing a t-shirt with the message "Straight and Proud of It" fall under *Harper*'s mantle?[206] Which groups are in the minority—is it based on the school district, the county, the state, the nation, or the world?[207] And how much persecution (and how long ago) is enough to warrant special protection by the state—is the Roman Empire too far in the past? Likewise, the rule is so vague that it could easily become a vehicle for suppressing political or religious expression under the guise of tolerance. Like the *Tinker* and *Bethel* standards, schools will incorporate it into their policies on student speech.[208] Once enshrined by precedent, the *Harper* rule would allow (if not require) schools to skew the political debate on subjects like affirmative action, the Middle East, and abortion because they will often implicate core characteristics of protected classes. Even an administrator with pure motives would be at a loss about what to do with students engaging in frank conversation about such subjects in a hallway chilled by the *Harper* rule.

Furthermore, the *Harper* rule is so vague and contrary to the school's other compelling purposes that it might fail the more forgiving reasonable relation standard.[209] As noted above, *Harper* sets up a rule that will ultimately *undermine* the school's compelling interest in fostering equality, tolerance for divergent opinion, and inculcating the habits necessary for students to engage in debate on

205. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984).

206. *Harper*, 445 F.3d at 1206 (Kozinski, J., dissenting).

207. *Id.* at 1201.

208. *See, e.g.*, POWAY HIGH SCHOOL, *supra* note 157, at 18, 21 (prohibiting disruptive conduct, obscene language, and "hate behavior").

209. *See* Volokh, *Transcending Strict Scrutiny*, *supra* note 23, at 2424.

serious issues. Youth who see that some students are "more equal" than others will not learn anything about liberty or equality; instead, they will learn that taking offense gains one special privileges.[210] And those students in the minority will not have the chance to apprehend the truth of their positions in the same way that majority students do: by testing them against their peers.[211] The *Harper* rule should be rejected outright because it sacrifices these higher goods for lesser ones.

On the other hand, *Nixon*'s approach to the "rights of students," if properly understood, is a workable rule for handling speech like Chase Harper's. Naturally, the school's substantial interest in providing a safe forum for education requires that certain phrases and acts be prohibited. But *Bethel* and its progeny already provide a framework for evaluating whether student speech is lewd, vulgar, or plainly offensive. Controlling vulgar speech or epithets painted over with a thin veneer of political advocacy would not pose any more of a First Amendment problem than vulgar speech. *Bethel* itself dealt with just such a situation.[212]

On the other hand, when faced with genuinely substantive but offensive speech, courts could reliably balance the interest in free speech with the interest in leaving decisions about student conduct to schools by judging an administrator's conduct in *Chaplinsky*'s light. That is, if an administrator could reasonably conclude that the speech at issue included words that, (1) "by their very utterance inflict injury or tend to incite an immediate breach of the peace," and that those words (2) form "no essential part of any exposition of ideas," and therefore (3) "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed" by the school's interest in preventing psychological injury, then the administrator's decision to restrict the speech could withstand First Amendment scrutiny.[213] If any element is not present—like (2) and (3)

210. This tendency to throw away the long-term view in favor of short-term gain is the portent of the end of democratic virtue according to Isocrates, who argued against the "King's Peace" at the beginning of the end of Athenian greatness. EDITH HAMILTON, THE ECHO OF GREECE 64–66 (Norton Library 1964) (interpreting the core of Isocrates's speech criticizing the Athenians as: "If you truly wished to find out what is best for the country you would listen more to those who oppose you . . . . How can men decide wisely without giving an unbiased hearing to both sides?").

211. MILL, *supra* note 92, at 35–36.

212. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

213. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

in Chase Harper's case—then the speech should enjoy the full protection of the First Amendment. This approach would allow administrators to screen out objectionable speech like "Hide Your Sisters—the Blacks are Coming"[214] without suppressing valuable speech (even if that value only comes from exposing the falseness of the idea it expresses).

CONCLUSION

> Freedom of the mind requires not only, or not even especially, the absence of legal constraints but the presence of alternative thoughts. The most successful tyranny is not the one that uses force to assure uniformity, but the one that removes awareness of other possibilities . . . .[215]
>
> ~Allan Bloom

The *Harper* rule does not adequately reflect the primary purposes of the Free Speech Clause. It would, at best, promote comfort and civility at the expense of a more important function—educating students in the principles and habits necessary to exercise and endure liberty. Yet the Supreme Court has repeatedly indicated how important schools are to forming citizens who can participate in the nation's political life.[216] What better place is there for young adults to practice the give-and-take necessary to living in a free and disputatious society than high school, where vulgar and plainly offensive speech can still be controlled?

Nixon's approach better serves the values that underlie the free speech clause. It parallels the closest thing to a universally valid rule of free speech: that private speech on one side of an issue of public concern cannot be targeted for restriction.[217] *Nixon*, read in light of *Bethel* and *Chaplinsky*, adequately controls student speech that is deeply offensive and of no value as a step to truth, such as racial slurs. Statements such as: "Negroes: Go back to Africa" or "Hitler Had the

214. Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053 (9th Cir. 2006).

215. BLOOM, *supra* note 12, at 249.

216. *See supra* notes 116–119 and accompanying text.

217. *See* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971, 973–74 (S.D. Ohio 2005).

Right Idea—Let's Finish the Job!"[218] could be controlled in a principled and fair manner because a reasonable administrator could conclude those statements contain no message beyond scorn. At the same time, it leaves the principal the power to respond if a particular topic becomes so heated in the school that it must be altogether banned to go on with the daily business of educating.

Therefore, the Court should revisit the First Amendment's application to public school students and read *Tinker*'s "rights of students" prong the way that *Nixon* does. The *Harper* rule follows the general trend of critical theory: it busily cuts down the trunk of the tree of liberty while perched on one of its branches. Rather than seeking equality by using the state to dominate another group, minority speakers should minimize the restrictions on speech, which may one day be turned on them. This characteristically American dedication to freedom of speech and conscience is the common ground that can unite those with divergent viewpoints, such as members of the Gay-Straight Alliance and Christians like Chase Harper. "No matter which side wins the debate, both religious groups and gay-rights groups will have lost if this battle leads to a restriction in expressing [the right of] conscience."[219] Reason, not force, is the proper path for progress toward truth and justice. Therefore, the democratic majority has a solemn duty to allow dissent for the good of the whole, even when speech may be hurtful to some listeners. And if the majority fails to uphold this duty, it is a grave error and an injustice to society.

218. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1180 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007); Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053 (9th Cir. 2006).

219. J. Brady Brammer, Comment, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 BYU L. REV. 995, 1025 (2006).